Paved with Good Intentions, Fraught with Flaws: the Regulatory Impact Analysis in the Department of Labor's "Fiduciary Rule"

Carl B. Wilkerson, Vice President & Chief Counsel, Securities & Litigation
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I. Scope. This outline principally evaluates the Regulatory Impact Analysis (RIA) accompanying a 2015 Department of Labor (DOL) initiative modifying the definition of fiduciary and conflict of interest standards, particularly regarding recommendations to purchase annuities in IRA rollover transactions. The proposal is dependent on the viability of the RIA which must fulfill comprehensive statutory, judicial and administrative standards governing federal agency rulemaking. Whether the proposal satisfies those standards will determine its longevity. The legal background to the proposal is briefly highlighted for context. The federal securities laws provide parallel benchmarks for this calculus, which appears in the latter part of the outline.

II. Brief Summary of the Legal Foundation for the Proposal

A. This outline focuses on the status of the RIA on the 2015 DOL Fiduciary Rule proposal. A general summary of the proposal's legal foundation, the predecessor 2010 proposal, and the 2015 proposal provides context for analyzing the RIA.

B. Overview of the Law governing ERISA fiduciaries.

1. In enacting Employee Retirement Income Security Act of 1974, as amended ("ERISA") in 1974, Congress established a number of provisions governing investment advice to private-sector employee benefit plans and IRAs.

2. Under ERISA and the tax code, any person paid directly or indirectly to provide investment advice to a plan or IRA is a fiduciary.

3. Prohibited transactions. Substantially identical provisions in ERISA and the tax code prohibit fiduciaries from engaging in a variety of transactions, including those that result in self-dealing, unless they fall within the terms of an exemption from the general prohibition.

4. The relevant ERISA provisions apply to private-sector employee benefit plans, and the related tax code provisions apply to both plans and IRAs. In either case, fiduciaries who engage in prohibited transactions are subject to excise taxes.

5. ERISA and the tax code each provide the same statutory exemptions from the general prohibition against self-dealing. The Secretary of Labor is authorized to issue additional exemptions.

6. Scope of an exemption. DOL leadership instructs that from the fiduciary's point of view, an exemption is permissive: it allows the fiduciary to engage in certain transactions that would otherwise be prohibited. *See* testimony of Phyllis Borzi during the 2010 proposal (July 26, 2011) at http://www.dol.gov/ebsa/newsroom/ty072611.html (last viewed October 6, 2015)**.** DOL , however, noted that from a worker's point of view, an exemption should be protective, because it establishes rules of the road that fiduciaries must follow when they self-deal so that transactions are in workers' interest. *Id*. Thus, if an investment adviser is compensated for "steering a worker's retirement savings toward a particular financial product," the adviser must first satisfy conditions established by Congress or the Department to protect the worker's interests and rights. *Id*.

7. Fiduciary duties.

A. ERISA subjects fiduciaries who advise private-sector employee benefit plans to certain additional duties, including a duty of undivided loyalty to the interests of plan participants and a duty to act prudently when giving advice.

B. DOL instructs that fiduciaries face personal liability for any losses arising from breaches of such duties. ERISA authorizes both participants and the Department to sue fiduciaries to recover such losses. These ERISA provisions, however, generally did not extend to fiduciaries who advise IRAs. *Id*. <u>This gap in fiduciary status on IRA recommendations was a primary driver for the 2010 and the 2015 proposals.</u>

C. DOL pointed out that ERISA's fiduciary standard is one of the highest standards of care available under the law. The department's 1975 rule restricted this definition by creating a five-part test (explained immediately below) for the definition to be met.

D. Section 102 of the Reorganization Plan No. 4 of 1978 generally transferred to the Department of Labor the Treasury Department's authority to interpret the tax code's prohibited transaction provisions and to issue related exemptions, thus consolidating interpretive and rulemaking authority for these substantially identical ERISA and tax code provisions in one place – the DOL.

E. Coextensively, the Internal Revenue Service's (IRS) general responsibility for enforcing the tax laws extends to excise taxes imposed on fiduciaries who engage in prohibited transactions. Thus, DOL shares with the IRS responsibility for combating self-dealing by fiduciary investment advisers to plans and IRAs. *Id.*

C. Evolution of ERISA's Provisions through DOL Regulations

1. In 1975, the Department issued a five-part regulatory test [Prohibited Transaction Exemption 84-24, 49 Fed. Reg. 13208 (April 3, 1984)] defining "investment advice" that gave a very narrow meaning to this term.

A. The regulation significantly narrowed the plain language of the statute as enacted, so that today much of what plainly is advice about investments is not treated as such under ERISA and the person paid to render that advice is not treated as a fiduciary.

B. Under the regulation, a person is a fiduciary under ERISA and/or the tax code with respect to their advice only if they:

(1) make recommendations on investing in, purchasing or selling securities or other property, or give advice as to their value;

(2) on a regular basis;

(3) pursuant to a mutual understanding that the advice;

(4) will serve as a primary basis for investment decisions; and

(5) will be individualized to the particular needs of the plan.

2. An investment adviser is not treated as a fiduciary unless each of the five elements of this test is satisfied for each instance of advice.

A. For example, if a plan hires an investment professional on a one-time basis for advice on a large complex investment, the adviser has no fiduciary obligation to the plan under ERISA, because the advice is not given on a "regular basis" as the regulation requires.

B. Similarly, individualized, paid advice to a worker nearing retirement on the purchase of an annuity is not provided on a regular basis. Thus, the adviser is not a fiduciary even though the advice may concern the investment of a worker's entire IRA or 401(k) account balance.

3. Since 1977, DOL has afforded an exemption from ERISA's prohibited transaction rules to allow certain transactions involving purchases with plan assets of insurance or annuity contracts and of securities issued by registered investment companies, and the receipt of sales commissions in

connection with such sales. Prohibited Transaction Exemption 77-9, 42 Fed. Reg. 32395 (June 24, 1977), amended and superseded , Prohibited Transaction Exemption 84-24, 49 Fed. Reg. 13208 (April 3, 1984).

4. DOL recognized that, in the absence of an exemption, the purchase of plan assets of mutual fund securities or an insurance or annuity contract from a party in interest would violate the prohibited transaction provisions under section 406 of ERISA. In addition, DOL recognized that the receipt of sales commissions by a pension consultant or insurance agent from an insurance company in connection with the purchase of insurance contracts by a plan, where such pension consultant or insurance agent is a fiduciary with respect to the plan, would violate section 406(b) of ERISA.

5. Among other conditions, PTE 84-24 requires that the insurance agent or broker, pension consultant, insurance company, or investment company principal underwriter (or any affiliate of any such entity) involved in the transaction not be a trustee of the plan, other than a nondiscretionary trustee who does not render investment advice with respect to any assets of the plan.

6. In a 1977 interpretive letter, the DOL and the IRS took the position that the predecessor to PTE 84-24 was nonetheless available for transactions where the insurance agent or broker, pension consultant, insurance company, or investment company principal underwriter was a fiduciary to a plan who was expressly authorized to manage plan assets on a discretionary basis, provided that the fiduciary had no authority, control, or responsibility with respect to the plan assets involved in the particular transaction. A copy of the DOL's and IRS's October 31, 1977 letter, which was addressed to John A. Cardon, Esq., et al., is available at 1977 ERISA LEXIS 87.

III. Brief Summary of the 2010 & the 2015 Conflict of Interest/Fiduciary Proposals

A. Overview of the 2010 Proposed Fiduciary Rule: Clues to DOL's Thinking in the 2015 Proposed Fiduciary Rule

1. On October 22, 2010, the Department published a proposed regulation defining when a person is considered to be a "fiduciary" by reason of giving investment advice for a fee with respect to assets of an employee benefit plan or IRA. The proposal would have amended the then current 1975 regulation that DOL thought may have inappropriately limited the circumstances that give rise to fiduciary status on the part of the investment adviser.

2. According to DOL, the proposed rule took into account significant changes in both the financial industry and the expectations of plan fiduciaries, participants and IRA holders who receive investment advice.

3. DOL noted that, in particular, the 2010 proposal was designed to protect participants from conflicts of interest and self-dealing by correcting some of the current rule's more problematic limitations and providing a clearer understanding of when persons providing such advice are subject to ERISA's fiduciary standards, and to protect IRA holders from self-dealing by investment advisers. *See*, Phyllis Borzi Op-Ed Pension & Investments, April 18, 2011 http://www.dol.gov/ebsa/newsroom/published/041811.html (last viewed October 6, 2015).

4. Examples of changed marketplace developments cited by DOL as rationale for the 2010 proposal (and the 2015 proposal):

A. Since the mid-70's, there have been significant changes in the retirement plan community, with more complex investment products, transactions and services available to plans and IRA investors in the financial marketplace, and a shift from defined benefit plans to defined contribution plans. *Id*.

B. With the shift to 401(k)-type plans, investment advice has become increasingly important to employers, particularly small and medium-sized employers, when choosing an appropriate menu of plan investments for their workers, and for workers when selecting among investments for their individual accounts. *Id.*

C. With the increase in the amount of assets held in IRAs, IRA holders shoulder a greater amount of investment responsibility, like 401(k) plan participants. But, unlike 401(k) plan participants, IRA holders are more vulnerable since no other plan fiduciary protects the IRA investments. *Id*.

D. EBSA believed it was time to re-examine the types of advisory relationships that give rise to fiduciary duties and to update the rigid 1975 regulation so that plan fiduciaries, participants and IRA holders receive the impartiality they expect when they rely on their adviser's expertise. *Id*.

E. The variety and complexity of financial products had increased, widening the information gap between advisers and their clients and increasing the need for expert advice. *Id*.

F. Consolidation in the financial industry and innovations in products and compensation practices had multiplied opportunities for self-dealing and made fee arrangements less transparent to consumers and regulators. At the same time, the burden of managing retirement savings had shifted dramatically from large private pension fund managers to individual 401(k) plan participants and IRA holders, many with low levels of financial literacy. According to DOL, these trends could not have been foreseen when the existing regulation was issued in 1975. *Id*.

5. The 2010 proposed regulation would have modified the 1975 regulation by:

A. replacing the five-part test with a broader definition tracking the statutory language; and

B. providing clear exceptions for conduct that should not result in fiduciary status.

6. Under the 2010 proposal, the following types of advice and recommendations could have resulted in fiduciary status:

A. appraisals or fairness opinions concerning the value of securities or other property;

B. recommendations as to the advisability of investing in, purchasing, holding or selling securities or other property; or

C. recommendations as to the management of securities or other property.

7. To be a fiduciary under the 2010 proposal, a person must have been:

A. engaged in one of the following activities, must have received a fee, and met at least one of four conditions.

(1) represent to a plan, participant or beneficiary that the individual is acting as an ERISA fiduciary;

(2) already be an ERISA fiduciary to the plan by virtue of having any control over the management or disposition of plan assets, or by having discretionary authority over the administration of the plan;

(3) be an investment adviser under the Investment Advisers Act of 1940; or

(4) provide the advice pursuant to an agreement or understanding that the advice may be considered in connection with investment or management decisions with respect to plan assets and will be individualized to the needs of the plan.

B. Nontheless, the 2010 proposed regulation also recognized that activities by certain persons should not result in fiduciary status.

C. Specifically, the 2010 proposal excluded:

(1) persons who do not represent themselves to be ERISA fiduciaries, and who make it clear to the plan that they are acting for a purchaser/seller on the opposite side

of the transaction from the plan rather than providing impartial advice;

(2) persons who provide general financial/investment information, such as recommendations on asset allocation to 401(k) participants under existing Departmental guidance on investment education;

(3) persons who market investment option platforms to 401(k) plan fiduciaries on a non-individualized basis and disclose in writing that they are not providing impartial advice; and

(4) appraisers who provide investment values to plans to use only for reporting their assets to the DOL and IRS.

B. Key Drivers in the 2010 and 2015 Proposals: Lack of DOL Enforceability

1. DOL explained in 2010 that two of the primary elements of the five-part test was the requirement that the advice had to be given on a regular basis and that it had to be given pursuant to a mutual understanding that the advice would be the primary basis for the investment decision.

A. According to DOL, "this meant that advice given infrequently, however flawed or conflicted, was seldom actionable by the department." *See* Phyllis Borzi's testimony on the 2010 proposal (July 26, 2011) http://www.dol.gov/ebsa/newsroom/ty072611.html (last viewed October 6, 2015.

B. DOL noted that advice could concern all of a plan's assets and it still wouldn't be treated as fiduciary advice if given on a one-time basis. *Id*.

C. Moreover, DOL emphasized that unless both the plan official and the adviser understand that the advice serves as a primary basis for the investment decision, "advisers who base their advice on their own financial interests rather than the plan's can't be held accountable under ERISA for the resulting losses." *Id.*

C. Ultimately, DOL withdrew its 2010 proposal in response to significant public comment and testimony.

D. Brief Overview of the 2015 Conflict of Interest/Fiduciary Rule Proposal[1]

1. Background. DOL released for public comment on April 14, 2015, its proposed rule that establishes a sweeping, principles-based approach to defining investment fiduciaries under ERISA. The Proposal also would cover the delivery of investment advice to individual retirement accounts

[1] http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=28201 (last visited on October 6, 2015)

("IRAs") under section 4975 of the Internal Revenue Code of 1986 (the "Code") and IRA "rollover advice." The Proposal creates limited exemptions and amendments to existing exemptions from prohibited transaction rules applicable to fiduciaries under ERISA and the Code.

