

THE WILLARD
1455 PENNSYLVANIA AVENUE, NW, SUITE 1200
WASHINGTON, DC 20004

TEL 202-347-2230
FAX 202-393-3310 WWW.DAVIS-HARMAN.COM

January 3, 2020

Office of the Secretary of the Commonwealth
Attn: Proposed Regulations – Fiduciary Conduct Standard
Massachusetts Securities Division
One Ashburton Place, Room 1701
Boston, MA 02108

Re: Comments on Proposed Fiduciary Conduct Standard

Dear Secretary Galvin:

We are writing to provide comments on the rule proposal published in December of 2019, entitled “Fiduciary Conduct Standard for Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives.”

In brief, our message is that there is documentary evidence, as provided below, that Massachusetts residents would be severely harmed by the proposed regulation if it is finalized in a manner similar to its current form. We accordingly urge a major re-write of the proposed regulation, followed by a re-proposal. As discussed below, the evidence is clear and the expected harm would be so significant that the proposal needs to be rewritten. *In fact, the proposed regulation could very well result in the cessation of most, if not all, broker-dealer services in Massachusetts and to Massachusetts residents (other than pure execution services), thus cutting off most low- and middle-income residents from their only source of personalized investment assistance.*

SUMMARY

We have eight main points, which are summarized here and discussed in more detail below.

I. The proposal effectively requires broker-dealers to provide ongoing advice, which would effectively disqualify them from broker-dealer status. Under the proposal, a broker-dealer has an ongoing fiduciary duty if the broker-dealer engages in a course of business that results in a client having a reasonable expectation that the broker-dealer will monitor the client’s account on a regular or periodic basis. Unless a broker-dealer is prepared to simply ignore its clients, it will be difficult to avoid giving rise to a reasonable expectation of monitoring. For example, if a broker-dealer checks in periodically with clients, as would be expected, that could very reasonably give rise to an expectation of monitoring.

For this reason and other reasons discussed below (including the proposal's titling rules), under the proposal, broker-dealers would generally have an ongoing fiduciary duty to clients. Under clear SEC guidance, this ongoing duty would cause the broker-dealer to cease to qualify for the exception from investment adviser status, so that the broker-dealer could no longer offer brokerage services but rather must only offer advisory services (if dual registered).¹ This result is mandated in an additional way by the Investment Advisers Act of 1940. That is because in this context, the broker-dealer would almost inevitably have to charge a fee for performing such an ongoing duty. An ongoing fee would itself cause the broker-dealer to cease to qualify for the exception from investment adviser status.

The vast majority – estimated at 98% – of low- and middle-income individuals in the U.S. receiving personalized investment assistance obtain that assistance from broker-dealers. Many of those individuals do not have sufficient savings to qualify for an advisory account. ***So by eliminating the brokerage model for Massachusetts residents, the proposal would effectively eliminate all personalized investment assistance for countless low- and middle-income individuals living in Massachusetts.***

To address this serious problem, we ask for a rule clarification so that broker-dealers can define the scope of their duties, as long as any limitations on their duties are clearly communicated to clients.

II. The general duty of loyalty standard is unworkable. Under the proposal, the duty of loyalty requires a broker-dealer or investment adviser to satisfy certain requirements, including to make all reasonably practicable efforts to avoid conflicts of interest, eliminate conflicts that cannot be avoided, and mitigate conflicts that cannot be avoided or eliminated.

This requirement is unworkable and frankly impossible to understand or apply. For example:

- What is the difference between avoiding a conflict and eliminating a conflict?
- Under what circumstances must a conflict be avoided or eliminated? Correspondingly, how does one determine if a conflict cannot be avoided or eliminated?
- What is required to mitigate a conflict?

The proposal does not provide answers to any of these questions, leaving financial professionals with frankly no idea regarding how to comply. In the absence of any guidance, financial professionals will be extremely hesitant to provide brokerage services in Massachusetts, even assuming that the effective prohibition on those services described above is removed. Cutting off low- and middle-income individuals from the only investment assistance available to them is not a service to Massachusetts residents; it is a major disservice.

¹ SEC Release No. IA-5249, Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer Exclusion from the Definition of Investment Adviser, at page 21.

There is a very simple solution to this problem. Massachusetts should simply require all broker-dealers and advisers to act in the best interest of their clients. That is putting the clients first, and it is a simple administrable rule.

III. Unworkable presumption under the duty of loyalty.

The proposal provides:

(d) It shall be presumed to constitute a breach of the duty of loyalty for a broker-dealer, agent, investment adviser, or investment adviser representative to recommend any investment strategy, the opening of or transferring of assets to a specific type of account, or the purchase, sale, or exchange of any security, commodity, or insurance product, if the recommendation is made in connection with any sales contest, implied or express quota requirement, or other special incentive program.

This is an overly broad presumption. It calls into question the compensation of virtually all broker-dealers, agents, investment advisers, and investment adviser representatives in the country, since virtually all of them are compensated at least in part on the basis of sales and transactions, as illustrated below.

- **Example.** An investment adviser and one of its representatives solicit business from a prospective client, recommending the prospective client open an advisory account with the adviser. If such an account is opened, the adviser and its representative benefit from the “sale.” Is this a sales contest? The adviser and representative are compensated by making more sales. Is this a special incentive program? Obviously, this presumption cannot be intended to cover this typical situation.

Clarification is clearly needed to narrow the presumption to sales contests that promote specific products over other products during a limited period of time.

IV. No jurisdiction to regulate insurance in this manner. The Securities Division has no jurisdiction over insurance products. However, under section 204 of the Massachusetts Uniform Securities Act, the Secretary of the Commonwealth may penalize broker-dealers and investment advisers if it finds that such penalty is: (1) in the public interest; and (2) the broker-dealer or investment adviser “has engaged in any unethical or dishonest conduct or practices in the securities, commodities or insurance business.”

This is the statutory basis for the Securities Division’s proposal. However, the proposed rule is an arbitrary and capricious interpretation of that section because a failure to satisfy the proposed fiduciary standard would not necessarily result in conduct that is dishonest or unethical.

Under rules promulgated by the Massachusetts Division of Insurance, insurance producers are subject to long-established suitability standards when recommending the purchase or exchange of an annuity. Given these existing standards, it would be arbitrary and capricious to promulgate rules that would make it dishonest or unethical for a broker-dealer to recommend an insurance product in full compliance with the standards of conduct prescribed by the Division of Insurance,

simply because the broker-dealer did not conform to additional standards imposed by the state's primary regulator of securities. Put differently, insurance sales practices that are *not unethical or dishonest* or illegal in any way when a state-licensed insurance agent makes a recommendation should not magically become unethical or dishonest solely because such person also registers as a broker-dealer or investment adviser.

V. Great harm can be done by restricting broker-dealer services. The now-invalidated fiduciary rule issued by DOL strongly favored fee-based advice over broker-dealer services. Even in the short time that the rule was in effect, this aspect of the DOL rule caused massive harm to low- and middle-income individuals, as documented in the Appendices at the end of this letter. As discussed above and below, the current Massachusetts proposal appears to go even further by effectively banning broker-dealer services, which would result in even more harm to low- and middle-income individuals.

VI. Preemption. If the Massachusetts rule is not far narrower than the proposal, the rule will be substantially or fully preempted by:

- the Employee Retirement Income Security Act of 1974 (“ERISA”),
- clear case law preempting state laws that conflict with a Congressionally authorized national regulatory regime prescribed by the SEC, and
- the National Securities Markets Improvement Act of 1996 (“NSMIA”).

The disruption and cost associated with invalid rules that are only in place until invalidated in court would be borne by everyone, but mostly by small retail investors.

VII. The Securities and Exchange Commission’s (“SEC”) Regulation Best Interest will protect retail investors in the most effective manner. We strongly support the application of the SEC-promulgated Regulation Best Interest to investment recommendations provided to retail investors by broker-dealers. This federal best interest standard for broker-dealers will go into effect on June 30, 2020 and will protect investors across the country in an efficient and effective manner. As discussed by SEC Chair Clayton in his June 5, 2019 statement, a patchwork of inconsistent and/or conflicting state rules adds cost and confusion to what is a national issue. Such cost and confusion is in turn borne by retail investors. In fact, if a state moves forward with its own fiduciary standard, such a standard could actually result in the elimination *in that state* of broker-dealers’ ability to help IRA owners, due to the Internal Revenue Code’s harsh prohibited transaction rules.

VIII. Effective date. It is hard to evaluate the right type of effective date for the regulation, since the proposed regulation is simply unworkable and would result in the widespread elimination of broker-dealer services in Massachusetts. The effective date issue deserves further attention in the context of a re-proposal. At a minimum, there needs to be a transition period of at least 18 months after the publication of final regulations. Any shorter transition period would, independent of the substance of the regulations, likely result in brokerage services (other than execution-only services) for many, if not all, Massachusetts residents ceasing as of the effective date.

In addition, the proposal does not grandfather ongoing relationships from the new rule. In the context of the DOL rule, the absence of a grandfather rule for existing relationships resulted in many thousands of investors receiving letters informing them that they could no longer receive personalized assistance with respect to their account. Accordingly, investors were unable to obtain assistance on investments that may cease to be appropriate for them. In our view, existing relationships need to be grandfathered so as not to cut off investors from help in the middle of an investment strategy.

DISCUSSION

I. The Proposal Would Effectively Require Broker-Dealers to Provide Ongoing Advice, Which Would Effectively Disqualify Them from Broker-Dealer Status, Thus Eliminating Personalized Investment Assistance for Most Low- and Middle-Income Massachusetts Residents.

