



Analysis of the Effects of the 2016 Department of Labor Fiduciary Regulation on Retirement Savings and Estimate of the Effects of Reinstatement

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PREPARED BY



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“Analysis of the Effects of the 2016 Department of Labor Fiduciary Regulation on Retirement Savings and Estimate of the Effects of Reinstatement”

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INTRODUCTION

As a non-partisan advocacy organization dedicated to strengthening working families by promoting common-sense public policy solutions, the Hispanic Leadership Fund is pleased to present this essential study on the effects of the U.S. Department of Labor's 2016 fiduciary regulation on retirement savings. This in-depth analysis confirms that the 2016 fiduciary regulation hurt the very people it was intended to help, especially the working families that our organization seeks to protect.

The fiduciary rule was meant to help financial services consumers by seeking to legally ensure that advisors were acting in their customers' best interest. But good intentions do not guarantee positive results, and in fact, a multitude of negative consequences began to materialize.

Although the harm caused by the 2016 fiduciary regulation was significant, the rule was thankfully in place for only a short period. Recognizing the Department of Labor's overreach in developing this counterproductive regulation, the U.S. Court of Appeals for the Fifth Circuit vacated the regulation in 2018, reinstating the prior rules that have served hard-working Americans for decades.

Now, as working families across the country struggle to recover from the personal and financial toll of the COVID-19 pandemic, the Department of Labor is sending strong signals that it intends to reinstate many aspects of its 2016 fiduciary regulation. However well-intentioned, this was the wrong approach in 2016, and the consequences of repeating this mistake will be even graver this time for low and middle-income families.

Reinstatement of this overregulation in any form similar to the 2016 regulation will once again prevent hard-working Americans from receiving information that is highly relevant for their financial well-being. As this research shows, reinstatement would be estimated to **reduce the accumulated retirement savings of 2.7 million individuals with incomes below \$100,000 by approximately \$140 billion over 10 years**. The impact of reinstatement would be **even more dire for Black and Hispanic Americans**, contributing to a **roughly 20% increase in the wealth gap** when looking at accumulated IRA savings alone.

Any regulation that in effect cuts off less affluent individuals and families from receiving all possible advice and information is clearly the wrong answer. This study serves a critical role in demonstrating just how wrong that answer is.

We thank both Davis & Harman LLP for initiating this important work on behalf of their clients and Quantria Strategies for their outstanding research and analysis.

Mario H. Lopez
President
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**ANALYSIS OF THE EFFECTS OF THE 2016 DOL FIDUCIARY
REGULATION ON RETIREMENT SAVINGS
AND ESTIMATE OF THE EFFECTS OF REINSTATEMENT**

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EXECUTIVE SUMMARY

The Department of Labor (DOL) has announced that it will be revisiting the circumstances under which financial professionals will be treated as fiduciaries by reason of providing investment advice with respect to retirement plans and IRAs. It is widely expected that DOL will be moving closer to the 2016 fiduciary rule that the Fifth Circuit Court of Appeals invalidated.¹

This study is the first to use data and information on the actual effects of the 2016 rule and *provide a fact-based analysis of what is likely to happen if DOL resurrects significant portions of the 2016 rule*. As an example of those actual effects, Deloitte studied institutions representing 43 percent of U.S. financial advisers and 27 percent of the retirement savings assets in the market. The study found that, as of the DOL rule's first applicability date, *53 percent of study participants reported limiting or eliminating access to brokerage advice for smaller retirement accounts, impacting an estimated 10.2 million accounts and \$900 billion in savings*.

Based on a rigorous analysis and actual experience, our conservative estimate is that reinstatement of the 2016 rule would:

- (1) reduce the projected accumulated retirement savings of 2.7 million individuals with incomes below \$100,000 by approximately \$140 billion over 10 years, and*
- (2) have the most adverse effects on Blacks and Hispanics – reducing their projected accumulated IRA savings by approximately 20 percent over 10 years – contributing to an approximately 20 percent increase in the wealth gap attributable to IRAs for these individuals.*

Our estimates also consider factors that (1) have occurred since 2016 and (2) the DOL did not consider in its estimates of the effects of the 2016 regulation. *In other words, DOL's predictions of the effect of the regulation on individuals did not materialize, which provides a valuable window into the effects of reinstating the rule*. Further, as noted, the changes triggered by the 2016 rule negatively impacted the availability of financial advice for retirement savers, so that its reinstatement would create long-term risks for retirement savings, retirement readiness, and the wealth gap in the United States.

Under the 2016 rule, any individualized suggestion by a financial professional regarding retirement plan or IRA investments or distributions would trigger fiduciary status. The widespread expectation that this rule will be largely resurrected is based both on informal discussions by DOL officials and on language in the preamble to Prohibited Transaction Exemption 2020-02. The preamble set out DOL's view – *not the law* – that in the vast majority of cases an individualized suggestion should trigger fiduciary status.

¹ *Chamber of Com. of U.S. of Am. v. U.S. Dept. of Lab.*, 885 F. 3d 360 (5th Cir. 2018).

If DOL again requires the application of a fiduciary duty standard to virtually all investment assistance, low and middle-income investors will lose significant access to brokerage services – generally, the only source of personalized assistance for them and a model that historically has helped many savers achieve their financial goals, especially those with more modest savings. As this study confirms, savers benefit greatly from the choices they currently have in working with financial services professionals who offer different ways of investing and a variety of investment products that meet the wide array of savers' changing investment needs.

In light of the Fifth Circuit decision, there are clear legal questions about the validity of DOL's intended changes, but those questions are beyond the scope of this paper. The purpose of this paper is to examine the likely effects on savers, especially lower income and minority savers, of DOL resurrecting significant portions of the 2016 rule.

Further, our research includes the following findings, discussed in more detail in the body of this paper:

- **Low and middle-income individuals will lose access to valuable investment assistance that DOL disregarded in its 2016 analysis.** One of the most inexplicable elements of DOL's 2016 regulatory impact analysis was that it ascribed zero benefit to investment assistance. A Vanguard study found that investment advice can provide help regarding risk and return features, tax efficiency, fees, and regular rebalancing. Financial advice can also help with respect to meeting investment goals, saving behavior, spending behavior, debt, retirement planning, and risk management and insurance. An Oliver Wyman study found that across all age and income levels individuals who receive advice have a minimum of 25 percent more assets than non-advised individuals.
- **The effects on minority populations would be the most adverse.**
 - **Existing wealth problem.** A December 2020 study by the Federal Reserve Bank of St. Louis found that the median family wealth in 2019 in the United States was \$23,000 for Blacks, \$38,000 for Hispanics, and \$184,000 for Whites.
 - **Critical importance of personalized advice for minority populations.** As EBRI noted in a 2021 report, personalized advice that takes account of the unique circumstances of Black and Hispanic Americans could improve the accumulation of retirement savings for these groups; a regulation like the 2016 rule that reduces this access will have the opposite effect.
 - **The loss of advice could greatly exacerbate the wealth gap by reducing the projected accumulated IRA balances of Black and Hispanic Americans by approximately 20 percent over 10 years.**
- **The pandemic has underscored the need for financial assistance.** Polls show, for example, that nearly 60 percent of individuals with at least \$50,000 of retirement savings accessed those savings during the pandemic. Individuals need assistance to understand the long-term harm of such withdrawals and advice on how to weather short-term financial shocks in a way that minimizes adverse effects on retirement savings.
- **DOL's 2016 regulatory impact analysis vastly understated the actual compliance costs of the 2016 rule, which get passed on to savers.** DOL simply made a mistake in

projecting the cost of compliance. An analysis found that the actual costs of compliance were *nearly three times* what DOL had estimated in 2016. It is important to understand these costs because economists generally assume that increased costs on businesses will be passed through to customers. Rarely, if ever, is the full burden of the increased costs borne solely by the producer.² While the DOL acknowledged that the 2016 fiduciary regulation would impose increased costs on financial advisers for compliance with the regulation, they failed to recognize how those increased costs would affect individual savers.

- **The effect of the 2016 DOL rule on lifetime income and protection against longevity risk was particularly adverse because the rule discouraged transaction-based advice, which is how most savers have access to annuities.** Annuities are an important product to provide retirees with guaranteed income and the assurance that they will not outlive their retirement savings.³ Also, Baby Boomers who own annuities are more likely than non-annuity owners to (1) have more confidence in living comfortably during retirement (by a 2-1 margin over non-annuity owners) and (2) be more likely to engage in positive retirement planning behaviors with 68 percent having calculated a retirement goal and 63 percent having consulted a financial adviser.⁴
- **The financial services industry has evolved since 2016, and the SEC’s adoption of Regulation Best Interest has meaningfully raised the bar for financial professionals, underscoring that any possible benefit from the regulation would be far less than DOL anticipated prior to 2016 and far less than the above costs.** DOL had aimed to achieve certain changes in the market by adopting the 2016 rule. There is data showing that most of these changes have been achieved without the rule, making the adverse effects of resurrecting the 2016 rule unnecessary. For example, as detailed in this paper, there has been:
 - A decline in commissions and 12b-1 income,
 - A shift to fee-based models,
 - A decline in expense ratios,
 - Increased competition in fee-based models,
 - A slowdown in IRA rollovers, and
 - Asset flows from mutual funds to ETFs.

² Economic theory indicates that the more inelastic the demand for investment products, the more the full burden is borne by the investor. In other words, if the consumer, in this case the investor, is able to move seamlessly through the financial markets, they will be able to respond by selecting another financial provider. However, investment relationships tend to be somewhat inelastic.

³ Insured Retirement Institute (IRI), Letter to the Employee Benefits Security Administration, U.S. Department of Labor, *Definition of the Term “Fiduciary”; Conflict of Interest Rule – Retirement Investment Advice; Best Interest Contract Exemption (Prohibited Transaction Exemption 2016-01); Prohibited Transaction Exemption 84-24 RIN 1210-AB79*, April 17, 2017.

⁴ *Id.* The letter also noted that annuities appeal to middle-income individuals with 70 percent of annuity owners having annual household incomes of less than \$100,000.

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I. EFFECTS OF THE 2016 DOL FIDUCIARY REGULATION

A. Overview

In 2010, the Department of Labor (DOL) began efforts to introduce a new fiduciary standard for financial advice. These efforts culminated in a published final regulation in April 2016 applying a fiduciary standard to individuals providing financial advice to retirement savings plans and individual retirement account (IRA) account holders. In 2018, the United States Court of Appeals for the Fifth Circuit Court vacated the regulation, reinstating the former five-part test for fiduciary status.⁵ In December 2020, the DOL proposed a new prohibited transaction exemption (PTE 2020-02, which became effective in February 2021) and formally reinstated the prior regulation (dating from 1975) that defined individuals who were investment advice fiduciaries.⁶ Recent actions taken by the DOL suggest there may be plans to reinstate some version of the 2016 regulation.

The DOL has announced that it will be revisiting the circumstances under which financial professionals will be treated as fiduciaries by reason of providing investment advice with respect to retirement plans and IRAs. Based on informal discussions by DOL officials and on language in the Preamble to PTE 2020-02 (which sets out DOL's view – not the law), there is widespread expectation by the financial services industry that DOL will move closer to the 2016 fiduciary regulation. The 2016 regulation stated that any individualized suggestion by a financial professional regarding retirement plan or IRA investments or distributions would trigger fiduciary status, a position that was invalidated by the Fifth Circuit in 2018.

⁵ Under ERISA and the Internal Revenue Code of 1986, a fiduciary is defined in relevant part as a person who “renders investment advice for a fee or other compensation, direct or indirect, with respect to moneys or other property of [a] plan”. The five-part regulatory test below states that a person shall be deemed to be rendering “investment advice” for this purpose, only if:

Such person *renders advice to the plan as to the value of securities or other property, or makes recommendations as to the advisability of investing in, purchasing, or selling securities or other property*; and . . . Such person either directly or indirectly (e.g., through or together with any affiliate). . . Renders any [such] advice . . . *on a regular basis* to the plan *pursuant to a mutual agreement*, arrangement, or understanding, written or otherwise, between such person and the plan or a fiduciary with respect to the plan, that such services will serve as *a primary basis for investment decisions* with respect to plan assets, and that such person will render *individualized investment advice* to the plan based on the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan assets. [highlighting added to show the five parts]

⁶ In 2019, the Securities and Exchange Commission adopted Regulation Best Interest, which requires broker-dealers to act in the best interest of their clients when making a recommendation of any securities transaction or investment strategy involving securities to a retail customer. The adoption of this regulation mitigates the need for a separate fiduciary standard with respect to IRA owners and qualified plans.

If financial professionals become fiduciaries and provide individualized suggestions with respect to decisions that affect their own pay – which is inevitable with respect to any transaction-based compensation arrangement – the financial professionals will be committing an impermissible “prohibited transaction,” absent a prohibited transaction exemption. DOL has also announced its intent to revisit the current prohibited transaction exemption rules, suggesting that they will move much closer to the invalidated 2016 prohibited transaction exemption rules.

The 2016 DOL fiduciary regulation had wide ranging effects on individuals saving for retirement during the fiduciary regulation’s short tenure. To understand the impact on retirement savers, it is important to examine the observed effects on retirement savers and financial service providers during the period in which the regulation applied. This Part I of our analysis examines those effects.

The 2016 DOL regulation defined the circumstances under which an activity or communication provided for a fee would constitute *investment advice subject to a fiduciary standard*. Under the regulation, any individualized suggestion by a financial professional regarding retirement plan or IRA investments or distributions would trigger fiduciary status. Under the 2016 regulation, the following activities would constitute investment advice if a fee applies:

- Recommendations as to the advisability of acquiring, holding, disposing of, or exchanging, securities or other investment property, or a recommendation as to how securities or other investment property should be invested after the securities or other investment property are rolled over, transferred, or distributed from the plan or IRA;
- A recommendation as to the management of securities or other investment property, including, among other things, recommendations on investment policies or strategies, portfolio composition, selection of other persons to provide investment advice or investment management services, selection of investment account arrangements (e.g., brokerage versus advisory); or
- Recommendations with respect to rollover, distributions, or transfers from a plan or IRA, including whether, in what amount, in what form, and to what destination such a rollover, transfer or distribution should be made.⁷

There was one overarching issue with respect to the 2016 fiduciary rule – it opened up huge opportunities for class action lawsuits based on very vague standards that could not be applied with any precision. The opportunity for lawsuits went well beyond the regulation’s “Best Interest Contract Exemption,” such as in the case of rollover advice. In addition, brokers and advisers would need to make sizable investments in technology and compliance measures to comply with the regulation. The 2016 A.T. Kearney report identified widespread changes required to business practices as well, including requiring increased levels of disclosure to clients, which would accelerate the industry trend toward a fee-based model as well as product offering and price adjustments. The pressures of these changes would require change in the

⁷ 29 CFR Parts 2509, 2510, and 2550, Definition of the Term “Fiduciary”; Conflict of Interest rule – Retirement Investment Advice, April 8, 2016.

underlying business models, as more brokers and agents would move to registered investment advisers (RIAs) with different compensation structures.⁸

The DOL fiduciary regulation led to significant adverse effects impacting primarily investors.. In a letter to the Department of Labor, the Financial Services Roundtable identified these effects to include the following: “(1) less guidance and support to IRA owners and small plans; (2) increases in minimum account size; (3) limited product shelf; (4) shift to fee-based accounts; (5) moving clients with small accounts to self-service or robo-advice; (6) orphaning of smaller, less profitable accounts due to heightened risks; (7) reduced willingness to discuss or consider unmanaged assets with clients due to risks; (8) poor client service due to the time required to perform comparative analysis on the proposed account to the existing account; (9) disinclination to sell annuity products because of uncertainty surrounding the Rule and inability to launch new products because resources are tied up with Rule implementation; (10) additional disclosure documents and other changes to sales processes make the sales process markedly longer in each client appointment; (11) less discretion on small accounts and compensation changes make working with small accounts more challenging and less cost-effective for financial professionals; (12) higher manufacturing and distribution costs; and (13) new liability concerns.”⁹

Ultimately, and as discussed further in Part II below, our analysis of the effects of the 2016 DOL regulation shows that, if the regulation is reinstated, structural industry changes made to comply with the regulation will alter the behavior of individuals, particularly those saving for retirement. Reinstatement of the 2016 regulation would adversely impact retirement savings by making investment advice less available, particularly with respect to individuals who most need assistance in planning for retirement. Further, because retirement savings remains the most important component of wealth next to homeownership, reinstatement of the regulation could contribute to decreases in family wealth for vulnerable groups and increase the wealth gap in the United States.

⁸ A.T. Kearney, *A.T. Kearney Study: The \$20 billion impact of the new fiduciary rule on the wealth management industry*, Perspective for Discussion, October 2016.

⁹ Financial Services Roundtable, *Letter to the Employee Benefits Security Administration, U.S. Department of Labor, Fiduciary Rule Examination*, August 10, 2017, p. 3.

B. Practices Changed or Services Eliminated by the 2016 DOL Regulation

The 2016 DOL regulation caused significant disruptions in the financial services industry, leading to disruptions in services provided to investors. Retirement savers rely on a number of sources for financial information. However, a majority of IRA owners rely on the services provided by professional financial advisers. (Refer to Graph 1.)