2. Purpose. The purpose of the rule, according to the DOL, is to update a five-part test that applied to fiduciary investment advice prior to the advent of 401(k)-type self-directed participant plans and IRA rollovers. Many financial intermediaries currently playing a role in guiding plan and IRA investments do not have an obligation or requirement under current regulation to serve as ERISA fiduciaries. Consequently, DOL observes that some advisers provide conflicted advice that conflicts with the duty to act solely in the plans' interest as would be required if those same advisers were fiduciaries.

3. Exemptions from the Fiduciary Definition. In view of the expanded fiduciary definition, the proposal includes several new exclusions and modifications of exemptions from the 2010 proposal. Subject to additional conditions, the exclusions cover seven activities of advisers that do not represent themselves as ERISA fiduciaries.

A. Seller's Exemption. Two alternative exemptions are available to advisers under the proposal.

(1) The first applies to advisers providing advice to plans with more than 100 participants in which the adviser reasonably believes that the fiduciary exercising control over plan assets has sufficient expertise to evaluate the transaction and obtains written representation from the fiduciary that the fiduciary will not rely on the seller to act in the plan's best interests or provide impartial advice. Under this exclusion, the adviser also must disclose any financial interests in the transaction and not be paid directly by the plan.

(2) The second applies to plans with at least $100 million in plan assets and that otherwise meet the same conditions except that the adviser need not obtain written representations other than to "fairly inform" the fiduciary of his or her conflicts of interest.

B. Swaps. Recommendation to a plan fiduciary to enter into a swap or securities-based swap regulated by the U.S. Securities and Exchange Commission or Commodity Futures Trading Commission are excluded.

C. Plan Sponsor Employees. Internal staff of the company sponsoring the plan that provides advice and receives no compensation beyond the employee's "normal compensation" for work performed are excluded.

D. Investment Platform Providers. The exemption extends also to individuals marketing investment options to the plan without regard to the individualized needs of the plan through a platform from which the plan fiduciary may select investment options. The platform provider must disclose in writing that they are not planning to provide impartial investment advice or act as a fiduciary.

E. Objective Criteria or Financial Data. An exclusion is available for the adviser limiting advice to identifying investment alternatives meeting objective criteria of the plan fiduciary, such as expense ratios, size of fund, type of asset, or providing data and comparisons with independent benchmarks.

F. ESOP Appraisals. This exclusion applies principally to individuals providing an appraisal to an employee stock ownership plan.

G. Investment Education. An exclusion exists for individuals providing information on investment options in a plan or IRA without making recommendations regarding specific investment products or IRA alternatives. Educational materials may include information on investment concepts such as risk and return, diversification and dollar-cost averaging, as well as objective questionnaires, worksheets and interactive software.

4. Prohibited Transaction Exemptions

A. Proposed Best Interest Contract Prohibited Transactions Exemption[2]

(1) The cornerstone of the Department's exemptions from ERISA's prohibited transaction rules is the so-called "Best Interest Contract Exemption," one of several prohibited transaction exemptions.

(2) The proposal responds to commentators on the 2010 proposal concerned that the 2010 proposal would have eliminated sales commissions and other indirect forms of compensation. Coextensively, DOL developed a 'best interest' standard designed to protect advice recipients.

(3) Advisers would continue to be able to set compensation practices on plan or IRA advice as long as

[2] http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=28202 (last viewed on October 6, 2015).

the compensation was 'reasonable.' Further, an adviser must commit in writing in the contract that it:

(a) Acknowledges fiduciary status

(b) Adheres to basic standards of impartial conduct

(c) Warrants compliance with federal and state laws governing advice

(d) Disclose basic conflicts of interest

(e) Communicates the cost of their advice; and

(f) Has adopted policies and procedures reasonably designed to mitigate conflicts of interest.

B. According to the DOL, this approach is founded in longstanding trust-law duties of prudence and loyalty as reflected in Section 404 of ERISA and would not expand or contract the existing standard of care for plan advice.

(1) Rather, the exemption would expand the same standard to IRA advice. Consequently, IRA accountholders would obtain a private right of action to assert violations.

C. "Lower-Fee" PTE

(1) The DOL also requested comments on a theoretical, streamlined PTE that would apply to variable compensation received by advisers for recommending certain "high-quality, low-fee investments" in given product classes.

(2) DOL indicates that a properly drafted PTE could minimize compliance burdens for advisers when they offer products with little potential for material conflicts of interest.

D. Principal Transaction Exemption.

(1) Similar in concept to the SEC's principal transaction relief for dually registered broker-dealers and investment advisers selling higher-quality fixed-income securities out of inventory, advisers would be able to recommend similar products to plan participants and IRA accounts under a special PTE. The Principal Transaction PTE must fulfill the same contractual requirements as the Best Interest Contract PTE.

(2) In addition, the adviser would have to obtain two price quotes from unaffiliated counterparties for the same or a similar security, with the transaction price as favorable to the plan or IRA as the two quotes.

5. Proposed Amendment to and Proposed Partial Revocation of Prohibited Transaction Exemption (PTE) 84–24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies and Investment Company Principal Underwriters[3]

A. PTE 84–24 currently provides an exemption for certain prohibited transactions that occur when plans or IRAs purchase insurance and annuity contracts and shares in an investment company registered under the Investment Company Act of 1940 (a mutual fund).

(1) The exemption permits insurance agents, insurance brokers and pension consultants that are parties in interest or fiduciaries with respect to plans and IRAs to effect the purchase of the insurance or annuity contracts for the plans or IRAs and receive a commission on the sale.

(2) The exemption is also available for the prohibited transaction that occurs when the insurance company selling the insurance or annuity contract is a party in interest or disqualified person with respect to the plan or IRA.

(3) Similarly, concerning mutual fund transactions, PTE 84–24 permits mutual fund principal underwriters that are parties in interest or fiduciaries to effect the sale of mutual fund shares to plans or IRAs, and receive a commission on the transaction.

(4) This proposal would make several changes to PTE 84–24.

(a) First, it would increase the safeguards of the exemption by requiring fiduciaries that rely on the exemption to adhere to certain ‘‘Impartial Conduct Standards,’’ including acting in the best interest of the plans and IRAs when providing advice, and by more precisely defining the types of payments that are permitted under the exemption.

(i) Under the first impartial conduct standard, the insurance agent, insurance broker, pension consultant, insurance

[3] http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=28205 (last viewed on October 6, 2015).

company or mutual fund principal underwriter would be required to act in the plan's or IRA's best interest when providing investment advice regarding the purchase of the insurance or annuity contract or mutual fund shares.

(a) Best interest is defined as acting with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and the needs of the plan or IRA.

(b) DOL explains further that, under the best interest standard, the insurance agent, insurance broker, pension consultant, insurance company or mutual fund principal underwriter must act without regard to its own financial or other interests or those of any affiliate or other party.

(ii) Under this standard, the fiduciary must put the interests of the plan or IRA ahead of the fiduciary's own financial interests or those of its affiliates or any other party.

(iii) In this regard, DOL notes that while fiduciaries of plans covered by ERISA are subject to the ERISA Section 404 standards of prudence and loyalty, the Code contains no provisions that hold IRA fiduciaries to these standards.

(iv) The second conduct standard requires that the statements by the insurance agent, insurance broker, pension consultant, insurance company or mutual fund principal underwriter about recommended investments, fees, material conflicts of interest, and any other matters relevant to a plan's or IRA owner's investment decisions, are not misleading.

(v) For this purpose, the failure to disclose a material conflict of interest relevant to the services the entity is providing or other actions it is taking in relation to a plan's or IRA owner's investment decisions is deemed to be a misleading statement.

(vi) DOL explains that transactions that violate the requirements are not likely to be in the interests of or protective of plans and their participants and beneficiaries and IRA owners.

(b) Second, on a going forward basis, the amendment would revoke relief for insurance agents, insurance brokers and pension consultants to receive a commission in connection with the purchase by IRAs of variable annuity contracts and other annuity contracts that are securities under federal securities laws and for mutual fund principal underwriters to receive a commission in connection with the purchase by IRAs of mutual fund shares.

(5) A new exemption for the receipt of compensation by fiduciaries that provide investment advice to IRA owners is proposed coextensively in the ''Best Interest Contract Exemption'' and briefly summarized above in this outline.

IV. Judicial, Statutory and Executive Order Requirements for Cost-Benefit Analyses in Federal Agency Rulemaking

A. Overview: Congress, courts, and the executive branch of government have issued unequivocal guidance mandating thorough, objective cost-benefit analysis in rulemaking. Collectively, these standards ensure that federal agencies "strike the right balance," and develop "more affordable, less intrusive rules to achieve the same ends--giving careful consideration to benefits and costs."[4]

1. Executive Orders

A. Executive branch mandates for cost-benefit analysis began in 1981 with Executive Order 12,291 that created a new procedure for the Office of Management and Budget (OMB) to review proposed agency regulations, and ensured the president would have greater control over agencies and improve the quality and consistency of agency rulemaking.

(1) *See* 46 Fed. Reg. 13193, 13193 (Feb. 17, 1981).

(2) Cost-benefit analysis formed the core of the review process. The order unambiguously stated that "regulatory

[4] Op-Ed, President Barak Obama, *Toward a 21st Century Regulatory System*, Wall Street Journal (Jan. 18, 2011). The President's Op-Ed coincided with his issuance of Executive Order 13,563, which set strict standards for cost-benefit analysis in federal agency rulemaking.

action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society." Regulatory agencies, therefore, must balance the benefits of proposed rules against their costs.

B. In 1993 Executive Order 12,866 superseded the 1981 order, but retained cost-benefit analysis as a fundamental requirement in rulemaking. *See* Exec. Order No. 12,866, 3 C.F.R. 638 (1993).

(1) Executive Order 12,866 instructs that "in deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating."

(2) In a manner parallel to the 1981 order, Executive Order 12,866 advises that agencies must perform their analysis and choose the regulatory approach that maximizes net benefits.

(3) The 1981 and the 1993 executive orders emphasize different approaches to the same cost –benefit end. The 1981 order required that the benefits "outweigh" the costs, while the 1993 order required only that the benefits "justify" the costs. *See generally* Peter M. Shane, Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking, 48 ARK. L. REV. 161, 176-78 (1994) (comparison of 1981 and 1993 executive orders with additional detail and observing that the 1993 "order focuses on a similar mandate, but describes it with greater nuance").

C. President Obama reaffirmed the importance of cost-benefit analysis in 2011 through Executive Order 13,563, and reinforced the core principles in Executive Order 12,866 by emphasizing that "each agency must . . . propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs." *See* Exec. Order 13,563, § 1(b), 76 Fed. Reg. 3821 (Jan. 18, 2011).

(1) The order further notes that "each agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible."

D. Additional analysis of this order can be found in Helen G. Boutrous, Regulatory Review in the Obama Administration: Cost-Benefit Analysis for Everyone, 62 ADMIN. L. REV. 243, 260 (2010).

E. Importantly, five administrations between 1981 to present have consistently made cost-benefit analysis a threshold for federal agency rulemaking.

2. OMB Guidance on Cost Benefit Analysis

A. To implement the various Executive Orders, the OMB provided federal agencies with extensive guidance to perform cost-benefit analysis in its Circular A-4.21 C,[5] which identifies three fundamental elements to federal agency rulemaking:

(1) a statement of the <u>need for the proposed regulation</u>;

(2) discussion of <u>alternative regulatory approaches</u>; and,

(3) an <u>analysis of both qualitative and quantitative costs and benefits</u> of the proposed action and the leading alternatives.

B. According to the OMB guidance, the analysis should attempt to express both benefits and costs in a common measure—monetary units—to facilitate the assessment. When benefits or costs cannot be quantified in monetary terms or in some other quantitative measure, the agency should describe them qualitatively.

3. Statutory Standards for Cost-Benefit Analysis

A. The Administrative Procedure Act (APA) provides comprehensive standards governing federal agency rulemaking, and includes guideposts for judicial review of agency rulemaking under an arbitrary and capricious threshold.

B. The Regulatory Flexibility Act (RFA) of 1980 (5 U.S.C. §§601-612) requires federal agencies to assess the impact of their forthcoming regulations on "small entities," which the RFA defines as including small businesses, small governmental jurisdictions, and certain small not-for-profit organizations.

(1) Under the RFA, cabinet agencies must prepare a "regulatory flexibility analysis" when final rules are issued. The RFA requires the analysis to describe, among other things,

(a) reasons why the regulatory action is being considered;

[5] Office of Mgmt. & Budget, Circular No. A-4, Regulatory Analysis (Sept. 17, 2003), last available at http:// www.whitehouse.gov/OMB/circulars/a004/a-4.pdf (last viewed October 6, 2015). OMB invited full public comment on his 48-page circular in draft form, which contains detailed instructions about conducing cost-benefit analysis, and provides a standard template for running the analysis.

(b) small entities to which the proposed rule will apply and, where feasible, an estimate of their number;

(c) projected compliance burdens of the proposed rule; and

(d) any significant alternatives to the rule that would accomplish the statutory objectives while minimizing the impact on small entities.