One of the key questions that has arisen with respect to the Massachusetts fiduciary proposal is whether a broker-dealer will be effectively required to have an ongoing fiduciary duty to clients. As discussed below, we conclude that the answer is yes. Under clear SEC guidance, this ongoing duty would cause the broker-dealer to cease to qualify for the exception from investment adviser status, so that the broker-dealer could no longer offer brokerage services but rather must only offer advisory services (if dual registered).² This result is mandated in an additional way by the Investment Advisers Act. That is because in this context the broker-dealer would almost inevitably have to charge a fee for performing such an ongoing duty. An ongoing fee would itself cause the broker-dealer to cease to qualify for the exception from investment adviser status.³

The vast majority – estimated at 98% – of low- and middle-income individuals receiving personalized investment assistance obtain that assistance from broker-dealers.⁴ Many of those individuals do not have sufficient savings to qualify for an advisory account. *So by eliminating the brokerage model for Massachusetts residents, the proposal would effectively eliminate all personalized investment assistance for countless low- and middle-income individuals living in Massachusetts.*

Proposed regulatory language. Under the current Massachusetts proposal, a broker-dealer servicing Massachusetts residents would have a fiduciary duty during any period in which the broker-dealer:

² SEC Release No. IA-5249, Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer Exclusion from the Definition of Investment Adviser, at page 21.

³ The broker-dealer exception from investment adviser status is for “any broker or dealer whose performance of such services is solely incidental to the conduct of his business as a broker or dealer *and who receives no special compensation therefor.*” (emphasis added) 15 U.S.C. §80b-2(a)(11).

⁴ Oliver Wyman report: Assessment of the impact of the Department of Labor’s proposed “fiduciary” definition rule on IRA consumers (April 12, 2011).

1. Has or exercises discretion in a customer's or client's account, unless the discretion relates solely to the time and/or price for the execution of the order;
2. Has a contractual fiduciary duty;
3. Has a contractual obligation to monitor a customer's or client's account on a regular or periodic basis;
4. Receives ongoing compensation or charges ongoing fees for advising a customer or client, either directly or through publications or writings, as to value of securities or as to the advisability of investing in, purchasing, or selling securities, or providing the foregoing services as an integral component of other financially related services; or
5. Engages in any act, practice, or course of business that results in a customer or client having a reasonable expectation that the broker-dealer, agent, investment adviser, or investment adviser representative will monitor the customer's or client's account(s) or portfolio on a regular or periodic basis.

For this purpose, a broker-dealer will be treated as creating a reasonable expectation described in #5 above by reason of:

The use of a title, purported credential, or professional designation containing any variant of the terms "adviser," "manager," "consultant," or "planner," in conjunction with any of the terms "financial," "investment," "wealth," "portfolio," or "retirement," or any terms of similar meaning or import . . .

Reasonable expectation issue aside from the titling issue: very hard to avoid reasonable expectation of monitoring. Unless a broker-dealer is prepared to simply ignore its clients, it will be difficult to avoid giving rise to a reasonable expectation it will perform monitoring. For example, if a broker-dealer checks in periodically with clients, as would be expected, that could very reasonably give rise to an expectation of monitoring.

This element of the proposal alone is more than sufficient to trigger an ongoing duty. To address this serious problem, which would cause brokerage services (other than execution services) to generally cease to be available in Massachusetts, we ask for a rule clarification so that broker-dealers can define the scope of their duties, as long as any limitations on their duties are clearly communicated to clients.

Titling provision. Even if we could get past the reasonable expectation analysis on its own, the proposed regulation makes it very difficult to avoid using a title that triggers a reasonable expectation of monitoring. Under the proposal, most titles that are commonly used would trigger a reasonable expectation of monitoring. And the breadth of the titling provision makes it difficult to avoid any risk of triggering such an expectation. We ask for guidance providing safe harbor titles that can be used to prevent triggering an ongoing fiduciary duty. We also ask that these titles:

- (1) permit broker-dealers to accurately describe the scope of the services that they provide, including incidental advice,
- (2) permit the use of professional credentials that are meaningful to clients and help them select a financial professional to assist them, and

- (3) permit dual registrants to provide brokerage services as long as it is clear to the customer when the dual registrant is acting as a broker-dealer.

Ongoing compensation. As noted above, an ongoing fiduciary duty is triggered if a broker-dealer:

Receives ongoing compensation or charges ongoing fees for advising a customer or client, either directly or through publications or writings, as to value of securities or as to the advisability of investing in, purchasing, or selling securities, or providing the foregoing services as an integral component of other financially related services;

It needs to be clarified that the receipt of normal payments from investment product manufacturers, such as commission trails, revenue sharing, shareholder servicing fees, and recordkeeping services, are not treated as ongoing compensation for advising a customer. Factually, that is not what the payments are for, and it would be helpful for the regulation to clarify this point.

II. Unworkable Application of the Duty of Loyalty: the General Duty of Loyalty.

The proposal provides:

- (b) The duty of loyalty requires a broker-dealer, agent, investment adviser, or investment adviser representative to:
1. Disclose all material conflicts of interest;
 2. Make all reasonably practicable efforts to avoid conflicts of interest, eliminate conflicts that cannot be avoided, and mitigate conflicts that cannot be avoided or eliminated; and
 3. Make recommendations and provide investment advice without regard to the financial or any other interest of any party other than the customer or client.

The second and third prongs of this rule are unworkable and frankly impossible to understand or apply. For example:

- What is the difference between avoiding a conflict and eliminating a conflict”?
- Under what circumstances must a conflict be avoided or eliminated? Correspondingly, how does one determine if a conflict cannot be avoided or eliminated?
- What is required to mitigate a conflict?

The proposal does not provide answers to any of these questions, leaving financial professionals with frankly no idea regarding how to comply. In the absence of any guidance, financial professionals will be extremely hesitant to provide brokerage services in Massachusetts, even assuming that the effective prohibition on those services described above is removed. Cutting off low- and middle-income individuals from the only investment assistance available to them is not a service to Massachusetts residents; it is a major disservice.

Let’s take a simple example. A broker-dealer is providing investment assistance to a client through the brokerage model on a commission basis. Technically, this is perceived by regulators

as causing the following conflict of interest with respect to any recommended transaction. If the client enters into a recommended transaction, the broker-dealer earns a commission; if the client does not enter into the recommended transaction, no commission is earned.

In this extremely simple example, it is completely unclear how to comply with the proposed rule, for the reasons noted above. For instance:

- Does the broker-dealer in this situation have to avoid or eliminate the conflict? For example, the broker-dealer could theoretically try to “avoid” or “eliminate” the conflict by suggesting that the client move to an advisory model.
 - What if the client does not have sufficient assets to qualify for an advisory account? Does the broker-dealer have to recommend the client invest on his or her own without personalized assistance? Or is the conflict one that cannot be avoided or eliminated?
 - What if the client has sufficient assets to qualify for an advisory account, but such an account would not be appropriate for the client under securities rules because the client is a buy and hold investor? Presumably, the broker-dealer would not be forced to violate the securities laws by recommending an unsuitable type of account. So again, would the broker-dealer have to recommend that the client forgo personalized assistance since the brokerage account has conflicts and an advisory account is unsuitable? Or is this a conflict that cannot be avoided or eliminated?
 - What if the client rejects an advisory account and wants to use the brokerage model with its “conflicts?” Does the broker-dealer have to refuse to provide brokerage services and leave the customer to invest on his or her own? Or is this a conflict that cannot be avoided or eliminated?
 - Assume that the proper analysis is that this conflict cannot be avoided or eliminated. What is required to mitigate the conflict?
 - Is it sufficient to implement training and supervisory controls to try to prevent conflicts from affecting recommendations?
 - If not, how can a broker-dealer mitigate the conflict arising from the fact that inactivity does not trigger a commission while transactions can generate some form of commission?
 - What form of mitigation is required with respect to different levels of commissions among different products? What if the level of commission is dictated by the product manufacturer, not the broker-dealer?
- Finally, what does it mean for a recommendation to be made “without regard to the financial or other interests of” the advice provider?
 - For example, assume that a broker-dealer works for a mutual fund family. Is the broker-dealer required to research all competing products, which would be an impossible task?
 - What interests other than financial need to be disregarded?

Solution. There is a very simple solution to all of the above. Massachusetts should simply require all broker-dealers and advisers to act in the best interest of their clients. That is putting the clients first, and it is a simple administrable rule.

III. Unworkable Presumption under the Duty of Loyalty.

The proposal provides:

(d) It shall be presumed to constitute a breach of the duty of loyalty for a broker-dealer, agent, investment adviser, or investment adviser representative to recommend any investment strategy, the opening of or transferring of assets to a specific type of account, or the purchase, sale, or exchange of any security, commodity, or insurance product, if the recommendation is made in connection with any sales contest, implied or express quota requirement, or other special incentive program.

This is an overly broad presumption that calls into question the compensation of virtually all broker-dealers, agents, investment advisers, and investment adviser representatives in the country, since virtually all of them are compensated at least in part on the basis of sales, assets under management, and/or transactions, as illustrated below.

- **Example.** An investment adviser and one of its representatives solicit business from a prospective client, recommending the prospective client open an advisory account with the adviser. If such an account is opened, the adviser and its representative benefit from the “sale.” Is this a sales contest? The adviser and representative are compensated by making more sales. Is this a special incentive program? Obviously, this presumption cannot be intended to cover this typical situation.
- **Solution.** Clarification is clearly needed to narrow the presumption to sales contests that promote specific products over other products during a limited period of time.