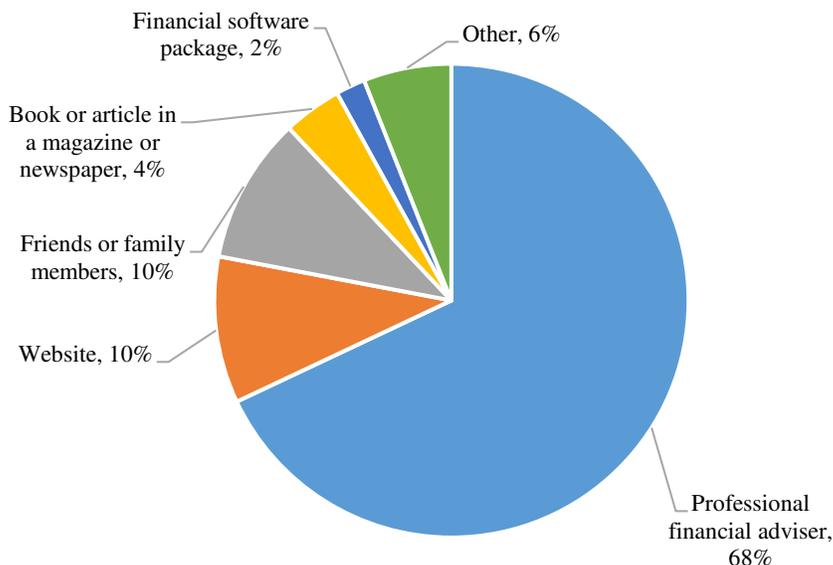
A July 2017 poll of 600 financial advisers across the United States indicated that, in response to the 2016 fiduciary regulation, advisers had stopped selling certain products, including securities and investment products, variable annuities and/or variable life insurance, and 401(k) or other qualified pension plans.¹⁰

Table 1 details the impact, as revealed in the July 2017 poll, on the industry practices and, ultimately, investors. The respondents, when asked about changes that would take place as a result of the regulation, identified changes in practices that would “probably/definitely/may occur or have already happened.” Specifically, the respondents indicated that paperwork requirements would increase for clients (83 percent); they would pass on higher compliance costs to clients (52 percent); they would take fewer clients (46 percent); and they would direct more clients to robo-advisers online and to call centers (29 percent). Moreover, the respondents indicated that their firm would take fewer small accounts due to increased compliance costs and increased legal risks (68 percent); they would limit the investment options/products available to clients (63 percent); and they would offer fewer mutual fund options (56 percent).¹¹

The poll also examined the responses of advisers based on the average starting net worth of their individual clients. Table 1 shows that, for example, 75 percent of advisers with clients with the lowest average starting net worth (i.e., under \$25,000) indicated that there would be less access to financial advisers for small accounts. Interestingly, 72 percent of advisers with clients with average starting net worth over \$500,000, also reported less access for small accounts.

Graph 1.—Percentage of Traditional IRA–Owners with a Financial Strategy, by Primary Source, 2020

Source: Investment Company Institute IRA Owners Survey



¹⁰ Harper Polling, *National Survey of Financial Professionals*, July 7-12, 2017.

¹¹ *Id.* It is important to understand that the change in product offerings is likely to affect new brokers or those with less tenure in the market. Brokers or financial advisers with greater tenure are more likely to have an established clientele and are less likely to experience disruptions in assets under management from these changes.

	Overall Definitely/ Probably/ Already Has Happened	Under \$25k	\$25k-50k	\$50k-75k	\$75k-100k	\$100k-150k	\$150k-250k	\$250k-500k	Over \$500k
More contracts and paperwork	83	69	83	82	76	85	82	88	85
Less access for small accounts	68	75	61	60	58	68	66	75	72
Limit investment options/products	63	42	63	67	56	62	60	70	64
Fewer mutual fund options	56	53	47	58	39	60	56	64	54
Higher compliance costs passed to clients in fees	52	55	57	47	44	60	43	54	54
Less access to advisers	46	32	33	44	45	55	42	50	48
More clients directed to robo-adviser services	29	43	27	28	20	31	27	30	34

Source: Harper Polling, National Survey of Financial Professionals, July 7-12, 2017.

C. Financial Advice and How it Affects Retirement Savings

The fundamental premise of the 2016 DOL fiduciary regulation was DOL’s unsubstantiated belief that “conflicted” financial advice reduces potential retirement savings for individual investors with respect to 401(k) plans and IRAs. DOL published a regulatory impact analysis (RIA) outlining its projected costs and benefits of the fiduciary regulation, which represented DOL’s justification for the specific actions taken.¹² However, as further addressed in Part I.D. below, the 2016 DOL RIA (1) *overstated the amount and cost of potentially conflicted advice* that may occur, (2) *understated the costs of complying* with the regulation and the impact on individual investors, and (3) *failed to analyze and quantify the potential benefits* of financial advice that result in improved gains for individual investors who rely on a financial adviser. The value of financial advice to investors represents a key element of any quantitative analysis of the effects of imposing a rule similar to the 2016 DOL fiduciary regulation.

The failure of the DOL to identify and attempt to quantify any positive effects of financial advice on individual savings outcomes ignores important information about individual savings behavior and the role financial advisers play in helping Americans save adequate amounts for retirement.

¹² U.S. Department of Labor, *Regulating Advice Markets, Definition of the Term “Fiduciary” Conflicts of Interest – Retirement Investment Advice*, Regulatory Impact Analysis for Final Rule and Exemptions, April 2016.

A fundamental flaw in the DOL’s 2016 RIA is that DOL presumed that the existence of certain fees (e.g., front-end load mutual funds) or the existence of certain investment products (e.g., variable annuities) per se represented so-called “conflicted advice.” However, the DOL analysis failed to provide definitive evidence that investors were disadvantaged by these fee structures or investment products. Further, by omitting the adverse impacts of the regulation on individuals’ ability to make sound, informed retirement savings decisions (e.g., portfolio choices), DOL ignored the positive effects of financial advice or assistance on individual investors.¹³

1. Benefits of Financial Advice

Financial advisers offer a variety of benefits to investors. Over the past ten years, there have been a number of studies that compare the performance of advised and non-advised investments for investors. One of the early studies, *The Value of Advice*, prepared by The Investment Funds Institute of Canada, confirmed that when controlling for both age and income, the net worth of advised individuals was significantly greater than their non-advised counterparts. In addition to higher net worth, the study found that advised individuals chose the savings products and the right asset mix to optimize fund performance.¹⁴ In addition to results from their survey data, the study reviewed international evidence from Australia and the United States that extended and confirmed their findings.¹⁵

More recently, two important studies by Vanguard Research consider the: (1) value of advice to investors and (2) methodology to quantify the value of advice provided by advisers.¹⁶

Value to Investors – Vanguard points to three components that provide value for investors: (1) portfolio value, (2) financial value, and (3) emotional value. These components provide the basis for the empirical framework, which Vanguard found can add about three percent in net returns for clients. They find that financial advice has the ability to increase returns to investors when using a comprehensive advice service to address all three components. The portfolio value considers the composition of the assets (risk and return features), tax efficiency, fees, and regular rebalancing. Financial value focuses on meeting the investment goals and includes saving behavior, spending behavior, debt, retirement planning, risk management and insurance, as well as bequests or estate planning.

The final component, emotional value, relies on individual responses to value judgments. In other words, it is difficult to measure peace of mind. However, when the investor trusts the adviser, the relationship allows for advice that corresponds to their personal situation. Other surveys support this contention – finding that trust in an adviser provides greater investment

¹⁴ Investment Funds Institute of Canada, *The Value of Advice 2012*. Accessed at: <https://www.ific.ca/Content/Document.aspx?id=7506&LangType-1033>.

¹⁵ The Canadian survey relies on the Ipsos Reid Canadian Financial Monitor study, which is based on a longitudinal database about Canadian households’ financial behaviors and attitudes. This market research survey has been run continuously since 1999 and is widely used by government agencies and financial institutions to monitor trends in Canadian consumers’ financial services behavior.

¹⁶ Pagliaro, Cynthia and Stephan P. Utkus, *Assessing the Value of Advice*, Vanguard Research, September 2019 and Kinniry, Jr., Francis, Colleen M. Jaconnetti, Michael A. DiJoseph, Yan Zibering, and Donald G. Bennyhoff, *Putting a value on your value: Quantifying Vanguard Advisor’s Alpha*, Vanguard Research, February 2019.

confidence.¹⁷ This component, emotional value, can be particularly important in the case of certain demographic groups.

An Employee Benefits Research Institute (EBRI) report based on the 2021 Retirement Confidence Survey explored the financial priorities and experiences of Black and Hispanic Americans. Compared to other groups, Black and Hispanic Americans believe it was more important that financial advisers have similar background or upbringing, similar racial/ethnic backgrounds, the same gender, and/or affiliation with their employer.¹⁸

In order to meet these preferences, the report also identified potential modifications to the financial system that could help improve the retirement prospects of Black and Hispanic Americans, which would contribute to greater wealth and retirement readiness for these groups. One recommendation was to provide diversity in individuals providing financial help in the workplace and beyond so that Black and Hispanic Americans feel they are receiving assistance from someone who understands their circumstances. Another recommendation would be to provide one-on-one personalized advice and advice that recognizes the unique circumstances of Black and Hispanic Americans (such as importance of supporting family and friends to help weigh decisions between helping others and saving for retirement). Finally, the financial system would need to identify problems that cause Black and Hispanic Americans to feel they are not being treated fairly.

Advisor's Value – Vanguard Advisor's Alpha study quantified the various components of financial advice. They estimated the value-added from wealth management best practices could increase net returns by 3 percent.¹⁹

The components of their financial strategy include:

- Suitable asset allocation using broadly diversified funds/ETFs;
- Cost-effective implementation (expense ratios);
- Portfolio rebalancing;
- Behavioral coaching;
- Asset location;
- Spending strategy (withdrawal advice/order); and
- Total return versus income investing.

The Vanguard Advisor's Alpha research is consistent with a previous study by Morningstar Investment Management.²⁰ They recognize the importance of selecting a financial adviser

¹⁷ Sommer, Matt, *Assessing the Value of Financial Advice: More than Dollars and Cents*, Janus Henderson Investors, November 10, 2020. Available online at: <https://www.janushenderson.com/en-us/advisor/article/assessing-value-of-financial-advice-more-than-dollars-cents/>.

¹⁸ Employee Benefits Research Institute, EBRI Fast Facts, *Financial Advice and the Experiences of Black and Hispanic Workers and Retirees*, Fast Facts #402, June 24, 2021.

¹⁹ Kinniry, Jr., et al, *supra* note 16. The study cautions that the increase in net returns is not an annual increase, but rather overall improvement in managed accounts.

²⁰ Blanchett, David and Paul Kaplan, *Alpha, Beta, and Now...Gamma*, Journal of Retirement, August 28, 2013. The authors measure value through a certainty-equivalent utility-adjusted retirement income metric.

(alpha) and proper asset allocation (beta), but also point to the importance of overall financial planning (gamma). They estimate a retiree can expect to generate 22.6 percent more in certainty equivalent income using a Gamma-efficient retirement income strategy (compared to their base case).²¹ This addition has the effect of an annual arithmetic return increase of +1.59 percent, which represents a significant improvement in portfolio efficiency for a retiree.

2. Evidence of the Negative Impact of the 2016 DOL Fiduciary Regulation on Investors

Loss of access to investment options – A 2017 Oxford Economics study based on a survey of investment advisers reported that virtually all investment advisers had reported that they were reducing product choices for their clients in order to comply with the 2016 DOL fiduciary regulation.²² Advisers believed that more product choices and more varied product choices would expose firms to litigation risks under the regulation. Oxford Economics summarized the concern as follows: “An oversimplified description of concern is that more options (especially those with liquidity, price or performance characteristics) invited class action lawsuits and there the solution is to standardize fewer products that are less differentiated and more homogenized. While many firms remain committed to providing as much product choice as possible, most firms could point to specific examples of how choice has been reduced.”²³

One firm interviewed in the Oxford survey indicated that it had reduced the number of mutual fund offerings to its clients from 400 to 30. Another firm eliminated all commissionable alternative investments, which led to a 50-percent reduction in the number of real estate products offered. Smaller emerging funds that offered innovative managers and approaches to investing were at particular risk of being eliminated. There are two aspects to diminished investment options. One is that investors may have limited options or lose access to preferred products. But the other is that it could also affect those brokers with less tenure in the marketplace, as well.²⁴

Variable annuity sales provide evidence of the impact of the 2016 fiduciary regulation on investment products availability. Sales of variable annuities dropped significantly after the 2016 DOL fiduciary regulation went into effect. In 2017, an *InvestmentNews* report noted “the variable annuity industry took a beating in 2016, with several of the top sellers inking losses upwards of 25 percent on the year and some exceeding 40 percent. The DOL’s Fiduciary Rule, issued in its final form last spring, played a big role in the industry’s bruising, observers said.”²⁵

The effect of the 2016 DOL rule on lifetime income and protection against longevity risk was particularly adverse because the rule discouraged transaction-based advice, which is how most savers have access to annuities.

²¹ *Id.* The study assumes a 4 percent initial portfolio withdrawal where the withdrawal amount is subsequently increased by inflation and a 20 percent equity allocation portfolio.

²² Oxford Economics, *Encouraging Market Alternatives to the Fiduciary Rule*, August 7, 2017.

²³ *Id.*, p. 10.

²⁴ More senior brokers/advisors would have an established base of assets under management and are likely to experience smaller disruptions in their business due to changes in investment options.

²⁵ Iacurci, Greg, *InvestmentNews*, *Department of Labor’s fiduciary rule blamed for insurers’ massive hit on variable annuity sales*, March 28, 2017.

Declining sales in variable annuities influence the investment choices in IRAs and other retirement savings. Loss of this investment option could diminish the performance of some IRAs as, in 2015, variable annuities totaled 56 percent of IRA annuity sales, which declined to 46 percent of 2016 IRA annuity sales.²⁶

Oxford Economics identified the following drivers of reduced product choice:

- Advisers noted there are **large, fixed costs required to comply with the regulation** to create and maintain data from product manufacturers and mutual funds;
- The **heightened risks of litigation** (particularly class action lawsuits) led advisers to reduce product offerings in order to provide more homogenized products to reduce these risks so that there is a smaller difference between fees and performance of the various investment offerings; and
- The **complexity of compliance with the regulation stifled product manufacturers** from creating products, especially non-standard products (e.g., non-traded REITs), which limits the range of products created for investors.

In its report, Oxford Economics stated: “It is difficult to overstate how significantly this result – the limitation of product choice – is at fundamental odds with the core mission of the community of independent financial services firms and the needs of retirement investors.”²⁷ The compression of product choices runs the risk of forcing all investors into a narrow selection of products without regard to the unique needs of any individual investor.

Loss of access to financial advice – One of the most significant issues with the 2016 fiduciary regulation relates to the potential for individuals who most need financial advice losing access to it. For many investors, financial advice offers more than just asset allocation or product choices.

Many financial advisers indicated that they had a variety of roles when working with their clients. These roles included such educational roles as informing strategy and options to help clients make appropriate asset-allocation decisions and ensuring that clients have realistic expectations about the amounts they need to accumulate for retirement readiness. Other roles include offering guidance or coaching. This might involve coaching clients to meet their retirement savings goals, or preventing clients from making rash decisions about their retirement savings (e.g., preventing withdrawals that might result in an early withdrawal tax). Other advising guidance involved helping clients protect against unforeseen risks through products like life insurance, annuities, and long-term care insurance.²⁸

In a September 2019 study, Pagliaro and Utkus utilized a three-part framework to assess the value of financial advice; the components of the framework include portfolio outcomes, financial outcomes, and emotional outcomes.²⁹ The study sample consisted of 44,000 self-directed investors who switched to Vanguard’s Personal Adviser Service (PAS), which is a hybrid

²⁶ Montminy, Joseph, InsuranceNetNews Magazine, *Bumpy Ride Predicted for Individual Annuity Sales in 2017*, April 2017.

²⁷ Oxford Economics, *supra*, note 22, p. 9.

²⁸ *Id.*

²⁹ Pagliaro, Cynthia A. and Stephen P. Utkus, *supra* note 16.

advisory service including both algorithmic and human elements. While not quantifying the dollar value of such advice, the authors found that financial advice led to measurable changes in portfolio outcomes, including altered equity risk-taking (66 percent of the study sample), reduced cash holdings (approximately 30 percent of the sample), eliminated home bias by increasing international holdings (more than 90 percent of the sample), and eliminated single-stock risk (for 10 percent of the sample holding significant positions in single stocks).

To measure the value of adviser services for financial outcomes, the authors examined goal success rates relative to the goal of secure retirement income, which was the goal most often identified by investors. As of January 2019, 80 percent of PAS investors with a retirement income goal had an 80 percent or greater probability of achieving their goal; fully 76 percent of such investors had a 90 percent or greater probability of achieving their goal. Finally, the authors attempted to measure the emotional security provided by an advisory relationship. The authors found that the personal relationship with an adviser accounted for half of the value assigned to the advisory relationship by investors.

Complexity of paperwork for investors – The Oxford Economics study identified complex paperwork requirements as a significant issue for both advisers and investors. Under the regulation, full disclosure with respect to a transaction required up to 12 pages of documentation that took 20 minutes to 2 hours to complete. Further, the actual content of the documentation frequently did not vary much from transaction to transaction suggesting that the value of the disclosures was minimal relative to the paperwork burdens on both firms and investors.

Further, the way in which documentation was required to be provided did not reflect the reality of most interactions between advisers and their clients. Many interactions between advisers and clients take place by telephone and are intended to initiate time-sensitive transactions.

Many advisers noted that clients were inundated by disclosures under the 2016 regulation and that the information provided hampered efforts to educate investors on their best retirement options. This issue becomes particularly prevalent with respect to the information required to be disclosed with respect to rollovers, when an adviser was required to review with a client the fee structure of the existing account (or retirement plan) and the new account. This could be particularly problematic when the adviser was not be able to obtain the necessary information from the existing plan to complete the disclosure.

Disclosures, which are extremely important, should be transparent and simple enough for the average investor to understand. Excessive paperwork can overwhelm these investors and will not contribute to educated decision making. Consistent with economic theory, our analysis assumes that increased documentation and compliance costs associated with reinstatement of the regulation generally will be passed through to account owners. Our analysis incorporates these higher costs as a reduction in the net return.

3. Increased Leakage from Retirement Savings

Impact of loss of financial advice on leakage – When personal financial advice is not available to individuals as they consider whether to withdraw or rollover assets from a retirement plan at job separation, they often make choices that could impede their retirement readiness. Loss of financial advice leads to increased withdrawals (cash outs) from retirement plans at job separation. In a 2014 report, we estimated that loss of financial advice from call centers and broker-dealers would lead to increased cash outs of retirement savings of \$20-32 billion annually, representing a 17-22 percent increase in total cash outs.³⁰

A 2021 report of the Joint Committee on Taxation estimated that approximately 22 percent of net contributions made by individuals age 50 or under leaks out of the retirement savings system in a given year and found that the most prominent factor associated with leakage from retirement accounts is job separation.³¹ The Joint Committee staff found other events impacting leakage from retirement savings included negative income shocks, home purchase, divorce, and high medical expenses (e.g., qualifying for a medical expense deduction).