4. Judicial Precedent on Cost-Benefit Analysis in Federal Agency Rulemaking

A. In three significant cases involving SEC rulemaking beginning in 2005, the U.S. District Court for the federal circuit overturned major rules due to the SEC's failure to conduct adequate cost-benefit analysis which the court viewed as arbitrary and capricious actions contrary to the mandates of the APA. *See Chamber of Commerce v. SEC*, 412 F.3d 133 (D.C. Cir. 2005), Am. Equity Inv. Life Ins. Co. v. SEC, 613 F.3d 166 (D.C. Cir. 2010), and Bus. Roundtable & U.S. Chamber of Commerce v. SEC, 647 F.3d 1144 (D.C. Cir. 2011).

(1) In Business Roundtable and Chamber of Commerce of the United States of America v. SEC, 647 F.3d 1144 (July 22, 2011), the D.C. Circuit overturned proxy access Rule 14a-11 adopted by the SEC in August 2010.

(a) The new rule was initially adopted by the SEC on August 25, 2010 pursuant to the authority under the Dodd-Frank Act. According to an SEC press release dated August 25, 2010, the new rule would have required each affected company to include the nominees of significant, long-term shareholders in the company's proxy materials alongside the nominees of management. In addition to Rule 14a-11, the SEC simultaneously added a new Rule 14a-8, which would have allowed shareholders to include proposals in the company's proxy materials.

(b) In its decision, the D.C. Circuit ruled that the SEC acted in a manner that was arbitrary and capricious when it developed and adopted the rules.

(c) The court noted that the SEC has "a unique obligation to consider the effect of a new rule upon 'efficiency, competition, and capital formation."

(d) The court agreed with the Business Roundtable and the Chamber of Commerce that the SEC's failure to "apprise itself—and hence the public and the Congress—of the economic consequences of a proposed regulation" made promulgation of the rule arbitrary and capricious and not in accordance with law.

(e) The court also noted that the SEC had not made a complete analysis of the costs and benefits of the new rules and had failed to address the potential abuse of the new rules by groups with special interests, such as unions and state pension funds, which could unconstructively exploit the new mechanisms being created.

(2) U.S. Court of Appeals for the 2nd District decided in American Equity Investment Life Insurance Co. et al. v. SEC, 613 F.3d 16(July 12, 2010) that

(a) This case involved the SEC's adoption of Rule 151A under the Securities Act of 1933 which provided guidance as to whether fixed index annuities were entitled to rely on the exclusion provided under Section 3(a)(8) of that act.

(b) The Court remanded Rule 151A back to the SEC for "reconsideration," solely because it found that the SEC had not given proper consideration to the rule's effect on "efficiency, competition, and capital formation" in the annuity industry, as required by Sect. 2(b) of the Securities Act of 1933.

(c) The Court determined that the SEC's consideration of the effect of Rule 151A on efficiency, competition, and capital formation was arbitrary and capricious, despite the SEC's assertion that rule would bring about clarity in what had been uncertain area of law.

(d) The ruling indicated that the SEC did not disclose a reasoned basis for its conclusion that Rule 151A would increase competition and the SEC did not make any finding as to existing level of competition in the marketplace under state insurance law regimes or the efficiency of existing state insurance law regimes.

(e) The ruling held that the SEC's determination that fixed indexed annuities did not constitute "annuity contracts," and thus did not fall within the

Section 3(a)(8) exclusion for annuity contracts subject to state insurance laws was reasonable.

(f) As a postscript to the case, the "Harkin Amendment" that was included in Section 989J of the Dodd-Frank Act Provides that the SEC "shall treat as exempt securities described under section 3(a)(8) of the Securities Act of 1933 … any insurance or endowment policy or annuity contract…" provided that certain conditions are met.

(i) The Harkin Amendment makes the securities exemption for indexed annuities conditioned on compliance with the NAIC's Suitability in Annuity Transactions Model Regulation, among other things, and buttresses the SEC's and FINRA's goal of harmonizing the suitability and disclosure requirements for indexed annuities.

B. These three rulings are significant because they were rendered by the federal court that typically reviews agency actions and, thus, serves as a touchstone for appropriate federal rulemaking in general. Additionally, the rulings provide an avoidable roadmap to litigation for insufficient cost-benefit analysis in rulemaking.

C. On June 29, 2015, the U.S. Supreme Court underscored the primacy of a carefully balanced and quantified cost-benefit analysis in federal agency rulemaking.

(1) *See Michigan v. EPA*, No. 14-46 (June 29, 2015) http://www.supremecourt.gov/opinions/14pdf/13-1314_3ea4.pdf (last viewed October 6, 2015). In this case, the Court sent a rule under the Clean Air Act back to the EPA to objectively quantify and balance the benefits and costs under the rule before it could become operative.

5. The guidance established by statutes, executive orders, and seminal recent court cases require a carefully balanced and detailed cost-benefit analysis to accompany federal agency rulemaking. *See generally* Peter M. Shane, Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking, 48 ARK. L. REV. 161, 176-78 (1994).

V. Measuring the Regulatory Impact Analysis Against Statutory, Judicial and Administrative Precedent

A. The proposal was accompanied by a 243 page "regulatory impact analysis"[http://www.dol.gov/ebsa/pdf/conflictsofinterestria.pdf (last viewed

October 6, 2015) and seven supporting documents. Department of Labor documents pertaining to the proposed rule can be found here: http://www.dol.gov/ebsa/regs/conflictsofinterest.html (last viewed October 6, 2015).

B. While significant in length, this cost-benefit analysis is fundamentally flawed in several significant respects, particularly as it pertains to variable annuities.

C. Evaluating the Proposal's Need for New Regulation

1. The Department justifies its proposal with the claim that there is a "substantial failure in the market for retirement advice." *See* U.S. Department of Labor, "Fiduciary Investment Advice: Regulatory Impact Analysis" (April 14, 2015) at 7.

A. The Department's analysis fails to prove this assertion and contains at least three significant flaws which undermine the proposal's required statement of need. Specifically, the regulatory impact analysis:

(1) Calculates the cost of conflicted advice and the benefits of the proposed rule through selective and imbalanced use of academic studies of mutual funds that are misinterpreted and misapplied to the entire market for retirement advice;

(2) Overlooks the negative impact of the proposed rule on lower-wealth investors, the likelihood that the supply of financial advice will decline and price of advice increase, and the increased costs inflicted on employer plan participants; and,

(3) Bases estimates of direct costs of the proposal on inadequate and incomplete data and insufficient consideration of the time required to implement changes necessary to comply with the proposal.

B. Significantly, although the proposed rule and cost-benefit analysis mention annuities a total of 172 times and acknowledge that "31 percent of IRAs include investments in annuities") and that "insurance companies [will] be significantly affected by the proposal", the cost-benefit analysis makes no attempt to examine the impact of the proposed rule on insurers, the annuity market, or on the availability of lifetime income, nor does it attempt to assess the value of variable annuities or their role in retirement security.

2. Reviewing the RIA's Cost Estimates. DOL justified the need for the

proposed rule based on a selective review of six refereed studies and three working papers.

A. A comprehensive review of the studies referred to in the DOL's Regulatory Impact Analysis ("RIA") can be found in: Berkowitz, Jeremy; Comolli, Renzo; Conroy, Patrick, "Review of the White House Report Titled 'The Effects of Conflicted Investment Advice on Retirement Savings'", NERA Economic Consulting (March 15, 2015). A complete list of the studies appears at pages 95-96 of the proposal's RIA.

B. Though the primary justification of the proposed rule is the elimination of conflicts of interest, the Department admits that "[n]one of these papers attempts to detect some major possible sources of underperformance of IRA assets attributable to conflicts of interest."

C. The studies do not, however, focus on either the returns of load vs. no-load mutual funds or the returns of broker-sold vs. direct-sold mutual funds.

D. Most of these studies found that during the period under consideration broker-sold front-load mutual funds (which comprise only about 13 percent of the IRA market) may not have performed as well as other funds and that direct-sold mutual funds may have performed better than broker-sold mutual funds. <u>None provide support for the assertion that fiduciary-advised accounts perform better than other types of accounts.</u>

E. The Department relies on these very narrowly focused studies as proof of market failure and does not utilize other bodies of work which would be useful for their analysis, such as the literature on the benefits of using a financial adviser. *See* Montmarquette, Claude; Viennot-Briot, Nathalie, "The Value of Financial Advice", Annals of Economics and Finance, V. 16., No. 1, at 69-94, 2015.

(1) This study finds that over the course of several years, investors who use advisers obtained greater returns than those who don't.

(2) For an explanation of the role and value of life insurance agents in assuring retirement security, *see* Rosh, Robert M., "Death of a Salesman: The Rise and Unfortunate Potential Demise of the Full-Time Life Insurance Salesman", St. John's Law Review, Vol. 88, Winter 2014, No. 4, at. 985-1021.

F. <u>Varied Estimates & Extrapolations</u>. Based on the studies DOL cites, and on the assumption that IRA holders who purchase broker-sold front-load mutual funds received conflicted investment advice which resulted in lower returns, DOL determined that investors holding such funds can expect their investments to underperform by an average of 100 basis points annually.

(1) Using this figure and implicitly assuming that this level of underperformance will continue and that investors will not adjust their portfolios, DOL concluded that "underperformance associated with conflicts of interest -- associated with the mutual fund segment alone -- could cost investors more than $210 billion over the next 10 years and nearly $500 over the next 20 years.

(2) Throughout their analysis DOL provided a very wide range of cost estimates associated with conflicted advice and with the benefits of the proposed rule.

(a) On the lower end, DOL estimated that the "expected gain would total between $20 billion and $22 billion over 10 years (Preamble at 108)."

(b) On the higher end, DOL estimated that "under current rules, advisor conflicts could cost IRA investors as much as $410 billion over 10 years, and $1 trillion over 20 years (p. 8)", and that "underperformance associated with conflicts of interest ... could cost IRA investors $210 to $430 billion over the next 10 years and approximately $500 billion to $1 trillion over the next 20 years (Preamble at 211)."

(c) In a related analysis, the Council of Economic Advisors estimates that conflicted advice costs investors $17 billion annually.

(3) The broad range of estimates brings the reliability of the proposal's calculus into question.

G. All of the studies DOL cited use data from the 1990s and early to mid-2000s. In more recent time periods, competition has markedly increased in recent years, driving down fees. The market has changed so much that any analysis based on old data cited by DOL has dubious relevance to the current market and should not be used to formulate or substantiate regulations.

H. their sample is not representative of the US population and their data is unacceptably stale. Chalmers and Reuter examine defined contribution plan accounts of faculty and administrators employed by the Oregon University System from 1996 to 2007. This is hardly representative of the general U.S. population today.

I. Finally, though results may be fairly consistent with regard to front-load mutual funds sold through broker-dealers in the 1990s and part of the 2000s, the results concerning other types of investments, such as revenue-sharing mutual funds, are much less conclusive. In fact, Christoffersen, Evans, and Musto (2013), a study the Department analysis relies upon most heavily and which appears to underpin all of the Department's benefit estimates, do not contain strong evidence of a negative relationship between broker-sold revenue-sharing mutual funds and performance, suggesting that the Department may have selectively used more favorable results to estimate the benefit of the proposed rule.

3. For these reasons, the cited studies should not be used to justify the need for, or determine the potential benefits of, the proposed rule and should not be relied on to formulate well-intentioned rules which can, in fact, have a detrimental impact on plan participants, particularly retirees and pre-retirees, as well as the financial services industry overall.

4. <u>The RIA's Estimate of the Proposal's Impact on Small and Medium Retirement Savers</u>

A. The RIA relied heavily on a UK initiative that has proven to be unsuccessful if not harmful to small and medium retirement savers.

(1) Though the cost-benefit analysis claims the opposite, there is compelling evidence that following the introduction of the Retail Distribution Review (RDR) in the U.K., which the Department extols in support of the proposal, a significant percentage of small investors were priced out of the market and are now considered 'stranded customers'.

(2) In June 2006 the United Kingdom's financial regulator, the Financial Services Authority (FSA), created its Retail Distribution Review (RDR) program with the intention of enhancing consumer confidence in the retail investment market and eliminating 'conflict risk'. In June 2007 the principal discussion paper on RDR was published, and on December 31st 2012, the RDR was implemented.

(3) The RDR has three general components:

(a) a clear division between independent and restricted advice;

(b) a ban on commissions; and,

(c) greater minimum qualifications for investment advisers and a requirement that knowledge be maintained.

B. Though the RDR was implemented at year-end 2012, the UK's financial services industry was adjusting to the coming changes in the years leading up to implementation.

(1) The number of investment advisers was steadily declining pre-RDR. According to the Association of Professional Financial Advisers (APFA), in 2010 there were 43,937 investment advisers in the U.K. and by 2013 there were 31,132, almost a 30% decline.

(2) This decline can be attributed to the new qualification standards and the ban on commissions, and to many older advisers choosing to retire earlier than they had planned rather than navagate the new system.

C. In 2014, Morningstar UK reported that eleven million investors have fallen through an 'advice gap' following industry regulation. The week before the hearings on the proposal, the UK launched a comprehensive review of its regulations and its abandoned retirement savers in response to this severe problem.

(1) During the hearing, none of the economists or DOL staff acknowledged the rather shocking reversal of position in the UK program that DOL had highlighted to justify the proposal. Failure to discuss the negative implications of the proposal in light of the documented advice gap to UK retirement savers undermines the integrity of the RIA.

