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Ladies and Gentlemen:

The National Employment Law Project ("NELP") submits these comments in response to the Federal Register Notice from the Department of Labor (the "Department") seeking additional information on the Conflict of Interest Final Rule and related exemptions, RIN 1210-AB79 (collectively, the "Rule"). NELP is a non-profit research and policy organization with over 45 years of experience advocating for the employment and labor rights of low-wage workers. As such, NELP strongly opposes any effort to rescind or weaken the Rule, which is already conferring significant benefits to all workers saving for retirement.

In NELP's experience, the burden and responsibility of preparing for secure retirements is being increasingly shifted to workers and retirees. By and large, this group has neither the expertise nor the tools needed to make sound investment decisions and must often turn to financial advisers for help. These investors have a legitimate expectation that the advice they receive from financial advisers is designed to protect their interests and maximize their benefits, but, as the Department proved in the run-up to the Rule's promulgation, this advice is often conflicted. As a result, investors are losing millions of dollars in forgone returns and, in some cases, even their principal. The losses hurt low-wage workers and other small savers the most since they can least afford to bear them.

The Rule puts a stop to such abuse by aligning advisers' interests with those of their clients. And, as firms prepare to comply, NELP is already observing changes to compensation models and investment-product lineups that benefit investors. The Department's own careful analysis shows far more benefits will accrue in the future – benefits that the Department determined just last year will greatly outweigh the Rule's costs. No new evidence or circumstances have occurred since then that would lead to a different conclusion.

Thus, rescission or dilution of the Rule would be neither desirable nor legal. The conclusions the Department already reached about the need for regulation and the Rule's beneficial effect cannot be reversed unless there is clear and convincing evidence, based in fact, to justify such action. Such fact-based evidence does not exist. It is not enough that some of the Rule's benefits are enjoyed even prior to its applicability. This shows only the Rule's effectiveness, and common sense dictates that many advisers will revert to their prior practices if they no long face the prospect of its obligations. Certainly, it would be unreasonable to expect those firms that have lobbied continuously against the Rule to voluntarily to adopt its rules of conduct, which they have opposed throughout the entire rulemaking process.

As discussed, below issue-by-issue, the merits of all of the issues on which the Department has specifically requested comment favor retaining the Rule as is. Because of NELP's interest in protecting the retirement savings of low-wage workers, whose interests are especially threatened by changes to the Rule, we urge the Department to consider these matters carefully.

Consumer Demand

The Department requested comment on consumer demand for investment products, including as between asset classes, and advisory services.

Consumers want investment advice that is in their best interest and products that best serve their financial objectives rather than those of their advisers.[1] This has not changed since the Rule's promulgation,[2] nor would we expect it to change in the future.

What matters for the purposes of the Department's re-examination of the Rule is not the nature of consumers' demand – their desire for sound, impartial advice is a given – but the degree to which this demand is met. On this point, the Rule's effect has been and will be enormously positive. As the Department powerfully demonstrated just over a year ago in the Rule's Regulatory Impact Analysis (the "RIA"), absent government intervention, information asymmetries in markets for financial advice can create chronic and severe shortages of high-quality, impartial advice.[3] Left on their own, even relatively sophisticated consumers are often simply unable to differentiate conflicted from impartial advice *ex ante*, and generally will not be able to evaluate the quality of advice even after they have acted on it.[4] This all changes, however, once advisers' interests are aligned with those of their clients. When advisers are prohibited from having a personal financial stake in the sale of the products they recommend or when, if advisers do have such a stake, they are nevertheless required to act in their clients' best interest, we – like the Department in the RIA[5] – expect major improvements in access to high-quality advice. In fact, just the promise of the Rule's application is already yielding benefits.

To begin with, anecdotal evidence suggests that publicity surrounding the Rule's promulgation has raised consumer awareness about the risks of conflicted financial advice and,

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[1] *See* Department of Labor, "Regulating Advice Markets, Definition of the Term 'Fiduciary,' Conflicts of Interest, Retirement Investment Advice," *Regulatory Impact Analysis for Final Rule and Exemptions* (hereinafter "RIA") 182 & n.412 (April 2016)

[2] *See* Lisa Greenwald, Craig Copeland, and Jack VanDerhei, Employee Benefit Research Institute, *The 2017 Retirement Confidence Survey—Many Workers Lack Retirement Confidence and Feel Stressed About Retirement Preparations* 14 (EBRI Issue Br. No. 431, 2017), https://www.ebri.org/pdf/surveys/rcs/2017/IB.431.Mar17.RCS17..21Mar17.pdf.

[3] *See, e.g.*, RIA § 3.2.3 (analyzing the market for IRA advice).

[4] *See id.* § 3.2.3.3

[5] *See, e.g.*, *id.* § 3.3 (analyzing gains to investors from the reduction of conflicted advice in the IRA advice market).

as a consequence, more investors are asking their advisers whether they adhere to a fiduciary standard of care.[6] It is reasonable to assume that the more investors evaluate advisers on the basis of applicable standards of care, the more they will select fiduciaries and, as a result, the more impartial advice will become available in the market. This increased awareness should create positive spillover effects into other markets for financial advice not covered by the Rule, such as with respect to retail brokerage accounts.

Next, and more importantly, advisers are increasingly steering clients toward fee-based service arrangements.[7] Indeed, some major broker-dealers at least initially announced in response to the Rule that they would *only* offer advice on this basis.[8] As the Department knows, fee-based advice does not give rise to conflicts like commission-based advice can because the adviser receives the same compensation regardless of the advice provided. This, and the transparency the fee-model offers, may explain why consumers who have fee-based accounts are more satisfied with what they pay their adviser than those with commission-based accounts.[9]

Another consequence of the transition to fee-based advice is that consumers are increasingly buying passively-managed investment products, such as ETFs and other index funds,[10] which, as the Department recognized, generally outperform actively managed products, net of fees.[11] Whether the decision to switch to these products reflects newly impartial personal

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[6] *See, e.g.,* Ron A. Rhodes, *Thank You to a Small Team that Accomplished Great Things (DOL Fiduciary Rule)*, Scholarly Fin. Planner . . . A Blog Exploring the Fiduciary Duties of those Providing Personalized Investment and Financial Advice, Jan. 18, 2017, http://scholarfp.blogspot.com/2017/01/thank-you-to-small-team-that.html.