Type of Leakage	Dollar-Value Increase in Deficits	Percentage Increase Relative to Current Retirement Deficit
At least one loan default	\$2,522	7%
At least one hardship withdrawal	\$11,857	36%
At least one cash out	\$17,527	53%
All three sources of leakage at least once	\$24,848	75%

Source: Employee Benefit Research Institute Retirement Income Security Projection Model, Version 3623.

A recent EBRI analysis examined the impact of 401(k) plan leakage on the adequacy of retirement income. Table 2 shows the EBRI estimated increases in retirement income deficits caused by various types of leakage.³² The table shows that individuals with at least one cash out from a 401(k) plan increased their retirement savings deficit by \$17,527 (representing a 53 percent increase in current average retirement deficit).

EBRI found that cash outs had the most negative impact on retirement savings, more than doubling the estimated number of people projected to have inadequate savings for retirement.

Access to financial advice can reduce leakage from retirement savings as financial advisers can help individuals make appropriate decisions with respect to their savings by emphasizing the importance of a long-term retirement savings plan, helping individuals determine the appropriate

³⁰ Quantria Strategies, LLC, *Access to Call Centers and Broker-Dealers and Their Effects on Retirement Savings*, April 9, 2014.

³¹ Joint Committee on Taxation, *Estimating Leakage From Retirement Savings Accounts*, JCX-20-21, April 26, 2021.

³² Employee Benefits Research Institute, *Quantifying the Impact of 401(k) Plan “Leakage” on Retirement Deficits*, Fast Facts #363, September 17, 2020.

balance between current cash needs and long-term savings goals, and facilitating the transfer of assets from one retirement plan to another plan or a rollover IRA.

Some might argue that individuals are better off leaving their retirement assets in an employer's plan even if they are terminating employment. While a reduction in rollover activity does not per se produce a negative result, there are circumstances in which an individual might be better served by rolling over assets to an IRA. For example, access to an adviser generally is not available with respect to assets in a plan, so that rolling over can provide the many advantages of an adviser discussed above. Also, if an individual tends to be highly mobile both in terms of employment and location, a rollover IRA that holds assets from multiple prior employer plans might be preferable to trying to keep track of various types of retirement accounts.

Effects on small accounts – Under current law, when an individual separates from employment with an employer, the individual's accumulated retirement savings can be automatically rolled over from the employer's retirement savings plan to a rollover IRA without the individual's consent if the balance in the account is \$5,000 or less (amounts of \$1,000 or less can be distributed directly to the terminating employee).³³ These "mandatory" cash outs are required to be invested in assets that minimize risk and seek to maintain a stable dollar value (e.g., money market funds, savings accounts, and certificates of deposits (CDs)). This mandatory cash-out rule contributes to the fact that a significant percentage of IRAs have small account balances.

³³ Internal Revenue Code of 1986, Section 401(a)(31).

Table 3.—Distribution of IRA Ownership by Account Balance, 2015 to 2017			
Account Balance	2015	2016	2017
	Percentage of Accounts Below Threshold		
<\$5,000	23.5	24.4	19.6
\$5,000-\$9,999	33.5	34.3	29.2
\$10,000-\$24,999	49.5	50.1	45.4
\$25,000-\$49,999	63.1	63.4	59.5
\$50,000-\$99,999	76.5	76.6	73.5
\$100,000-\$149,999	83.2	83.4	81.0
\$150,000-\$249,999	89.9	90.1	88.4
>\$250,000	99.9	100.0	100.0
Account Balance	Percentage of Accounts		
<\$5,000	23.5	24.4	19.6
\$5,000-\$9,999	10.0	9.9	9.6
\$10,000-\$24,999	16.0	15.8	16.2
\$25,000-\$49,999	13.6	13.3	14.1
\$50,000-\$99,999	13.4	13.2	14.0
\$100,000-\$149,000	6.7	6.8	7.5
\$150,000-\$249,999	6.7	6.7	7.4
>\$250,000	10.0	9.9	11.6
Account Balance	Percentage of Individuals		
<\$5,000	23.6	23.7	20.3
\$5,000-\$9,999	8.6	8.6	8.6
\$10,000-\$24,999	14.5	14.3	14.3
\$25,000-\$49,999	12.9	12.5	13.0
\$50,000-\$99,999	13.5	13.2	13.4
\$100,000-\$149,000	7.2	7.1	7.5
\$150,000-\$249,999	7.6	7.5	7.9
>\$250,000	13.2	13.1	14.7
Source: Copeland, EBRI IRA Database: IRA Balances, Contributions, Rollovers, Withdrawals, and Asset Allocation, 2016 Update			

IRAs represent 28 percent of estimated total U.S. retirement plan assets.³⁴ In 2017, 19.6 percent of IRA accounts had an account balance of less than \$5,000 and 98.4 percent of individuals with an account balance of less than \$5,000 had only one IRA account (Refer to Table 3).³⁵ This represented a decline from 2016 when 24.4 percent of accounts and 23.7 of individuals had IRA account balances of less than \$5,000.³⁶ While the data do not permit the attribution of this decline to a specific factor, the timing coincides with applicability of the 2016 DOL fiduciary regulation. As noted below, advisers responded to the DOL regulation by reducing their advisory services for small accounts.

³⁴ Copeland, *EBRI IRA Database: IRA Balances, Contributions, Rollovers, Withdrawals, and Asset Allocation, 2017 Update*, Issue Brief No. 513, September 17, 2020.

³⁵ *Id.*

³⁶ Copeland, Craig, *Employee Benefits Research Institute Issue Brief, EBRI IRA Database: IRA Balances, Contributions, Rollovers, Withdrawals, and Asset Allocations, 2016 Update*, Issue Brief No. 456, August 13, 2018.

Table 3 shows that, in 2017, 45.4 percent of IRA accounts had balances of less than \$25,000. By comparison, in 2015 and 2016, 50.1 and 49.5 percent of IRA accounts respectively had balances less than \$25,000. The change in the percentage of small accounts from 2016 to 2017 represented nearly a 10 percent drop in the number of small IRA accounts, which also may be attributable to reduced access to person-to-person advisory services under the 2016 DOL regulation.

The August 2017 Oxford Economics study found, while all firms interviewed indicated a commitment to small retirement accounts, many suggested that accounts below certain asset levels (\$25,000 to \$70,000 for the firms interviewed) would be directed to web-based products that do not require a financial advisor.³⁷ The study also noted that small independent broker-dealers would have an even higher break-even point due to their higher relative overhead costs.

As individuals with small accounts lose access to investment advice, cash outs from retirement plans will increase, leading to reduced retirement savings. In addition, many small IRAs that do exist will likely be invested in, or remain invested in, lower-yield assets. A 2020 Employee Benefit Research Institute (EBRI) study found that a significant percentage of traditional rollover IRAs with balances of \$1,000-\$5,000 were 100 percent allocated to money assets.³⁸ In addition, this pattern of allocation persists over a long period of time in many cases (Refer to Table 4) and can lead to returns that do not outpace fees in a low interest rate environment.

Owner Age	Established 7-11 Years Prior	Established in Same Year
25-29	76.3%	85.7%
30-34	78.8%	87.6%
35-39	74.9%	89.0%

Source: EBRI IRA Database (account as of 2016).

EBRI notes that the persistence of these investments has important implications for holders of small IRAs because it cannot be assumed that the individual owners will take action with the accounts without some other impetus.

While the above referenced studies did not quantify the effects on retirement readiness of leakage and conservative investment choices, we incorporate these effects in our analysis. Refer to Appendix B for examples of the effects on IRA accumulations for leakage from IRAs and conservative investment choices.

³⁷ Oxford Economics, *supra* note 22.

³⁸ Employee Benefit Research Institute, *Losing Ground Safely: Small IRAs' Large Stake in Money*, Fast Facts #364, October 1, 2020.

D. Key Concerns with the 2016 DOL Regulatory Impact Analysis

A 2015 White House Council of Economic Advisers (CEA) study examined “conflicted advice or advice that was not in the best interest of an advisee.”³⁹ The CEA assumed that any advice with certain features (certain fee structures in particular) represented conflicted advice. This study largely provided the impetus for the 2016 DOL Regulatory Impact Analysis (RIA), which attempted to quantify the costs and benefits of eliminating conflicted advice through regulation.⁴⁰

A number of studies have since called into question the assumptions, analysis, and conclusions underlying the 2016 DOL RIA. One study, authored by Craig M. Lewis, a former Chief Economist at the Securities and Exchange Commission and Professor of Finance at Vanderbilt University, noted that “the Fiduciary Rule is informed by an economic analysis of quantified costs and benefits that is simultaneously misleading and incorrect.”⁴¹ Lewis summarized his findings as follows:

- (1) DOL failed to consider feasible alternatives or dismissed reasonable alternatives without providing adequate justification;
- (2) DOL’s regulatory analysis failed to demonstrate the extent to which brokers actually provided advice deviating from a client’s best interests, resulting in claims of a significant market failure based on anecdotal or relatively indirect evidence;
- (3) DOL’s regulatory analysis contained a calculation error that reverts DOL’s estimated net BENEFIT of \$16.4 billion to a net COST of \$16.1 billion,⁴² and
- (4) So-called conflicted funds underperform by approximately 15 basis points, a statistically insignificant amount that is far below what DOL estimated.

The DOL attempted to *quantify the benefits* of the regulation without *quantitatively measuring the problem* or assessing the extent to which research that provided either anecdotal evidence or evidence confined to small sample sizes could be extrapolated to all affected financial advisers and entities providing financial advice. Instead, DOL assumed that any fee structure taking a particular form represented conflicted advice per se without systematically measuring the

³⁹ U.S. Executive Office of the President, Council of Economic Advisors, *The Effects of Conflicted Advice on Retirement Savings*, February 2015. The CEA analysis provided largely anecdotal evidence of problems, rather than finding evidence of wide-spread industry practices that amounted to conflicted advice.

⁴⁰ U.S. Department of Labor, *Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, *supra* note 12. Appendix A provides more information on the impact of the 2016 DOL fiduciary regulation on financial service providers by type of business.

⁴¹ Lewis, Craig M. *The Flawed Cost-Benefit Analysis Underlying the Department of Labor’s Fiduciary Rule*, August 2017, p.2. The Lewis critique pointed to the methodology used by the Securities and Exchange Commission, which requires detailed analysis of the problem, before evaluating the benefits of the regulatory actions.

⁴² In an Appendix (page 11), Lewis demonstrates that the DOL’s assumed excess load of 2.3 percent has a probability of occurring of 0.011 percent (equivalent to an event that occurs once every 9,090 trials). Lewis notes that the error in the DOL analysis relates to an interpretation of “excess” load that was used to support DOL’s estimates of the benefits of the 2016 regulation. The error occurs because DOL made two inappropriate assumptions: (1) that excess load is equal to average front-end load and (2) excess load is positive. Lewis points out that, by definition, average excess load is zero, implying that, for every fund with a positive excess load, another fund will have a negative excess load. Because these amounts offset one another, the benefits associated with excess loads should be close to zero.

empirical baseline to support this assertion.⁴³ Without a baseline estimate, the DOL contended (in the 2016 RIA) that there was consistent evidence of substantial market failure for retirement advice.⁴⁴

The DOL RIA estimated that IRA holders receiving conflicted investment advice could expect their investments to underperform by an average of 50 to 100 basis points per year over the next 20 years. According to the DOL RIA, “The underperformance associated with conflicts of interest – in the mutual funds segment alone – could cost IRA investors between \$95 billion and \$189 billion in investments over the next 10 years and between \$202 billion and \$404 billion over the next 20 years.”⁴⁵ However, the DOL never presented documentary evidence of this market failure.⁴⁶

DOL’s 2016 RIA vastly understated the actual compliance costs of the 2016 rule, which get passed on to savers. An analysis found that the actual compliance costs were nearly three times what DOL had estimated in 2016. While the DOL acknowledged that the 2016 fiduciary regulation would impose increased costs on financial advisers, they failed to recognize how those increased costs would affect individual savers.

The DOL underestimated the costs of the regulation for advisers and other service providers (elimination of certain fee structures and compliance with disclosure requirement) and overstated the benefits of the regulation for investors. In 2016, the DOL estimated that the compliance costs associated with the fiduciary regulation would total \$16.5 billion over the first ten years (DOL estimated a range of \$10-\$31.5 billion for potential costs).⁴⁷ The DOL noted that the cost estimates relied on what they referred to as “unverifiable cost estimates” submitted by financial services industry trade groups due to the lack of data from other sources that would present a more neutral perspective. Following implementation of the 2016 regulation, the financial services industry developed

information on the “actual effects” of implementation of the regulation on affected industry representatives.

⁴³ Oxford Economics, *supra* note 22. It should be noted that the DOL used data from an earlier Oxford Economics report to inform their 2016 costs estimates for the regulation, but significantly discounted the Oxford estimates. In August 2017, Oxford Economics prepared a report for the Financial Services Institute based on interviews and surveys of industry representatives reflecting their actual experiences in implementing the DOL fiduciary rule. Notably, the Oxford report found that the DOL’s cost-benefit analysis for the 2016 regulation failed to take into account (1) the potential reduction in product choice as a result of the regulation and (2) the value of retirement planning services for asset owners, while (3) generally failing to link the purported benefits of the regulation to any specific provisions.

⁴⁴ Lewis, Craig M, *supra* note 41.

⁴⁵ U.S. Department of Labor, *Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, *supra* note 12.

⁴⁶ Industry comments on the 2016 DOL fiduciary regulation argued that the DOL RIA consistently overestimated the extent to which investor returns were reduced by so-called “conflicted advice” and dismissed arguments of the potential harm to investors (increased fees and reduced services) that would occur as a result of the regulation. The fundamental problem was that the DOL (1) did not establish a baseline for “conflicted advice” that occurred prior to the regulation, relying instead on small studies or anecdotal evidence and then extrapolating those results to the entire advice industry and (2) failed to consider how the regulation would actually affect individual investors.

⁴⁷ U.S. Department of Labor, *Retirement Investment Advice, Regulatory Impact Analysis for Final Rule and Exemptions*, *supra* note 12.

Oxford Economics found that the actual costs of compliance with the DOL fiduciary regulation for broker-dealers were *nearly three times what the DOL had estimated* in 2016.⁴⁸ Further, Oxford Economics extrapolated these costs to include all affected industry participants, which suggested that the total 10-year costs for implementing the DOL regulation ranged from \$39-47 billion and exceeded the DOL estimates (\$33-36 billion) of the benefits of the regulation. The report also noted that the DOL benefits estimates were based on a small portion of total retirement assets (front-end load domestic equity mutual funds held in IRAs) and ignored investments in foreign equity funds which, if included in the DOL analysis, would have reduced the purported “benefits” of the regulation to one-tenth the DOL’s estimates.

However, the DOL omitted the value of human advisers. As discussed in a previous section, consumers value and appreciate human advisers as well as the perspective and expertise they provide.

Related to this omission is that the DOL RIA suggested that technology (e.g., robo-advisers) was a pure substitute for personalized financial advice provided by an advisor.⁴⁹ The DOL essentially presumed that individuals who lose access to financial advice as a result of the fiduciary regulation could be adequately served by robo-advisers and other non-personalized forms of financial assistance, rather than acknowledging the benefits of financial advisers to assist investors in investing the appropriate amounts for retirement savings and to identify the appropriate level of risk for individual investors.

The 2016 DOL RIA raised concerns that investors may be unable to understand the fees or costs associated with alternative investments and therefore, will incur costs that dampen their return.⁵⁰ The downward trend of fees market-wide for the past twenty years suggests that this concern overstates the problem.

⁴⁸ Oxford Economics, *supra* note 22.

⁴⁹ Refer to Litan, Robert E., and Hal Singer, *OP-ED Obama’s big idea for small savers: ‘Robo’ financial advice*, July 22, 2015. Secretary of Labor Thomas Perez insists that small savers would be better off working with “robo advisers”—computer-programmed advice delivered by email or text message—than with human brokers who get paid commissions by investment firms, because this renders their human advice “conflicted.”

⁵⁰ *Id.*

1. Empirical Evidence of Changes Affecting Investors

The Oxford Economics study estimates take into account eight “drivers” of effects of the regulation:

- (1) Decline in commissions and 12b-1 income,
- (2) Pressure on 12b-1 fees,
- (3) Brokers shift to fee-based models (RIA and dual RIA),
- (4) Decline in expense ratios,
- (5) Competition in fee-based models increases,
- (6) Slowdown in IRA rollovers,
- (7) Asset flows from mutual funds to ETFs, and
- (8) Industry shifts away from servicing small-balance accounts.

Beginning in 2016, the industry responded in anticipation of the effective date of the DOL fiduciary regulation. We can observe empirical evidence of most of these drivers of the industry response.⁵¹

Year	Percent
2000	46
2005	59
2010	68
2011	72
2012	73
2013	74
2014	78
2015	79
2016	82
2017	86
2018	88
2019	86
2020	88

Sources: Investment Company Institute, Lipper, and Morningstar.

The financial services industry has evolved since 2016 and the SEC’s adoption of Regulation Best Interest has meaningfully raised the bar for financial professionals underscoring that any possible benefit from reinstatement of the 2016 DOL regulation would be far less than DOL anticipated prior to 2016 and far less than the likely costs to investors and the industry.

Decline in commissions and 12b-1 income and pressure on 12b-1 Fees (#1 and #2) – Table 5 shows the effect of the transition to no-load funds on mutual fund gross sales percentages. In 2000, no-load mutual funds represented 46 percent of gross sales. By 2020, this percentage had increased to 88 percent.

The growth in sales of no-load mutual funds did not occur in a vacuum, but also reflects the increased competitiveness in the industry and investor demand for lower fees, including for load funds. As Table 5 shows, the growth in sales of no-load mutual funds was already occurring at a steady pace for many years prior to the 2016 fiduciary rule, which had little to no effect on this

trend. This is important because the DOL regulatory analysis suggested that broker-dealers encouraged investors to investments in load funds, which DOL argued per se represents conflicted advice to investors.