IV. The Proposal Exceeds the Secretary’s Authority, Especially with Respect to Insurance Sales.

The fiduciary standard of care being proposed by the Securities Division is an impermissible exercise of the Secretary’s regulatory authority under Massachusetts’ General Laws. That is because it would interpret the Uniform Securities Act to create a broker-dealer standard of care that contradicts the stated purpose of the Uniform Securities Act. Specifically, section 415 of the Uniform Securities Act says that the Uniform Securities Act “shall be so construed as to effectuate its general purpose *to make uniform the law of those states which enact it and to coordinate the interpretation and administration of this chapter with the related federal regulation* (emphasis added).”⁵

The fiduciary standard of care being proposed for broker-dealers clearly contradicts this statutory purpose by creating a Massachusetts broker-dealer standard of care that is inconsistent with the federal standards for broker-dealers and the standards imposed by other states. Many broker-dealer activities that would be unlawful under the proposed Massachusetts fiduciary standard are clearly permitted under the federal standards of care for broker-dealers, including the standards most recently articulated in the SEC’s Regulation Best Interest (“Reg BI”). Moreover, these

⁵ Mass. Gen. Laws Ann. ch. 110A, § 415.

same activities are clearly permitted under the standards of care imposed by the laws of other states that have adopted the Uniform Securities Act.

By creating a new Massachusetts fiduciary standard of care for broker-dealers that is inconsistent with the federal regulation of broker-dealers, and the regulation of broker-dealers by other states, the proposal would create a standard of care that is impossible to coordinate among the various federal and state standards. This clearly contradicts the statutory policy expressed in section 415 of the Uniform Securities Act and would result in an impermissible exercise of the Secretary's regulatory authority under the Uniform Securities Act.

No Jurisdiction to Regulate Insurance in this Manner. Under the proposal, the recommendation of an insurance product by a broker-dealer, agent, investment adviser, or investment adviser representative would trigger the proposed fiduciary standard of care. In a technical sense, the proposal would achieve this result by designating any insurance recommendation that fails to meet the proposed fiduciary standard as “dishonest or unethical” conduct.

This aspect of the proposal, if finalized, would exceed the Secretary's regulatory authority because, as further explained below: (1) the Massachusetts Insurance Code expressly exempts insurance from regulation through the Uniform Securities Act; and (2) the proposed standards are an arbitrary and capricious interpretation of the Uniform Securities Act with respect to insurance.

Massachusetts' Insurance Code Exempts Insurance from Regulation through the Uniform Securities Act. Massachusetts' Insurance Code regulates insurance products, and the sale of insurance products in Massachusetts. Through the Massachusetts Insurance Code, the Massachusetts legislature clearly expressed its intent for the Massachusetts Insurance Code to *exclusively* regulate insurance, and the sale of insurance products, in Massachusetts. Relevantly, the Massachusetts Insurance Code says:

“Any [contract of insurance or annuity, including any such insurance or annuity contract which is a contract on a variable basis] and the negotiation, solicitation, sale or transaction thereof by any person *shall not be subject to the provisions of [the Uniform Securities Act]* (emphasis added).⁶

Notwithstanding this clear direction from the legislature, the proposal attempts to impermissibly regulate the sale of insurance products through section 204 of the Uniform Securities Act. This attempted regulation is prohibited by the clear jurisdictional boundaries drawn by the Massachusetts Insurance Code in the provision quoted above. Moreover, this attempted regulation of insurance products contradicts the portions of the Uniform Securities Act that reflect the same jurisdictional bar. Specifically, sections 401(k) and 402(a)(5) of the Uniform Securities Act exclude insurance products from the definition of “security” and exempt insurance

⁶ Mass. Gen. Laws Ann. ch. 175, § 3.

products from the Uniform Securities Act's registration requirements.⁷

The Proposal is Arbitrary and Capricious. Even if the Insurance Code did not clearly exclude insurance products and insurance sales from regulation under the Uniform Securities Act, the application of the proposed fiduciary standard to insurance sales reflects an arbitrary and capricious interpretation of the Uniform Securities Act. Under section 204 of the Uniform Securities Act, the Secretary of the Commonwealth may penalize broker-dealers and investment advisers if it finds that such penalty is: (1) in the public interest; and (2) the broker-dealer or investment adviser “has engaged in any unethical or dishonest conduct or practices in the securities, commodities or *insurance business*”⁸ (emphasis added). This is the statutory basis for the Securities Division's application of the rule to insurance products. However, the proposed rule is an arbitrary and capricious interpretation of that section because a failure to satisfy the proposed fiduciary standard would not necessarily result in conduct that is dishonest or unethical, as those concepts are traditionally understood and clearly intended by the Massachusetts legislature. While the entire proposal reflects this flaw in its proposed treatment of specified securities recommendations as dishonest or unethical, the flaw is particularly impactful in the case of its purported attempt to regulate the sale of insurance products.

Under rules promulgated by the Massachusetts Division of Insurance, insurance producers are subject to long-established suitability standards when recommending the purchase or exchange of an annuity. Given these existing standards, which have been established by the state's primary regulator of insurance, it would be arbitrary and capricious to promulgate rules that would make it dishonest or unethical for a broker-dealer to recommend an insurance product in full compliance with the standards of conduct prescribed by the Division of Insurance, simply because the broker-dealer did not conform to additional standards imposed by the state's primary regulator of securities. Put differently, insurance sales practices that are *not unethical or dishonest* or illegal in any way when a state-licensed insurance agent makes a recommendation should not magically become unethical or dishonest solely because such person also registers as a broker-dealer or investment adviser.

For example, consider a broker-dealer who makes a one-time annuity recommendation to a customer in full compliance with Massachusetts' suitability standards for annuity sales.⁹ Assuming the broker-dealer did not make any false statement, mislead the customer, or conceal

⁷ Mass. Gen. Laws Ann. ch. 110A, § 401(k) (“Security” does not include any insurance or endowment policy or annuity contract under which an insurance company promises to pay money either in a lump sum or periodically for life or some other specified period.); Mass. Gen. Laws Ann. ch. 110A, § 402(a)(5) (“The following securities are exempted from [registration]: . . . (5) any security issued by and representing an interest in or a debt of, or guaranteed by, any insurance company organized under the laws of any state and authorized to do business in this commonwealth . . .”).

⁸ Mass. Gen. Laws Ann. ch. 110A, § 204(a)(2)(G).

⁹ 211 Code Mass. Regs. 96.05 (“In recommending to a consumer the purchase of an annuity or the exchange of an annuity that results in another insurance transaction or series of insurance transactions, the insurance producer, or the insurer where no producer is involved, shall have reasonable grounds for believing that the recommendation is suitable for the consumer on the basis of the facts disclosed by the consumer as to his or her investments and other insurance products, his or her financial situation and needs and his or her suitability information.”).

information, this activity would not be dishonest. Additionally, this activity would not be unethical because it would be consistent with the moral norms and standards of professional conduct for insurance sales,¹⁰ as interpreted by the Division of Insurance. Accordingly, the proposed fiduciary rule, especially in its application to insurance sales, would result in an invalid, arbitrary, and capricious interpretation of the Massachusetts Uniform Securities Act.

In our view, the Massachusetts Securities Division should have no interest in proposing an arbitrary rule that is certain to be invalidated as beyond its jurisdiction. Such a proposal would only cause short-term disruption, burdens, and costs to be borne by Massachusetts residents, until it is invalidated.

V. The Specter of Harm to Low- and Middle-Income Massachusetts Residents is Very Real; There is Documentary Evidence.

The risk of harm from an unworkable fiduciary rule is not hypothetical in any way. On the contrary, there is extensive data showing the very real harm that the DOL rule did to low- and middle-income individuals. Please see the Appendices for more complete data on this harm. But below, we provide some key examples:

- **10.2 million accounts harmed.** The national accounting firm Deloitte studied 21 financial institutions that represent 43% of U.S. financial advisors and 27% of the retirement savings assets in the market. The study found that as of the DOL rule's first applicability date on June 9th, *53% of study participants reported limiting or eliminating access to brokerage advice for retirement accounts, which the firms estimate impact 10.2 million accounts and \$900 billion AUM.*
- **68% report harm to small accounts.** In a Harper Polling survey of 600 financial professionals, 68% reported that they or their institutions would take on fewer small accounts.
- **75% report taking on fewer small clients.** A NAIFA survey of 1,093 members found that nearly 75% of financial professionals experienced or expected to experience an increase in the minimum account balances for the clients they serve.
- **Small employers and small accounts harmed.** A survey of Insured Retirement Institute ("IRI") members found that "more than 60 percent of the distribution firms that participated in the Survey have, are planning to, or are considering exiting or de-emphasizing target markets such as small IRA holders and small retirement plan sponsors."
- **Devastating effect on small accounts projected.** The consulting firm of A.T. Kearney projected that, by 2020, broker-dealer firms would collectively stop serving the majority of the \$400 billion currently held in low-balance retirement accounts.

¹⁰ See Black's Law Dictionary (11th ed. 2019) (Defining "unethical" to mean "Not in conformity with moral norms or standards of professional conduct.").