[7] *See* Michael Foy, *Fiduciary Roulette*, JD Power, 2017, http://www.jdpower.com/resource/wealth-management-fiduciary-roulette; ThinkAdvisor, *JP Morgan Abandoning Commissions . . . Or Not?*, Mar. 15 2017, http://www.thinkadvisor.com/2017/03/15/jpmorgan-abandoning-commissions-or-not; Adam Antoniades, *How Independent Financial Advisors Can Build Practices that Thrive Regardless of the DOL Fiduciary Rule Outcome*, InvestmentNews, Mar. 14, 2017, http://www.investmentnews.com/article/20170314/BLOG09/170319979/how-independent-financial-advisers-can-build-practices-that-thrive; ThinkAdvisor, *Merrill Opens "Pandora's Box" with Shift on Commissions: Analysts*, Mar. 10, 2017, http://www.thinkadvisor.com/2017/03/10/merrill-opens-pandoras-box-with-shift-on-commissio; ; LIMRA, *Fees Versus Commissions: Where the Firms Stand* (hereinafter *Fees versus Commissions*), Feb. 23, 2017, http://www.limra.com/uploadedFiles/limracom/LIMRA_Root/Secure_Retirement_Institute/Navigating_Regulatory_Change/Media/Fees-vs-Commissions.pdf; Fitch Ratings, *Fitch – DOL Fiduciary Rule Effects on Wealth Managers*, Dec. 12, 2016, https://www.fitchratings.com/site/pr/1016325

[8] *Fees versus Commissions*, *supra* note 7.

[9] Foy, *supra* note 7.

[10] *See* Sarah Krouse, *Schwab Reduces Fees on Five of its ETFs*, Wall St. J., Oct. 5, 2016, https://www.wsj.com/articles/schwab-reduces-fees-on-five-of-its-etfs-1475844106; Michael Wong, *Department of Labor's Fiduciary Rule Will Have Substantial Effect* (hereinafter *Rule Will Have Substantial Effect*), Morningstar, June 22, 2016, http://news.morningstar.com/articlenet/article.aspx?id=757487.

[11] RIA § 3.2.3.4.1; *see also* Ilana Polyak, *Passive Investing Is on a Tear, and for a Very Good Reason*, CNBC, Oct. 4, 2016, http://www.cnbc.com/2016/10/04/passive-investing-is-on-a-tear-and-for-very-good-reason.html; *Rule Will Have Substantial Effect*, *supra* note 10; Dan Eagan, *ETFs Are Better than Mutual Funds for a 401(k)*, Betterment LLC, Jan. 15, 2016, https://www.betterment.com/resources/investment-strategy/etfs/etfs-better-than-mutual-funds-for-401k/; Kathleen Elkins, *Investing Pros John Bogle, Warren Buffett and Charlie*

advice or "robo-advice" provided through new use of automated advice platforms, it is unquestionably the result of better, less-conflicted, guidance. A virtuous cycle seems to be developing as fund providers for some ETFs are preparing to compete for the new customers by further lowering their fees.[12]

For those advisers who want to continue to recommend actively-managed products that pay commissions or share revenue, such as mutual funds, changes to these products are now in process to increase the probability that they in fact serve the client's best interest. For example, mutual fund "A Shares" are widely expected to be replaced by "T Shares," which have roughly half the upfront sales fee.[13] And "Clean Shares", which have no distribution fees at all, may soon become available.[14] Clearly, because of the price differential, there is a large subset of investors for whom advice to buy Clean Shares or T Shares would be in their best interest, whereas advice to purchase A Shares was not.

Finally, the Rule's promulgation seems poised to vastly improve advice related to annuities. Market analysts predict that fixed annuities will soon take substantial market share from fixed-index annuities and variable annuities,[15] two products that the Department determined are most prone to abuse by conflicted advisers.[16] This is at least partly because many insurance companies will simply discontinue the manufacture of fixed-index and variable annuities,[17] evidently determining that at least some of them are seldom or never in the best interest of consumers.

Munger All Agree on the Best Way for the Average Person to Invest, Business Insider, July 8, 2015, http://www.businessinsider.com/investing-in-low-cost-index-funds-2015.

12 Krouse, *supra* note 10.

13 *See* John Rekenthaler, *Lower-Cost T Shares Coming to a Fund Near You*, Morningstar, Jan. 6, 2017, http://news.morningstar.com/articlenet/article.aspx?id=787395#.WOungh9VVoU.aolmail.

14 *See* Alec Lucas, *SEC Signs Off on Clean Share Proposal*, Morningstar, Jan. 11, 2017, http://news.morningstar.com/articlenet/article.aspx?id=787997#.WOunBiVFGNo.aolmail.

15 *See* Joseph E. Montminy, *How DOL's Fiduciary Rule Will Affect Individual Annuity Sales*, LIMRA MarketFacts Q., No.4, Dec. 31, 2016, http://www.limra.com/uploadedFiles/limra.com/LIMRA_Root/Posts/PR/Thought_Leaders/_PDF/Number-4-2016-RetirementCommentary.pdf; Nick Thornton, *FIAs to Take Hit Next Year, Courtesy of DOL's Fiduciary Rule* (hereinafter *FIAs to Take Hit*), BenefitsPRO, Aug. 18, 2016, http://www.benefitspro.com/2016/08/18/fias-to-take-a-hit-next-year-courtesy-of-dol-fiduc?page_all=1&slreturn=1492445855.

16 *See* RIA at 119, 122-26; *see also* Christopher Robbins, *Looming DOL Rule Makes Americans, Wary, Curious About Annuities*, Fin. Advisor Mag., Mar. 20, 2017, http://www.fa-mag.com/news/with-dol-rule-looming--americans-wary--curious-about-annuities-31876.html (reporting on a survey that found Americans are concerned with the cost and complexity of certain annuities).

17 *See* John Hilton, *Analyst: Some Firms Want to Keep Trips, Incentives*, InsuranceNewsNet.com, Oct. 18, 2016, https://insurancenewsnet.com/innarticle/1049736.

Small Savers

The Department sought comment on the Rule's effect on, among other segments, the small-IRA-investor market segment.

NELP is particularly interested in small-IRA investors because low-wage workers tend to have relatively small retirement savings and tend to enter the market via rollover.[18] Starting with modest savings, these investors are least able to absorb the diminished returns conflicted advice generates and, because of their relative reliance on rollovers, are most exposed to it.[19] Due to these vulnerabilities, small savers stand to benefit disproportionately from the increased supply of high-quality, impartial advice described above.