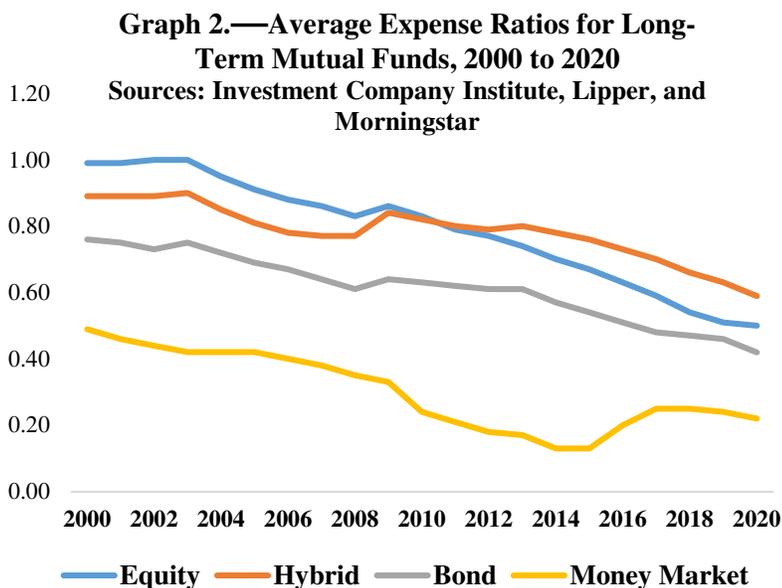
The Investment Company Institute (ICI) looked at potential mutual fund underperformance from 2008-2016 by comparing front-end load funds to retail no-load funds. This comparison is important because implicit in the DOL rule is the assumption that all funds paying a load fee to brokers have potential for conflicted advice and that all no-load funds are conflict free.⁵² Using net return plus 12b-1 fees to measure performance, ICI found the difference in returns only 0.10

⁵¹ Refer to Appendix C for a detailed analysis of the declines in fees.

⁵² Investment Company Institute, *Letter to U.S. Department of Labor, Office of Regulations and Interpretations, Employee Benefit Security Administration*, March 17, 2017.

to 0.11 percent, which is significantly smaller than the DOL’s estimated underperformance of 0.50 to 1.00 percent per year.

Shift to, and competition in, fee-based models increases and expense ratios decline (#3, #4, and #5) – The growth in no-load mutual funds has also driven down average expense ratios.



Since 2000, the average expense ratios for mutual funds have declined significantly, particularly for equity, hybrid, and bond funds, as shown in Graph 2. A 2019 Morningstar report identified several factors driving fees downward: (1) growth in investor awareness of the importance of minimizing investment costs, (2) intensifying competition among fund managers drives fees down to increase market share, and (3) changes in the economics of advice.⁵³ Morningstar also noted that the move to fee-based models of charging for financial advice represents a key driver in the shift

to lower-cost funds, share classes, and fund types (e.g., ETFs), the savings of which may benefit investors with larger account balances but may be entirely negated should lower-balance savers be required to pay advisory fees.

Graph 2 shows the trend in average expense ratios by type of mutual fund. In all categories of mutual funds, the expense ratios demonstrate significant declines over the period—declines that once again were already steadily occurring for years before DOL’s 2016 regulation, and have continued through 2020 without the 2016 regulation in effect.

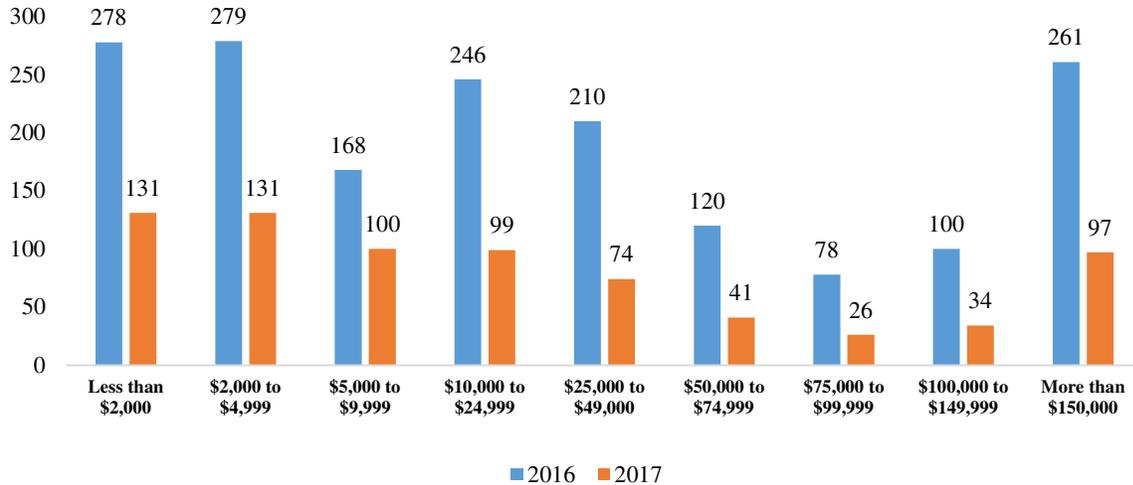
Slowdown in IRA rollovers (#6) – A recent study by Copeland considers the significant decline in rollovers from 1.74 million accounts in 2016 to 734,000 accounts in 2017.⁵⁴ See Graph 3 for the distribution of rollovers in 2016 and 2017 by rollover amount. Rollovers were down in every category from 2016 to 2017, with significant declines in smaller balance accounts. The EBRI IRA database represents a significant subset of the universe of IRA investors and it provides insight into investor behavior. The advantage of the EBRI study is that from year-to-year, the population remains consistent. This provides the ability to observe behavioral effects that are not readily apparent in other databases.

⁵³ Morningstar, *2019 U.S. Fund Fee Study, Marking nearly two decades of falling fees*, June 2020.

⁵⁴ Copeland, Craig, *EBRI IRA Database, 2016 Update*, *supra* note 36. These 1.74 million accounts represent a subset of the universe of IRA plans. The EBRI IRA data reflect those plans that participate in their study. While representing a significant share of the market, they do not reflect the universe, but provide an important picture of the effects. Contributions to IRAs also declined during this time period, from 2.288 million accounts in 2016 to 1.277 accounts in 2017.

Graph 3.— Distribution of Rollovers to IRAs by Amount, 2016 and 2017

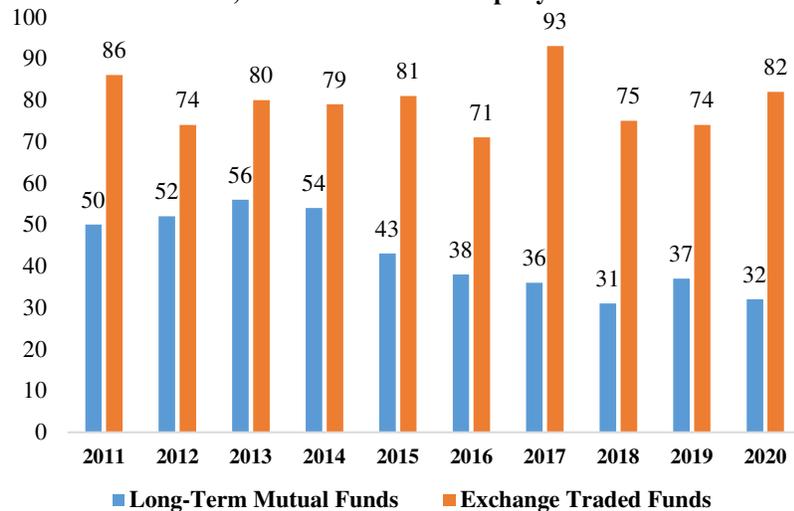
Source: Copeland, *EBRI IRA Database: IRA Balances, Contributions, Rollovers, Withdrawals, and Asset Allocation, 2017* [Dollar Amounts in thousands]



Asset flows from mutual funds to ETFs (#7) –The increased availability of other investment products has led to changes in how investors are allocating their portfolios. The percentage of mutual fund companies retaining assets and attracting net new investments generally has been lower in recent years. In 2020, 32 percent of fund complexes saw positive flows to their long-term mutual funds, and 82 percent of ETF sponsors had positive net share issuance. ETFs can offer lower operating costs and lower expense ratios to investors compared to actively managed mutual funds.

Graph 4.—Net Flows to Long-Term Mutual Funds and Net Share Issuance of ETFs, Percentage of Investment Fund Complexes

Source: ICI, 2021 Investment Company Fact Book



Small Accounts (#8) – Numerous surveys and studies confirmed the adverse impact of the 2016 DOL fiduciary regulation on small retirement accounts. A 2017 survey of members of the American Bankers Association (ABA) found that 63 percent of surveyed banks reported that the regulation had the most impact on customer accounts with \$25,000 or less of assets.⁵⁵

⁵⁵ American Bankers Association, *ABA Survey Department of Labor Fiduciary Rule*, contained in a letter to the Department of Labor, Office of Exemption Determinations, Employee Benefit Security Administration, on August

A 2017 review conducted by the Chamber of Commerce found the following evidence of the adverse impacts of the DOL regulation on small accounts:

- (1) 64 percent of financial professionals stated that the regulation would have a large negative impact on their mass-market clients (i.e., investors with less than \$300,000 of investable assets) and they would stop working with 25 percent of these clients;
- (2) A.T. Kearney estimated that financial services firms would stop serving most of the \$400 billion in low-balance retirement accounts by 2020;
- (3) 70 percent of respondents to a survey of the Insured Retirement Institute stated that they had or were considering exiting smaller markets with lower balance IRAs and small employer plans and half already had or were considering raising IRA account minimum balances;
- (4) A survey by the National Association of Insurance and Financial Advisors (NAIFA) found that 75 percent had seen or expected to see increases in minimum account balances for their clients;
- (5) A report by *InvestmentNews* found that 35 percent of advisers would move away from accounts with less than \$25,000 in assets and nearly 25 percent would increase their account minimum balances;
- (6) One large mutual fund provider reported that the number of orphaned accounts (with average balances of \$21,000) almost doubled in the first three months of 2017 and projected that 16 percent of accounts would be orphaned because of the DOL fiduciary rule;
- (7) Americans for Tax Reform estimated that the regulation could result in 7 million IRA holders losing access to investment advice and reduce the number of IRAs opened each year by 300,000-400,000 accounts;
- (8) According to a report by CoreData, 71 percent of U.S. advisers planned to disengage from mass market clients and said they would no longer serve 25 percent of their current clients.⁵⁶

The national accounting firm Deloitte studied 21 financial institutions that represented 43 percent of U.S. financial advisers and 27 percent of the retirement savings assets in the market. The study found that as of the DOL rule's first applicability date on June 9th, 2017, 53 percent of study participants reported limiting or eliminating access to brokerage advice for retirement accounts, which the firms estimated as impacting 10.2 million accounts and \$900 billion AUM.⁵⁷ Further, 93 percent of study participants made changes to the products available to retirement investors, including limiting or eliminating asset classes offered and certain share classes or product structures.

7, 2017. The Investment Company Institute report on retirement assets for the first quarter of 2021 reported that \$644 billion of IRA assets (5 percent of the total) are held by banks and thrift deposits. Refer to Investment Company Institute, *Retirement Assets Total \$35.4 Trillion in First Quarter 2021*, June 16, 2021.

⁵⁶ U.S. Chamber of Commerce, *The Data Is In: The Fiduciary Rule Will Harm Small Retirement Savers*, Spring 2017.

⁵⁷ Deloitte, *The DOL Fiduciary Rule: A study on how financial institutions have responded and the resulting impacts on retirement investors*, August 9, 2017.

DOL's argument that significant fund underperformance results from front-end load fees represents the primary justification for the 2016 regulation. The research conducted since 2016, however, clearly shows that (1) the DOL did not account for the long-term trends in mutual fund fees and the shifting of assets to ETFs and (2) the 2016 regulation disadvantaged individuals with small accounts by increasing leakage from retirement savings and eliminating financial advice for the individuals who most need it.

2. Loss of Access to Retirement Products

A separate but related effect of the 2016 DOL fiduciary regulation involved significant compression of available investment products to retirement investors. The Chamber of Commerce report reported that the distribution firms and financial professionals significantly reduced their use of commission-based products like variable annuities, leading to a 21.6 percent decline in the sales of variable annuities from 2015 to 2016. This is important because variable annuities represented 56 percent of IRA annuity sales in 2015 and declined to 46 percent of such sales in 2016.

Similarly, more than 80 percent of respondents to a 2017 Insured Retirement Institute (IRI) survey considered introducing fee-based variable annuities, which would be appropriate in some cases, but would not be appropriate for all retirement savings, including those for whom a traditional variable annuity would be more cost effective. In addition, some firms stopped offering mutual funds in IRA brokerage accounts and some stopped offering IRA brokerage accounts completely. In many cases, firms reduced available investments to mitigate potential litigation risks.

Text Box 1.--Experience of the 2016 DOL Fiduciary Regulation

A key element of the 2016 DOL fiduciary regulation required that any differences in compensation to brokers across products be based on “neutral factors.” The regulation did not provide guidance on how to translate the concept of neutral factors into dollars.¹ The neutral factors rule thus made it very difficult to maintain brokerage accounts in their traditional form. As a result, to mitigate risk of litigation, companies made specific changes to their IRA brokerage accounts to avoid the effect of neutral factors rule.

First, based on the rule in the regulation for grandfathered accounts, some companies froze all their IRA brokerage accounts as of a specific date. This process was painful both for clients and brokers as there were strict limits on what could be done with the grandfathered accounts – i.e., no new buys and the investments in the account at the time it was frozen generally could not be changed. However, companies spent significant time, money, and efforts to preserve these accounts.

Second, some companies created new brokerage accounts that required assets in each account to be limited to certain types of investments, such as equities and bonds in one account and mutual funds in another, to avoid the application of the neutral factors test. As a result of the regulation, clients often ended up with multiple brokerage accounts comprised of different types of investments.

Another change implemented to comply with the 2016 fiduciary regulation was the adoption of a minimum account limit. One reason for adopting an account limit was that it would be very difficult to satisfy diversification requirements with a low value account balance. This limit caused significant problems, as many small-account balance investors represented current clients who also had larger accounts (e.g., a teacher rolling over a small 403(b) account) and relatives (such as children or grandchildren) just starting their retirement savings. Thus, the account threshold inadvertently denied services to existing clients.

A second problem was that SEPs, SIMPLE plans, and IRAs might have a number of accounts with money going in and out, but never reaching the dollar threshold.

Companies generally abandoned the above types of changes after the 2016 regulation was vacated because they represented changes designed specifically to avoid the significant pitfalls of the 2016 regulation. These changes did not necessarily achieve the goals of the regulation and, in fact, imposed difficult restrictions on clients.

In contrast, certain actions taken by companies persisted after the 2016 regulation was vacated.² Examples include the adoption of new rollover tools to ensure rollovers were in the client’s best interests, limits on share classes, compensation levelizing changes for financial advisors, and the adoption of a new share class for annuities. These changes were viewed as ***conflict mitigation changes that were also consistent with the SEC’s Regulation Best Interest***, which applied changes across the industry to both taxable and tax-exempt accounts.

Overall, changes made in response to the 2016 fiduciary rule that ***helped retirement savers were in many cases retained***, while those that ***hurt the very people that the regulation intended to help were eliminated***.

¹ For example, justifying different compensation for annuities versus mutual funds was intuitively obvious, but nearly impossible to quantify.

² Some of the changes made in response to the 2016 fiduciary regulation represented changes companies had been considering, so the regulation advanced, rather than prompted, the changes.

II. ESTIMATES OF THE EFFECTS OF A REINSTATEMENT OF THE 2016 FIDUCIARY REGULATION ON ACCUMULATED RETIREMENT SAVINGS AND RETIREMENT READINESS

A. Process for Estimating the Potential Reinstatement of the 2016 Fiduciary Regulation

One of the criticisms of the DOL regulatory impact analysis is that DOL used an overly broad brush to paint a picture of conflicted advice and overstated the potential benefits of the regulation. This analysis, in an effort to avoid the same misstep, focuses on the subset of investors that are likely to experience the greatest effects of reinstatement of the DOL regulation. Further, our estimates incorporate the many market changes that have occurred since the introduction of DOL's regulation in 2016.⁵⁸

Estimating the impact of reinstatement of the 2016 fiduciary regulation depends on accurately quantifying the following three factors: (1) current baseline or state of the industry; (2) potential benefits of reinstatement; and (3) potential costs to investors of reinstatement. In order to quantify these factors, we have considered the investors most likely to feel the impact of these regulatory changes (positive or negative). As stated, certain investors – older, higher income, high net worth – are unlikely to feel material disruptions (positive or negative) in access to advice or investment products. The younger, lower income, or lower-net worth investors are most likely to experience disruptions in access or products from a reinstatement of the rule. The importance of this cannot be overstated. Retirement savings play an important role in overall net worth for most households. An erosion of this retirement savings means that investors are less likely to be prepared for retirement.⁵⁹

Based on a rigorous analysis and evidence from actual experience of the 2016 DOL regulation, our conservative estimate is that reinstatement of the 2016 rule would reduce the accumulated retirement savings of 2.7 million individuals with incomes below \$100,000 by approximately \$140 billion over 10 years.

Our analysis thus focuses on the subset of investors believed to experience the greatest effects of reinstating the DOL regulation. Therefore, the calculation of the subset focuses on these lower balance, lower income, and lower net worth investors and evaluates the effect given the industry changes reflected in the current marketplace. For this subset of investors, we estimate their projected growth in IRA savings from approximately \$900 billion to nearly \$1.75 trillion in year 10, based on current trends in investments and financial advice and assistance, without the reintroduction of the 2016 DOL fiduciary regulation.

⁵⁸ It is difficult to project how the DOL might update their estimates given the many market changes (fees, product offerings) and whether they would acknowledge the role the human advisor plays in shaping retirement readiness plans.

⁵⁹ For purposes of this analysis, part of retirement readiness means understanding all the income sources available in retirement. If retirement income, through gradual withdrawals, are insufficient to cover living expenses, retirees

Our estimates also consider factors that (1) have occurred since 2016 and (2) the DOL did not consider in its estimates of the effects of the 2016 regulation. DOL's predictions of the effects of the regulation on individuals did not materialize, which provides a valuable window into the effects of reinstating the rule. Further, the changes triggered by the 2016 rule negatively impacted the availability of financial advice for retirement savers, so that its reinstatement would create long-term risks for retirement savings, retirement readiness, and the wealth gap in the United States.