The DOL fiduciary rule made it much riskier and more expensive for broker-dealers to provide transactional assistance to small accounts. As a result, such assistance was reduced significantly. In this regard, the DOL framework was not nearly as draconian as the proposed Massachusetts regulation is. The Massachusetts proposal would effectively ban transactional assistance under the brokerage model, as discussed above. As discussed briefly above, the DOL fiduciary rule resulted in dramatically reduced advice access for small retail investors. The consequences of the Massachusetts proposal would be far worse for Massachusetts residents, not just because it is more draconian but also because the proposal impacts all account types, not just retirement accounts.

VI. Preemption.

ERISA preemption in general. The proposal appears to attempt to avoid ERISA preemption by making the fiduciary rule inapplicable to persons acting as fiduciaries under ERISA. This does not avoid ERISA preemption because ERISA’s preemptive power does not depend on whether the professionals that Massachusetts’ proposal seeks to regulate are ERISA fiduciaries or not.¹¹ As discussed more fully below, the only relevant preemption question is whether Massachusetts’ proposal “relates to” employee benefit plans, which it clearly does by attempting to impose fiduciary standards in the case of investment advice offered to ERISA-covered plans and participants.¹²

As the U.S. Supreme Court has said, whether a state law “relates to” an employee benefit plan depends on the objectives of ERISA and the effect of state laws on ERISA plans.¹³ In effect, the proposal attempts to override Congress’ goal of establishing uniform standards for all matters central to plan administration, including fiduciary responsibility. ERISA carefully delineates who is a fiduciary and who is not. In the context of employee benefit plans, states cannot choose to treat as fiduciaries persons excepted from the ERISA definition. If this approach were successful in avoiding ERISA preemption, state laws could, contrary to the Congressional intent and case law described below, completely disrupt the national framework of laws applicable to ERISA plans by re-writing the duties of persons serving such plans.

ERISA broadly preempts state laws relating to employee benefit plans. ERISA is a comprehensive federal statute regulating employer-sponsored retirement and welfare benefit plans. When Congress passed ERISA, it included an explicit and far-reaching preemption provision. According to that provision, and except as otherwise provided by law, title I and title IV of ERISA “*shall supersede any and all State laws insofar as they may now or hereafter relate*

¹¹ See *Faulman v. Sec. Mut. Fin. Life Ins. Co.*, 353 Fed. Appx. 699, 702 (3d Cir. 2009) (explaining that ERISA fiduciary status is only one of several factors used to determine whether claims “relate to” an ERISA plan for preemption purposes); *Glaziers and Glassworkers Union Loc. No. 252 Annuity Fund v. Newbridge Securities, Inc.*, 93 F.3d 1171, 1185 (3d Cir. 1996) (even if a defendant is not an ERISA fiduciary, “state law claim[s] may ‘relate to’ an ERISA plan and be preempted”).

¹² See *Kollman v. Hewitt Associates, LLC*, 487 F.3d 139 (3d Cir. 2007) (concluding that state law malpractice claims against a plan administrator who was not an ERISA fiduciary were preempted because the state law claims went to the “essence of the function of an ERISA plan”).

¹³ *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 147 (2001).

to any employee benefit plan” (emphasis added).¹⁴ Importantly for purposes of this discussion, title I of ERISA defines who is a fiduciary with respect to an employee benefit plan and establishes a federal standard of care for fiduciaries. *As one court put it, ERISA’s preemption provision is “the most sweeping federal preemption statute ever enacted by Congress.”*¹⁵

ERISA: exclusive enforcement mechanism for the regulation of plan fiduciaries. When drafting ERISA, Congress was clear that it wanted ERISA’s preemption clause to apply broadly. In fact, ERISA’s legislative history is full of commentary explaining how the law is intended to be the exclusive authority governing the entire field of employee benefit plans, including providing the exclusive enforcement mechanism regarding ERISA plans. For example, the text of ERISA itself states that ERISA is intended “to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by . . . establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.”¹⁶ As the Supreme Court has said, “any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted.”¹⁷

Courts: state law fiduciary claims preempted. For purposes of this discussion, it is important to emphasize that courts considering ERISA’s preemption provision have dismissed non-ERISA state law claims involving breaches of fiduciary duties, among other state law claims related to ERISA-covered retirement plans. For example, courts have consistently held that state claims arising out of the common law of trusts, including claims of breach of fiduciary duty, are preempted in the context of ERISA-covered retirement plans.¹⁸

Supreme Court: savings clause does not protect investment advice regulation from preemption. ERISA’s preemption provisions also contain what is known as the “savings clause,” which is a carve-out from preemption for state laws regulating *insurance, banking, or securities*. States attempting to develop their own fiduciary rules may try to argue that their efforts are not expressly preempted by ERISA because they are regulating “insurance, banking, or securities.” This argument, however, is inconsistent with current case law interpreting ERISA’s savings clause.

The case law on ERISA’s savings clause interprets it very narrowly. In the case of insurance, the Supreme Court has explained that the savings clause is not applicable unless (1) the state law is

¹⁴ ERISA § 514.

¹⁵ *California Hospital Association v. Henning*, 569 F. Supp. 1544, 1546 (C.D. Cal.1983).

¹⁶ ERISA § 2(b).

¹⁷ *Aetna Health Inc. v. Davila*, 542 U.S. 200, 209 (2004).

¹⁸ *See, e.g., Kramer v. Smith Barney*, 80 F.3d 1080, 1083 (5th Cir. 1996) (“[Plaintiff’s] state law claims alleging that defendants violated their fiduciary duties to the plans and the beneficiaries relate to ERISA plans and are therefore preempted under section 514(a.)”; *Nagy v. De Wese*, 705 F. Supp. 2d 456, 470 (E.D. Pa. 2010) (concluding that a state law fiduciary breach claim by a retirement plan participant was preempted by ERISA because the state law fiduciary claim relied on the defendant knowing that funds were held for the benefit of the participant under the plan).

“specifically directed towards entities engaged in insurance,” and (2) the state law “substantially affect[s] the risk pooling arrangement between the insurer and the insured.”¹⁹ Thus, the insurance carve-out from ERISA preemption would not extend to protect state rules seeking to regulate advice regarding insurance products that relate to an ERISA-covered plan because any such regulation would not affect the risk pooling arrangement between the insured and the insurer.

Applying the Supreme Court’s logic to the carve-out for securities and banking regulation, it is clear that ERISA’s savings clause would not protect any state’s fiduciary rule for broker-dealers from ERISA preemption. This is because states’ efforts to create their own fiduciary rules, such as the effort described in the proposal, regulate the provision of investment advice, rather than regulating insurance, banking, or securities.

Supreme Court: savings clause inapplicable to state laws affecting enforcement issues.

Moreover, any state fiduciary rule would also be preempted to the extent that it creates a legal remedy that duplicates, supplements, or supplants ERISA’s civil enforcement provisions, which provide an exhaustive list of remedies. Again, by comparison to the reference to the state regulation of insurance under ERISA’s savings clause, the Supreme Court has said, “even a state law that can arguably be characterized as ‘regulating insurance’ will be pre-empted if it provides a separate vehicle to assert a claim for benefits outside of, or in addition to, ERISA’s remedial scheme.”²⁰ Thus, by applying this principle to non-insurance matters described by ERISA’s savings clause (i.e., banking and securities), state laws creating new legal remedies with respect to ERISA-covered plans would be preempted.

In short, ERISA’s powerful preemption provision expressly reflects Congress’s unambiguous intent for the federal government to regulate all matters relating to employee benefit plans, including fiduciary responsibilities and the provision of investment advice. ERISA defines who is a fiduciary and creates its own enforcement mechanisms through DOL, the IRS, and federal courts. States may not add any new or additional requirements to that comprehensive system with respect to an employee benefit plan.

In sum, there is nothing unclear about the breadth of ERISA’s preemption provision or the fact that it would clearly preempt any state fiduciary rule that attempts to apply to ERISA plans. ***For a real-life example of states’ recognition of this clear fact, one has to look no further than the New York State Department of Financial Services’ First Amendment to 11 NYCRR 224 (addressing “suitability and best interests in life insurance and annuity transactions”), which exempts all ERISA plans from its application.*** See 11 NYCRR section 224.2(b)(1). Because “insurance,” like “securities,” is covered by ERISA’s savings clause, this is further evidence that the savings clause is clearly not applicable to state fiduciary rules.

¹⁹ *Kentucky Ass’n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 334 (2003).

²⁰ *Davila*, 542 U.S. at 217–18; see also *McGuigan v. Reliance Stand. Life Ins. Co.*, 256 F. Supp. 2d 345, 348 (E.D. Pa. 2003); *Hawaii Mgt. All. Ass’n v. Ins. Com’r*, 100 P.3d 952, 965 (Haw. 2004).

The type of rule contemplated in the proposal would clearly be preempted with respect to ERISA plans and participants. As a result, any rule that is issued needs to be inapplicable with respect to ERISA plans.