Some critics of the Rule, however, have predicted that small savers will, on the contrary, lose access to advice.[20] The argument is that, as firms move from commission to fee-based advice models, minimum-account-balance requirements commonly associated with fee-based models will exclude small savers.[21]

This is a red herring. Several states already consider brokers to be fiduciaries under state common law, and investors in those states have full access to investment advice. A 2010 study found no statistically significant difference in access to advice between states that considered advisors fiduciaries and those that did not when it came to serving small savers.[22]

Recent developments in the financial industry will further enable advisers to serve small savers under a fiduciary standard. First, many advisers are lowering their minimum-account balances,[23] which are already relatively low. The reason is obvious: they do not want to lose paying clients simply because of changes to their compensation model. According to one broker-dealer's CEO, "[t]he goal is to not leave any investor behind . . .."[24]

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[18] It is important to note, however, that not all small IRA investors are low income individuals with limited investable assets. Some may maintain small IRA accounts, while keeping significant additional assets in an employer provided retirement plan or retail brokerage account. These small savers will be far less affected even if there is some increase in the cost of advice.

[19] *See* RIA § 4.2.2.2 (discussing the prevalence of conflicts in the market for rollover advice).

[20] *See, e.g.*, U.S. Chamber of Commerce, https://www.uschamber.com/retirement?tab=take-action (last visited Apr. 17, 2017).

[21] *See, e.g.*, Supplemental Comment Letter from the Investment Company Institute to the U.S. Dep't of Labor 9-10 (Sept. 24 2015), https://www.ici.org/pdf/15_ici_dol_rule_comment.pdf.

[22] *See* Michael Finke and Thomas P. Langdon, *The Impact of Broker-Dealer Fiduciary Standard of Financial Advice*, Mar. 9, 2010, https://www.onefpa.org/journal/Pages/The%20Impact%20of%20the%20Broker-Dealer%20Fiduciary%20Standard%20on%20Financial%20Advice.aspx.

[23] *See* Michael Wursthorn, *Brokerages Adapt to Pending Labor Rule*, Wall St. J., Mar. 16, 2016, https://www.wsj.com/articles/brokerages-adapt-to-pending-labor-rule-1458151260.

[24] *Id.* (quoting Mark Casady of LPL Financial).

Additionally, as investors' fee awareness rises, they will likely exert additional pressure on advisers to lower costs.[25] Lower costs will be possible because, technology is and will continue to lower the cost of giving advice, which will benefit smaller savers in particular.[26] Financial technology providers are steadily unveiling new products aimed at providing advice to smaller clients and improving compliance.[27] Firms are increasingly passing along the benefits of technology to consumers.[28] Moreover, as discussed above, new, cheaper investment products, such as low-fee mutual fund shares and discounted ETFs are becoming available. Even if the switch from commissions to fees initially results in a somewhat higher advice costs for some customers – which outcome is itself purely speculative – fund costs will be lower.[29]

Next, the commission-based system is not going away. While it appears, as discussed above, that the Rule will accelerate the movement to fee-based advice from commission-based advice, commission-based advice is still allowed as long as it is in the investor's best interest and other exemption requirements are met. And, in fact, a number of large financial services firms have announced that they intend to continue to offer commission-based advice.[30]

Finally, as referenced above, automated advice platforms are on the rise.[31] These services tend to have low or no fees, simple investment advice, and limited or no high-cost products,[32] so they are well-positioned to serve small savers for whom traditional personal advisory services are not attractive.[33] Automated advice has a strong performance record,[34] and

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[25] *See* John Rekenthaler, *Is the Fiduciary Rule Really So Bad?* (hereinafter *Is the Rule So Bad?)*, Morningstar, Nov. 11, 2016, http://news.morningstar.com/articlenet/article.aspx?id=780184.

[26] *See id.* ("[T]he solution for smaller investor, of course, is to leverage technology.")

[27] *See* Jerilyn Klein Bier, *DOL Compliance: The New Growth Industry*, Fin. Advisor Mag., Dec. 1, 2016, http://www.fa-mag.com/news/dol-compliance--the-new-growth-industry-30124.html; John Harris, *New DOL Rules Present an Opportunity for Fee-Based Advisers*, TrustAdvisor, Sept. 9, 2016, http://thetrustadvisor.com/featured-contributors/new-dol-rules-present-an-opportunity-for-fee-based-advisors.

[28] *See What Regulatory Rollbacks Could Mean for Financials*, Morningstar, Feb. 3, 2017, http://news.morningstar.com/articlenet/article.aspx?id=792078.

[29] *See Is the Rule So Bad?*, *supra* note 25.

[30] *See Fees versus Commissions*, *supra* note 7; *see also* John Kennedy, *Keep Come and Carry on with both Commissions and Fees*, InvestmentNews, Mar. 15, 2017, http://www.investmentnews.com/article/20170315/BLOG09/170319965/ (recommending that advisers offer both compensation models); Antoniades, *supra* note 7 (same).

[31] *See* Brian O'Connell, *Will Robo-Advisors Benefit from the Fiduciary Rule?*, TheStreet, Feb. 23, 2017, https://www.thestreet.com/story/14009692/1/will-robo-advisors-benefit-from-the-fiduciary-rule.html; Suleman Din, *Robo-Advisors' Response to Trump's Fiduciary Order: We Can't Be Stopped*, FinancialPlanning, Feb. 6, 2017, https://www.financial-planning.com/news/robo-advisers-response-to-trumps-fiduciary-order-we-cant-be-stopped.

[32] Among the low-cost products commonly offered on these platforms are ETFs, whose fund providers have been further lowering their fees as they compete for newly available assets. *See* Krouse, *supra* note 10.

[33] *See* O'Connell, *supra* note 31.

[34] *See, e.g.*, Cybele Weisser, *The Rise of the Robo-Adviser*, Consumer Reports, July 28, 2016, http://www.consumerreports.org/personal-investing/rise-of-the-robo-adviser/.

the market is growing to such an extent that even traditional broker-dealers are now offering low-cost online advice options.[35] Finally, the technology underlying these platforms is being offered to financial advisers, enabling them provide personal service more productively and thus serve small savers at a profit.[36]

Small savers, who may be relatively less financially sophisticated, should also benefit especially from the Rule's effect on investor education. Contrary to warnings by some opponents to the Rule that valuable investor education would be chilled because such efforts are now defined as "advice,"[37] the Rule clarifies the distinction between the two and, in fact, should encourage more education. Not surprisingly, the trade press has not reported on any substantial cutbacks to education initiatives, and investor education appears to continue to be a focus for some of the largest advisory firms for savers large and small.[38]

<u>Changes to Investment Products and Advisory Services</u>

The Department sought comment on a variety of issues related to the Rule's effect on firms' investment products and advisory services – including changes in design, delivery, and price – as well as related compliance regimes.