The market has changed considerably since the 2016 fiduciary regulation was finalized, both in the types of fees applied to funds (the number of flat-fee products have increased) and the overall decline in asset-weighted fees (continuing the long-term downward trend in fees). Therefore, our baseline incorporates the empirical evidence of IRA asset investments and the corresponding fee structures currently found in the industry. In addition, as noted previously, the pandemic caused many Americans to access retirement savings to cover pre-retirement expenses. Although necessary in many cases, this increased leakage of retirement savings nonetheless has detrimental effects on retirement readiness.

Our analysis recognizes and attempts to model the characteristics of the investors and industry that would be most impacted by the reinstatement – not a “one-size-fits all” approach. This means identifying

a subset of investors and their corresponding financial assets. These effects will vary with the institution where those assets are held and the types of investment mix currently held by these investors.

1. Current Baseline for Reinstatement

This study considers the effects of a reinstatement of the 2016 fiduciary rule on IRAs; a review of the adverse effects on qualified retirement plans is beyond the scope of this paper.

The starting point for constructing the baseline for purposes of estimating the effects of the DOL fiduciary rule begins with the more than \$11 trillion in IRA balances according to the IRS Statistics of Income (refer to Table 6).⁶⁰ As shown below, a considerable component of IRA investments includes annuities.⁶¹ This figure is comprised largely of traditional IRAs, with approximately 85 percent of IRA assets in traditional IRAs. Assets held in annuities totaled \$3.2 trillion at the end of 2020, of which a significant portion are likely invested in IRAs. The Investment Company Institute (ICI) estimates that assets in IRAs totaled \$13.2 trillion at the end of the second quarter of 2021.⁶²

may need to find additional work. Further, careful financial planning means that retirees may be able to develop a withdrawal strategy to cover living expenses and health or other unexpected expenses.

⁶⁰ As discussed below, we further refine our analysis to consider the subset of individuals most likely to be adversely affected by a reinstatement of the regulation.

⁶¹ Consistent with the 2016 DOL RIA estimated losses, this analysis begins with traditional, Roth, SEP, and Simple IRAs invested in mutual funds, annuities, and other assets. In addition, we consider rollovers to IRAs, as the explosive growth in IRA assets results from the large sums rolled over from qualified plans and the potential direct effect of the fiduciary regulation on these qualified plans and plan rollovers to IRAs.

⁶² Investment Company Institute, *Retirement Assets Total \$37.2 Trillion in Second Quarter 2021*, September 29, 2021.

Type of IRA	Tax Year					
	2010*	2015*	2016*	2017*	2018*	2020†
Traditional	\$4,339.6	\$6,386.7	\$6,824.0	\$8,017.5	\$7,744.6	\$9,325.5
SEP	265.5	364.3	382.4	453.3	422.7	509.0
SIMPLE	69.5	101.2	111.9	126.6	122.0	147.0
Roth	354.9	625.1	697.1	842.0	845.9	1,018.5
Total	\$5,029.5	\$7,477.3	\$8,015.4	\$9,439.4	\$9,135.2	\$11,000.0
Type of Individual Annuity**	2010	2015	2016	2017	2018	2020
Variable	1,561.0	1,921.7	1,983.3	2,149.9	1,986.6	2,377.0
Fixed	474.0	447.8	453.3	453.7	448.7	466.5
Indexed	185.0	334.2	374.3	407.8	468.2	517.0
Total	\$2,220.0	\$2,703.7	\$2,810.9	\$3,011.4	\$2,903.5	\$3,164.8

*Source: IRS Statistics of Income, Table 1. Taxpayers with Individual Retirement Arrangement (IRA) Plans, by Type of Plan, Selected Tax Years.
†Estimates based on ICI statistics for IRAs (refer to *Ten Important Facts About IRAs*, ICI Research, May 2020).
**Insurance Information Institute, available online: <https://www.iii.org/fact-statistic/facts-statistics-annuities>

Rollovers to IRAs – Table 7 details the aggregate rollovers to IRAs for various tax years. The estimated rollovers for 2020 are \$623 billion. Rollovers are an important characteristic of the baseline, because they propel the growth rate in IRAs.⁶³

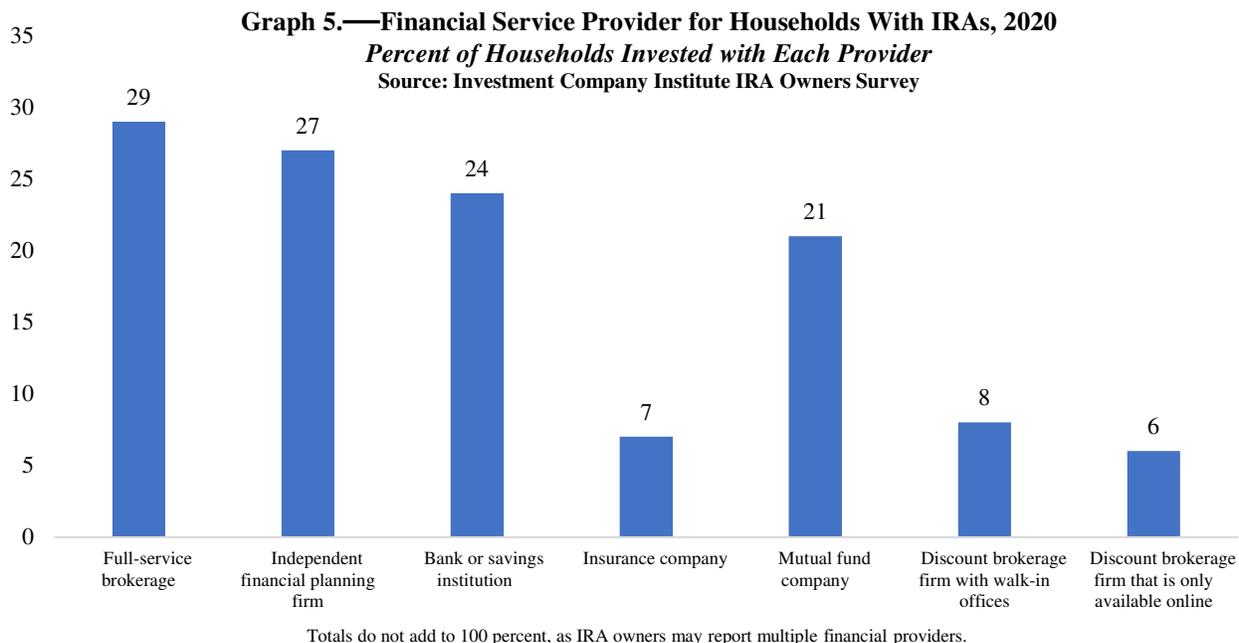
In addition, rollovers are an important segment to study, because the 2016 DOL regulation limited the ability of financial advisers to provide rollover guidance (e.g., guidance on investment composition, as well as guidance regarding when or how much to rollover).

Tax Year	Rollovers to IRAs
2015	\$472,582
2016	\$444,711
2017	\$477,989
2018	\$533,835
2020	\$623,000

Source: IRS, Statistics of Income, Table 2. Taxpayers with Individual Retirement Arrangement (IRA) Plans, by Size of Adjusted Gross Income, Various Tax Years. Refer to LIMRA, available online: [Secure Retirement Institute Predicts Increase in Money Moving from DC Plans to IRAs \(limra.com\)](https://www.limra.com)

⁶³ The aggregate trend reflects an increase in the numbers of rollovers, not necessarily the dollars rolled over to the IRA. In other words, aggregate rollover activity is increasing, possibly indicating a desire for greater individual control over retirement assets.

Financial service providers – IRA owners utilize a variety of financial service providers. Overall, a recent survey indicates that a majority (56 percent) of IRA owners report full-service brokerage firms and independent financial planning firms as their choice for investing. Graph 5 displays the reported service providers. In many cases, IRA owners had accounts with more than one provider. However, the graph displays the importance of full-service financial service providers.



Effects of pandemic on retirement savings – In order to construct an accurate baseline against which to analyze the effects of a reinstated DOL fiduciary regulation, it’s important to consider the impact of the COVID-19 pandemic on retirement savings. Because of the significant challenges presented by the pandemic and legislation enacted to assist individuals coping with the pandemic, the state of retirement savings in the United States differs significantly from 2016 when the DOL fiduciary regulation originally went into effect.

Many people accessed retirement savings during 2020 in order to weather the economic challenges presented by the pandemic. A Kiplinger/Personal Capital survey in November 2020 examined the impact of the pandemic on retirement savings.⁶⁴ The poll included only individuals with at least \$50,000

The pandemic has underscored the need for financial assistance. Polls show that nearly 60 percent of individuals with at least \$50,000 of retirement savings accessed those savings during the pandemic. Individuals need assistance to understand the long-term harm of such withdrawals and advice on how to weather short-term financial shocks in a way that minimizes adverse effects on retirement savings.

⁶⁴ Kiplinger, *A Kiplinger-Personal Capital Poll: Retirement Planning During COVID*, January 7, 2021. The poll surveyed a national sampling of 744 individuals aged 40 to 74, none of whom were fully retired, who had at least \$50,000 in retirement savings. The median amount saved for retirement among the respondents was \$188,800.

of retirement savings, excluding the large number of individuals who have significantly less accumulated in their retirement accounts. According to Kiplinger’s editor of Kiplinger Personal Finance, “The past year rocked the confidence of most Americans saving for retirement. With many people dipping into their retirement savings or planning to work longer, 2020 will have a lasting impact for years to come.”⁶⁵

The poll found that nearly 60 percent of individuals with at least \$50,000 of retirement savings accessed these savings during the pandemic and 63 percent used the funds to cover basic living expenses. Table 8 shows that significant amounts were withdrawn or borrowed from retirement savings during 2020.

Table 8.—Withdrawals and Loans from Retirement Savings During 2020 (Percentage of Total)		
Amounts	Withdrawn	Borrowed
Less than \$25,000	17%	14%
\$25,000-\$49,999	27%	28%
\$50,000-\$74,999	24%	27%
\$75,000-\$100,000	32%	31%
Source: Kiplinger/Personal Capital national poll conducted November 2020.		

Nearly a third of all withdrawals and loans from retirement savings totaled at least \$75,000. Individuals responding to the poll indicated that the reasons for the withdrawals/loans included: living expenses (63 percent), medical bills (41 percent), home repairs (32 percent), automobile expenses (26 percent), college tuition (23 percent), and helping family members (21 percent).

Further, the poll asked individuals about the asset allocations in their retirement account or investment portfolios and found that asset allocations comprised stocks (36 percent), cash (24 percent), bonds (17 percent), real estate investments (12 percent), and other (11 percent).

The analysis of the potential impact of reinstating the 2016 DOL fiduciary regulation must consider the shocks to retirement savings that occurred during 2020 and the importance of assisting individuals to get back on track with retirement savings going forward. In addition, this suggests that moving forward, investors will need to restore pre-pandemic patterns of retirement saving to ensure retirement readiness. Financial advisers will play an important role in this effort, particularly for those investors most at risk of not meeting their retirement savings goals.

A recent EBRI longitudinal study of IRA holders provides evidence of the uneven savings patterns that IRA account holders demonstrate. During the seven-year period studied, 86.4 percent of IRA holders did not contribute to the IRA in any year, while only 1.7 percent contributed in all seven years.⁶⁶ More importantly, more than 36 percent took a withdrawal from

⁶⁵ Kiplinger’s Personal Finance/Personal Capital an Empower Company, *New Survey Finds Americans Are Withdrawing Significant Amounts From Retirement Accounts to Cover Living Expenses During the Pandemic*, January 6, 2021.

⁶⁶ Copeland, Craig, *Individual Retirement Account Balances, Contributions, Withdrawals, and Asset Allocation Longitudinal Results 2010 – 2016: The EBRI IRA Database*, EBRI Issue Brief, No. 462, page 2, October 22, 2018.

their IRA in *at least* one year of the seven-year period.⁶⁷ With sporadic contributory patterns and consistent withdrawals, IRA holders run the risk of eroding their account balances – but more importantly not meeting their retirement savings goals.

Our analysis incorporates the effects of the pandemic in the current account balances, as many IRA investors have already accessed their account balances. However, the effects of the pandemic on IRA balances makes stronger the case against reinstatement of the DOL regulation, as many individuals were likely to take loans, make withdrawals, or stop contributing to their IRA. The need for financial advisory services is even more important to restoring retirement readiness.

2. Assessing the Potential Benefits of Reinstatement

An analysis of benefits to investors of reinstating the DOL fiduciary regulation should incorporate several factors: (1) changes in investment allocations since 2016; and (2) investor preferences. Because the DOL’s 2016 estimates of the benefits of the regulation overstated the extent to which conflicted advice reduced investor gains, should they provide an updated estimate, it should show a ***dramatically reduced*** estimate of the benefits of a reinstated regulation for investors. Further, the DOL further overestimated the benefits by ignoring potential investor preferences. Preferences for risk (or lack of risk) vary across individual characteristics (e.g., age, investment goals).⁶⁸

Our analysis estimates the offsetting value to some investors who may benefit from reinstating the regulation (refer to Appendix B), but given the market changes that are continuing to occur even without the 2016 fiduciary regulation, and investor preferences, it is likely that those investors are a small subset of the higher-income/higher-wealth individuals.

Lewis’s analysis of the 2016 DOL regulatory analysis noted the following: “One of the key points a revised economic analysis must make is to offer a view regarding the underlying cause for the reduction in underperformance. Commenters have offered a number of possibilities – for example, (i) load fees have declined sharply in the recent past and estimates of underperformance based on older time periods will overstate the expected benefits, and (ii) there has been an increase in competition from lower cost substitutes such as exchange traded products and more no-load funds.”⁶⁹ The trends noted by Lewis and others in 2017 have continued even after the DOL fiduciary regulation was vacated and must be considered in assessing the potential benefits of reinstating the regulation.

Investment Choices – Table 9 displays the composition of assets held in IRAs. It is important to note that the bold numbers sum to a number greater than 100 percent, because investors have

⁶⁷ *Id.*

⁶⁸ There is a positive relationship between investment risk and return. As the risk increase, in most cases, the return may also increase. Some investors prefer active trading strategies to capitalize on potentially higher returns. In 2016, the DOL essentially assumed that all investors had the same tolerance for risk. However, there is no single profile of a retirement saver as individuals have different demographic profiles, asset profiles, and risk tolerance. Further, DOL did not address expected losses that arise from buying and selling at an inopportune time, which can occur when individual investors lack financial advice.

⁶⁹ Lewis, *supra* note 41.

invested their IRA in an average of three types of investment products. Regardless of the overlap, a significant majority of households reported that they held their IRA assets in mutual funds.

Table 9.—Estimated Composition of Assets Held In IRAs, 2020 <i>(Percentage of households with Type of IRA)</i>		
IRA investments	Traditional IRAs	Roth IRAs
Mutual funds (total)	73	69
Equity funds	50	48
Bond funds	26	19
Balanced funds	37	34
Money market funds	30	21
Individual equities	48	42
Annuities (total)	26	18
Fixed annuities	17	11
Variable annuities	16	10
Bank savings accounts, money market deposit accounts, or certificates of deposit	21	11
Individual bonds (not including US savings bonds)	20	14
US savings bonds	11	9
ETFs	25	27
Other	3	2
Mean number of investment types held in IRA	3 types	3 types
Source: Investment Company Institute, Figure A10, Types of Investments Held in IRAs		

Overall, the assets held in IRAs demonstrate a balanced allocation, with multiple holdings, as shown in Table 9. However, this does not hold uniformly across IRA investors. Copeland, in an EBRI study, followed IRA holders before and after a rollover from their 401(k) plans.⁷⁰ This study revealed stark differences between small and large accountholders. For those IRA investors with account balances below \$5,000 (the threshold below which employers can force rollovers of retirement plan assets to IRAs), 76.7 percent allocated their resources in money (i.e., money market funds, money market savings accounts, and certificates of deposit) rather than a balanced or index fund.⁷¹ For investors with rollovers of \$5,000 or more, only 24.8 percent remained in these types of money accounts.

Copeland finds that, regardless of their pre-rollover asset allocation, accounts with balances less than \$5,000 had, on average, low equity allocations (less than 10 percent) when rolled over to

⁷⁰ Copeland, Craig, *Comparing Asset Allocation Before and After a Rollover From 401(k) Plans to Individual Retirement Accounts*, EBRI Issue Brief, No. 495, November 7, 2019.

⁷¹ *Id.*

IRAs. The same is true for small balance accounts and allocations to target-based or balanced funds, where 87 percent of these rollovers had less than 10 percent in these funds.⁷²

The importance of asset allocation after a rollover is particularly important for those investors with small balances. These assets play an important role in their overall retirement plan. Studies show that small balance accounts are more likely to make pre-retirement distributions than those with larger balances and job separation plays an important role in these distributions.⁷³ Collectively, such decisions as asset allocations and pre-retirement distributions create adverse conditions for meeting retirement savings goals.

Expenses – Typically, investors will incur two types of fees for investment services provided to their accounts. The first type is an ongoing expense – or the amount of the fund’s assets that are used to pay administrative or operating expenses.⁷⁴ The second type of expense is a sales load – or the difference between the public security price and the sales proceeds received.

The ongoing expenses for a fund are typically expressed as a ratio of the total assets (i.e., expense ratio). From 2000 through 2020, these ongoing fees (asset-weighted) for equity funds have fallen from \$0.99 to \$0.50, marking a 49 percent decline.⁷⁵ The pattern is consistent across all classes of mutual funds (refer to Graph 2 in the previous section).

There are a number of factors that influence the mutual fund expense ratios. Some costs reflected in the expense ratio are fixed fees (e.g., accounting or audit fees). Therefore, as the assets increase, these costs become a smaller share of the expense ratio. Another factor contributing to the decline of the average expense ratios of long-term mutual funds is the shift toward no-load funds (Refer to Table 5 in section I).

However, it is also important to recognize that these ongoing fees will vary with the goals of the mutual fund. For instance, assets held in a growth fund tend to have a higher (asset-weighted) expense ratio than a blended fund. However, a growth fund’s objectives differ from those of a blended fund (one that balances performance and limits risk).