5. <u>The Preamble and RIA Misrepresented Annuity Surrender Charges</u>

A. ACLI explained during the hearing that concerning surrender charges associated with insurance products like annuities, DOL's public statements assumed that:

(1) all annuities have surrender charges;

(2) full surrender charges are applied 100% of the time;

(3) all surrenders are for the full amount of the annuity; and,

(4) annuity contracts never waive surrender charges in cases of hardship.

B. ACLI emphasized that none of these presumptions were correct, noting that surrender charges are contingent deferred sales charges, meaning that if the customer holds the contract for the surrender period, which is usually 7 years, then there is no surrender charge.

C. Since DOL's discussion of surrender charges was based on anecdotal information, ACLI commissioned NERA to examine the incidence of surrender charges in a sample of 237,000 variable annuity contracts representing 30% of variable annuity reserves. *See* https://www.acli.com/Newsroom/News%20Releases/Pages/NR15-043.aspx . NERA's report was published August 8 and found:

(1) 76% of those firms surveyed offer contracts with no surrender fee;

(2) The average surrender charge on any surrender (partial or full) is 0.8% or .008 in decimal notation;

(3) Of the accounts with surrenders, approximately 23,000, or 70%, are IRA accounts.

(4) For IRA variable annuities only, the average surrender fee paid on any partial withdrawal or full surrender is even lower, at 0.6% or .006;

(5) 78.6% of withdrawals in IRA accounts paid 0% in fees.

D. Nothing about this type of data was considered in the four economic studies posted after the hearing or in the economic studies DOL identified as supporting the RIA. A proper understanding of surrender fees needs to be part of the conversation on the proposed regulation and the RIA.

D. Observations about DOL's "Four Additional Research Papers"

1. On September 8, 2015, DOL announced the posting of four "additional research papers" on a segment of its web space entitled "conflict of interest proposed rule."

A. The "four additional research studies" were produced by the Rand Corporation (Burke and Hung (2015); Hung, Gong and Burke (2015); and, Burke and Hung (2015b)) and one by the Advanced Analytical Consulting Group (Panis (2015)).

B. The four reports present literature reviews, commentary on the work of another consulting firm (NERA), and a comparison of the regulatory environment and market for financial advice in five countries (the U.S., the U.K., Australia, Germany, and Singapore) and the E.U. None of the studies were peer reviewed. All reflect the independent and unverified research of the authors.

2. The status of those additional research papers on the proposal is unclear. In choosing to post the four papers on the proposal's web space, DOL apparently thought the papers were integral to its overall regulatory package. Nothing, however, explains the exact role of the four additional research papers on the proposal.

3. Lower and middle income investors would be most affected and would be forced to rely on robo-advisors or manage their own investments. As mentioned earlier, automated financial advice is not a sufficient substitute for a human being and cannot offer benefits such as encouraging greater savings, dissuading emotional investing (particularly the liquidation of assets in a market downturn), or addressing client-specific questions and concerns.

4. The DOL's Regulatory Impact Analysis entirely failed to examine the various benefits of using a financial adviser and how the loss of these benefits would impact retirement security.

A. Burke and Hung (2015) attempt to fill this gap by investigating whether financial advisers actually offer such benefits, focusing primarily on saving. They examine nine studies, eight of which found a strong correlation between the use of an adviser and saving. Some of the more compelling results include:

B. Martin and Finke (2014) found that "those who had calculated retirement needs and used a financial planner generated more than 50 percent greater savings than those who estimated retirement needs on their own without the help of a planner (p. 52)."

C. Using 2010 Survey of Consumer Finances data, Hudson and Palmer (2014) found "a significant and positive relationship between the use of information from formal advisors and the acceptable savings behaviors of low-income employees, and a significant and positive relationship between the use of information from formal advisors and the cash-flow management behaviors of low-income employees (p. 41)."

D. Using 2004, 2007, and 2010 Survey of Consumer Finance data, Smith and Griesdorn (2014) find that "seeking the advice and knowledge of a financial planner can help self-employed families navigate the complexity of tax-deferred retirement vehicles and establish the best savings plan for their unique situation (p. 58).

E. Winchester and Huston (2014) found that individuals who felt they did not have control of their finances were considerably more likely to achieve their financial goals when using a financial adviser.

5. Despite these findings, Burke and Hung (2015) imply that using an adviser may not result in greater saving since "the same underlying characteristics make an individual more likely to seek out financial advice and more likely to save" (Burke and Hung (2015, p. 12)). However, the authors identified only one study, Mardsen, Zick, and Mayer (2011), to support their claim. Marsden, Zick, and Mayer (2011) do find that using a financial adviser does not increase savings, however, their study is based on a survey of 2,191 employees of a "large mountain west university", which is not representative of the entire U.S.

6. Based on their literature review, Burke and Hung (2015) conclude that wealthier, higher income, more educated, older, and/or more financially literate individuals are more likely to seek and receive financial advice. If these findings are valid, they call into question the validity of the RIA.

A. The RIA hinges on the implicit assumption that an investor will hold a poorly performing mutual fund for an extended period of time.

B. If investors who use financial advisers are more knowledgeable, experienced, and sophisticated than those who merely own indexed funds, there is no reason to believe they would hold sub-optimal investments for an extended period of time or maintain a working relationship with an adviser who charges excessive fees or continually steers them toward poorly performing investments.

7. The information in the four economic studies posted after the hearing are unpersuasive on the issues under study and particularly with regard to advice about annuity purchases in a retirement context.

VI. The Proposal Excluded Current Regulatory Protections from its Quantification of Need

A. In its justification for the proposal, Department asserted that current regulatory protections are inadequate to address Department's concerns about advice to retirement plan participants.

1. ACLI disagreed with the wholesale disregard of detailed systems of significant protection from the analysis of regulatory need. The commentator emphasized that the scope of the proposal can be responsibly tempered with an objective integration of these fundamental protections and prophylactics in the redesign of the Department proposal.

2. ACLI explained that it is contrary to the guiding statutory, executive, and judicial standards to impose new and redundant elements governing advice to plan participants that are already served quite well under complementary patterns of significant regulation.

B. A detailed regulatory framework governs conduct in the sale of insurance products.

1. Life insurance companies and their associated persons currently fulfill a broad array of regulation administered by state insurance departments, the Securities and Exchange Commission (SEC), the Department, the Financial Industry Regulatory Authority (FINRA), and various state securities departments.

2. This comprehensive regulatory framework provides background for evaluating the benefits, needs and the costs of the Department proposal.

A. Business conduct standards regulate important aspects of the customer relationship, including suitability standards, disclosure, advertising, supervision, maintenance of customer account assets, data collection, training, compensation, and supervision of associated persons.

B. In general, the federal securities laws and FINRA rules govern individual variable insurance contracts, and state insurance laws and regulations apply to fixed insurance products. In some cases, insurance products invoke both federal and state laws. Collectively, this body of regulatory provisions and oversight provide important consumer protection and strong enforcement tools.

3. Laws and regulations most relevant include:

A. The NAIC Suitability in Annuity Transactions Model Regulation; [http://www.naic.org/store/free/MDL-275.pdf (last viewed October 6, 2015)].

B. FINRA Rule 2330 governing suitability and supervision in the sale of variable annuities; [http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=8824 (last viewed October 6, 2015)].

C. FINRA Rule 2320 governing non-cash compensation for variable products and mutual funds; [http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=8494 (last viewed October 6, 2015)].

D. The NAIC Annuity Disclosure Model Regulation; http://www.naic.org/store/free/MDL-245.pdf (last viewed October 6, 2015)].

E. The NAIC Life Insurance and Annuity Replacements Model Regulation [http://www.naic.org/store/free/MDL-613.pdf (last viewed October 6, 2015)], and state insurance regulations such as:

(1) New York Regulation 60 which governs life insurance and annuity replacements [http://www.dfs.ny.gov/insurance/r_finala/1998/reg60fin.pdf (last viewed October 6, 2015)];

(2) The NAIC Unfair Trade Practices Act [http://www.naic.org/store/free/MDL-880.pdf (last viewed October 6, 2015)] and the prohibition on "unfair financial planning practices" at Section 4(M) page 880-6; and**,**

(3) State insurance consulting laws governing the simultaneous receipt of product commissions and fees for insurance consulting services. *See* ACLI submission appendix at page 171 for a discussion of insurance consulting laws. [http://www.dol.gov/ebsa/pdf/1210-AB32-2-00621.pdf (last viewed October 6, 2015)].

C. Life Insurers provide significant written disclosures at the point of sale to satisfy multiple regulators' requirements and to help customers understand the nature of their various products and relationships.

1. These disclosures include many product related materials (insurance sales illustrations, policy contracts, required "buyers guides," prospectuses), marketing materials describing the firm's offerings, documents that provide the terms for a brokerage or advisory relationship (brokerage account agreements, advisory account agreements, Form ADV, investment policy statements), and other required disclosures.

2. There also is a considerable amount of post-sale disclosure depending on the nature of products and services provided, such as in-force insurance ledgers, transaction confirmations, periodic performance reporting for investment accounts, and updated Form ADV brochures. Several state and federal laws are designed to ensure appropriate sales practices and suitable recommendations consistent with customers' financial objectives and best interests.

3. Insurance products are the only products in today's financial marketplace with free-look provisions extending for 10, or more, days. These features give consumers a meaningful opportunity to carefully evaluate purchases after the sale and to change their mind for any reason, including cost factors, to receive a refund.

D. One thing is uniformly consistent in the preamble, the Regulatory Impact Analysis (RIA), the economic studies supporting the RIA and the hearing transcript: they all ignore the comprehensive scope of consumer-protective regulation governing the sale of annuities, and fail to translate the unique impact of the initiative on annuities.

1. ACLI noted during the hearing that although the initiative mention annuities a total of 172 times and acknowledge that "31 percent of IRAs include investments in annuities" and that "insurance companies [will] be

significantly affected by the proposal," the cost-benefit analysis makes no attempt to examine the impact of the proposed rule on annuities, advisers, insurers, or retirement savers using them.

2. Neither the hearing transcript nor four economic studies posted after the hearing reveal any additional analysis or information about the proposed rule's impact on retirement savers using annuities, on advisers recommending annuities, or on annuities' role in retirement security.

3. The RIA, therefore, continues to fail the statutory, administrative and judicial requirements that federal agency rulemaking conduct a meaningful cost-benefit analysis.

VII. The Status of Non-Cash Compensation Regulations Governing Variable Annuities: A Gap in the Proposal's Considerations

A. Discussion surrounding the DOL proposal has referenced inappropriate influences of non-cash compensation. The Secretary of Labor has referenced non-cash compensation in interviews, and statements to Congress. Similarly, Senator Elizabeth Warren send a letter dated April 28, 2015, to 15 of the largest U. S. life insurers seeking records about compensation practices and information "about the incentives they offer, the number and value of the incentives awarded, and the companies' policies for disclosing these potential conflicts of interest."

B. Many of the observations in Senator Warren's letter and Secretary Perez's statements reflect isolated circumstances and appear ignorant of significant constraints on non-cash compensation practices. A brief explanation about the standards governing non-cash compensation can illuminate objective analysis and balanced approaches to the proposal.

1. Life insurers comply with regulations that regulate permitted non-cash compensation practices. FINRA Rule 2320 applies to broker-dealers selling variable insurance contracts and mutual funds, respectively, and limit non-cash compensation to:

A. gifts of up to $100 per associated person annually;

B. an occasional meal, ticket to a sporting event or theater, or comparable entertainment;

C. payment or reimbursement for training and education meetings held by broker-dealers or issuers/sponsors for the purpose of educating associated persons of broker-dealers, so long as certain conditions are met;

D. in-house sales incentive programs of broker-dealers for their own associated persons; and,

E. contributions by any company or other FINRA member to a broker-dealer’s permissible in-house sales incentive program, subject to the following explicit conditions:

(1) Non-cash compensation arrangements between a broker-dealer and its associated persons or a company and its sales personnel who are associated persons of an affiliated member, are conditioned on:

(a) the member's or non-member's non-cash compensation arrangement, if it includes variable contract securities, is based on the total production of associated persons with respect to all variable contract securities distributed by the member;

(b) the non-cash compensation arrangement requires that the credit received for each variable contract security is equally weighted;

(c) no unaffiliated non-member company or other unaffiliated member directly or indirectly participates in the member's or non-member's organization of a permissible non-cash compensation arrangement; and

(d) the record keeping requirement in the rule is satisfied.

F. With regard to training and education meetings, the rule imposes strict additional conditions that require associated persons to obtain their broker-dealers’ prior approval to attend the meeting and that

(1) attendance by a member’s associated persons is not conditioned by the broker-dealer on the achievement of a sales target or any other incentives pursuant to a non-cash compensation arrangement permitted by the rule;

(2) the location is appropriate to the purpose of the meeting, which shall mean an office of the offeror or the broker-dealer, or a facility located in the vicinity of such office, or a regional location with respect to regional meetings;

(3) the payment or reimbursement is not applied to the expenses of guests of the associated person; and,

(4) the payment or reimbursement by the offeror is not conditioned by the offeror on the achievement of a sales target or any other non-cash compensation arrangement allowed under the rule.

(5) These limitations successfully assure that training and education meetings are appropriate. *See* FINRA Rule 2320 *[http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=8494 (last viewed October 6, 2015)].*

2. Rule 2320 requires broker-dealers to maintain records of all non-cash compensation received by the broker-dealer or its associated persons in permitted non-cash compensation arrangements. The records must include:

A. the names of the offerors, companies or other broker-dealers making the non-cash compensation contributions;

B. the names of the associated persons participating in the arrangements;

C. the nature and value of non-cash compensation received; the location of training and education meetings; and any other information that proves compliance by the broker-dealer and its associated persons with the rule.