Preemption under NSMIA. Similar to the ERISA preemption principles discussed above, Congress has also expressly indicated its intent to preempt certain state regulation of investment advisers and broker-dealers through its robust framework of federal securities law. For purposes of this discussion, we focus on an important provision included in the National Securities Markets Improvement Act of 1996 (“NSMIA”), a federal law that clearly reflects Congress’s intent to preempt the state regulation of securities, investment advisers, and broker-dealers. As the congressional managers of the Conference Committee for that law explained, NSMIA’s preemption provisions are intended to “eliminate duplicative and unnecessary regulatory burdens [imposed by the states] while preserving important investor protections by reallocating responsibility over the regulation of the nation’s securities markets in a more logical fashion between the Federal government and the states.”²¹

Through NSMIA, Congress expressly indicated its intent to preempt certain state regulation of broker-dealers. Through the addition of section 15(i) of the Securities Exchange Act of 1934, Congress prohibited states from subjecting broker-dealers to any state requirement involving the “making and keeping [of] records,” if such requirements “differ from, or are in addition to,” the requirements already imposed by federal law.²²

The express congressional directive on broker-dealer financial recordkeeping was clearly intended to preempt any state investment advice regulation that would, in effect, require broker-dealers to collect and keep records to document compliance with the law, which a fiduciary rule would clearly do. After all, any case brought by states or individual plaintiffs to enforce a fiduciary rule will be highly dependent on the broker’s books and records regarding compliance steps, which have been declared “off limits” to the states by Congress.

The Bureau’s proposed fiduciary rule attempts unsuccessfully to avoid the preemption issue described in the preceding two paragraphs by stating that it shall not “be construed to establish any requirements for capital, custody, margin, financial responsibility, making and keeping of records, bonding, or financial or operation reporting for any broker-dealer or agent that differ from, or are in addition to, the requirements established under [federal securities laws].” This part of the proposal is in irreconcilable conflict with the rest of the proposal, which requires extensive recordkeeping to demonstrate compliance. Thus, this purported limitation will not prevent preemption.

Accordingly, any fiduciary rule issued by the Bureau with respect to broker-dealers would be preempted under NSMIA.

The proposed rule would also be preempted based on “conflict preemption.” Federal law can preempt state laws in different ways. Congress can, for example, *expressly* say that certain

²¹ H.R. REP. NO. 104-864, at 39-40 (Conf. Rep.).

²² 15 U.S.C. § 78o.

issues, like the regulation of employee benefit plans or broker-dealer recordkeeping requirements, are “off limits” to the states. This is the kind of preemption discussed above, which is triggered by, for example, section 514 of ERISA and section 15(i) of the Securities Exchange Act of 1934.²³ Express preemption is not, however, the only way that federal law can preempt state law.

Even if Congress does not expressly preempt state law, it can impliedly preempt state law through a constitutional principle known as “conflict preemption.” Federal law can preempt a state law under the doctrine of “conflict preemption” in one of two ways. First, a state law can be invalidated when it is impossible to comply with the federal and state laws at the same time.²⁴

Second, a state law can be invalidated when it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.²⁵ This second type of conflict preemption, which is sometimes referred to as “obstacle preemption,” provides a clear means of preempting Massachusetts’ proposed fiduciary rule. This basis for preemption has been strengthened now that the SEC has finalized Regulation Best Interest – a rule that explicitly rejects a harmonized fiduciary standard for broker-dealers and investment advisers.

In the context of broker-dealer regulation, there is a significant body of case law indicating that the imposition of state fiduciary standards upon broker-dealers, especially as they relate to the forms of acceptable compensation and the disclosure of conflicts, are preempted under the doctrine of implied conflict preemption when they exceed the federal standards. For example, in the mid-1990s, plaintiffs brought a series of common law fiduciary claims against broker-dealers alleging that the brokers breached their state fiduciary duties by failing to disclose to their customers the receipt of “order flow” payments. Essentially, the plaintiffs argued that state fiduciary standards required detailed disclosure of those payments, notwithstanding the fact that the SEC imposed less strenuous standards at the federal level.

In a string of opinions considering those claims, the highest courts of four states concluded that federal law preempted the detailed disclosure of order flow payments as an outgrowth of state fiduciary principles. According to the courts, those state-based obligations were more stringent than the federal rules crafted by the SEC and would create an obstacle to the accomplishment and execution of the full purpose and objectives of Congress, namely Congress’ objective of entrusting the SEC to comprehensively and uniformly regulate broker-dealers under a national market system.²⁶ In many respects, that string of cases closely parallels current efforts by states

²³ 15 U.S.C. § 78o.

²⁴ *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990).

²⁵ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

²⁶ See *Guice v. Charles Schwab & Co., Inc.*, 674 N.E.2d 282 (N.Y. 1996) (concluding that federal law preempted state fiduciary standards requiring broker-dealers to disclose order flow payments because state-by-state fiduciary standards would defeat Congress’ intent for the SEC to develop a national market system); *Orman v. Charles Schwab & Co., Inc.*, 688 N.E.2d 620 (Ill. 1997) (holding that federal disclosure rules for broker-dealers preempted state fiduciary standards that would obstruct the national market system Congress intended to foster); *Shulick v. PaineWebber, Inc.*, 722 A.2d 148 (Pa. 1998) (concurring) (concluding that the disclosure of order flow payments under a state fiduciary standard was preempted because allowing states to impose more stringent requirements on broker-dealers would render the federal scheme “largely nugatory” and would require brokers “to craft their disclosures to meet potentially dozens of different state standards”); see also *Dahl v. Charles Schwab & Co., Inc.*, 545 N.W.2d 918 (Minn. 1996) (concluding that federal law preempted state fiduciary standards for broker-dealers

to impose new fiduciary standards for broker-dealers that exceed the federal standards. Accordingly, if Massachusetts finalizes its regulations as proposed, challengers seeking to invalidate the rule would prevail by applying similar logic – i.e., the Massachusetts proposal would create an obstacle to Congress’ objective of entrusting the SEC to comprehensively and uniformly regulate broker-dealers under a national market system.

Now that the SEC has finalized its own broker-dealer standards through Regulation Best Interest, the case for conflict preemption is very strong. The Massachusetts proposal would directly conflict with many clear policy decisions made by the SEC, including the following:

Unlike the proposal, the SEC specifically rejected the idea of applying a fiduciary standard to broker-dealers. “We have declined to subject broker-dealers to a wholesale and complete application of the existing fiduciary standard under the Advisers Act because it is not appropriately tailored to the structure and characteristics of the broker-dealer business model (i.e., transaction-specific recommendations and compensation), and would not properly take into account, and build upon, existing obligations that apply to broker-dealers, including under FINRA rules. Moreover, we believe (and our experience indicates), that this approach would significantly reduce retail investor access to differing types of investment services and products, reduce retail investor choice in how to pay for those products and services, and increase costs for retail investors of obtaining investment recommendations.

“We have also declined to craft a new uniform standard that would apply equally and without differentiation to both broker-dealers and investment advisers. Adopting a “one size fits all” approach would risk reducing investor choice and access to existing products, services, service providers, and payment options, and would increase costs for firms and for retail investors in both broker-dealer and investment adviser relationships.”

Preamble to Regulation Best Interest at pages 19-20.

Unlike the proposal, the SEC specifically rejected the requirement that advice be provided without regard to the broker-dealer’s interest. “[W]e are concerned that there is a risk that the “without regard to” language would be inappropriately construed to require a broker-dealer to eliminate all of its conflicts when making a recommendation (i.e., require recommendations that are conflict free), which we believe could ultimately harm retail investors by reducing their access to differing types of investment services and products and by increasing their costs.”

Id. at pages 63-64.

Unlike the proposal, the SEC specifically rejected applying an ongoing duty to broker-dealers. “[T]he provision of recommendations in a broker-dealer relationship is generally transactional and episodic, and therefore the final rule requires that broker-dealers act in the

because Congress intended the SEC to regulate the securities markets and state law would effectively eliminate a form of compensation permitted by federal law).

best interest of their retail customers at the time a recommendation is made and imposes no duty to monitor a customer's account following a recommendation.”

Id. at page 60.

Moreover, these SEC decisions were made pursuant to broad grants of authority by Congress.

“The Commission is adopting Regulation Best Interest pursuant to the express and broad grant of rulemaking authority in Section 913(f) of the Dodd-Frank Act. . . . Section 913(f) of the Dodd-Frank Act provides the Commission discretionary authority to “commence a rulemaking, as necessary or appropriate to the public interest and for the protection of retail customers (and such other customers as the Commission may by rule provide), to address the legal or regulatory standards of care for brokers, dealers. . . [and] persons associated with brokers or dealers. . . for providing personalized investment advice about securities to such retail customers.” In addition to Section 913(f), the Commission is promulgating Regulation Best Interest pursuant to other provisions of the Exchange Act, including Section 15(c)(6) and Section 17.”

Id. at page 55.

The Massachusetts proposal would directly conflict with these and other core decisions made by the SEC pursuant to a Congressional grant of authority, and thus would fall squarely within the conflict preemption doctrine.

Moreover, as part of its recent regulatory package, the SEC reaffirmed that broker-dealers who provide advice that is “solely incidental” to their primary business of effecting securities transactions are exempt from the fiduciary standards imposed on investment advisers through the Investment Advisers Act of 1940. Under the doctrine of conflict preemption, this interpretation cannot be undone by state regulation subjecting broker-dealers to an ongoing fiduciary duty when they provide *any* level of investment advice to their customers, as the Massachusetts proposal would do.

VII. Support for Regulation Best Interest promulgated by the SEC in order to protect retail investors in the most effective manner and reduce regulatory complexity.