⁷² *Id.*

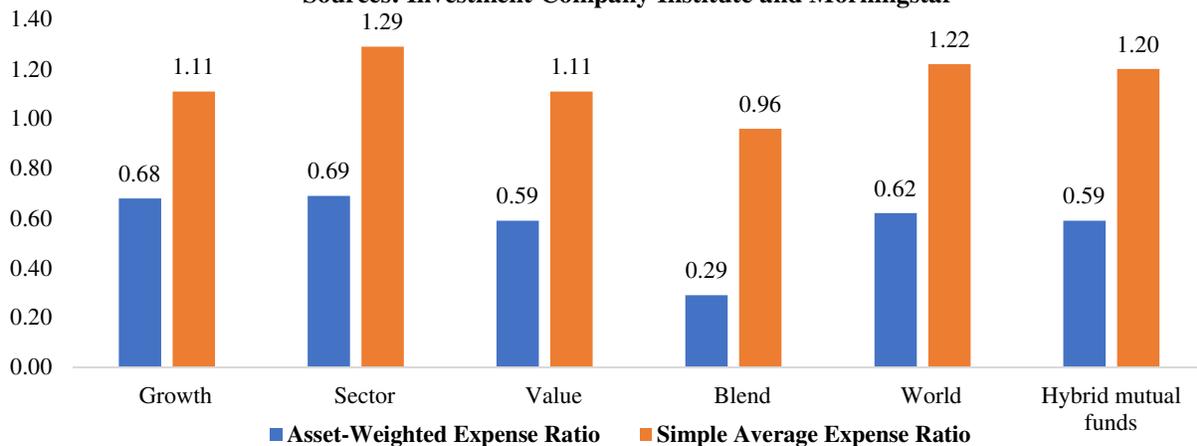
⁷³ A 2021 report of the Joint Committee on Taxation estimated that approximately 22 percent of net contributions made by individual 50 or under leaks out of the retirement savings system in a given year and found that the most prominent factor associated with leakage from retirement accounts is job separation, *supra* note 31.

⁷⁴ According to the ICI, these services include portfolio management, fund administration, daily fund accounting and pricing, shareholder services (such as call centers and websites), distribution charges (known as 12b-1 fees), and other operating costs.

⁷⁵ Investment Company Institute, *2021 Fact Book*.

Graph 6.—Expense Ratios Vary by Fund Objective, 2020

Sources: Investment Company Institute and Morningstar

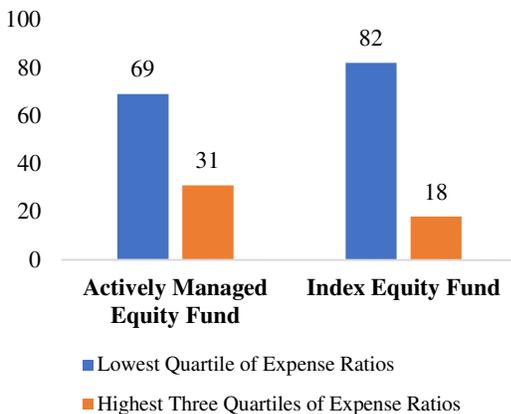


Related to the fund objectives is the management style. For instance, active management will incur greater fees than passive management (index fund). If the investor chooses a growth fund, it is more likely to have an active style (greater number of transactions) compared to an index fund).

Despite the fund objective or the management style, costs generally have declined across all mutual funds.⁷⁶ Graph 7 depicts the concentration of equity fund assets held in the lowest expense ratio funds. This suggests that some investors, working with a specific financial plan,

Graph 7.—Majority of Equity Mutual Fund Assets are in the Lowest Expense Ratio Funds, 2020

Source: Investment Company Institute and Morningstar



choose funds with different (1) financial objectives and (2) management styles from those of a long-term index fund.

Sales Load Fees – Load share classes include a sales load, a 12b-1 fee, or both.⁷⁷ Sales loads and 12b-1 fees are used to compensate brokers and other financial professionals for their services. The sales load can be assessed at various times over the life of the investment. Front-end loads (Class A shares) pay a fee at the sale as a percentage of the sales or issue price. Back-end loads (Class B shares) pay the fee upon redemption or sale of the shares. Alternatively, level loads are a form of annual compensation (e.g., 12b-1).⁷⁸ In 2020, nearly 88 percent of mutual fund assets were held

⁷⁶ Duvall, James, *Trends in the Expenses and Fees of Funds, 2020*. ICI Research Perspective 27, no. 3 (2020). Available at www.ici.org/pdf/per27-03.pdf.

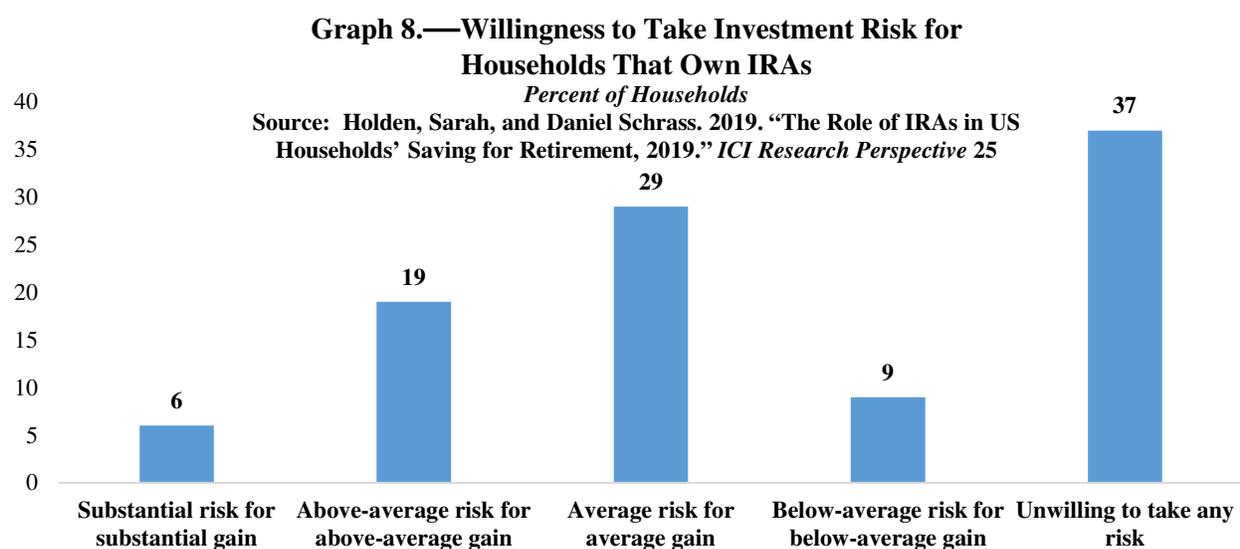
⁷⁷ The SEC adopted Rule 12b-1 allows mutual funds and their shareholders to compensate financial professionals and other financial intermediaries through asset-based fees.

⁷⁸ In addition, some Class C shares assess a CDSI fee that shareholders pay if they sell within a year of purchase.

in no-load funds (with no 12b-1 fees).⁷⁹ Our analysis incorporates the current expense ratio allocation of assets in the baseline activity – something omitted by the DOL regulatory impact analysis.

Risk Tolerance – Risk tolerance is an important factor in designing an investment strategy for investors. The following graph provides an indicator of the willingness of IRA investors to take risks while investing their IRA assets. Based on ICI surveys of IRA owners, approximately 54 percent of respondents were willing to take at least average risks, with about half of those willing to take a greater degree of risk.⁸⁰ (Refer to Graph 8.)

Our analysis recognizes that risk tolerance represents an investor characteristic and that some investors seek above-average risk for their retirement assets. In this case, our analysis incorporates this effect by the potential for the loss of certain products should the DOL regulation be reinstated.



3. Potential Costs of Reinstatement

The DOL regulatory analysis for the 2016 fiduciary regulation significantly underestimated the costs of the regulation and thus provides a poor basis for estimating the potential costs of reinstatement. The industry costs of complying with a reinstated regulation will result in increased costs to investors and reduced access to financial assistance. Thus, investors will see (1) increased costs passed along to account owners, (2) decreased services and products, and (3) decreased access to financial advice.

⁷⁹ Investment Company Institute, *2021 Fact Book*, Sources cited as: Investment Company Institute, Lipper, and Morningstar.

⁸⁰ The quantified losses estimated in the 2016 DOL RIA also assume that the losses DOL calculated with respect to front-load mutual funds would occur at the same rate with respect to other investment vehicles, such as annuities, without any evidence to support this extrapolation. The DOL points to, but does not separately attempt to quantify, what it alleged were similar conflicts with respect to various annuity products.

Consistent with economic theory, our analysis assumes that increased compliance costs associated with reinstatement of the regulation generally will be passed through to account owners. Our analysis further assumes that small accounts will lose access to financial advice because the compliance costs (of offering financial advice to small account holders) will be unacceptably large relative to the account size. For purposes of our analysis, the following increased costs are expressed as a reduction in the net return to IRA investors.

Direct Costs to the Industry – A number of studies have examined the impacts of the 2016 DOL fiduciary regulation on various sectors of the financial services industry. An overview of these studies shows the significant negative impacts and increased costs the industry faced following the adoption of the regulation. It is important to understand these costs because economists generally assume that increased costs on businesses will be passed through to customers. Rarely, if ever, is the full burden of the increased costs borne solely by the producer.⁸¹ When costs increase, then a business will either reduce the services provided or increase the costs of the service. While the DOL acknowledged that the 2016 fiduciary regulation would impose increased costs on financial advisers for compliance with the regulation, they failed to recognize how those increased costs would affect individual investors.

Direct Costs to Investors – One comment letter for the 2016 regulation addressed the issue of changing to a level-fee arrangement. For more modest-sized accounts, the change will likely increase significantly the fees for the retirement saver.⁸² One study found that advisers earn 0.54 percent on commission-based accounts versus 1.18 percent on fee-based accounts.⁸³ The study authors calculated that this amounts to aggregate fees of \$39.4 billion or an average of \$813 per IRA account holder based on aggregate assets in IRAs of \$7.3 trillion at the time of the study. Thus, for some accounts, the increase in fees required to make the continued provision of services economically viable would be so significant that services could not be offered to accounts in compliance with the requirements of the Final Rule and the BIC Exemption.⁸⁴

Broker-Dealers – The 2015 study by Oxford Economics for the Financial Services Institute attempted to quantify the costs that independent broker-dealers would face under the DOL fiduciary regulation.⁸⁵ The study identified the following costs that these broker-dealers would face under the regulation, including: data collection; modeling future costs and returns; disclosure requirements; record keeping; implementing BICE contracts; training and licensing; supervisory, compliance, and legal oversight; and litigation costs. The report also identified other potential business disruption costs that were identified but not quantified, such as disruptions to sales models, shifting clients away from commission-based accounts, the

⁸¹ Economic theory indicates that the more inelastic the demand for investment products, the more the full burden is borne by the investor. In other words, if the consumer, in this case the investor, is able to move seamlessly through the financial markets, they will be able to respond by selecting another financial provider. However, investment relationships tend to be somewhat inelastic.

⁸² U.S. Chamber of Commerce, *supra* note 56.

⁸³ Pricematrix, Insights (August 2012), http://www.pricematrix.com/cms/wpcontent/uploads/PriceMatrix-Insights_Transitioning-To-Fee_Engl.

⁸⁴ Financial Services Roundtable, *Letter to the Employee Benefits Security Administration, U.S. Department of Labor Fiduciary Rule Examination, RIN 1210-AB79*, April 17, 2017.

⁸⁵ Oxford Economics, *supra* note 22.

opportunity costs of selling fewer, more commoditized productions, and potential reductions in payments from third-party vendors.

Oxford Economics estimated that the start-up costs for broker-dealer firms to comply with the DOL fiduciary regulation would total \$3.9 billion and noted that there would be substantial ongoing costs that were not quantified for purposes of their analysis.

Oxford identified reasons why broker-dealer firms would face significant challenges under the regulation. First, Oxford noted that independent broker-dealers are more likely than larger firms (e.g., wirehouses) to use clearing firms to clear some of their transactions, meaning that they would face the challenges of paying for new services and data feeds and the integration of multiple sources of data for their disclosures. In addition, independent broker-dealers are more likely to work directly with insurance companies and other firms that create specialty investment products, which would require a BICE. And, finally, independent broker-dealers are more likely to serve small retail investors.

Oxford concluded that the industry disruptions would likely lead to a bifurcation of the industry, in which large firms are better equipped to comply with the regulation and that all firms would have incentives to offer fewer and more commoditized products.

Banks – The American Bankers Association (ABA) conducted a survey of banks to determine their efforts to comply with the DOL regulation.⁸⁶ They found that 30 percent of banks surveyed reported that they had eliminated or reduced the number of retirement products and services provided to their customers and 38 percent had indicated that the DOL Fiduciary regulation had fragmented their bank’s advisory and financial relationship with their customers.⁸⁷ Further, and more importantly, the ABA survey also found that 63 percent of surveyed banks reported that the regulation had the most impact on customer accounts with \$25,000 or less of assets.⁸⁸

Annuity Market – A November 2016 survey of 552 US financial advisers by CoreData Research found that 57 percent indicated they would limit offering variable annuities in retirement accounts because of the DOL fiduciary rule. These projected effects of the DOL rule were borne out in actual sales of annuity products after the 2016 finalization of the DOL rule. LIMRA Secure Retirement Institute reported that US annuity sales dropped 12 percent between the first quarter of 2016 (prior to the finalization of the DOL regulation) and the first quarter of 2017, which the Institute attributed to the impact of the DOL regulation, stating “despite an improvement in the equities market and interest rate environment, uncertainty around the DOL rule overwhelmed any impact it may have had on annuity sales.”⁸⁹ The Institute also reported

⁸⁶ American Bankers Association, *supra* note 55.

⁸⁷ The surveyed banks generally provided the following investment options to their IRA customers: certificates of deposit (CDs) (95 percent), managed investments (65 percent), customer-directed investments (58 percent), and other bank products, such as money market deposit accounts (49 percent). The surveyed banks indicated that, if the fiduciary rule were to apply to bank IRA/CD programs, 54 percent of banks would convert to a customer-directed program and 2 percent would discontinue their IRA/CD programs entirely.

⁸⁸ The Investment Company Institute report on retirement assets for the first quarter of 2021 reported that \$644 billion of IRA assets (5 percent of the total) are held by banks and thrift deposits. Refer to Investment Company Institute, *Retirement Assets Total \$35.4 Trillion in First Quarter 2021*, *supra* note 55.

⁸⁹ LIMRA, *LIMRA Secure Retirement Institute: First Quarter 2017 Annuity Sales Decline*, May 18, 2017.

that, for the first half of 2017, total annuity sales decreased 10 percent over the comparable period in 2016.⁹⁰ The Institute noted “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.”⁹¹

Interestingly, after the DOL fiduciary regulation was vacated, sales of annuity products rebounded. A 2019 Morningstar report noted that annuity sales fell in 2017 while the DOL regulation was being implemented, but rebounded in 2018, with total sales up 5 percent and fixed annuity sales up 24 percent compared to 2016.⁹²

The adverse effect of the 2016 rule on annuities may be an industry issue, but at its core, it is a consumer issue. Annuities are the only source of guaranteed income for life (other than Social Security benefits), something that individuals need to protect themselves against longevity risk. The Insured Retirement Institute (IRI), in a letter to the DOL in 2017 noted that annuities are an important product to provide retirees with guaranteed income and the assurance that they will not outlive their retirement savings.⁹³ They noted that Baby Boomers who own annuities are more likely than non-annuity owners to (1) have more confidence in living comfortably during retirement (by a 2-1 margin over non-annuity owners) and (2) be more likely to engage in positive retirement planning behaviors with 68 percent having calculated a retirement goal and 63 percent having consulted a financial adviser.⁹⁴

Our analysis assumes that reinstatement of the 2016 regulation would lead to reduced purchases of annuities similar to those experienced after the 2016 regulation’s applicability date. These reductions in annuity sales would reduce the number of individuals with a guaranteed source of income in retirement.⁹⁵

Investor Access – Losing access to financial advisory services means that individuals may experience changes in one or multiple factors influencing their investment performance. This

⁹⁰ LIMRA, *LIMRA Secure Retirement Institute: First Half 2017 Annuity Sales Reach Lowest Level in 16 Years*, August 23, 2017.

⁹¹ *Id.* The DOL’s regulatory analysis of the 2016 regulation estimated that approximately 400 insurers would be affected by the DOL fiduciary regulation (based on 2014 data from SNL Financial). DOL argued that this number could be inflated because some companies no longer offered annuities and some companies (75 in total) reported a small amount of annuity purchases. DOL assigned costs of compliance with the DOL fiduciary rule to insurers based on the costs assigned to broker-dealers, without trying to account for the actual costs that individual insurers might incur. In addition, DOL then offered a series of arguments to suggest that their assigned costs to insurers likely overstated actual costs. DOL did not estimate costs separately for insurance agents, despite the fact that independent insurance agents would also be required to comply with the regulation and, therefore, also would have costs incurred.

⁹² Miller, Mark, *The Uptick in Annuities*, May 28, 2019, accessed at <https://www.morningstar.com/articles/930554/the-uptick-in-annuities>.

⁹³ Insured Retirement Institute (IRI), Letter to the Employee Benefits Security Administration, U.S. Department of Labor, *Definition of the Term “Fiduciary”; Conflict of Interest Rule – Retirement Investment Advice; Best Interest Contract Exemption (Prohibited Transaction Exemption 2016-01); Prohibited Transaction Exemption 84-24 RIN 1210-AB79*, April 17, 2017.

⁹⁴ *Id.* The letter also noted that annuities appeal to middle-income individuals with 70 percent of annuity owners having annual household incomes of less than \$100,000.

⁹⁵ Most individuals would have access to some guaranteed income in the form of Social Security payments.

loss of access to investment advice or assistance represents a cost of reinstating the DOL regulation. These measurable effects of this loss of access include the following:

- Lower earnings rates – IRA investors that do not receive financial advice may invest all of their assets in one conservative investment product (referred to as a safe, but costly mistake)⁹⁶;
- Sub-optimal mix of assets in the portfolio – IRA investors may diversify, but still select a portfolio that underperforms;
- Lower contribution rates – Many savers contribute to their retirement accounts as a result of the encouragement and reminders as part of a financial plan. Without the advisor, many will opt to contribute less or not contribute at all; and
- Leakage – Maintaining assets in a tax-preferred retirement product is important to retirement preparation. Often, without the advice of a financial professional, investors will make early withdrawals to finance current expenses.⁹⁷

As discussed in more detail in Appendix B, each of these effects will lead to reductions in retirement savings for the affected individuals. The analysis incorporates the various behavioral responses for IRA investors, including increased withdrawals, inconsistent contribution patterns, and reduced returns (for investment choice or investment performance).