Many of the Rule's positive effects in the market for retirement advice and products have already been discussed. Firms are directing their clients increasingly toward fee-based advisory services and low-cost passively-managed investment products are gaining popularity, spurred in part by the continued rise of affordable automated advice platforms. Even mutual fund fees are poised to drop markedly.

But there are additional developments that deserve mention. Chief among them is the reformation of the annuity business. In addition to the probable substitution of fixed annuities for a sizable share of the fixed-index and variable annuity market discussed above, some annuity manufacturers are creating entirely new products that will not be sold on commission at all.[39] Annuity distribution systems are also likely to change dramatically, with the most intrinsically conflicted channels cut off.[40] And the industry has initiated a significant effort to train those

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[35] *See* O'Connell, *supra* note 31.

[36] *See What Regulatory Rollbacks Could Mean for Financials*, *supra* note 28.

[37] *See, e.g.*, U.S. Chamber of Commerce, *Labor Department Poised to "Reform" Retirement Savings at Small Businesses' Expense: 7 Reasons You Should Be Worried* (2016), https://www.uschamber.com/issue-brief/labor-department-poised-reform-retirement-savings-small-businesses-expense-7-reasons-you.

[38] *See, e.g.,* Merrill Edge Investor Education, https://www.merrilledge.com/investor-education (last visited Apr. 17, 2017); Vanguard Investor Education, https://investor.vanguard.com/investing/investor-education (last visited Apr. 17, 2017); Press Release, TD Ameritrade, *TD Ameritrade Hosts Free Investor Education Day; Empowering Investors on All Stages of Their Retirement Journey*, Mar. 15, 2017, http://www.amtd.com/newsroom/press-releases/press-release-details/2017/TD-Ameritrade-Hosts-Free-Investor-Education-Day-Empowering-Investors-on-All-Stages-of-Their-Retirement-Journey/default.aspx

[39] *See FIAs to Take Hit*, *supra* note 15.

[40] *See LIMRA Secure Retirement Institute: Fixed Indexed Annuity Sales Record Strongest Growth in Third Quarter*, Annuity Outlook Mag., Dec. 2016/Jan. 2017, http://annuityoutlookmagazine.com/2016/12/limra-secure-retirement-institute-fixed-indexed-annuity-sales-record-strongest-growth-in-third-quarter-2/; Hilton, *supra* note 17; Rachel Summit, *Distribution Channels*

remaining salespeople who plan to continue to receive conflicting commissions on the requirements of the Best Interest Contract Exemption (the "BICE").[41]

Another development of some interest is at least one broker-dealer's work with manufacturers to standardize commissions on all products it sells within certain classes – including mutual funds and annuities.[42] The result should be that advice can continue to be compensated by commission but without the conflicting effect different commission rates have on an adviser's incentives.

Finally, firms are offering data analytics tools to investment advisers on a commercial basis to give them additional tools to comply with the Rule.[43] In this way, the market is responding rationally and facilitating compliance with the Rule.

Litigation

The Department sought comment on a variety of issues related to the prospect of increased litigation under the Rule. NELP has seen no evidence to indicate the advent of a huge wave of new litigation resulting from the Rule, but, even if litigation does increase in the short term, there is no basis to conclude that it would be necessarily socially harmful. Rather, as explained below, the prospect of private liability – as the Department concluded[44] – serves as an important deterrent against breaches of advisers' fiduciary duties and the terms of the PTEs. Furthermore, it is only fair that investors be justly compensated in the event they are damaged by their adviser's disloyalty. NELP is not aware of any evidence to suggest that any suits brought for breach of the Best Interest Contract or of an adviser's fiduciary duty would be frivolous. Indeed, the evidence from ERISA 401(k) class action suits suggests otherwise.

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for Fixed Indexed Annuity Sales Changing After DOL Rule, AnnuityFYI, May 2016, http://www.annuityfyi.com/blog/2016/05/distribution-channels-fixed-indexed-annuity-sales-changing-dol-rule/.

[41] *See, e.g.,* The DOL Fiduciary Rule: Moving Forward in a Brave New World, http://www.loma.org/dol/ (last visited Apr. 17, 2017). Insurance companies that plan on using the BICE have also been conducting due diligence on salesman compensation to ensure that their commission structure is "reasonable" for purposes of the exemption. *See Average Agent Comp For Indexed Annuities At Decade-Long Low*, InsuranceNewsNet.com, Oct. 10, 2016, https://insurancenewsnet.com/oarticle/average-agent-comp-indexed-annuities-decade-long-low.

[42] *See* Margarida Correia, *LPL Puts Final Touches on Product Lineups in Preparation for Fiduciary Rule*, FinancialPlanning, Mar. 9, 2017, https://www.financial-planning.com/news/lpl-puts-final-touches-on-product-lineups-in-preparation-for-fiduciary-rule.

[43] *See, e.g.,* Salesforce: The Rules Have Changed. Make Sure You're Ahead of the Game, https://salesforce.com/form/industries/financial-services/DOL-system-of-engagement.jsp?nc=7010M0000 (last visited Apr. 17, 2017); Fi360, Products, Fiduciary Toolkit, http://www.fi360.com/products-services/tools-overview/fiduciary-focus-toolkit (last visited Apr. 17, 2017); Seismic, A Comprehensive Resource for Industry News, Stakeholder Activity and Critical Deadlines to Prepare You for the DOL Fiduciary Rule, http://info.seismic.com/its-time-to-comply-with-the-dol-fiduciary-rule (last visited Apr. 17, 2017); *see also* Liz Skinner, *Evestnet Buys Data Analytics Firm with Eye toward DOL Fiduciary Rule Compliance*, InvestmentNews, Oct. 10, 2016, http://www.investmentnews.com/article/20161010/FREE/161019994.

[44] *See* RIA at 280-81.