We strongly support the application of the SEC-promulgated Regulation Best Interest to investment recommendations provided to retail investors by broker-dealers. Investors are best served by having broker-dealers subject to this workable set of national rules promulgated by the SEC. Inconsistent rules produce a variety of harms. As SEC Chair Clayton said in his June 5, 2019 statement:

Recent examples of increases in . . . regulatory complexity include, among other things, (1) the Department of Labor's now vacated Fiduciary Rule, which would have imposed a standard of conduct different from both our existing standard of conduct for broker-dealers and the fiduciary standard applicable to investment advisers under the Advisers Act, and (2) the potential patchwork of inconsistent state-level standards. I and many others believe a patchwork approach to the regulation of the vast market for retail

investment advice will increase costs, limit choice for retail investors and make oversight and enforcement more difficult. I am hopeful that our regulatory colleagues will continue to work with us to minimize inconsistencies and maximize the effectiveness of our collective efforts.

The harm attributable to a patchwork of inconsistent state rules would indeed be very significant:

- **Additional costs, depleting investor savings.** For broker-dealers operating in many or all states, the cost of designing, maintaining, training, and oversight with respect to different rules in different states is very material. And those costs will certainly be passed on to customers. This issue has not received the attention it deserves. There has been enormous scrutiny of fees, and the effect that they have on savings. Oddly, at the same time, there has been far too little scrutiny of rules that give rise to higher fees. Inconsistent rulemaking is certainly a huge creator of higher fees, as evidenced by the billions of dollars spent nationwide on the now-invalidated DOL rule.
- **Cross border issues.** There is no guidance on how to address cross border issues, such as the application of different state rules to broker-dealers providing assistance to investors in different states, leading to more confusion, uncertainty, and costs.
- **Great risk of errors and confusion.** We all know that our world is increasingly mobile. Broker-dealer representatives move between states, as do their customers. With multiple different rules in different jurisdictions, inadvertent errors by broker-dealers will likely increase, causing confusion and possibly undermining investor confidence. And mobile investors receiving different types of advice in different jurisdictions cannot help but be confused.
- **Gaps in advice due to inconsistencies.** All firms are developing systems to comply with the SEC's new rules. What happens if a state then develops different rules that are inconsistent with, and could possibly conflict with, the SEC rules? National firms will have no choice but to delay the provision of assistance in that state until systems are developed to deal with the differences, with the possibility that those differences cannot be dealt with and resolved easily, resulting in longer gaps in advice.
- **Inadvertent prohibition on advice regarding IRAs.** Without sufficient coordination with the federal agencies, there is a real possibility that the proposal could trigger fiduciary status under the Internal Revenue Code (though such treatment would be inappropriate). For example, by treating broker-dealers as subject to a fiduciary duty, that could result in the broker-dealer being treated as a fiduciary under the Code. That would mean in turn that almost all advice provided by broker-dealers with respect to IRAs would constitute a prohibited transaction under Code section 4975.²⁷ This is true because

²⁷ As discussed above, it appears that the proposal would generally force broker-dealers to convert to investment adviser status. In that case, they would generally be ERISA fiduciaries, but by reason of the form of compensation charged by investment advisers, the prohibited transaction issues referenced in the text would generally not apply.

the advice provided by broker-dealers as fiduciaries can affect their own compensation, which runs afoul of Code section 4975(c)(1)(E). Although there are some prohibited transaction exemptions that could be helpful in some cases under the Code, the existing exemptions are not comprehensive, *meaning that advice regarding IRAs would be widely prohibited in the state adopting the insufficiently coordinated fiduciary standard.*

In short, it is very important for there to be as much uniformity as possible in the protection of investors. Accordingly, we support the national standard promulgated by the SEC.

VIII. Effective date.

It is hard to evaluate the right type of effective date for the regulation, since the proposed regulation is simply unworkable and would result in the widespread elimination of broker-dealer services. The effective date issue deserves further attention in the context of a re-proposal, but at a minimum, there needs to be a transition period of at least 18 months after the publication of final regulations. Any shorter transition period would, independent of the substance of the regulations, likely result in brokerage services (other than execution-only services) for many, if not all, Massachusetts residents ceasing as of the effective date.

In addition, the proposal does not grandfather ongoing relationships from the new rule. In the context of the DOL rule, the absence of a grandfather for existing relationships resulted in many thousands of investors receiving letters informing them that they could no longer receive personalized assistance with respect to their account. This was extremely harmful to small accounts across the country. Investors were unable to obtain assistance on investments that may cease to be appropriate for them, all attributable to a DOL failure to design a workable grandfather rule.

In our view, existing relationships need to be grandfathered so as not to cut off investors from help in the middle of an investment strategy.

Thank you for considering the comments provided above.

Sincerely,



Kent A. Mason

APPENDIX A: GENERAL HARM CREATED BY THE FIDUCIARY RULE

1. Deloitte & Touche Study (August 9, 2017), as described in SIFMA’s August 9, 2017 comment letter

- a. *Description: a study of a cross-section of SIFMA’s members, consisting of 21 financial institutions that represent 43% of U.S. financial advisors and 27% of the retirement savings assets in the market.*
- b. “[A]s of the Rule’s first applicability date on June 9th, 53% of study participants reported limiting or eliminating access to brokerage advice for retirement accounts, which the firms estimate impact 10.2 million accounts and \$900 billion AUM.”
- c. “Roughly 95% of study participants indicated that they have reduced access to or choices within the products offered to retirement savers because of efforts to comply with the Rule. Products affected include mutual funds, annuities, structured products, fixed income, private offerings, and more, impacting an estimated 28.1 million accounts. Examples of the reduction in mutual fund availability include: 1) the elimination of no-load funds from brokerage platforms; 2) the elimination of mutual funds held directly at the mutual fund company; 3) reduced product offerings; and 4) elimination of other share classes.”
- d. “Across the industry, broker-dealers will have spent more than \$4.7 billion in start-up costs relating to the Rule, much of which has already been spent.”
- e. “The ongoing costs to comply are estimated at over \$700 million annually....”

2. Harper Polling (July 2017), as described in the Financial Services Roundtable’s August 10, 2017 comment letter (report and survey slides attached to letter)

- a. *Description: a national survey of 600 financial professionals conducted by phone and through online interviews from July 7-12, 2017 (July 17, 2017).*
- b. A majority of respondents reported the Rule is restricting them from serving their clients’ best interests.
- c. “Only 12% of respondents report the Rule is helping them to serve their clients best interest and 33% report there has been no impact, yet those respondents still report more complicated paperwork and fewer small accounts.” “For those who reported the Rule is helping or has had no impact on their ability to serve their clients best interests, many reported negative changes to client services by (i) servicing fewer small accounts, (ii) offering fewer investment options, (iii) including fewer mutual fund options, and (iv) higher compliance costs, including additional fees for Retirement Investors.”
- d. “Only 10% of Certified Financial Planners (CFP) report that the Rule is helping them to serve their clients best interests, and 55% report the Rule is restricting them from serving their clients best interests. This runs counter to the claim by the CFP Board of Standards that the Rule is workable for their members.”
- e. 75% of respondents whose “typical clients have starting assets under \$25,000 report that they will take on fewer small accounts due to increased compliance costs and legal risks.”
- f. 63% reported that “the fiduciary standard will definitely/probably/or has already limited investment options/products they can provide to clients.”

- g. 56% said “their firms would offer fewer mutual fund products to consumers.”
- h. “...68% reported that they or their institutions will take on fewer small accounts.”

3. American Action Forum (AAF) (March 16, 2017 comment letter)

- a. *Description: AAF’s comments are based on: (1) an AAF staff survey of the available literature in 2015 on the likely impact of the DOL rule, as discussed in an August 4, 2015 article; (2) a September 17, 2015 AAF article; and (3) AAF research as discussed in a February 22, 2017 article.*
- b. Found reported compliance costs of at least \$106 million in 2016, representing up-front costs from just four companies.
- c. “[A]most all retail investors will see their costs increased by 73 to 196 percent due to a mass shift toward fee-based accounts.”
- d. “[F]irms providing investment advice will see an average of \$21.5 million in initial compliance costs and \$5.1 million in annual maintenance costs.”
- e. “[U]p to 7 million Individual Retirement Accounts (IRAs) would fail to qualify for an advisory account due to the balance too low to be sustainable for the advisor. In the shorter term, we found that the fiduciary rule, as written, will result in over \$1500 of duplicative fees charged per household retirement account.”
- f. “...the fiduciary rule would cost \$31.5 billion in total costs and \$2 billion in annual burdens, making it the most expensive rule of 2016 and the second most expensive non-EPA rule since 2005.”

4. Meghan Milloy / American Action Forum (AAF) Research (April 2017), as stated on AAF’s website

- a. *Description: a research article by Meghan Milloy, Director of Financial Services Policy.*
- b. The Rule will result in additional charges to retirement investors of approximately \$816 annually per account or over \$46 billion in aggregate.
- c. “Although the rule has not yet become effective, AAF research has found that three major companies have left part of the brokerage business, and six more are drawing down their business or switching to a fee-based arrangement. From these companies alone, reported compliance costs have already topped \$100 million, affecting 92,000 investment advisors, \$190 billion in assets, and at least 2.3 million consumers.”

5. Chamber of Commerce’s Monitoring of Rule’s Impact, as described in the Chamber’s August 16, 2017 comment letter

- a. *Description: outreach conducted by the Chamber to 14 firms that collectively manage \$10 trillion in assets.*
- b. “[N]early all of the institutions reported excluding some investment products from retirement investors in response to the rule, largely due to concerns about the pending ‘level’ fee requirements of the ‘full’ BIC Exemption.”
- c. “Most of the institutions also reported using the ‘grandfathering’ provisions included in the final rule, meaning that a substantial number of investors would be prevented from receiving new investment advice going forward, unless they

decide to change the type of account they have (e.g. change from a transaction-based account to a fee-based account).”