B. Estimating the Reinstatement of the Fiduciary Regulation

One important takeaway from the industry responses to the 2016 DOL regulatory impact analysis (RIA) is that broad assumptions and ‘one-size fits all’ analysis does not reflect the marketplace. Therefore, quantifying the loss of financial advice involves three steps to characterize precisely the effects of reinstatement. First, our baseline takes into consideration the (1) types of accounts (including the financial institution where they are held); (2) types of investments these accounts hold; and (3) characteristics of the investors (e.g., age and income levels). Second, for this subset of accounts, the analysis considers the current state of the market. Finally, to quantify the effects of reinstatement, the effects on investors must be considered, including (1) loss of access to certain services and advice as well as (2) savings behavioral responses that occur as a result of the loss of financial services.⁹⁸

Our estimates of the effects of reinstating the 2016 DOL fiduciary regulation are not comparable to the estimates contained in the 2016 DOL RIA for a variety of reasons. First, as noted above, our estimates consider potential losses in retirement savings that occur when investors lose access to financial advice, whereas the 2016 DOL RIA presumed that any reduced fees that potentially resulted from the regulation represented pure net gains for investors without

⁹⁶ EBRI Fast Facts #364, *supra* note 38.

⁹⁷ Deloitte, *supra* note 57. All financial institutions indicated the lack of easily accessible and reliable plan data, such as 404a-5 fee disclosures, has significantly disrupted the rollover process. Deloitte indicates that financial institutions continuing to allow rollover recommendations have spent significant time and effort developing recommendations based on the 2016 DOL fiduciary regulation. Institutions identified enhancing documentation requirements relating to rollover recommendations, particularly around existing plan costs and services.

⁹⁸ Refer to Appendix B for the supporting data and descriptive analysis.

accounting for the behavioral effects of financial advice on retirement investors. Second, as demonstrated by Lewis and others, the purported benefits of reduced fees in the 2016 DOL RIA overstated the “actual” benefits of the regulation.⁹⁹ Finally, conditions in the marketplace have changed considerably from 2016 with continued downward trends in mutual fund fees across the board and the negative impacts of the COVID-19 pandemic on retirement savings.

1. Characterizing the Estimates

Types of Accounts – The foundation for our estimates relies on the \$13 trillion currently held in IRAs (Traditional, Roth, SEP, and SIMPLE accounts). These assets are classified by the type of financial institution where the assets are held. Within each class, we consider the likelihood that the financial institution will limit access to or eliminate advice for certain account holders (refer to Appendix B).

Types of Investments – The base of accounts by financial institution is further classified by the types of investments held within the IRA accounts. Specifically, certain investments are more likely to lose access to financial advice. In addition, the loss of financial advice can lead to sub-optimal asset composition of assets held within IRAs. Asset holdings for the subset of individuals are categorized by the financial institutions.

Characteristics of the Investors – Characteristics of the IRA investor are very important to this analysis, because higher income (and those with large account balances) are less likely to feel the effects of reinstating the DOL regulation. High net worth accounts benefit from lower costs (based on the assets under management) and will see little or no disruption in the services offered to them.

There are two primary characteristics of small account holders – age and income. The IRA assets for lower income investors (those with adjusted gross incomes below \$100,000) and younger investors (those 50 years of age or younger) represent the primary subset of IRA investors most likely to experience the greatest impact of the reinstatement.

The IRA owners least likely to feel the impact of the reinstatement of the regulation – largely higher-income individuals, those closer to retirement, or high net-worth individuals – hold approximately 70 percent of these assets, yet are only about half of the account holders. This means that the lower-income, younger, or lower-net worth individuals have considerably less saved for retirement. These changes will have a disproportionate effect on their retirement readiness.

This analysis assumes that approximately 30-40 percent of total IRA assets will be adversely affected by reinstatement of the 2016 DOL regulation, representing individuals with lower income and smaller accounts. In determining the extent to which these investors would be adversely affected, the analysis further creates a subset of investors. The subset includes a portion of those investors: (1) currently using personalized assistance through the brokerage model, but would lose access to such services; and (2) those not currently using advisory services, but might seek such services in the future.

⁹⁹ Lewis, *supra* note 41.

Market Characteristics – The analysis adjusts for the state of the market and the share of assets held in certain mutual funds. It is important to adjust for two factors, those individuals (1) with assets already in low-cost funds and (2) selecting actively managed accounts.¹⁰⁰ Individuals with assets already in low-cost funds will see few benefits of a reinstatement of the regulation. Individuals with assets in actively managed funds could see increases in costs as a result of the reinstatement.

Quantifying Loss of Access – A number of studies have quantified the effects of financial advice in terms of the returns realized. As mentioned previously, studies found that financial advice has the ability to increase returns to investors when using a comprehensive advice service. Further, financial advice considers more than just the rate of return, as it includes asset composition (risk and return features), tax efficiency, fees, and regular rebalancing. While it is difficult to quantify all the components of financial planning advice, estimates suggest that, over time, the benefits could total a net 3 percent.¹⁰¹

Behavioral Effects – In addition to financial returns, advice can influence the investor’s behavior as well through the personal relationship developed through financial advice. These relationships encourage such behavior as consistency in contributions, limiting early withdrawals, and prudent rollover behavior.¹⁰² The relationship can provide important coaching or management of an individual’s overall retirement plan.

The adviser relationship is most important given the retirement savings leakage caused by the pandemic. With the assistance of an advisor, these relationships provide guidance and careful planning that would help keep investors working toward their goal of retirement readiness. These plans encourage steady contributions, limiting pre-retirement withdrawals when possible, and creating rollover strategies.

2. Estimated Effects

The reduction in accumulated assets from *the loss of services (financial products and/or advice)* following a reinstatement of the 2016 fiduciary regulation *is approximately \$140 billion* over ten years, derived in the manner discussed in Appendix B. This cost has the greatest impact on lower-income and younger individuals through diminished

	Percentage of Individuals	Percent of Total Assets
Traditional IRA	41.3%	37.7%
Roth	33.1%	27.5%
SEP	3.0%	4.7%
SIMPLE	12.6%	8.1%
Estimated Percentage of Total Assets for the Individuals Most Vulnerable to Adverse Effects		36.6%

¹⁰⁰ Eliminating financial advice could curtail the choices available to investors. This could have an impact on certain investors.

¹⁰¹ Kinniry, Jr., Francis, *supra*, note 16. Refer to Pagliaro, Cynthia, *supra*, note 16.

¹⁰² *Id.*, As of January 2019, 80 percent of PAS investors with a retirement income goal had an 80 percent or greater probability of achieving their goal; fully 76 percent of such investors had a 90 percent or greater probability of achieving their goal.

returns and behavioral effects. The analysis assumes that higher-income individuals with greater net worth will feel little or no effects from the reinstatement of the DOL fiduciary regulation.

The impact such losses would have on the subset of investors is not trivial. Table 10 shows the percentage of all IRA investors and the percentage of total assets adversely affected if the 2016 DOL fiduciary regulation is reinstated. Significant costs, in terms of lower returns, greater leakage, fewer planned rollovers, and sub-optimal investment choices, will diminish the much-needed retirement assets of those in greatest need.

We estimate that there are 2.7 million IRA owners who are lower income, younger, and have smaller account balances and are most likely to be adversely affected by reinstatement of the 2016 regulation. The most vulnerable of these individuals currently hold approximately \$900 billion of IRA assets. The ten-year erosion of \$140 billion of these most vulnerable accounts represents nearly 16 percent of their current balances – erosion of balances for those least likely to be able to recover from such costs.

III. ESTIMATES OF THE EFFECTS OF A REINSTATEMENT OF THE 2016 FIDUCIARY RULE ON THE RETIREMENT READINESS AND THE EFFECT ON THE WEALTH GAP IN THE UNITED STATES

A. The Existing Wealth Gap in the United States

In recent years, significant research has been devoted to the wealth disparity among various racial groups in the United States. Wealth is generally defined as the total of assets owned by a family (investments, business assets, bank accounts, equity in a primary residence, other real estate assets, retirement savings, etc.) minus outstanding debt (home mortgages, credit card debt, student loans, and other forms of debt).¹⁰³ The Federal Reserve Board in cooperation with the U.S. Department of the Treasury conducts a triennial survey of U.S. families (Survey of Consumer Finances (SCF)) that tracks changes in family balance sheets, pensions, incomes, and demographic characteristics that provides periodic measures of family income and wealth.¹⁰⁴

Wealth is an important indicator of financial security. Families with greater wealth (i.e., net worth) have greater ability to withstand financial shocks and the ability to gain upward mobility. People with greater wealth have greater access to higher education for their families, which leads to greater earning potential. People with greater wealth have greater capacity to start a business or invest in assets that will lead to even more wealth. Greater wealth also allows for the generational transfer of wealth during lifetime and at death. In essence, wealth begets more wealth both for current households and for future generations of these households. A Pew Center analysis of the SCF found that the wealth gap between the richest and poorest families in American doubled from 1989 to 2016.¹⁰⁵ Pew found that, by 2016, the top 5 percent of families in the United States held 248 times as much wealth as a family at the median. Pew also found that the median wealth of the poorest 20 percent of families was either zero or negative in most years.

A 2017 Current Population Report demonstrates the significant disparity in wealth in the United States.¹⁰⁶ Households in the 10th percentile of wealth had negative wealth in 2017 whereas

¹⁰³ Economists use marketable assets in wealth calculations because certain consumer durables, like automobiles and household items, cannot be converted easily to cash and may have more value for household use. See, Domhoff, G. William, *Wealth, Income, and Power*, accessed at <https://whorulesamerica.ucsc.edu/power/wealth.html> on July 22, 2021.

¹⁰⁴ The Survey of Consumer Finances (SCF) is normally a triennial cross-sectional survey of U.S. families. The survey data include information on families' balance sheets, pensions, income, and demographic characteristics. Information is also included from related surveys of pension providers and the earlier such surveys conducted by the Federal Reserve Board. No other study for the country collects comparable information. Data from the SCF are widely used, from analysis at the Federal Reserve and other branches of government to scholarly work at the major economic research centers. They have studied continuously asset accumulation and debt patterns since 1962.

¹⁰⁵ Schaeffer, Katherine, Pew Research Center, *6 facts about economic inequality in the U.S.*, February 7, 2020, accessed at <https://www.pewresearch.org/fact-tank/2020/02/07/6-facts-about-economic-inequality-in-the-u-s/> on July 22, 2021.

¹⁰⁶ Eggleston, Jonathan, Donald Hays, Robert Munk, and Briana Sullivan, U. S. Department of Commerce, U.S. Census Bureau, Current Population Reports, *The Wealth of Households, 2017*, P79BR0170, August 2020. This study derives data from the Survey of Income and Program Participation (SIPP), which is a nationally representative panel survey administered by the U.S. Census Bureau and collects information on the short-term dynamics of

households in the 90th percentile had over \$1 million in wealth for the same period (see Table 11).

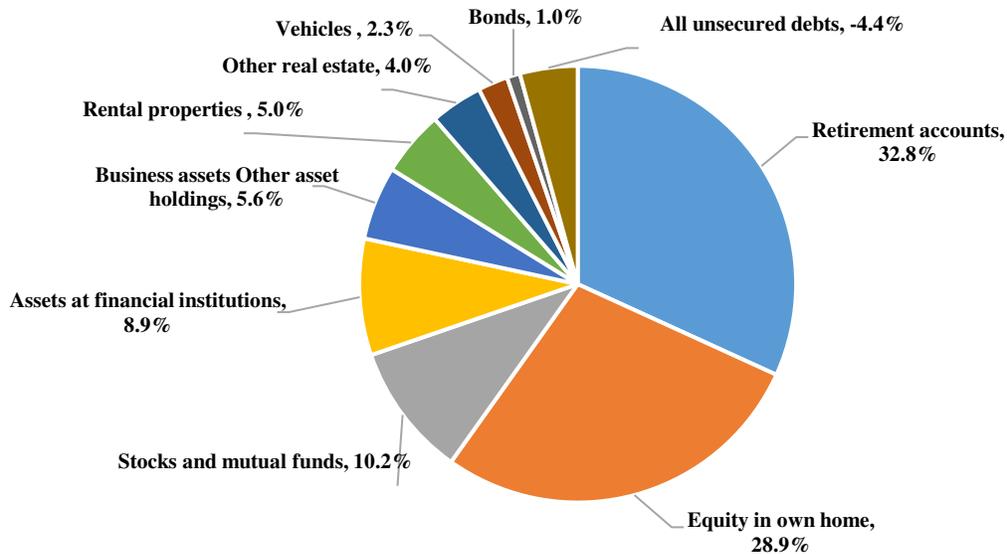
Percentile	2017 Dollars
10 th	-5,724
25 th	5,608
50 th	104,000
75 th	427,700
90 th	1,212,000

Source: Eggleston et al., U.S. Census Bureau, Current Population Reports, *The Wealth of Households: 2017*, August 2020, P70BR-170.

For most U.S. families, the two assets contributing most significantly to family wealth include retirement accounts and home ownership (i.e., home equity). The 2017 Current Population Report found that, excluding families in the top one percent of wealth, 61.7 percent of household wealth came from retirement accounts (32.8 percent) and home equity (28.9 percent). See Graph 9 for the breakdown of the components of wealth for the bottom 99 percent of U.S. families.

Graph 9.—Composition of Wealth by Asset Type, 2017

Source: U.S. Census Bureau, Survey of Income and Program Participation, Survey Year 2018



Assets at financial institutions (e.g., bank checking and savings accounts) are the most commonly held assets, reported by 93.7 percent of survey participants, but the median value of

employment, income, household composition, and eligibility and participation in government assistance programs using a panel that follows individuals for several years, providing monthly data. The survey is an important source of information on economic well-being, family dynamics, education, wealth and assets, health insurance, child care, and food security.

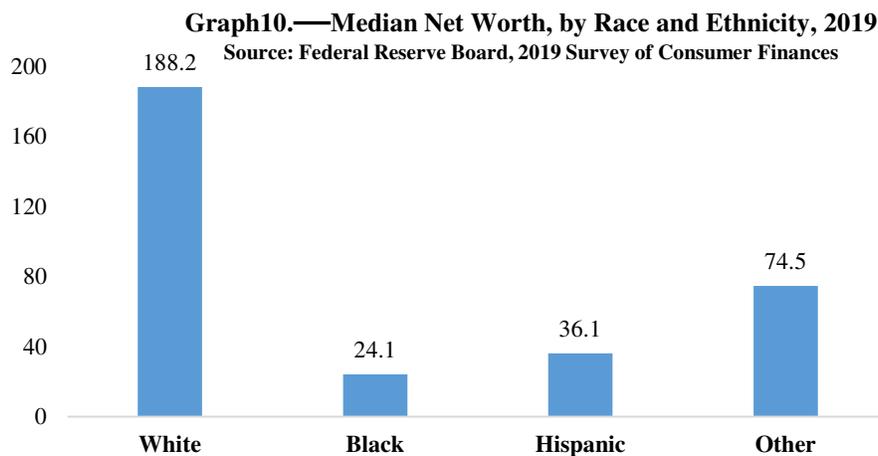
these assets per household totals \$5,803. On the other hand, 61.8 percent of households reported home equity assets with a median value of \$118,000 and 57.3 percent of households reported retirement assets (IRAs, Thrift Savings Plans, and 401(k) plans) with a median value of \$65,000.¹⁰⁷

B. Wealth by Demographic Characteristics

The Survey of Consumer Finances (SCF) explores patterns of wealth and net worth of their survey participants. The most recent survey (2019) provides a detailed view of asset and debt categories used to construct wealth and net worth estimates.

The SCF defines total net worth as the difference between total assets and total debt. Total assets are comprised of total financial assets and total nonfinancial assets. Financial assets include liquid assets, retirement and non-retirement savings, as well as life insurance.¹⁰⁸ Nonfinancial assets include residential property, business assets, and vehicles.¹⁰⁹

The primary finding from the SCF is that a typical median net worth White American family has eight times the wealth of a typical Black American family and three times the wealth of a typical Hispanic American family.¹¹⁰ Historically, there are many factors that contribute to the long-standing disparities by race in the wealth gap. One factor is the lack of intergenerational mobility. In other words, the current socioeconomic status persists across generations.¹¹¹



¹⁰⁷ *Id.*

¹⁰⁸ Total financial assets include liquid transaction accounts, certificates of deposit, savings bonds, pooled investment funds (mutual funds), directly held stocks, life insurance, managed assets, retirement accounts, and miscellaneous other financial assets. Within each category of financial asset, the SCF identifies between six and ten specific types of holdings.

¹⁰⁹ Residential property includes a primary residence, as well as other residential property (e.g., second home). The SCF also identifies other investment real estate. Vehicles includes automobiles, planes, boats, and recreational vehicles.