Among the matters on which the Department sought comment was what can be learned from existing class action lawsuits filed under ERISA. The available data suggest that class actions, while not a large proportion of total cases filed under ERISA, are vital to ensuring that retirement savers' hard-earned savings are protected, not only by recovering plan benefits but also by deterring violations and changing behavior.[45]

ERISA class actions recover hundreds of millions of dollars for plans and participants annually. In 2016, the top 10 ERISA class action settlements alone recovered $807.4 million in aggregate[46] – an amount that is hard to square with the frivolous litigation narrative. The size of these settlements no doubt reflects the merit to the underlying actions and represents a substantial recovery of assets that improves outcomes for plans and participants and helps deter other violations.

In fact, private class actions under ERISA dwarf government enforcement, so they are critical to effective deterrence. While the Department has pursued numerous significant cases under ERISA, especially in recent years, it nonetheless files far fewer cases than the private bar. A total of 6831 ERISA cases were filed in federal court in 2016.[47] Only a small fraction of those cases were filed by the Department, which simply lacks the resources to bring a significant number of cases. As the Department has previously recognized in the FLSA context, private litigation is a "necessary complement" to the Department's own enforcement due to its limited resources.[48]

Beyond monetary recovery, class action litigation plays a pivotal role in improving compliance by changing behavior in the industry. The mere prospect of class action litigation may serve as an incentive for firms to ensure their compliance with laws and regulations to which they are subject. The DOL itself recognized in this rulemaking the important role that class actions play in ensuring compliance.[49]

In terms of basic civil procedure, class action litigation also allows a party to obtain a broad injunction ending systemic illegal practices altogether – an option that is not available

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[45] Seyfarth Shaw LLP, notes that almost all cases filed under the Fair Labor Standards are collective actions. In contrast, although 6831 ERISA cases were filed last year only 63 judicial rulings issued last year involved ERISA action cases. Seyfarth Shaw LLP, *2017 Annual Workplace Litigation Report*, 407-444 (2017).

[46] Seyfarth Shaw, *supra* note 45 at 8. We note that this figure includes attorney's fees, so not all of this money went to the plan participants.

[47] U.S. Courts, *Caseload Statistics Data Tables 2016*, 3 (Table C-2), http://www.uscourts.gov/sites/default/files/data_tables/jb_c2_0930.2016.pdf.

[48] Br. for the Sec'y of Labor and the Equal Employment Opportunity Comm'n as Amicus Curiae at 7, *Dr. Horton, Inc., and Michael Cuda*, No. 12-CA-25764 (N.L.R.B. July 27, 2011), https://www.dol.gov/sol/media/briefs/horton(A)-07-27-2011.htm ("Because the Department of Labor has limited resources, it can enforce the FLSA only in a fraction of cases involving violations. Collective actions are a necessary complement to the Department's enforcement because they allow employees to redress violations that otherwise could not be remedied.")

[49] *See* RIA at 280-81.

through arbitration or generally with respect to individual claims litigated in court.[50] Aside from possible injunctions issued following judgment, class action settlements often require significant changes in policies and practices that bring companies into compliance with the law. For example, in addition to providing appropriate monetary relief, Defendants to a number of lawsuits alleging excessive fees in the 401(k) context settled the cases by agreeing to change how they disclose their revenue agreements, fees, and expense ratios.[51] These and other class action settlements netted the attention of industry observers who urged additional caution as a result.[52] Moreover, class actions are typically the only way small monetary claims can realistically be brought, even when they allege systemic illegality.[53]

The Department also asked whether class-action lawsuits have been particularly prone to abuse, again focusing on the ERISA experience. Especially considering broader trends in class action litigation today, the nature of ERISA litigation deters frivolous litigation. ERISA cases are complex and costly to bring, factors that serve as significant deterrents to abusive filing when coupled with new strict limits on class certification. This context is reflected in the relatively small number of ERISA class actions filed each year. There is no reason to believe that class actions for breach of fiduciary duties contained in a contract will face fewer hurdles.

In general, recent case law has raised the bar for filing successful class actions of all types. The Supreme Court's decisions on federal pleading standards in *Bell Atlantic Corp. v. Twombly*[54] and *Aschroft v. Iqbal*[55] have effectively established a mechanism for federal courts to assess arguments previously hashed out in class certification at an earlier pleading stage.[56] Parties who do not plead with some specificity how they meet the Rule 23 standards of

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[50] In fact, the impossibility of injunctive relief in arbitration has led many consumers to confront Federal Arbitration Act, arguing that a contract's mandatory arbitration clause is illegal and void as against public policy. *See, e.g.*, *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

[51] *See* Nick Thornton, *Northern Trust to Pay 36 million to Settle ERISA Suit*, BenefitsPRO, Feb. 19. 2015, http://www.benefitspro.com/2015/02/19/northern-trust-to-pay-36m-to-settle-erisa-suit ("On top of the money, Nationwide agreed to several other points that will change how it and, most likely, other service providers disclose their revenue agreements with mutual funds going forward."); Greg Carpenter, *Hope for Greater Fee Transparency*, Nov. 10, 2014, BenefitsPRO, http://www.benefitspro.com/2014/11/10/hope-for-greater-fee-transparency ("In the settlement, MassMutual will pay out over $9 million in cash compensation, give a 60-day window for any planned fund changes, and, most importantly, clearly disclose fees and expense ratios in plan funds as well as any revenue sharing payments it receives.")

[52] *See, e.g.*, Blaine F. Aikin, *Recent Class-Action Surge Ups the Ante for 401(k) Advice*, InvestmentNews, Jan. 21, 2016, http://www.investmentnews.com/article/20160121/BLOG09/160129985/recent-class-action-surge-ups-the-ante-for-401-k-advice.

[53] While the realistic and undisputed inability of many small claims to be brought as individual actions has been rejected by the Supreme Court as legal defense to FAA preemption, *see Italian Colors*, 133 S. Ct. at 2309-10, it remains a legitimate consideration in policy making.

[54] 550 U.S. 444 (2007).

[55] 556 U.S. 662 (2009).

[56] Christopher E. Roberts, Am. Bar Ass'n, *Class Actions 101: Surviving a Rule 12 Motion to Dismiss* (2013), http://apps.americanbar.org/litigation/committees/classactions/articles/winter2013-0313-class-actions-101-surviving-a-rule-12-motion-to-dismiss.html.

numerosity, commonality, typicality, and adequacy of representation may face an early dismissal.