6. NAIFA Survey of 1,093 Members (April 2017)

- a. Nearly 75% of financial professionals have experienced or expect to experience an increase in the minimum account balances for the clients they serve.
- b. Nearly 90% of advisors believe consumers will need to pay more for their financial advice services.
- c. More than 90% of financial professionals have already experienced or expect to experience restrictions of product offerings to their clients.
- d. 68% of NAIFA’s members have been told that they cannot recommend certain mutual fund classes or types to clients, and almost 70% say they cannot recommend certain annuities.

7. LIMRA Secure Retirement Institute’s Second Quarter 2017 U.S. Retail Annuity Sales Survey, as described in an August 23, 2017 LIMRA press release

- a. Total annuity sales for the first half of 2017 decreased 10% over the first half of 2016, the lowest first half sales since 2001.
- b. Q2 2017 is the:
 - i. 5th consecutive quarter of decline in overall annuity sales.
 - ii. 6th consecutive quarter in which fixed annuity sales have been greater than variable annuity sales, which “hasn’t happened in almost 25 years.”
- c. “A closer look at what’s driving the drop in VA sales reveals qualified VA sales have experienced a more significant decline than non-qualified VAs.... VA qualified sales were down 16 percent in the second quarter, while nonqualified sales were actually up 5 percent. This could be in reaction to the DOL fiduciary rule,” according to the director of annuity research.
- d. Variable annuity sales are forecast to drop 10-15% in 2017, returning to levels not seen since 1998.

8. LIMRA Secure Retirement Institute’s First Quarter 2017 U.S. Retail Annuity Sales Survey, as described in a May 18, 2017 LIMRA press release

- a. Indexed annuity sales are forecast to decline 5-10% in 2017 and “another 15-20 percent in 2018 when the BICE goes into effect.”

9. LIMRA Secure Retirement Institute Study (2017), as described in NAIFA’s August 4, 2017 comment letter

- a. “LIMRA estimates that access to guaranteed income products will decline 29% under the Rule/PTEs.”

10. Morningstar Report (2017), as described in the Insured Retirement Institute’s April 17, 2017 comment letter

- a. Variable annuity sales declined nearly 22% from 2015 to 2016 despite a rising stock market.

11. Survey of Insured Retirement Institute (IRI) Member Firms (July 2017), as described in IRI’s August 7, 2017 comment letter

- a. *Description: IRI surveyed a representative sampling of its insurance company and distributor members from July 18-31, 2017.*
- b. “More than 60 percent of the distribution firms that participated in the Survey have, are planning to, or are considering exiting or de-emphasizing target markets such as small IRA holders and small retirement plan sponsors.”
- c. A number of distributors reported that “approximately 155,000 of their clients have already been ‘orphaned,’ and a number of our insurer members told us that both the adviser and the firm have dissociated from the accounts of hundreds of their annuity contract owners. Far more accounts are expected to be impacted as implementation of the Rule proceeds.”

12. CoreData Report, CoreData Research UK (2016), as described in comment letter and attachment submitted by Kent Mason (August 3, 2017)

- a. *Description: a non-commissioned report based on an October 2016 survey of 552 U.S. financial advisors.*
- b. 71% of financial professionals will disengage from at least some retirement savers because of the Fiduciary Rule.
- c. 64% of financial professionals think the Fiduciary Rule will have a large negative impact on their mass-market clients (i.e., investors with less than \$300,000 in net investable assets).
- d. On average, financial professionals estimate they will no longer work with 25% of their mass-market clients, creating an advice gap for low-balance investors.
- e. 39% of advisors believe the cost of personal financial advice will become too expensive for most investors.
- f. 32% of advisors believe that shifting away from certain products, such as annuities and non-traded REITs, is one of the biggest challenges posed by the fiduciary rule.
- g. 57% of advisors “believe increased paperwork stemming from reporting and disclosure requirements will be one of the top three challenges of the fiduciary rule.”
- h. 18% of advisors “believe preparing for potential litigation will be one of the biggest challenges they must overcome.”

13. A.T. Kearney Study (October 2016), as described in comment letter and attachment submitted by Kent Mason (August 3, 2017)

- a. *Description: a study of the effects of the Fiduciary Rule published in connection with a discussion of how the global management consultant can help financial institutions adjust to the rule.*
- b. Concludes that “[a]s firms move toward fee-based advisory, many low-balance accounts will no longer be served, shifting many assets to formats such as robo-advice and self-directed.”
- c. Recommends that broker/dealers should “[a]ccelerate the transition to fee-based services and advisory, and evaluate account thresholds to continue serving (for example, accounts greater than \$200,000).”

- d. States that “[c]ertain high-cost investment products (such as variable annuities) will be phased out as the business model is no longer viable under the new rule....”
- e. By 2020, broker-dealer firms will collectively stop serving the majority of the \$400 billion currently held in low-balance retirement accounts.
- f. Implementing the DOL’s new fiduciary rule for retirement accounts will cost the brokerage industry \$11 billion over the next four years.

14. Large Mutual Fund (2017 data), as described in the Chamber of Commerce’s April 17, 2017 comment letter

- a. *Description: an interview the Chamber conducted with a large mutual fund provider.*
- b. One mutual fund’s number of orphaned accounts (i.e., accounts without an advisor) nearly doubled in the first three months of 2017, and the average account balance in these orphan accounts is just \$21,000. The fund projects that “ultimately 16% of the accounts it services will be orphaned this year because of the Fiduciary Rule.” “Extrapolating this prediction suggests that at least 1.6 million small retirement savers have already lost access to investment assistance since January 2017, and an additional 1.6 million are likely to lose access after the Rule becomes applicable.”

15. Fidelity Clearing & Custody Solutions Poll (August 2016), as described in September 28, 2016 ThinkAdvisor article

- a. *Description: A blind online poll of 459 advisors conducted from August 18-26, 2016. Respondents consisted of 30% independent broker-dealer reps, 21% RIAs, 19% regional BD reps, 15% from wirehouse firms, 11% insurance BD reps, and 3% from banks.*
- b. 10% of advisors responding to the survey reported they are planning to leave or retire from the field earlier than expected because of the rule, and another 18% said they are “reconsidering their careers as advisors.”

16. 2016 Global Survey of Financial Advisors commissioned by Natixis Global Asset Management, as described on Natixis website and in survey whitepaper

- a. *Description: a survey of 2,550 advisors (including 300 in the U.S.) in 15 countries in Asia, Europe, the United Kingdom, and the Americas conducted in July 2016. The online quantitative survey was developed and hosted by CoreData Research.*
- b. 38% of respondents said they will likely “disengage with smaller clients” as a result of new regulations.
- c. Almost 80% of respondents are “concerned that more stringent regulations could limit access to financial advice for lower balance and mid-tier clients.”
- d. More than 75% of advisors surveyed “believe increased regulations could even lead to higher costs for clients.”

17. The Cerulli Report – U.S. Broker/Dealer Marketplace 2016, as described in Lincoln Financial Group’s March 17, 2017 comment letter

- a. *Description: an “in-depth analysis of broker/dealers (B/Ds) with financial advisors serving retail investors.” Available for purchase.*
- b. 66% of advisors believe that small investors will have less access to professional financial advice as a result of the rule.

18. NERA Economic Consulting’s comment on the Department of Labor Proposal and Regulatory Impact Analysis (July 17, 2015)

- a. *Description: SIFMA retained NERA Economic Consulting to review and comment on the proposed fiduciary rule. To conduct its cost study of the proposal, NERA gathered account-level data from several financial institutions, representing tens of thousands of IRA accounts that were observed from 2012 through Q1 2015.*
- b. “Using [a] conservative minimum account balance of \$25,000, over 40% of commission-based accounts in our dataset would not be able to open fee-based accounts. Using a \$50,000 threshold, over 57% of accounts would not meet minimum balance requirements for a fee-based account. If the effective threshold is \$75,000, two-thirds of account holders would be left without any professional investment advice.”

19. Chamber of Commerce company interviews, as described in the Chamber’s April 17, 2017 comment letter

- a. *Description: In-depth, structured interviews of two to five persons with about 10 investment-advisory companies, broker-dealers, insurance companies, and others affected directly or indirectly by the Fiduciary Rule.*
- b. Interviewed companies “uniformly report that they have already restricted the choices of investment products available to retirement savers through their fee-based advisory channels, or they intend to do so when the Fiduciary Rule becomes applicable. The majority of companies interviewed have also either already raised the minimum account amounts to qualify for advisory services or have plans to do so upon applicability of the rule. Some firms have raised the minimum for advisory accounts to \$100,000 or more, clearly excluding from their services small beginning savers.”
- c. “[E]ven when the financial institution itself has not increased account minimums, individual brokers may implicitly discourage enrollment of smaller accounts and ration their time to larger accounts to earn better pay and to reduce time spent on compliance associated with smaller, transaction-based accounts.”
- d. Insurance costs could exceed two to three times the cost estimated by the Department. Some respondents cited numbers as high as \$10,000 per professional per year for Errors and Omissions coverage.
- e. The Chamber is unaware of any “robo-advisor” that recommends annuity products to generate retirement income, despite the clear need for these products and the Department’s reliance on robo-advisors to alleviate the potential loss of access to retirement advice for small savers.