3. Life insurers supported the spirit and purpose of Rule 2320, and actively participated in its development through comment letters and constructive suggestions to achieve an effective, consumer-protective regulation.

4. ACLI regularly compiles and digests all FINRA disciplinary actions to capture data involving the distribution of variable products and broker-dealers affiliated with life insurance companies. In a survey of the past five years, there have been no reported disciplinary actions involving non-cash compensation associated with insurance product sales. These results demonstrate that FINRA Rule 2320 works efficiently and effectively.

C. During the hearing, ACLI emphasized that the proposal was built on two false premises: (i) all commissioned advice is conflicted and (ii) all fee-based advice is unconflicted and always serves retirement savers' best interest.

1. The RIA failed to properly support these assumptions and nothing in the hearing transcript bolstered them further. Formidable and independent regulators have observed that fee based advice is not always in the customer's best interest. Rather, the appropriateness of commissioned advice and fee-based advice should be evaluated based on the unique facts and circumstances of each retirement saver.

2. In a very relevant point of reference, FINRA issued guidance about fee-based arrangements, recognizing that while fee-based programs are

beneficial for some customers, "they are not appropriate in all circumstances." FINRA instructs that:

A. Firms must consider the overall needs and objectives of the customer when determining the benefits of a fee-based account for that customer, including the anticipated level of trading activity in the account and non-price factors such as the importance that a customer places on aligning his or her interests with the broker. *See* Notice to Members 03-68, *Fee-Based Compensation-NASD Reminds Members That Fee-Based Compensation Programs Must Be Appropriate*, http://www.finra.org/sites/default/files/NoticeDocument/p003079.pdf (last viewed October 6, 2015)] .

B. Additionally, firms must take into account the nature of the services provided, the benefits of other available fee structures, and the customer's fee structure preferences.

(1) As FINRA observes, under some customer circumstances, compensation through commission arrangements may be more appropriate than fee-based arrangements. FINRA explained that the appropriateness of fee-only financial arrangements should be evaluated on the unique circumstances of each customer and their financial needs. *See Fee-Based Questions and Answers*, http://www.finra.org/industry/fee-based-account-questions-answers (last viewed October 6, 2015).

(2) FINRA stated that "[C]ertain potential problems have been identified through our examination program. For example, it is not always clear that customers receive adequate disclosure about the distinctions and features of fee-based versus commission-based accounts, including the differences in fee structures and that fees will probably be higher in a fee-based account if the level of activity is modest. Training and education at some firms are minimal, particularly in giving brokers guidance on how to evaluate whether a customer is appropriate for a fee-based account." *Id.*

3. The same is true with evaluations of commissioned recommendations to purchase annuities. Assets under management on which the annual, recurrent fees are assessed under fee-only financial arrangements may not always serve customers' best interest.

4. On commissions compared to fee-based compensation, Elisse B. Walters, who served as acting SEC chair, SEC Commissioner, and FINRA Senior Executive Vice President, critically noted:

A. "In a nutshell, while fee based accounts can be a good thing, they are not always the right thing, or the best thing. We need you to look at each customer and determine what kind of fee works best for him or her. The Tully Report itself recognized that investors with low trading activity would probably be better off with a commission-based program that charges only when trades are made." *See* Elisse Walters, Current NASD Regulatory Issues on Sales and Marketing (Sept. 28, 2004) http://www.finra.org/newsroom/speeches/092804-remarks-27th-annual-sia-sales-and-marketing-conference (last viewed October 6, 2015).

B. "So how do you decide what is the best fee structure for your customers? NASD [now called FINRA] states that it is inconsistent with just and equitable principles of trade to put your customer in a fee structure that can reasonably be expected to result in a greater cost than alternative account that provides the same services and benefits to the customer. We believe that cost is an important factor, but not the only one. Other factors include the objectives of the customer, including the anticipated trading and non-price factors such as aligning their interests with those of the broker." *Id.*

C. "You need to determine that such an account is appropriate by making reasonable efforts to get information about the customer that will allow you to gauge the right kind of fee, based on the services provided, the cost, the alternatives, and the customer's preferences. You also need to tell the customer about the fee based structure and what it means. And you need to set up supervisory procedures to review those fees - we recommend annually - to make sure that they stay appropriate over time." *Id.*

5. Importantly, regulators have provided strict guidance on managing conflicts in recommendations to customers. In 2013, FINRA published a Report on Conflicts of Interest in the broker-dealer industry to highlight effective conflicts management practices. *See* http://www.finra.org/industry/2013-report-conflicts-interest (last viewed October 6, 2015).

A. In this endeavor, FINRA published examples of how some broker-dealers address conflicts to help broker-dealers analyze the conflicts they face and implement a conflicts management framework appropriate to the size and scope of their business.

B. The report highlights approaches to managing conflicts that firms can apply across their business, and explained that there is no one-size-fits-all framework for conflict management.

D. in 2008 the RAND Corporation issued a report following a study conducted for the SEC on the services and functions of broker-dealers and investment advisers. The study followed judicial rejection of Rule 202(a)(11)-1 under the Investment Advisers Act, a rule that sought to delineate the regulatory status of these securities professionals in a contemporary marketplace. On the relative presence of fee-based advice compared to commissioned advice, the 2008 Rand Report observed:

1. "Not surprisingly, the primary form of compensation is based on a percentage of assets under management. More than 97 percent receive such compensation, and the share is even higher among the 98 percent of firms that report providing "continuous and regular supervisory or management services to securities" (language from SEC, 2006). The second-leading form of compensation is 'fixed fees (other than subscription)' (language from SEC, 2006), which are reported by 50 percent of advisers with individual clients, followed by hourly fees (44 percent). Only 13 percent of these advisers reported receiving commissions. In fact, more of these advisers (20 percent) reported receiving performance-based fees than reported receiving commissions." *See* https://www.sec.gov/news/press/2008/2008-1_randiabdreport.pdf (last viewed October 6, 2015).

A. This report was authored by Dr. Angela Hung, who was also an author of three of the four economic studies commissioned by DOL and posted after the hearing, and was an author of two of the documents identified by DOL as supporting the RIA.

B. Significantly, the 2008 RAND Report concludes that most advisory compensation is fee based and that only 13% of advisers reported receiving commissions. These conclusions suggest that the DOL's concerns about the presence of commissioned advice to retirement savers may be overstated and of disproportionate concern.

E. In a similar regulatory vein, New York Insurance Code Section 4228 governs certain non-cash compensation practices for life insurance policies and annuities. New York Insurance Code Section 4228(e)(6) provides that:

1. A company, including any person, firm or corporation on its behalf or under any agreement with it, may pay or award, or permit to be paid or awarded, prizes and awards to agents and brokers pursuant to a plan of agent or broker compensation, provided that no single prize or award may exceed a value of two hundred fifty dollars, and that the total value of such prizes and awards paid or awarded to any agent or broker within a calendar year may not exceed one thousand dollars. Notwithstanding the foregoing, a company may also pay or award not more frequently than monthly a prize or award valued at not more than twenty-five dollars.

2. An implementing regulation places monetary limits on the value of prizes and awards that insurers can provide agents. The records must include: the names of the offerors, companies or other broker-dealers making the non-cash compensation contributions; the names of the associated persons participating in the arrangements; the nature and value of non-cash compensation received; the location of training and education meetings; and any other information that proves compliance by the broker-dealer and its associated persons with the rule. The New York Department of Financial Services website contains additional information about what steps life insurers must take to comply with Section 4228. http://www.dfs.ny.gov/insurance/life/agcomp/life4228.htm(last viewed October 6, 2015).

F. In sum, the RIA fails to properly quantify and balance the different approaches to providing advice under the proposal. Consequently, the RIA does not fulfill the explicit judicial, statutory and administrative requirements to conduct a complete and balanced cost-benefit analysis.

VIII. Correcting Observations of Fact and Law

A. To ensure that agencies properly perform cost-benefit analysis and select the most cost-effective regulatory options, the White House Office of Information and Regulatory Affairs (OIRA) reviews agency cost-benefit analysis before proposed regulations become effective. The White House issued a Fact Sheet entitled *Middle Class Economics: Strengthening Retirement Security by Cracking Down on Backdoor Payments and Hidden Fees* on February 23, 2015 about the DOL proposal before its release and President Obama's press conference endorsing the proposal.

B. To the extent views from OIRA reflect the January 15, 2015 White House Memorandum and the White House Fact Sheet supporting the DOL's proposed fiduciary rule, there are some corrections of fact and law that may be constructive in the proposal's cost-benefit analysis.

C. According to the memorandum "many firms recommend that prospective customers roll over 401(K) plan assets into an IRA without any knowledge of a customer's financial situation." Salespersons recommending the purchase of a variable annuity on an IRA roll over must fulfill FINRA's suitability and supervision Rule 2330, which requires the salesperson to obtain specific information from the customer (such as the customer's investment objectives, liquid net worth, financial sophistication, and tax status).

1. This information is recorded on a customer account record that forms the basis of suitability determinations and supervisory review.

2. Further, Rule 2330 requires the salesperson to make an affirmative determination that the "customer would benefit from certain features of a deferred variable annuity (e.g., tax-deferred growth, annuitization or death benefit."

D. Rule 2330 imposes a significant supervisory obligation requiring the broker-dealer's registered principal to review the recommendation and consider the extent to which:

1. the customer would benefit from certain features of a deferred variable annuity;

2. the customer's age or liquidity needs make the investment inappropriate; and,

3. the customer involved an exchange of a deferred variable annuity: will incur surrender charges, face a new surrender period, lose death or existing benefits, have increased mortality and expense fees, appears to have a need for any potential product enhancements and improvements, or had another deferred variable annuity exchange within the preceding 36 months.

E. Likewise, the NAIC Suitability in Annuity Transactions Regulation imposes suitability and supervision standards for fixed annuity sales that are modeled on FINRA Rule 2330. This model regulation has been adopted in most jurisdictions. It is factually incorrect, therefore, that recommendations to purchase a fixed or variable annuity in an IRA roll over are done "without any knowledge of the customer's financial situation."

F. The memorandum states that "advisers steer investors into variable annuities and other complex products with high fees. Advisers can exploit their customer's low level of financial literacy by recommending riskier and more complex investments." (emphasis added).

1. Most contemporary fixed and variable annuities have surrender fees, which only occur if the customer cancels the contract within a specified period, usually about seven years on average.

2. Annuities are purchased and sold as long-term accumulation vehicles for retirement security, not as short-term trading vehicles. If customers purchase the contract and hold it for the surrender period, they will not incur surrender charges. The White House memorandum does not appear to understand these mechanics.

G. As explained above, FINRA Rule 2330 and the NAIC Suitability in Annuity Transactions Model Regulation impose suitability and supervision standards that are designed to ensure that annuity purchases are appropriate for customers, including those with low levels of financial literacy.

H. Variable annuities provide permanent annuity purchase rate guarantees for purchasers upon annuitization, and many variable annuities provide optional riders for guaranteed benefits, such as lifetime payouts, withdrawals and death benefits. Variable annuities are designed to track the growth in the economy and provide protection against lower purchasing power due to inflation.

I. The White House statement overlooks the fact that variable annuities can provide a valuable solution to the risk that consumers will have inadequate retirement assets. Continued access for workers and retirees to information and education on lifetime income products is consistent with the joint regulatory initiatives developed by the Department of Labor (DOL), Department of Treasury, and Internal Revenue Service to facilitate access to, and use of, lifetime income. Similarly, bipartisan endeavors in the House and the Senate have supported these same goals through the introduction of legislation. *See* 113th Congress – S. 1145/H.R. 2171, S. 1270, S. 1979, H.R. 5875, H.R. 2117.

J. The memorandum's statements associating variable annuity recommendations with high fees, exploitation of low financial literacy and riskier investments is generally incorrect.

K. The memorandum states that "consumer protections for investment advice in the retail and small plan markets are inadequate."

> 1. This unqualified observation is overbroad and ignores substantial consumer protections under the federal securities laws governing the activities of investment advisers and broker-dealers. Likewise, it ignores analogous protections under state laws such as the NAIC Suitability in Annuities Transactions Model Regulation.
>
> 2. A fiduciary duty is currently enforced under the Investment Advisers Act for registered investment advisers that may be involved in recommendations about IRA roll over options. SEC Commissioner Daniel Gallagher addressed this observation in a recent public speech, noting that the memorandum's statement is not accompanied by any analysis or study of the current protections consumers receive from the regulatory oversight of brokers and investment advisers by the SEC and SROs-in fact, it blatantly ignores this comprehensive regulatory oversight. Indeed, the memo manages to avoid any mention of either the SEC or FINRA. *See* Remarks at The SEC Speaks by SEC Commissioner Daniel M. Gallagher (Feb. 20, 2015) at 3.
>
> 3. The statement in the memorandum disregards other significant regulatory protections that currently exist under the federal securities laws.

L. The White House Fact Sheet references "outdated regulations" that provide consumer protections under IRA roll over recommendations. FINRA Rule 2330 and the NAIC Suitability in Annuities Regulation were recently adopted to significantly upgrade consumer protections in fixed and variable annuity sales.