In *Wal-Mart Stores v. Dukes*, [57] the Supreme Court also directly impacted class actions by raising the bar for what constitutes commonality for class certification purposes under Rule 23. Seyfarth Shaw's class action analysts have attributed a trend in diminishing aggregate values of class action settlements to this decision.[58] In fact, the same analysts reviewing 2016 decisions found that "class certification motions have the best chance of denial in the context of ERISA welfare plans, and ERISA defined contribution pension plans, where individualized notions of liability and damages are prevalent."[59]

Together, these precedents serve to narrow class actions to cases that involve systemic issues and not simply an amalgam of individual claims. They affect ERISA cases no less than others,[60] and these precedents and arguments have already begun to cascade into state court case law as well.[61]

At the same time, fewer plaintiffs' lawyers appear to be interested in filing complex class actions – and ERISA class actions are notoriously complex and resource-intensive. As Seyfarth's class action analysts have concluded after reviewing both federal and state class action ruling in 2016:

> [The plaintiffs' bar] has a diminished appetite to invest in long-term cases that are fought for years, and where the chance of a plaintiffs' victory is fraught with challenges either as to certification or on the merits. Hence, this reflects the various differences in success factors in bringing employment discrimination and ERISA class actions, as compared to FLSA collective actions.[62]

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[57] 564 U.S. 338 (2011).

[58] *See* Seyfarth Shaw, *supra* note 45 at 7.

[59] *Id.* at 16.

[60] Moreover, where systemic issues are implicated, class actions are generally only appropriate where traditional joinder of all parties impracticable, *see, e.g.*, Fed. R. Civ. P. 23(a)(1); N.Y. C.P.L.R. 901(a)(1). For advisers with relatively small client-bases, it is reasonable to question whether the putative class-sizes would even meet applicable numerosity requirements. *See* Nick Thornton, *Morningstar Expects Up to $150M in Annual Class-Action Settlements under Fiduciary Rule* (hereinafter *Morningstar Expects Up to $150M in Settlements*), BenefitsPRO, Mar. 16, 2017, http://www.benefitspro.com/2017/03/16/morningstar-expects-up-to-150m-in-annual-class-act ("Satisfying nurerosity requirements in order to get the courts to certify class actions will handicap plaintiffs' attorneys' ability to create a class from actions of one rouge advisor.").

[61] *See* Heather Baird and David Krueger, *Ohio Supreme Court Adopts Comcast and Wal-Mart Standards for Class Certification; Reverses Class Certification Due to Predominating Individualized Issues*, JDSupra Business Adviser, Nov. 19, 2013, http://www.jdsupra.com/legalnews/ohio-supreme-court-adopts-comcast-and-wa-00415/; Wystan Ackerman, *Louisiana Class Action: State Supreme Court Adopts Wal-Mart on Commonality*, Class Action Insider, Jan. 4, 2012, https://www.classactionsinsider.com/2012/01/louisiana-class-action-state-supreme-court-adopts-wal-mart-on-commonality/;

[62] Seyfarth Shaw, *supra* note 45 at 20.

Plaintiffs' attorneys do not file ERISA claims without significant review and analysis. Thomas Clark, an employer-side ERISA attorney and publisher of the *Fiduciary Matters* blog, summed up the state of ERISA litigation in late 2015 accordingly:

> Most of the claims I'm seeing are not about fishing expeditions. Plaintiffs' attorneys are now investing thousands of hours before a claim is even brought. These are complicated and expensive cases to litigate. There's too much risk and cost in making a frivolous claim.[63]

This backdrop helps to explain the relatively low (and dropping) number of ERISA class actions. In 2016, federal courts issued only 12 class certification decisions in ERISA cases – a drop in the bucket compared to the 224 FLSA collective action certification rulings.[64]

The available data suggest that many of these remaining claims have merit; plaintiffs won 8 of the 12 ERISA class certification rulings in 2016.[65] Nonetheless, in monetary terms, there has been a "significant downward trend for resolutions of . . . ERISA class actions."[66] And there are no indications that firms are exiting the space of advising ERISA plans – which would also be an indicator of high costs imposed by unchecked abusive litigation.

Nor is there reason to believe that class actions alleging breach of the Best Interest Contract by firms advising IRA holders will be any less challenging to litigate since they should often entail the same complicated merits issues and face the same or similar procedural obstacles.

The Department also asked questions about increases in litigation costs and how firms have "factored into their earnings projections or otherwise taken specific account of such potential liability." There are numerous reasons why these concerns are overblown, and even the most expansive projections suggest that an increase would be easily offset by the rule's benefits to retirement savers.

As a preliminary matter, the regulated community understands that litigation is a fact of life. To the extent the rule may increase litigation risks, many firms see it as "a cost of doing business"[67] Any regulatory change might lead to additional litigation, at least in the short term, as new requirements are applied for the first time to different fact patterns.

We have identified a number of forces that we expect to limit the litigation under the Rule. First, the regulation's key term – "fiduciary standard" – is familiar to courts and

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63 Nick Thornton, *Novant Folds Early in ERISA Case*, BenefitsPRO, Nov. 12, 2015, http://www.benefitspro.com/2015/11/12/novant-folds-early-in-erisa-case.

64 *See* Seyfarth Shaw, *supra* note 45 at 119, 407.

65 Seyfarth Shaw, *supra* note 45 at 17.

66 *Id.* at 8.

67 David Armstrong, *Fiduciary Rule takes Center Stage in Nashville*, Wealth Management.com, Apr. 18, 2016, http://www.wealthmanagement.com/napa-401k-summit/fiduciary-rule-takes-center-stage-nashville

stakeholders since it is a feature of prior large institutional investment programs.[68] As the Financial Planning Coalition has pointed out, its almost 80,000 members have, since 2008, operated under a regime similar to the BICE, including a fiduciary standard.[69] No one will be starting from scratch in terms of interpreting the standard's meaning. Indeed, many states made breach of contract claims available for IRA's even before the rulemaking.[70] In addition, while fiduciary status is often at issue in ERISA litigation, the requirement in the BICE that the adviser must acknowledge fiduciary status in the contract between the adviser and the customer will eliminate that issue in most cases.[71] Third, improvements in technology will bring down the cost of all such litigation.[72] Finally, the BICE is only enforceable through state law contract claims, and therefore fee-shifting does not apply. Fee shifting is designed to expand access to the courts by making a range of cases attractive to plaintiffs' attorneys that might not be so otherwise. Therefore, one can assume that without the fee shifting available in ERISA actions, fewer attorneys would be willing to take in state court these complicated breach of fiduciary duty cases.