20. SIFMA survey, as described in document “New Data Shows DOL Fiduciary Rule Harming Small Retirement Savers” (available as attachment to Kent Mason’s August 3, 2017 comment letter)

- a. *Description: a survey of 25 member financial firms impacted by the Fiduciary Rule.*
- b. “More than half the firms are considering moving IRA brokerage clients to call center services only.”
- c. “44% of the respondents anticipate that more than half of their clients could see a change in services (e.g., limitation of product choice, shift to fee-based account, or shift to online only, etc.). More than 50% of responding firms anticipate offering only advisory services to a subset of their current IRA brokerage customers.”
- d. “... more than 60% of the responding firms stated that they anticipate that some or all of the costs resulting from the potential increase in litigation and liability insurance may be passed on to clients.”

21. Wall Street Journal Reports (February and April 2017), as described in the Financial Services Roundtable’s April 17, 2017 comment letter

- a. Firms have responded to the Rule by taking actions that include: (1) moving clients to fee-based accounts; (2) eliminating commission-based IRAs; (3) raising investment minimums for commission-based IRAs; (4) eliminating variable annuity products; and (5) excluding certain products from commission-based IRAs (e.g., annuities, mutual funds, and exchange-traded funds).

22. Jonathan Reuter updated analysis, as described in the American Bankers Association’s (ABA) March 15, 2017 comment letter

- a. *Description: ABA recommendations of key developments that an updated DOL analysis of the Fiduciary Rule should account for.*
- b. The author of one of the academic studies cited by the Council of Economic Advisers (CEA), Jonathan Reuter, “issued an updated analysis that looked at more recent mutual fund performance (from 2003 to 2012) and concluded that broker-sold funds underperform no-load funds by an average of 18 basis points, significantly narrower than the 100-basis point difference cited by CEA.”

APPENDIX B: HARM TO THE ANNUITY MARKET FROM THE FIDUCIARY RULE

1. **LIMRA Secure Retirement Institute’s Second Quarter 2017 U.S. Retail Annuity Sales Survey, as described in an August 23, 2017 LIMRA [press release](#)**
 - a. Total annuity sales for the first half of 2017 decreased 10% over the first half of 2016, *the lowest first half sales since 2001.*
 - b. Q2 2017 is the:
 - i. 5th consecutive quarter of decline in overall annuity sales.
 - ii. 6th consecutive quarter in which fixed annuity sales have been greater than variable annuity sales, which “hasn’t happened in almost 25 years.”
 - c. “A closer look at what’s driving the drop in VA sales reveals qualified VA sales have experienced a more significant decline than non-qualified VAs.... VA *qualified sales were down 16 percent in the second quarter, while nonqualified sales were actually up 5 percent. This could be in reaction to the DOL fiduciary rule,*” (emphasis added) according to the director of annuity research.
 - d. *Variable annuity sales are forecast to drop 10-15% in 2017, returning to levels not seen since 1998.*
2. **LIMRA Secure Retirement Institute’s First Quarter 2017 U.S. Retail Annuity Sales Survey, as described in May 18, 2017 LIMRA [press release](#)**
 - a. Indexed annuity sales are forecast to decline 5-10% in 2017 and “another 15-20 percent in 2018 when the BICE goes into effect,” referring to the “Best Interest Contract Exemption” under the DOL fiduciary rule.
3. **LIMRA Secure Retirement Institute Study (2017), as described in NAIFA’s August 4, 2017 [comment letter](#)**
 - a. “LIMRA estimates that access to guaranteed income products will decline 29% under the [DOL Fiduciary] Rule/PTEs.” (The reference to “PTEs” is to the exemptions from the application of the Fiduciary Rule, which substantially all qualified annuities must use.)
4. **Morningstar Report (2017), as described in the Insured Retirement Institute’s April 17, 2017 [comment letter](#)**
 - a. Variable annuity sales declined nearly 22% from 2015 to 2016 despite a rising stock market, which “has traditionally led to increased sales” of VAs.
5. **Insured Retirement Institute (IRI) member survey (July 2017), as described in IRI’s August 7, 2017 [comment letter](#)**
 - a. “Half of the participating insurance companies reported that some of their distribution partners have already dropped the insurer’s products from their shelf as part of their efforts to implement the [Fiduciary] Rule.”
 - b. “Nearly 60 percent of the participating insurance companies expect that fee-based annuities manufactured in response to the [Fiduciary] Rule will result in higher overall fees to the consumer.”
 - c. “[A] number of our distributor members reported that approximately 155,000 of their clients have already been ‘orphaned,’ and a number of our insurer members

told us that both the adviser and the firm have dissociated from the accounts of hundreds of their annuity contract owners. Far more accounts are expected to be impacted as implementation of the Rule proceeds.”

6. Independent Insurance Agents & Brokers of America, Inc. (IIABA) Member Survey (July 2017), as described in IIABA’s August 3, 2017 [comment letter](#)

- a. “38%, or 315 respondents, answered that they personally and/or the insurance agency they work for had stopped selling or giving advice related to products impacted by the fiduciary rule, or planned to do so on or before January 1, 2018 when the [fiduciary] rule takes full effect.”
- b. “[M]ore than one third of independent insurance agents who responded to the survey will exit the market on or before January 1, 2018; and for those that remain some will offer more limited services to clients.”

7. ACLI (August 7, 2017 [comment letter](#))

- a. “One ACLI member informed us that it has reduced its proprietary insurance product offerings by 54 percent and its non-proprietary variable annuity offerings available through its broker-dealers by 76 percent.”
- b. Consequences of the Fiduciary Rule as reported by ACLI members:
 - i. “Some banks are no longer offering access to fixed and indexed annuities, even when they are used outside the context of an employee benefit plan or IRA.”
 - ii. “Some broker-dealers are no longer offering variable annuities even to savers and retirees with non-qualified assets not subject to the Regulation.”
 - iii. “Some broker dealers are reducing the number of insurers and annuity products available on their platforms.”
 - iv. “Some firms are inquiring how quickly they can be removed as the broker dealer of record from existing annuity business.”
- c. “[T]he Regulation has already resulted in a dramatic increase of ‘orphaned’ accounts. Several ACLI member companies have already been notified by distribution partners that they will resign as agent of record to IRA and ERISA plan annuity holders. For example, one ACLI member has informed us that, since the Regulation’s June 9, 2017 applicability date, it has received ‘disassociation’ requests for 84 annuity contracts, and the reason provided for each action was the Regulation. By comparison, this member received only 3 disassociation notices during 2016, none of which included the Regulation as the basis for the disassociation.”
- d. One member reported that it has “identified over 250 small retirement plans that have lost access to guidance and advice as a result of the Regulation.”

8. NAIFA Survey of 1,093 Members (April 2017)

- a. 70% of NAIFA’s members say they cannot recommend certain annuities.

9. CoreData Report, CoreData Research UK (2016), as described in [comment letter and attachment](#) submitted by Kent Mason (August 3, 2017)

- a. *Description: a non-commissioned report based on an October 2016 survey of 552 U.S. financial advisors.*
 - b. 32% of advisors believe that shifting away from certain products, such as annuities and non-traded REITs, is one of the biggest challenges posed by the fiduciary rule.
- 10. A.T. Kearney Study (October 2016), as described in [comment letter and attachment submitted by Kent Mason \(August 3, 2017\)](#)**
 - a. *Description: a study of the effects of the Fiduciary Rule published in connection with a discussion of how the global management consultant can help financial institutions adjust to the rule.*
 - b. States that “[c]ertain high-cost investment products (such as variable annuities) will be phased out as the business model is no longer viable under the new rule....”
- 11. Chamber of Commerce (April 17, 2017) [comment letter](#)**
 - a. The Chamber is unaware of any “robo-advisor” that recommends annuity products to generate retirement income, despite the clear need for these products and the Department’s reliance on robo-advisors to alleviate the potential loss of access to retirement advice for small savers.
- 12. Wall Street Journal Reports (February and April 2017), as described in the Financial Services Roundtable’s April 17, 2017 [comment letter](#)**
 - a. Firms have responded to the Rule by taking actions that include: (1) moving clients to fee-based accounts; (2) eliminating commission-based IRAs; (3) raising investment minimums for commission-based IRAs; (4) eliminating variable annuity products; and (5) excluding certain products from commission-based IRAs (e.g., annuities, mutual funds, and exchange-traded funds).
- 13. Cerulli Associates Research, as reported in December 15, 2016 ThinkAdvisor article**
 - a. “U.S. variable annuity and fixed indexed annuity sales are expected to decline by at least 10% through 2018 as the industry struggles to adapt to upcoming regulations put forth by the Department of Labor.”
 - b. Cerulli views insurers’ “biggest challenge for the foreseeable future” as being the Fiduciary Rule.
- 14. Insured Retirement Institute (IRI) First-Quarter 2017 Annuity Sales Report, as described in June 6, 2017 [press release](#)**
 - a. *Description: sales results based on data reported by Beacon Research and Morningstar, Inc.*
 - b. Industry-wide annuity sales declined 18% in the first quarter of 2017 as compared to the first quarter of 2016.
 - c. Fixed annuity sales during the first quarter of 2017 declined 13.9% as compared to the first quarter of 2016, and variable annuity sales declined 10.2% for the same period.

15. Insured Retirement Institute (IRI), as reported in December 15, 2016 ThinkAdvisor [article](#)

- a. IRI “found that industrywide annuity sales in the third quarter totaled \$51.3 billion, an 8.2% drop from sales of \$55.9 billion during the second quarter of 2016, and a 12.3% decline from \$58.5 billion in the third quarter of 2015.”