M. The memorandum states that "loads encourage advisers to excessively churn their customers' investments." FINRA and SEC regulations explicitly prohibit churning of customer accounts.

> 1. Indeed, FINRA Rule 2330 requires the adviser and supervisor to specifically consider whether a customer involved an exchange of a deferred variable annuity:

A. will incur surrender charges;

B. face a new surrender period;

C. lose death or existing benefits;

D. have increased mortality and expense fees;

E. appears to have a need for any potential product enhancements and improvements, or

F. had another deferred variable annuity exchange within the preceding 36 months.

N. In response to this assertion in the memorandum, SEC Commissioner Gallagher noted "our (SEC) rules expressly prohibit brokers from churning customer accounts, and the SEC and SROS have sophisticated tools designed to monitor for such activity." *See Remarks at The SEC Speaks* by SEC Commissioner Daniel M. Gallagher (Feb. 20, 2015) at 3.

O. Likewise, the NAIC Suitability in Annuities Transaction demands that recommendations, and accompanying supervision, are suitable. Churning would not be suitable.

IX. Commissioned Advice Compared to Fee-Only Advice

A. The proposal is founded on a premise that commissioned products influence advisers to provide conflicted advice to the detriment of retirement plan participants. As such, the proposal elevates fee-based advice and automated robo-advice systems as preferable alternatives because they are cheaper and aligned with the interests of retirement plan participants.

1. These premises are incorrect in many cases. Recommendations under the proposal may generate the least expensive product that may actually disserve and impair the participant's best interests.

2. While fee-based or automated advice are appropriate for some individuals, they are not necessarily appropriate for all.

B. Financial product recommendations and associated compensation arrangements are most objectively evaluated according to the unique facts and needs of each financial customer and the individual compensation arrangement.

1. Recurrent annual fees may be ill-suited to individuals with moderate assets needing little annual advice, and may exceed the total value of a commissioned-based adviser.

2. FINRA issued guidance about fee-based arrangements, recognizing that while fee-based programs are beneficial for some customers, "they are not appropriate in all circumstances." FINRA instructs that:

A. Firms must consider the overall needs and objectives of the customer when determining the benefits of a fee-based account for that customer, including the anticipated level of trading activity in the account and non-price factors such as the importance that a customer places on aligning his or her interests with the broker.

B. Additionally, firms must take into account the nature of the services provided, the benefits of other available fee structures, and the customer's fee structure preferences.

C. As FINRA observes, under some customer circumstances, compensation through commission arrangements may be more appropriate than fee-based arrangements.

1. FINRA explained that the appropriateness of fee-only financial arrangements should be evaluated on the unique circumstances of each customer and their financial needs. The same is true with evaluations of commissioned recommendations to purchase certain financial products like annuities.

2. There are many customers for whom annuities provide a valuable and appropriate means to achieving retirement security and guaranteed lifetime income.

3. The fact that the salesperson was compensated by commissions does not diminish the important role annuities play in financial and retirement security.

4. Commission-based compensation can be the most economical and appropriate form of compensation in advisory arrangements with consumers owning moderate amounts of retirement assets, and may be significantly less expensive than non-commissioned forms of compensation, such as asset management fees.

D. The proposal's recurrent conviction that commission-based advice is always conflicted fails to fulfill the statutory, executive, and judicial mandates that the cost-benefit analysis should be balanced, and consider several solutions to proposed rulemaking.

X. Antifraud and Conflict of Interest Standards under the Investment Advisers Act: Benchmarks to Evaluating the RIA

A. Section 206(1) and (2) of the Advisers Act make it unlawful for an investment adviser, directly or indirectly, to "employ any device, scheme, or artifice to defraud any client or prospective client" or to "engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client."

B. In *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 194 (1963), the Supreme Court construed an investment adviser as a fiduciary owing clients "an affirmative duty of utmost good faith, and full and fair disclosure of all material facts." Further, the court found a "failure to disclose material facts must be deemed fraud or deceit within its intended meaning, for . . . the darkness and ignorance of commercial secrecy are the conditions under which predatory practices best thrive." *Id.* at 200.

C. Financial Planners triggering investment adviser definition have a duty to avoid fraudulent conduct which includes disclosing material facts to clients whenever the failure to do so would defraud or deceive clients.

D. Disclosure of situations involving conflicts of interest or potential conflicts of interest with a client is significant in financial planning activities.

E. Examples of typical situations involving conflicts of interest within the investment adviser's duty to disclose.

1. Investment adviser providing financial planning services outside the scope of his employment as a registered representative of a broker-dealer must disclose that the advisory services are independent from the employment with the broker-dealer. *See*, e.g., Rocky Mountain Financial Planning, Inc. (avail. Mar. 28, 1983); David P. Atkinson (avail. Aug. 1, 1977).

2. Financial Planner is restricted to recommending a limited universe of products to implement the financial plan by virtue of employment agreement with insurance company or broker-dealer, or because financial planner lacks particular NASD qualification in order to share in commissions upon execution. *See*, e.g., George E. Bates (avail. Mar. 26, 1979).

3. Investment adviser should inform client that execution of the plan can be accomplished through a broker-dealer other than the financial planner or its affiliated broker-dealer. *See*, e.g., Don P. Matheson (avail. Sept. 1, 1976); Don P. Matheson (avail. May 24, 1979) (evaluates conflicts of interest in adviser's "letter of agreement").

4. Financial Planner should fully disclose nature and extent of the planner's interest in any recommendations, including any compensation that would be received on execution of the plan such as commissions or finders fees. *See*, e.g. Rocky Mountain Financial Planning, Inc. (avail. Mar. 28, 1983).

5. "An investment adviser must not effect transactions in which he has a personal interest in a manner that could result in preferring his own interest to that of his advisory clients." Kidder, Peabody & Co., 43 S.E.C. 911, 916 (1968). Example could occur when financial planner recommends purchase of real estate limited partnership in which planner is also involved in syndication or distribution.

6. Investment adviser must disclose if adviser's personal securities transactions are inconsistent with the advice given to

clients. In the Matter of Dow Theory Letters, Investment Advisers Act. Rel. No. 571 (Feb. 22, 1977), 11 SEC Docket No. 13 (Mar. 8, 1977).

A. Investment adviser who structures his personal securities transactions to trade on the market impact caused by his recommendations must fully disclose these practices to clients. SEC v. Capital Gains Research Bureau, 375 U.S. 180, 197 (1963).

B. Investment adviser should disclose compensation received from the issuer of a security recommended. Investment Advisers Act Rel. No. 701 (Sept. 17, 1979) 18 SEC Docket No. 10 (Oct. 2, 1979).

C. Section 206(3) of the Advisers Act generally makes it unlawful for an investment adviser acting as principal for his own account knowingly to sell any security to or purchase any security from a client, or, acting as broker for a person other than such client, knowingly to effect any sale or purchase of any security for the account of such client, without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtain the consent of the client to such transaction. The responsibilities of an investment adviser dealing with a client as principal or as agent for another person are discussed in Advisers Act Release Nos. 40 and 470 (February 5, 1945 and August 20, 1975 respectively).

XI. Congressional Directive to Conduct a Study on a Harmonized Standard of Care Fundamental the RIA's Calculation of Regulatory Need

A. The Dodd-Frank Act provides some valuable yardsticks for analyzing the timing and approach of the DOL's fiduciary proposal.

B. Section 913 of the Dodd-Frank Act required that the SEC, before engaging in any decision to advance rulemaking with respect to a new standard of care, conduct a Study to evaluate, among other things, the effectiveness of existing legal or regulatory standards of care for BDs, IAs and their associated persons providing personalized investment advice and recommendations about securities to retail customers imposed by the SEC and a national securities association, and other Federal and State legal or regulatory standards.

C. The Study specified fourteen separate required considerations to be addressed. Those required Study considerations include "the effectiveness of existing legal or regulatory standards" and "whether there are legal or regulatory gaps, shortcomings, or overlaps in legal or regulatory standards," and even "the potential impact of eliminating the broker dealer exclusion from the definition of 'investment adviser' under section 202(a)(11)(C) of the Advisers Act.

D. Other required Study considerations include the SEC's review of:

1. The specific instances related to the provision of personalized investment advice about securities in which the regulation and oversight

2. of investment advisers provide greater protection to retail customers than the regulation and oversight of broker dealers;

3. The potential impact on retail customers, including the potential impact on the range of products and services offered by broker dealers if the Advisers Act standard and/or other requirements are applied to broker dealers and their associated persons;

4. The varying level of services provided by brokers, dealers and investment advisers and their associated persons and the varying scope and terms of retail customer relationships among them;

5. The potential impact on retail customers that could result from changes in regulatory requirements or legal standards of care, including protection from fraud, access to investment advice, and recommendations about securities to retail customers, or the availability of such advice and recommendations;

6. The potential additional costs and expenses to retail customers regarding their investment decisions; and

7. The potential additional costs and expenses to brokers, dealers and investment advisers resulting from potential changes in the regulatory requirements or legal standards.

E. In sum, Section 913 required not only an investigation of whether a new or different standard of care will enhance investor protection, but also an evaluation of the potential consequences, intended and unintended, on retail customers, as well as the BDs and IAs who provide them with personalized investment advice about securities. The DOL proposal did not appear to factor Section 913 into its framework.

XII. Challenges to DOL's Authority to Promulgate the Fiduciary Standard and Create a Private Right of Action

A. Several commentators challenged DOL's authority to implement the fiduciary rule and the BIC exemption.

1. *See* comment of Eugene Scalia. [http://www.dol.gov/ebsa/pdf/1210-AB32-2-00547.pdf (last viewed October 6, 2015)].

A. "ERISA is a 'comprehensive and reticulated statute,' *Nachman Corp. v. PBGC*, 446 U.S. 359, 361 (1980), and its definition of 'fiduciary' is no different. Under ERISA, [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.* 29 U.S.C. § 1002(21)(A) (emphasis added). *Id*. at 2.

B. "The Department has proposed a definition of "fiduciary" so broad that it must be accompanied by seven carve-outs and six prohibited transaction exemptions to limit the scope of even a small portion of the vast new regulatory regime it would establish over broker-dealers and the IRA market. A regulatory definition that cannot function or be harmonized with generations of practice unless it is re-worked through a dizzying array of carve-outs and exemptions is, axiomatically, a definition that does not faithfully interpret the words Congress wrote" about the term fiduciary. *Id*. at 3.

C. "The law of trusts is not the only body of law that informs the meaning of 'fiduciary' in ERISA. So, too, does the law embodied in, and developed under, the IAA. In the investment-advice prong of ERISA's definition of fiduciary, Congress used the phrase 'renders investment advice for a fee or other compensation.' That language reflects terminology in the IAA, which for decades had held a central place in the regulation of investment advisers, and which defines 'investment adviser' as a person who `for compensation ... advis[esJ others ... as to the value of securities or as to the advisability of investing in, purchasing, or selling securities." 15 U.S.C. § 80b-2(a)(11) (emphasis added). Id at 4.

D. "The language and history of the Advisers Act is informative of ERISA's meaning in two ways. First, by the time of ERISA's enactment, investment advisers were widely understood to be fiduciaries—and the reason they were fiduciaries was that they had a closer, deeper relationship with their clients than did other financial professionals." *Id*.

(1) "Thus, the Supreme Court wrote in 1963 that the Advisers Act 'reflects a congressional recognition of the delicate fiduciary nature of an investment advisory relationship'; therefore, 'Congress recognized the investment adviser to be' 'a fiduciary.' *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191, 194-95 (1963). *Id*.

(2) " In reaching this conclusion, the Court relied on legislative history that recognized the 'personalized character of the services of investment advisers,' [Capital Gains Research Bureau] at 191, and cited congressional testimony that characterized investment advisers as having relationships of 'trust and confidence with their clients, [Capital Gains Research Bureau] at 190 (internal quotation marks omitted)." *Id.*

(3) "The Court cited this legislative history two decades later in reiterating the fiduciary 'character' of the investment-adviser relationship. *Lowe v. SEC*, 472 U.S. 181, 190 (1985). Being an investment adviser, the Court said, is a 'personal service profession [which] depends for its success upon a close personal and confidential relationship between the investment-counsel firm and its client. It requires frequent and personal contact of a professional nature between [the advisers] and [their] clients. [Lowe v. SEC] at 195 (emphases altered and internal quotation marks omitted)." Comment of Eugene Scalia. [http://www.dol.gov/ebsa/pdf/1210-AB32-2-00547.pdf (last viewed October 6, 2015)] at 5.

(4) "Second and related, when investment advisers were being described by the Court as having the sort of *'close and personal' relationship with clients—characterized by 'frequent and personal contact'*—that rose to the level of a fiduciary relationship, *the Court was not considering investment advisers in isolation, but rather in contrast with other financial professionals whose relationships did not rise to the same level, namely, broker-dealers.* Thus, the Advisers Act included a carve-out which clarified that 'investment adviser' did not include 'any broker or dealer" who provided advice that was 'solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor. 15 U.S.C. § 80b-2(a)(11)(C)." *Id*.