In addition, under the rule, a firm could still offer (but not compel) the use of arbitration for class claims. If indeed the terms of such action were speedy, fair, equitable, and efficient as determined by plaintiffs, they might choose it over the court route. While class arbitration has been criticized by some,[73] voluntary class arbitration is not foreclosed by this rule.

It is extremely difficult to predict future class action activity,[74] but some of the industry's claims concerning increased litigation appear to be entirely self-serving.[75] Morningstar's newly released estimate of litigation costs to advisers suggests that concerns about this issue are overblown. The company estimated that the Rule will result in $70 million to $150 million in

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[68] Bob Collie, *The DOL Rule: Tensions at the Heart of the Fiduciary Standard*, Fiduciary Matters Blog, Dec. 5, 2016, http://fiduciary-matters.russellinvestments.com/the-dol-fiduciary-rule/.

[69] Br. of Amicus Curiae Fin. Planning Coalition in Support of Defs. at 6-7, *U.S. Chamber of Commerce v. Hugler*, No. 16-cv-1476 (N.D. Tex. Aug. 24, 2016), http://financialplanningcoalition.com/wp-content/uploads/2016/08/FPC_AmicusCuriae_8.24.16.pdf.

[70] *See U.S. Chamber of Commerce v. Hugler*, No. 16-cv-1476, Slip Op. at 37-38 (N.D. Tex. Feb. 8, 2017), http://courthousenews.com/wp-content/uploads/2017/02/Adviser-Rule.pdf.

[71] Of the 24 ERISA class cases that Seyfarth Shaw reported involving allegations of breach of fiduciary duty, 20 involved substantive issues and, of those 20, four involved the issue of whether the defendant was a fiduciary. *See* Seyfarth Shaw, *supra* note 45, at 407-44.

[72] *Rule Will Have Substantial Effect*, *supra* note 10.

[73] *Italian Colors*, 133 S. Ct. at 2312 (2013) ("[T]he switch from bilateral to class arbitration . . . sacrifices the principal advantage of arbitration – its informality – and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." (*quoting AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1748 (2011)).

[74] *See Morningstar Expects Up to $150M in Settlements*, supra note 60.

[75]Although there have been claims that ERISA preemption litigation will become rampant, *see, e.g.*, Nick Thornton, *Will ERISA preempt state law under the fiduciary rule?*, BenefitsPRO, Mar. 30, 2017, http://www.benefitspro.com/2017/03/30/will-erisa-preempt-state-law-under-the-fiduciary-r, ERISA preemption should not be an issue in litigation under the BICE. ERISA does not cover IRA accounts, RIA at 21, in connection with which the BICE is expected to be most used, and any decision to invoke ERISA in other BICE litigation rests solely with the defendant.

increased litigation costs to firms each year, which represents only a 0.5 to 0.6 percent decrease in the intrinsic value of wealth management firms that Morningstar covers.[76] However, even these projections are hard to square with the forces that are naturally depressing ERISA cases, as outlined above. And, should Morningstar's estimated range prove accurate, then even the high-end of this range is still overshadowed by the benefits of the Conflict of Interest Rule – which are now valued between $147 million in the first year and $890 million over 10 years. Moreover, the Morningstar analysis estimating these costs recognized "[w]hile in an ideal world there would be no class actions lawsuits – as advisers would consistently act with their clients best interests in mind – we believe the prospect of class action litigation can serve as an incentive to establish prudent policies and procedures that protect their clients, which the current system, involving individual arbitration, doesn't do well."[77]

In the end, it is exceedingly difficult to accurately project any increase in litigation costs before this rule has taken effect, and nothing since the rule's initial promulgation has changed that fact. Basing litigation cost predictions upon class actions brought against large 401(k) ERISA plans are unreliable because "Defined contribution plans and IRAs are inherently different animals"[78] and the litigation costs involving 401(k) plans do not translate into IRA litigation under this rule.[79] Retirement plan participants will best be served by allowing the Rule to take effect; if experience demonstrates a significant increase in unwarranted litigation, the Department can then consider the need for any changes, perhaps by launching a retrospective review pursuant to EO 13563.[80]

<u>Amendments or Rescission</u>

The Department sought comment on whether any parts of the Rule could be amended to reduce compliance burdens or minimize market disruptions while preserving the Rule's intended benefits. The Department also sought comment on to whether the Rule's benefits would somehow still accrue even if the Rule were rescinded.

The Department would bear a heavy burden that NELP does not believe it can meet if it were to rescind or weaken the Rule. The conclusions already reached about the market failures requiring regulation and the effectiveness of the Rule in correcting these market failures cannot simply be reversed unless there is clear and convincing evidence, based in fact, to justify such action. Such fact-based evidence does not exist, and it is not enough that a new Administration would not have undertaken this rule making in the first place or has a different policy view.

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[76] Michael Wong, *Fiduciary Rule Delayed, Not Dead*, Morningstar, Apr. 6, 2017, http://news.morningstar.com/articlenet/article.aspx?id=801760.

[77] Michael Wong, *Fiduciary Rule Lawsuits Could Spur Industry Reform*, Morningstar, Apr. 3, 2017, http://news.morningstar.com/cover/videocenter.aspx?id=801452.

[78] *See Morningstar Expects Up to $150M in Settlements*, supra note 60.

[79] *Id.*

[80] Exec. Order No. 13,563, 3 C.F.R. 13563 (2011), *available at* https://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf.

The argument that the Rule has already done its work before even going into effect, and therefore can be revoked without causing the harms it was designed to remedy, especially defies logic and common experience. It is heartening that much of the affected industries have taken steps to reform their practices to conform to the Rule ahead of the applicability date, if anything, these actions speak to the essential reasonableness of the Rule. It is likely that some of those industry parties will continue with these practices because they deem it in their interest to do so. But it is entirely predictable that others currently heading toward full compliance will revert to the *status quo ante* of conflicted advice and excessive fees that are costing retirees enormous losses in their savings. After all, without the substantive obligations imposed by the Rule and backed by its transparency and enforcement provisions, there is nothing to keep advisers' incentives from reverting to their pre-rule state. Several firms' determination to slow or halt compliance efforts upon the Department's announcement of a possible delay in the application date[81] demonstrates how quick this backsliding could occur. Moreover, the parts of the affected industries who have resisted the Rule all along and who now seek its elimination can hardly be expected voluntarily to adopt rules of conduct that they would have just succeeded in getting the Government to overturn.