(5) "This exemption from the definition of investment adviser was not introduced by the IAA, the D.C. Circuit has explained, but 'reflected [a] distinction' then existing between the 'two general forms of compensation' that financial professionals received in connection with offering investment assistance. *Fin. Planning Assn v. SEC, 482 F.3d 481, 485* (D.C. Cir. 2007). 'Some [representatives] charged only ...commissions (earning a certain amount for each securities transaction completed). Others charged a separate advice fee (often a certain percentage of the customer's assets under advisement or supervision).' *Id*. This difference in compensation structures—and the notion that a fee for advice was suggestive of a fiduciary relationship, whereas a commission on a sale was not—was captured by the IAA in the broker-dealer exemption." Comment of Eugene Scalia. [http://www.dol.gov/ebsa/pdf/1210-AB32-2-00547.pdf (last viewed October 6, 2015)] at 5.

B. Arguments submitted challenging the DOL's authority

1. Section 913 of the Dodd-Frank Act stipulated that the SEC should determine what fiduciary standards should govern broker-dealers. The commentator viewed this as relevant because DOL stated in the preamble that the principal goal of the rulemaking is to regulate IRAs and the broker-dealers who offer them. *See* 80 Fed. Reg. at 21,928, 21,932. Comment of Eugene Scalia. [http://www.dol.gov/ebsa/pdf/1210-AB32-2-00547.pdf (last viewed October 6, 2015)] at 12.

2. DOL's proposed BIC exemption would affect most of the IRA market and creates a private right of action for plans and participants to sue broker-dealers for breach of contract. The commentator notes that only Congress can create private rights of action, citing *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) Comment of Eugene Scalia. [http://www.dol.gov/ebsa/pdf/1210-AB32-2-00547.pdf (last viewed October 6, 2015)] at 15.

3. DOL does not have regulatory authority over IRAs because IRAs—when sold to individual clients—are not "employee welfare benefit plans" or "employee pension benefit plans" that are "established or maintained by an employer or by an employee organization." *See* 29 U.S.C. § 1002(1) & (2). *Id*.

XIII. SEC Report on a "Harmonized" Standard of Care: A Guiding Framework for DOL's Fiduciary Proposal

A. Request for Public Input

1. In fulfillment of Section 913 of the DFA, on July 27, 2010 the SEC invited comment[6] on a study to evaluate:

A. The effectiveness of existing legal or regulatory standards of care for brokers, dealers, investment advisers, and persons associated with them when providing personalized investment advice and recommendations about securities to retail investors; and,

B. Whether there are gaps, shortcomings, or overlaps in legal or regulatory standards in the protection of retail customers relating to the standards of care for these intermediaries.

2. The SEC was required to submit a study report to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives no later than 6 months after the July 15, 2010 enactment of the Dodd-Frank Act.

B. Recommendations in the SEC Study Report

1. In January 2012, the SEC released its study on broker-dealers and investment advisers, as required by Section 913 of the Dodd-Frank Act. The study recommended that the SEC "adopt and implement, with appropriate guidance, the uniform fiduciary standard of conduct for broker-dealers and investment advisers when providing personalized investment advice about securities to retail customers." According to the study, the standard should be "no less stringent than currently applied to investment advisers under [the] Advisers Act."

2. The study also recommended "that when broker-dealers and investment advisers are performing the same or substantially similar functions, the SEC should consider whether to harmonize the regulatory protections applicable to such functions. Such harmonization should take into account the best elements of each regime and provide meaningful investor protection." The study observed that the "staff's recommendations were guided by an effort to establish a uniform standard that provides for the integrity of personalized investment advice given to retail investors.

3. Consistent with Congress's grant of authority in Section 913, the study recommended the consideration of rulemakings that would uniformly

[6] *See* Release No. IA-3058 (July 27, 2010) at http://www.sec.gov/rules/other/2010/34-62577.pdf (last viewed October 6, 2015).

apply a fiduciary standard no less stringent than currently applied to investment advisers under Advisers Act Sections 206 (1) and (2) to both broker-dealers and investment advisers when providing personalized investment advice about securities to retail customers.

4. The study addressed the following items:

- **Standard of Conduct**. The study recommends a uniform fiduciary standard of conduct should provide that all brokers, dealers, and investment advisers shall act in the best interest of the customer without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice, when providing personalized investment advice about securities to retail customers. The report recommends that the SEC should engage in rulemaking or issue interpretive guidance addressing the components of the uniform fiduciary standard concerning the duties of loyalty and care. In doing so, the report advises that the SEC should identify specific examples of common conflicts of interest to provide a smooth transition to the new standard by broker-dealers as well as consistent interpretations by broker-dealers and investment advisers.

- **Duty of Loyalty**. A uniform standard of conduct will obligate both investment advisers and broker-dealers to eliminate or disclose conflicts of interest. The report recommends that the SEC should prohibit certain conflicts and require uniform, simple and clear disclosures to retail investors about the terms of their relationships with broker-dealers and investment advisers, including any material conflicts of interest.

- **Duty of Care**. The report recommends that the SEC should consider specifying uniform standards for the duty of care owed to retail investors, through rulemaking or interpretive guidance. According to the report, minimum baseline professionalism standards could include, for example, specifying what basis a broker-dealer or investment adviser should have in making a recommendation to an investor.

- **Personalized Investment Advice About Securities**. The report recommends that the SEC should engage in rulemaking or issue interpretive guidance to explain what it means to provide personalized investment advice about securities.

- **Principal Trading**. The report recommends that the SEC should address through interpretive guidance or rulemaking how broker-dealers should fulfill the uniform fiduciary standard when engaging in principal trading.

- **Harmonization of Regulation**. The report observes that a harmonization of regulation, where harmonization adds meaningful investor protection, would offer several advantages, including providing retail investors the same or substantially similar protections when obtaining the same or substantially similar services from investment advisers and broker-dealers.

- **Costs of New Regulatory Compliance**. The report acknowledges that changes in legal or regulatory standards concerning personalized investment advice to retail investors could lead to increased costs for investors, investment advisers, broker-dealers, and their associated persons. The report considers a number of potential costs, expenses and impacts of various potential regulatory changes.

- **Broker-Dealer Exclusion from the Definition of Investment Adviser**. Section 913 of the Dodd-Frank Act required the SEC to consider the potential impact of (i) eliminating the broker-dealer exclusion from the definition of investment adviser in the Advisers Act; and (ii) applying the duty of care and other requirements of the Advisers Act to broker-dealers. The report indicates that these alternatives would not provide the SEC with a flexible, practical approach to addressing what standard should apply to broker-dealers and investment advisers when they are performing the same functions for retail investors.

- **Costs of New Regulatory Compliance**. The report acknowledges that changes in legal or regulatory standards concerning personalized investment advice to retail investors could lead to increased costs for investors, investment advisers, broker-dealers, and their associated persons. The report considers a number of potential costs, expenses and impacts of various potential regulatory changes.

C. Parallel Report from Government Accountability Office

1. In January 2011, the GAO issued its Report [7] to Congress under the Dodd-Frank Act concerning the consistency of Investment Adviser and Financial Planner Regulation under state and federal law. ACLI and company representatives met with a team of GAO representatives several times, explaining that investment advisers and financial planners were extensively regulated under state insurance and securities laws, and federal securities laws.

2. The GAO report concluded that relatively little needed revision under state and federal laws, and took note of the SEC's DFA Study on the IA-BD Standard of Care. The GAO report suggested that state insurance departments confirm that regulations are uniformly implemented across

[7] http://www.gao.gov/new.items/d11235.pdf (last viewed October 6, 2015).

jurisdictions, and recommended state regulatory study of the extent to which consumers understood the different capacities under which insurance agents can operate when providing sales advice and investment advisory services.

3. In November 2011, the NAIC developed a charge to conduct a consumer survey to implement the GAO recommendations. Several of the questions were drawn from a similar survey conducted by the RAND Corporation for the SEC preliminary to its rule proposals on the intersection of broker-dealer and investment advisory activity [Rule 202(a)(11)-1]. The NAIC provided a report to GAO highlighting the scope of its laws and regulations governing investment advice and financial planning.

XIV. The SEC's Request for Data and Information Preliminary to its Cost-Benefit Analysis on a Harmonized Standard of Care: Roadmap for the DOL's RIA

A. In advance of promulgating a rule for a harmonized standard of care for broker-dealers and investment advisers under Section 913 of the Dodd-Frank Act, the SEC conducted a request for data and information (RFDI). The RFDI[8] elicited information on the current market for investment advice to establish a baseline for consideration of possible regulatory approaches for a uniform fiduciary standard, and requested comment on other potential areas for regulatory harmonization for broker-dealers and investment advisers.

B. The Dodd-Frank Act does not <u>require</u> the SEC to engage in rulemaking on a harmonized standard of care, and the SEC has not formally indicated whether it intends to adopt rules, although the SEC has generally indicated that it intends at least to propose rules.

C. To establish a baseline for comparison, the RFDI sought data and information regarding the current regulatory structure and capacity of broker-dealers and investment advisers regarding the following topics:

1. Characteristics and perceptions of retail customers who invest using firms in each capacity;

2. Types and availability of services provided to retail customers under each capacity;

3. The extent to which different rules apply to the same or similar activities and the impact on retail customers;

4. Types of securities offered or recommended, security selections, principal trading with retail customers, analysis of customer returns, and nature, magnitude, and disclosure of conflicts of interest;

5. Costs to firms and to customers associated with providing/receiving investment advice;

[8] http://www.sec.gov/rules/other/2013/34-69013.pdf (last viewed October 6, 2015).

6. Ability of retail customers to bring claims against firms as well as the costs and results; differences in state laws contributing to differences in advice to customers; and

7. The extent to which retail customers are confused about the regulatory status of the two capacities.

D. The RFDI release described a series of non-exclusive assumptions about potential alternative approaches to establishing a uniform fiduciary standard of conduct for broker-dealers and investment advisers. Through this process, the SEC hopeed to elicit feedback on the benefits and burdens of the various alternatives.

1. Assumptions about a Possible Uniform Fiduciary Standard

A. “Personalized investment advice about securities” would include a “recommendation” as interpreted under existing broker-dealer regulation and any actions or communications that would be considered investment advice about securities under the Advisers Act (generally not “impersonal investment advice” or general educational tools);

B. The term “retail customer” would have the same meaning as in the Dodd-Frank Act;

C. Any action would apply to all SEC-registered broker-dealers and SEC-registered investment advisers;

D. The uniform standard would accommodate different business models and fee structures (brokers could receive commissions, no asset-based fee requirement, principal trades allowed with disclosure);

E. The uniform standard would generally not require either broker-dealers or investment advisers to (i) have a continuing duty of care or loyalty after providing advice about securities or (ii) provide services beyond those contractually agreed upon with the retail customer;

F. Offering or recommending only proprietary products or a limited range of products would not by itself constitute a violation of the fiduciary standard;

G. Advisers Act Sections 206(3) and 206(4) and related rules would continue to apply to investment advisers but not to broker-dealers; and

H. Existing law and guidance would continue to apply to broker-dealers.

2. While these assumptions provided guidance on possible future SEC rulemaking, the SEC repeatedly emphasized that these assumptions do not suggest the SEC's policy view or the ultimate direction of possible SEC action. The SEC also noted that commenters were free to provide information using alternatives or assumptions that are different from these assumptions.

E. Potential Uniform Fiduciary Standard

1. The RFDI release noted that the SEC's Report under Section 913 of the DFA on a harmonized standard of care contained recommendations that the SEC should adopt rules that provide for a uniform standard of conduct for all broker-dealers and investment advisers that provide advice about securities in the retail marketplace.

2. The SEC staff further recommended that these rules (or related interpretive guidance) should address the two key components of a uniform fiduciary standard: the duty of loyalty and the duty of care.

3. For purposes of considering these recommendations, the SEC sought information on the costs and benefits of implementing a uniform fiduciary standard that would include a duty of loyalty element and a duty of care element.

4. The SEC release advised commenters to assume that the SEC would provide detail or guidance that the duty of loyalty element would:

A. Require disclosure of all material conflicts of interest; require disclosure in a "general relationship guide" (similar to Form ADV Part 2A) to be delivered at the beginning of a retail customer relationship;

B. Require oral or written disclosure at the time advice is given of any material changes to existing conflicts of interest or new conflicts of interest;

C. Not require broker-dealers to conduct transaction-by transaction disclosure and consent for principal trading as required of investment advisers under Advisers Act Section 206(3); and,

D. Prohibit the receipt or payment of non-cash compensation in connection with the provision of personalized advice about the purchase of securities (no trips, prizes, sales contests).

5. In addition to the requirements of the duty of loyalty, the SEC stated that commenters should assume that the duty of care would impose certain minimum professional obligations upon broker-dealers and investment advisers.

6. The RDFI release advised commenters to assume that the duty of care would include:

A. Suitability requirements, including having a reasonable basis to believe that securities and investment strategy recommendations are suitable for (i) at least some customers and (ii) the specific customer to whom the recommendation was made;

B. Product-specific disclosure, due diligence, and suitability requirements for certain product recommendations, such as penny stocks, options, debt securities and bond funds, municipal securities, mutual fund share classes, hedge funds, and structured products;

C. A best execution duty; and,

D. A requirement that compensation must be fair and reasonable, taking into consideration all relevant circumstances.

F. The parallel paths of the SEC endeavor provides a compelling example of the process of developing a meaningful cost-benefit analysis.

XV.Congressional Action on the 2015 Fiduciary Rule Proposal

A. Several committees have conducted hearings on the fiduciary proposal:

1. Congressional Hearings:

A. The House Education and Workforce Health, Employment, Labor and Pensions Subcommittee held a hearing, on June 17, 2015, titled, "Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees."

B. The Senate HELP Employment & Workplace Safety Subcommittee held a hearing, on July 21, 2015, titled, "Restricting Advice and Education: DOL's Unworkable Investment Proposal for American Families and Retirees."

C. The House Financial Services Capital Markets & Government Sponsored Enterprises and Oversight & Investigations Subcommittees held a hearing on September 10, 2015, titled, "Preserving Retirement Security and Investment Choices for All Americans"

D. The House Ways and Means Oversight Subcommittee held a hearing on Wednesday, September 30, 2015 on the Department of Labor proposed fiduciary rule.

E. The House Financial Services Committee held a markup on Wednesday, September 30, 2015 and passed out of committee by a vote of 34 to 25 The Retail Investor Protection Act, H.R. 1090 introduced by Congresswoman Ann Wagner (R-MO). Congressman David Scott (D-GA) was the only Democrat to support the bill.

B. Members of Congress have signed joint letters to DOL about the Fiduciary Rule Proposal

1. July 21, 2015 letter to DOL Secretary Tom Perez, signed by Reps. John Kline (R-MN), Phil Roe (R-TN), Joe Wilson (R-SC), Virginia Foxx (R-NC), Duncan Hunter (R-CA), Glenn Thompson (R-PA), Tim Walberg (R-MI), Matt Salmon (R-AZ), Brett Guthrie (R-KY), Todd Rokita (R-IN), Lou Barletta (R-PA), Joe Heck (R-NV), Luke Messer (R-IN), Bradley Byrne (R-AL), Dave Brat (R-VA), Buddy Cater (R-GA), Mike Bishop (R-MI), Glenn Grothman (R-WI), Carlos Curbelo (R-FL), Elise Stefanik (R-NY), Rick Allen (R-GA) and Steve Russell (R-OK).

2. July 21, 2015 letter to DOL Secretary Tom Perez, signed by Reps. Tom MacArthur (R-NJ), Kay Granger (R-TX), Glenn Grothman (R-WI), Mike Coffman (R-CO), Paul Gosar (R-AZ), Bob Latta (R-OH), Brad Wenstrup (R-OH), Mike Kelly (R-PA), Dan Newhouse (R-WA), Leonard Lance (R-NJ), Pat Meehan (R-PA), Robert Pittenger (R-NC), Scott Perry (R-PA) and Scott Tipton (R-CO).

3. July 21, 2015 letter to DOL Secretary Tom Perez, signed by Reps. Bobby Scott (D-VA), Maxine Waters (D-CA), John Conyers (D-MI), Elijah Cummings (D-MD), Keith Ellison (D-MN), Raul Grijalva (D-AZ), Eleanor Holmes Norton (D-DC), Barbara Lee (D-CA), Bobby Rush (D-IL), Al Green (D-TX), Jim McDermott (D-WA), Judy Chu (D-CA), Ruben Hinojosa (D-TX) and Betty McCollum (D-MN).

4. July 23, 2015 letter to SEC Chair Mary Jo White signed by Senator Tim Scott (R-SC).

5. July 29, 2015 letter to DOL Secretary Tom Perez, signed by Reps. Mike Bost (R-IL), Rodney Davis (R-IL), Bob Dold (R-IL), Randy Hultgren (R-IL), Adam Kinzinger (R-IL), John Shimkus (R-IL) and Peter Roskam (R-IL).

6. July 29, 2015 letter to DOL Secretary Tom Perez, signed by Reps. Brian Babin (R-TX), Marsha Blackburn (R-TN), Bradley Byrne (R-AL), Michael Conaway (R-TX), Carlos Curbelo (R-FL), Bob Dold (R-IL), Sean Duffy (R-WI), Tom Emmer (R-MN), Stephen Fincher (R-TN), Michael Fitzpatrick (R-PA), Scott Garrett (R-NJ), Louie Gohmert (R-TX), Glenn Grothman (R-WI), French Hill (R-AR), Bill Huizenga (R-MI), Randy Hultgren (R-IL), David Jolly (R-FL), Trent Kelly (R-MS), Peter King (R-NY), Adam Kinzinger (R-IL), Doug LaMalfa (R-CA), Mia Love (R-UT), Blaine Luetkemeyer (R-MO), Luke Messer (R-IN), Mick Mulvaney (R-SC), Steve Pearce (R-NM), Robert Pittinger (R-NC), Bruce Poliquin (R-ME), Reid Ribble (R-WI), Scott Rigell (R-VA), Ed Royce (R-CA), Peter Roskam (R-IL), David Schweikert (R-AZ), John Shimkus (R-IL), Jason Smith (R-

MO), Steve Stivers (R-OH), Marlin Stutzman (R-IN), Scott Tipton (R-CO), Daniel Webster (R-FL), Rob Woodall (R-GA), Ryan Zinke (R-MT), Robert Goodlatte (R-VA), Patrick McHenry (R-NC) and Rodney Davis (R-IL).

7. July 29, 2015 letter to DOL Secretary Tom Perez, signed by Reps. Ann Wagner (R-MO), David Scott (D-GA), Andy Barr (R-KY), Lacy Clay (D-MO), Scott Garrett (R-NJ), Robert Hurt (R-VA), Ed Royce (R-CA), Steve Pearce (R-NM), Lynn Westmoreland (R-GA), Steve Stivers (R-OH), Randy Neugebauer (R-TX), Marlin Stutzman (R-IN), Bruce Poliquin (R-ME), Blaine Luetkemeyer (R-MO), Frank Lucas (R-OK), Mia Love (R-UT), French Hill (R-AR), Peter King (R-NY), Bill Huizenga (R-MI), Scott Tipton (R-CO) and Randy Hultgren (R-IL).

8. August, 5, 2015 letter from Senator Claire McCaskill (D-MO) to DOL Secretary Tom Perez.

9. August 6, 2015 letter to DOL Secretary Tom Perez from Senators Jon Tester (D-MT), Joe Donnelly (D-IN), Heidi Heitkamp (D-ND) and Angus King (I-ME).

10. August 7, 2015 letter to DOL Secretary Tom Perez from Senators Ron Wyden (D-OR), Debbie Stabenow (D-MI), Robert Menendez (D-NJ), Tom Carper (D-DE), Ben Cardin (D-MD), Michael Bennet (D-CO), Bob Casey (D-PA) and Mark Warner (D-VA).

11. September 2, 2015 letter to DOL Secretary Tom Perez from Congresswoman Carolyn Maloney (D-NY).

12. September 9, 2015 letter to DOL Secretary Tom Perez from Congressman Ed Perlmutter (D-CO).

13. September 11, 2015 letter to DOL Secretary Tom Perez from Congressman Richard Hanna (R-NY)

14. September 21, 2015 letter to DOL Secretary Tom Perez from Representatives Lynn Jenkins (R-KS), David Young (R-IA), Doug LaMalfa (R-CA), David Rouzer (R-NC), Bradley Byrne (R-AL), Jeff Duncan (R-SC), Jeff Miller (R-FL), Barbara Comstock (R-VA), Mike Pompeo (R-KS), David McKinley (R-WV), Scott Rigell (R-VA), Jim Bridenstine (R-OK), Scott DesJarlais (R-TN), Mark Amodei (R-NV), Ted Yoho (R-FL), Kevin Yoder (R-KS), Erik Paulsen (R-MN), Scott Tipton (R-CO), Bob Gibbs (R-OH), Chuck Fleischmann (R-TN), Evan Jenkins (R-WV), Kevin Brady (R-TX), Tom Rice (R-SC), Jackie Walorski (R-IN), David Schweikert (R-AZ), Ryan Zinke (R-MT), Luke Messer (R-IN), Robert Aderholt (R-AL), Steven Palazzo (R-MS), Ralph Abraham (R-LA), Richard Hudson (R-NC), Martha Roby (R-AL), Steve Knight (R-CA), David Valadao (R-CA), Lee Zeldin (R-NY), Chris Gibson (R-NY), Reid Ribble (R-WI), Mark Meadows (R-NC), Devin Nunes (R-CA), Billy Long (R-MO), Larry Bucshon (R-IN), Pat Tiberi (R-OH), Tim Huelskamp (R-KS), Rob Woodall (R-GA), Jaime Herrera Beutler (R-WA), Mo Brooks (R-AL), Jason Smith (R-MO), Alex Mooney (R-WV), Dave Trott (R-MI), Steve Stivers (R-OH), Renee Ellmers (R-NC),

Charles Boustany (R-LA), Martha McSally (R-AZ), Dave Reichert (R-WA), Randy Hultgren (R-IL), Charles Dent (R-PA), Michael Conaway (R-TX), Mick Mulvaney (R-SC), Kenny Marchant (R-TX), Lamar Smith (R-TX), Kristi Noem (R-SD), Ken Calvert (R-CA), Tom McClintock (R-CA), Pete Sessions (R-TX), Pete Olson (R-TX), Steve King (R-IA), Frank Lucas (R-OK), Cynthia Lummis (R-WY), Robert Wittman (R-VA), Steve Chabot (R-OH), John Shimkus (R-IL), Marsha Blackburn (R-TN), Joe Wilson (R-SC), Austin Scott (R-GA), Gus Bilirakis (R-FL), Cathy McMorris Dodgers (R-WA), Bill Posey (R-FL), Bill Flores (R-TX), John Ratcliffe (R-TX), Mike Rogers (R-AL), Tom Emmer (R-MN)

15. September 21, 2015 letter to DOL Secretary Tom Perez from Senator Kelly Ayotte (R-NH)

16. September 23, 2015 letter to DOL Secretary Tom Perez from Congressman Stephen Lynch (D-MA)

17. September 23, 2014 letter to DOL Secretary Tom Perez from Senator Richard Burr (R-NC) and Senator Tom Tillis (R-NC)

18. September 24, 2015 letter to DOL Secretary Tom Perez from Representatives Tony Cardenas (D-CA), Emanuel Cleaver (D-MO), Ron Kind (D-WI), Ann McLane Kuster (D-NH), John Larson (D-CT), Grace Meng (D-NY), Gwen Moore (D-WI), Richard Neal (D-MA), Krysten Sinema (D-AZ), Alma Adams (D-NC), Brad Ashford (D-NE), Joyce Beatty (D-OH), Donald Beyer (D-VA), Sanford Bishop (D-GA), Earl Blumenauer (D-OR), Corrine Brown (D-FL), Julia Brownley (D-CA), G.K. Butterfield (D-NC), Michael Capuano (D-MA), John Carney (D-DE), Kathy Castor (D-FL), Yvette Clark (D-NY), Lacy Clay (D-MO), James Clyburn (D-SC), Steve Cohen (D-TN), Gerald Connolly (D-VA), Jim Cooper (D-TN), Jim Costa (D-CA), Joe Courtney (D-CT), Henry Cuellar (D-TX), Elizabeth Etsy (D-CT), Chaka Fattah (D-PA), Bill Foster (D-IL), Marcia Fudge (D-OH), Gwen Graham (D-FL), Alcee Hastings (D-FL), Jim Himes (D-CT), Michael Honda (D-CA), Steve Israel (D-NY), Hakeem Jeffries (D-NY), Hank Johnson (D-GA), William Keating (D-MA), Robin Kelly (D-IL), Joseph Kennedy (D-MA), Dan Kildee (D-MI), Derek Kilmer (D-WA), Ann Kirkpatrick (D-AZ), Brenda Lawrence (D-MI), Ted Lieu (D-CA), Dave Loebsack (D-IA), Ben Ray Lejan (D-NM), Michelle Lujan Grisham (D-NM), Sean Patrick Maloney (D-NY), James McGovern (D-MA), Jerry McNerney (D-CA), Gregory Meeks (D-NY), Seth Moulton (D-MA), Patrick Murphy (D-FL), Grace Napolitano (D-CA), Rick Nolan (D-MN), Frank Pallone (D-NJ), Bill Pascrell (D-NJ), Ed Perlmutter (D-CO), Scott Peters (D-CA), Collin Peterson (D-MN), Chellie Pingree (D-ME), Mark Pocan (D-WI), Jared Polis (D-CO), Mike Quigley (D-IL), Charles Rangel (D-NY), Kathleen Rice (D-NY), Cedric Richmond (D-LA), Linda Sanchez (D-CA), Adam Schiff (D-CA), Kurt Schrader (D-OR), Terri Sewell (D-AL), Albio Sires (D-NJ), Brad Sherman (D-CA), Mark Takano (D-CA), Mike Thompson (D-CA), Dina Titus (D-NV), Norma Torres (D-CA), Juan Vargas (D-CA), Marc Veasey (D-TX), Tim Walz (D-MN), Peter Welch (D-VT), Frederica Wilson (D-FL), John Yarmuth (D-KY), Jackie Speier (D-CA), Pete Aguilar (D-CA), Joe Crowley (D-NY), Donald Norcross (D-NJ),

John Garamendi (D-CA), Danny Davis (D-IL), Denny Heck (D-WA), Donald Payne (D-NJ)

19. September 24, 2015 letter to DOL Secretary Tom Perez from Congresswoman Katherine Clark (D-MA) and Congresswoman Niki Tsongas (D-MA)

20. September 28, 2015 letter to DOL Secretary Tom Perez from Senators Joni Ernst (R-IA) and Charles Grassley (R-IA) and Representatives Rod Blum (R-IA), Dave Loebsack (D-IA), David Young (R-IA)