At bottom, ERISA remains an enforcement statute, and fiduciary obligations attendant to the giving of investment advice are not merely optional. There is, therefore, neither precedent nor, following last year's rulemaking, even authority for a voluntary compliance regime of the type implicated in this request for comment.

To the extent that the Department contemplates minor adjustments aimed at improving the Rule's effectiveness, NELP believes that it is still is far too early for this process. Until the Department proposed a delay to the Rule's applicability date, firms of all sizes affected by the Rule were on course for full compliance.[82] Given the benefits to investors and society overall already accruing from this effort, and the many more expected upon full application of the Rule, the Department should proceed with the Rule as is. Should unforeseen compliance difficulties emerge, the Department will offer guidance and has already pledged flexibility in enforcement during the transition period.[83] And, of course, once the policy has been in place for long enough to be properly evaluated, the Department can always perform a retrospective review under EO 13563, and propose adjustments as needed.

International Comparisons

The Department sought comment on other countries' experiences implementing regulations similar to the Rule. Although the Department's request focuses on these rules' rollout and the extent to which the implementation process may predict policy effect, it is doubtless related to the claim that the Rule would hurt small savers because similar rules had supposedly done so abroad. This contention was thoroughly debunked by the Department in the

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[81] *See* Final Rule; Extension of Applicability Date for Fiduciary Rule, 82 Fed. Reg. 16902, 16905 (Apr. 7, 2017).

[82] *See* Letter of Elizabeth Warren, U.S. Senator to Edward Hugler, Acting Sec'y of U.S. Dep't of Labor (Feb. 7, 2017), https://www.warren.senate.gov/files/documents/2017-2-7_Warren_Ltr_to_DOL.pdf.

[83] Extension of Applicability Date, 82 Fed. Reg. at 16909.

RIA,[84] and NELP is aware of no new evidence to justify revising its analysis. On the contrary, a recent report by the United Kingdom's Financial Conduct Authority ("FCA") indicates that small savers in that country have ample access to retirement advice. From a survey of 233 advisory firms, the FCA found that nearly half of the firms' customers had retirement accounts of less than £50,000 and over a quarter had accounts of less than £30,000.[85] Only 18 percent of the firms polled required minimum account-balances,[86] and, overall, firms reported that account size was a relatively unimportant factor when considering whether to serve a new customer.[87] For advice on investments, fully 57 percent of firms' customers were advised on less than £30,000 in assets.[88]

Academic Developments

The Department sought comment about any academic developments that bear on the likely effectiveness of the Best Interest Contract as an enforcement mechanism. NELP is not aware of any such developments, but notes that research continues to support two of the most important bodies of scholarship on which the Department relied in the RIA: (1) works demonstrating profound information asymmetries in markets for financial advice[89] and (2) studies suggesting the superiority of passively-managed investment products over actively-managed ones.[90] These well-established findings have been further strengthened since last year as research continues to indicate a serious lack of financial sophistication among retirement investors,[91] and strong performance by passively-managed investment products relative to actively-managed products.[92]

Timing of Costs and Benefits

The Department sought comment on the extent to which the Rule's costs are already sunk and the relationship between the Rule's benefits and these costs. As the Department recognized in the Regulatory Impact Analysis to its rule delaying application of the rule, many of the Rule's costs are upfront ones related to modifying compliance regimes and business models.[93] Much of this investment has already been made,[94] and, to be sure, the Rule's benefits are contingent on it.

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84 *See* RIA § 2.10.

85 Financial Conduct Authority, "FCA Survey of Firms Providing Financial Advice" ¶1.8 (April 2016).

86 *Id.* ¶1.10

87 *Id.*

88 *Id.* ¶1.12.

89 *See* RIA § 3.2.3.

90 *See id.* § 3.2.3.2

91 *See, e.g.,* Adam Creighton, *Financial Literacy Is Still Abysmal Everywhere*, Wall St. J., Oct. 12, 2016, http://blogs.wsj.com/economics/2016/10/12/financial-literacy-is-still-abysmal-everywhere/; Tom Anderson, Most People Flunked this Retirement Quiz. Can you Pass? CNBC, Mar. 10, 2017, http://www.cnbc.com/2017/03/10/most-people-flunked-this-retirement-quiz-can-you-pass.html.

92 *See, e.g.,* Polyak, *supra* note 11; Eagan, *supra* note 11; Elkins, *supra* note 11.

93 *See* Extension of Applicability Date, 82 Fed. Reg. at 16910.

94 *Id.*

But these benefits are *equally* contingent on advisers' continued compliance with the substantive duties imposed by the Rule and robust enforcement of these duties. While NELP, like the Department,[95] does not expect these ongoing compliance and enforcement costs to represent a major share of the overall cost of the rule, they are absolutely necessary for the Rule's benefits to continue to accrue. As discussed above, unless they are subject to the Rule's obligations, advisers will be once again experience the same incentives to offer conflicted advice that existed before the Rule's promulgation.

<u>Macroeconomic Developments</u>

The Department sought comment on any macroeconomic developments since early 2016 relevant to the Rule. NELP notes that the substantial efforts described above by advisers to prepare for the Rule's application – which include changes to compensation models, as well as the development of new services, products, and distribution channels – have not adversely impacted the financial services industry. In fact, the opposite appears to be true. The industry has seen job growth of 9,000 jobs in the last month, 45,000 jobs in the last three months, 85,000 jobs in the last six months, and 178,000 in the last year.[96]

<u>Welfare Transfers Versus Net Welfare Gains</u>

The Department sought comment on whether any new evidence or insights may inform its estimate of the portion of investor benefits under the Rule that represent net social welfare gain as opposed to transfers from advice suppliers. NELP believes that the Department's analysis in the RIA remains accurate and that there is no basis to revisit the question until the Rule has been fully implemented and its effects empirically analyzed.

<u>Conclusion</u>

For all the foregoing reasons, NELP believes that there is no evidence or new circumstances that would justify amendment or rescission of the Rule.

Sincerely,

Christine L. Owens

Christine L. Owens
Executive Director

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[95] *Id.*

[96] U.S. Bureau of Labor Statistics Graphics for Econ. News Releases, https://www.bls.gov/charts/employment-situation/otm-employment-change-by-industry-confidence-intervals.htm (last visited Apr. 17, 2017).