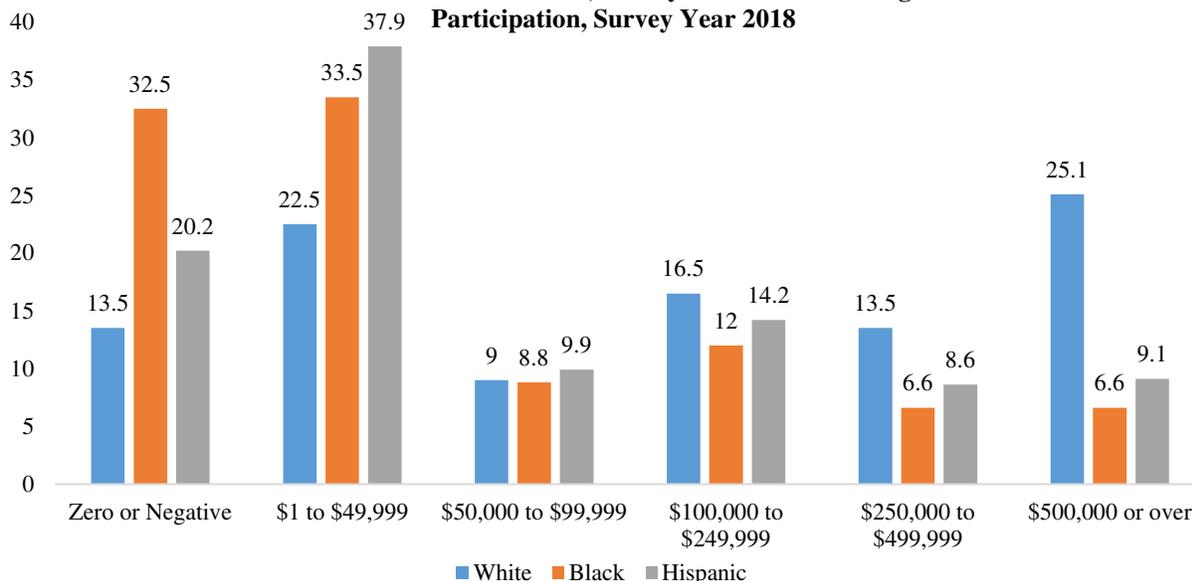
¹¹⁰ Refer to Bhutta, Neil, Andrew C. Chang, Lisa J. Dettling, and Joanne W. Hsu with assistance from Julia Hewitt, *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, Brookings Institution, September 28, 2020.

¹¹¹ Refer to Winship, Scott, Christopher Pulliam, Ariel Gelrud Shiro, Richard V. Reeves, and Santiago Deambrosi, *Long Shadows, The Black-White Gap in Multigenerational Poverty*, American Enterprise Institute and Brookings Institution, June 10, 2021. In particular, the appendix and references provide a survey of the economic literature that has studied the issue of intergenerational mobility since 1986 (the important seminal work was by Gary S. Becker and Nigel Tomes).

Examining wealth by amount and race shows the challenges faced by households of color (Graph 11). In 2017, 32.5 percent of Black American households had zero or negative net worth (i.e., debts exceeded assets), and 33.5 percent had net worth under \$50,000. Only 6.6 percent of Black American households had net worth of \$500,000 or more, compared to 25.1 percent of White American households. Similarly, for Hispanic American households, 20.2 percent had zero or negative net worth and 37.9 percent had net worth under \$50,000, while only 9.1 percent had net worth of \$500,000 or more.

Graph 11.—Household Net Worth, Distributed by Amount of Net Worth and Race, 2017

Source: U.S. Census Bureau, Survey of Income and Program Participation, Survey Year 2018



The current status of families of color depends primarily on differences in two asset classes: homeownership and retirement savings. These two assets comprise the majority of the wealth across all families, but for families of color, the absence or lower value of these assets plays an important role in explaining the disparities in wealth. As Graph 9 depicts, retirement savings and home ownership play the most important role in the composition of wealth across all families.

The SCF analysis of the wealth gap indicates that, across all age groups, rates of home ownership among White American households significantly exceeds the rates of home ownership among Black and Hispanic American households. Home ownership rates are lowest among Hispanic households of all ages.¹¹²

Further, the SCF reports that Black and Hispanic American individuals are less likely to have access to and participate in employer-sponsored retirement plans compared to their White American cohorts. Access to an employer-sponsored retirement plans is 12 percent lower for Black Americans than White Americans and 24 percent lower for Hispanic Americans.¹¹³

¹¹² Refer to Bhutta, Neil, *supra*, note 110.

¹¹³ *Id.*

The SCF research is consistent with other wealth gap research. For instance, a study followed the retirement participation rates (over eight years) for employees of a single employer. The study found significant differences in the rate of participation for Black and Hispanic American workers, relative to their White counterparts.¹¹⁴ Further, Black and Hispanic workers that did participate in the employer’s plan contributed at a lower rate on average than comparable White employees.

The study found that Black and Hispanic American workers draw down their 401(k) balances through withdrawals and loans at a significantly higher rate than White workers, which reduces their principal balances and their potential earnings on plan assets (see, also, the discussion in Section II, above, concerning increased leakage from retirement savings for Black and Hispanic American individuals). Finally, Black and Hispanic workers tend to prefer safer asset classes than comparable White workers. For example, Black workers were approximately half as likely to contribute to stock funds as White workers and were twice as likely to contribute to money market funds. A similar result occurred with Hispanic workers. Each of these factors contributes to the lower overall wealth attributable to retirement savings for Black and Hispanic workers.

Table 12.—Median Value of Assets for Households, by Type of Asset Owned and Race
Source: U.S. Census Bureau, Survey of Income and Program Participation, Survey Year 2018

Race	Median Value Equity in Own Home	Percent Holding Equity in Own Home	Median Value Retirement Accounts	Percent Holding Retirement Accounts	Median Net Worth as a Percentage of White Households*
White	\$120,000	66.8	\$75,000	60.3	100%
Black	\$72,900	38.0	\$20,000	41.5	7%
Hispanic	\$88,000	46.7	\$25,000	38.9	18%
Other	\$81,500	48.9	\$31,580	47.2	28%

*Net worth includes all financial and nonfinancial assets, in addition to retirement savings and home equity.

A December 2020 study by the Federal Reserve Bank of St. Louis found that some groups with historically low median wealth had significant gains in wealth from 2016 to 2019.¹¹⁵ However, the study also found that large wealth gaps remained even after these gains. For example, a median non-Hispanic Black family had about \$23,000 of wealth in 2019, which represented about 12 cents to the dollar of the median wealth (\$184,000) of a non-Hispanic White American family. Overall, 82 percent of Black American families had less wealth than the median White

A December 2020 by the Federal Reserve Bank of St. Louis found that the median family wealth in 2019 in the United States was \$23,000 for Blacks, \$38,000 for Hispanics, and \$184,000 for Whites.

¹¹⁴ Kuan, Kai Yuan, Mark R. Cullen, and Sepideh Modrek, *Racial Disparities in Savings Behavior for a Continuously Employed Cohort*, National Bureau of Economic Research, Working Paper 20937, February 2015.

¹¹⁵ Kent, Ana Hernandez and Lowell R. Ricketts, Center for Household Financial Stability, Federal Reserve Bank of St. Louis, *Has Wealth Inequality in America Changed over Time? Here Are Key Statistics*, December 2020.

American family in 2019, which has changed little from 1989. Black American families owned 3 percent of total household wealth in the United States in 2019 (an amount unchanged from 2016), despite comprising 15 percent of households. White families owned 85 percent of total wealth but comprised only 66 percent of households.

The median Hispanic family of any race had \$38,000 in wealth in 2019, which represented a significant gain from 2016. On the other hand, in 2019, Hispanics held 4 percent of total household wealth, which comprising 13 percent of all households. Further, 76 percent of Hispanic families held less wealth than the median White American family in 2019.

A recent FEDS note found that some differences in wealth can be explained because White households tend to be older, more highly educated, more likely to receive an inheritance, and less likely to be a single-parent household.¹¹⁶ However, the note also found that, even accounting for variation in various demographic factors (age, education, debt, inheritances, etc.), the gaps between households grouped by race/ethnicity remain.

Wealth helps households endure economic shocks (e.g., recessions) or unexpected disruptions to income (e.g., job loss). For example, during 2020, Black Americans were more likely to cash out retirement assets to meet current expenses despite holding lower level of retirement assets than White households. The Brookings Institution estimated that 14 percent of Black Americans under the age of 35 borrowed from or cashed out their retirement savings in July 2020 compared to 4 percent of Whites.¹¹⁷ Brookings also estimated that 22 percent of Black Americans over the age of 55 borrowed from or cashed out retirement savings in July 2020 compared to 10 percent of Whites.

Research shows that Blacks and Hispanics cash out their retirement savings at significantly higher rates than Whites. An important study in 2012 found that Black Americans are 61.5 percent more likely than their White counterparts to cash out their retirement savings, a finding that held across income and account balance levels.¹¹⁸ The same study found that Hispanic Americans are 46.2 percent more likely to cash out their retirement savings than their White counterparts. As discussed in Section II, cash outs make it harder for Black and Hispanic Americans to improve their retirement readiness and to accumulate sufficient household wealth to help them overcome anticipated and unanticipated expenses.

This indicates the importance of the long-term implications of the reductions in financial advice on the wealth gap in the United States. Because the DOL fiduciary regulation reduced access to financial advice for individuals with lower account balances and for individuals who, at job change, are deciding whether to cash out or roll over their retirement savings account balances, it creates further risks and pressures on reaching the goal of retirement readiness.

¹¹⁶ Dettling, Lisa J., Joanne W. Hsu, Lindsay Jacobs, Kevin B. Moore, and Jeffrey P. Thompson, *Recent Trends in Wealth-Holding by Race and Ethnicity: Evidence From the Survey of Consumer Finances*, FEDS Notes, Washington: Board of Governors of the Federal Reserve System, September 27, 2017. <https://doi.org/10.17016/2380-7172.2083>.

¹¹⁷ Moss, Emily, Kriston McIntosh, Wendy Edelberg, and Kristen Broady, *The Black-white wealth gap left Black households more vulnerable*, Brookings Institution, December 8, 2020.

¹¹⁸ *Id.*

As discussed in Section I, reduced access to financial advice and assistance—which resulted from the 2016 fiduciary regulation—further results in an increased leakage of retirement savings, which over the long term, would lead to decreased retirement readiness and reduced wealth, particularly with respect to individuals holding small account balances. Retirement savings represents an important component of household wealth in the United States, particularly for

Access to personalized financial advice is critical for minority populations like Blacks and Hispanics, particularly advice that takes into account the unique circumstances of these groups. Reinstatement of the 2016 DOL rule would reduce this access and likely have the opposite effect on the accumulation of retirement savings for these groups.

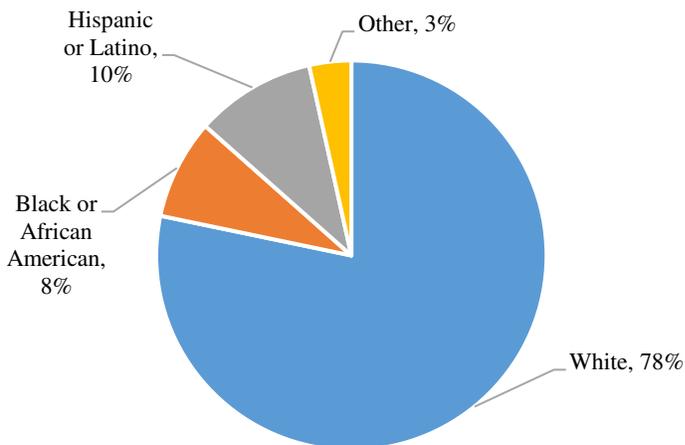
households at the lower levels of overall wealth. These effects are particularly important for Black and Hispanic households, which tend to accumulate less wealth than comparable White households. While addressing the systemic reasons for decreased wealth among these groups is beyond the scope of this paper, the loss of access to services for small retirement accounts and the loss of access to personalized financial advice could exacerbate an already significant problem. As EBRI noted in the 2021 report, personalized advice that takes account of the unique circumstances of Black and Hispanic Americans could improve the accumulation of retirement savings for these groups; a regulation that reduces this access will have the opposite effect.

C. Estimates of the Potential Effects of Reinstatement on the Wealth Gap

One important aspect of the potential loss of financial advice is the impact it will have on racial minorities. As mentioned, retirement savings, particularly IRA accounts, are an important component of wealth along with home ownership. Based on the Survey of Income and Program Participation (SIPP) 2018 survey data, people of color are less likely to have access to or

Graph 12.—Estimated IRA Owners, Distributed by Race, 2018

Source: Calculations based on IRS, SOI W-2 Study, Tax Year 2018 and Census Bureau Population Data



participate in workplace retirement plans. This suggests that for those with IRAs, the account plays a more important role in their personal wealth.

Data from the SIPP and SCF indicate that retirement savings and home ownership play a significant role in household net worth. However, minority households are less likely to have access to and participate in retirement savings plans. In other words, they are less likely to report having any retirement savings, which disadvantages minority households in the wealth gap analysis. As Graph 12 indicates, both Black and Hispanic

Americans are underrepresented in IRA ownership compared to their population share in the

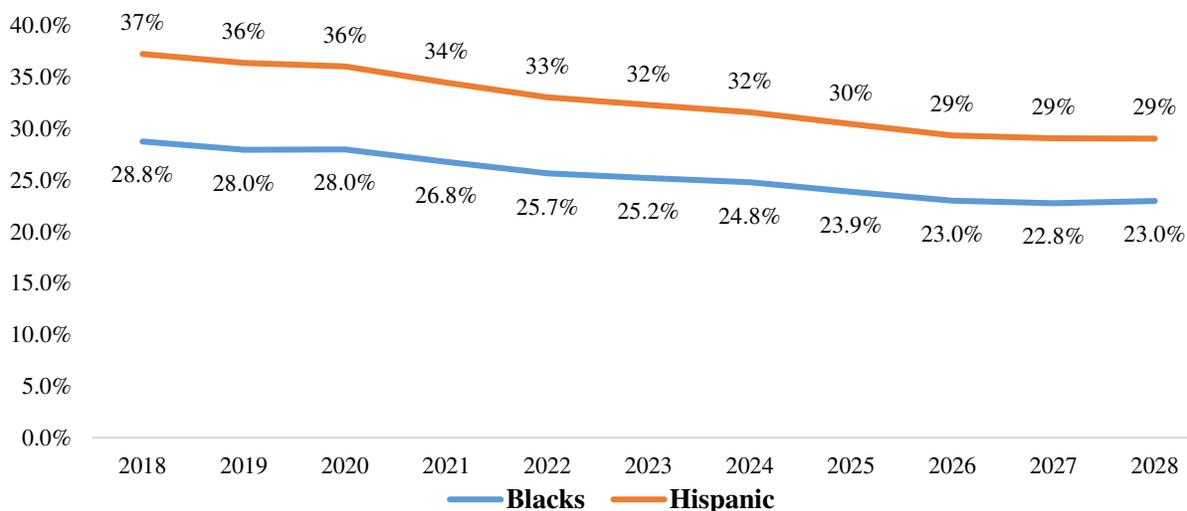
U.S.¹¹⁹ Further, for those reporting retirement savings (either IRAs or workplace retirement plans), the median Black American families has only 27 percent and the median Hispanic American family has 34 percent compared to the amount of retirement savings of White American families.¹²⁰

The loss of financial advice could greatly exacerbate the wealth gap by reducing the accumulated IRA balances for Black and Hispanic Americans by approximately 20 percent over 10 years leading to a 20 percent increase in the wealth gap with respect to IRA assets for these groups.

Applying the previous analysis of the effects of reinstating the DOL regulation to racial composition, Graph 13 indicates that the median Black or Hispanic investor would lose ground relative to their White American counterparts with respect to their IRA assets. The declining IRA accumulation, relative to White IRA investors, depicts the adverse effects of loss of financial advice – diminished performance, decreased contributions, or increased pre-retirement withdrawals.

The estimates suggest a *deterioration in the value of IRA assets* for Black and Hispanic savers *of approximately 20 percent over ten years* compared to an estimated 8 percent decline in IRA assets overall, derived in the manner addressed in Appendix B. This deterioration in the value of IRA assets for Black and Hispanic savers contributes to approximately a 20 percent increase in the wealth gap with respect to IRA assets over the ten-year period.¹²¹

Graph 13.—Black and Hispanic IRA Investors, as a Percentage of White Counterparts, Estimated Effects of Reinstating the DOL Regulation
 Source: Authors' calculations based on the SIPP Wealth Gap Estimates, 2018



¹¹⁹ Based on the results of the recent decennial census, Black Americans represent 14.1 percent and Hispanics represent 18.7 percent of the U.S. population. Refer to [Racial and Ethnic Diversity in the United States: 2010 Census and 2020 Census](#), U.S. Census Bureau, August 12, 2021.

¹²⁰ *Id.*

¹²¹ For example, as shown in Graph 13, Hispanic IRA investors had accumulated 37 percent of the value of IRA investments as their White counterparts had accumulated in 2018. Our analysis estimates that, if the 2016 fiduciary regulation is reinstated, Hispanic IRA investors will have only 29 percent of the value of IRA investments as their White counterparts by 2028, which represents an approximately 20 percent increase in the wealth gap when comparing IRA assets.

For minority IRA investors, the decline in value over time foretells a widening wealth gap over the next decade. Rather than working toward closing the gap, reinstating the 2016 DOL regulation could create adverse conditions which result in an increasing wealth gap.

APPENDIX A – Advisers Affected by the Regulation

1. Broker-Dealers – There are two types of broker-dealers: a wirehouse (firm selling its own products and other outside products) and independent broker-dealers (firm selling products from outside sources).

Wirehouses – A wirehouse is a term used to describe a **full-service broker-dealer**. Wirehouse brokers typically provide a full range of services to their clients, ranging from research, investment advice, and execution of orders. These brokers can range from smaller regional brokerage firms to large national firms. Wirehouses often have proprietary products that they offer to their clients and in addition to these products, must maintain data on adviser compensation and implement new policies to ensure compliance of all their brokers.

The Wall Street Journal reported in 2017 on how large brokerage firms were responding to the DOL regulation.¹²² Reuters separately reported on another large company.¹²³ These reports found the following actions planned in response to the regulation:

- No longer offer individual retirement accounts that charge commissions and change to an asset-based fee structure and created simple account statements to convey more clearly the fee structure;
- Offer fee- and commission-based IRAs, planned product pricing changes, and eliminate access to certain investment products (e.g., annuities);
- Make changes to commission-based IRA products; and
- Changed fee structure to asset-based fees and stopped selling products that did not comply with the rule, such as exchange-traded notes issued by the company.

Independent broker-dealers – Independent broker-dealers range from large national brokerage houses to small broker-dealers. These firms assist investors by providing comprehensive financial services. There is also a distinction between the activities and roles of the broker and dealer. The broker acts as an agent of the client, while the dealer acts as principal. The Securities Exchange Act of 1934 defines a dealer as “any person engaged in the business of buying and selling securities...for such person’s own account through a broker or otherwise.”¹²⁴

Under the typical independent broker-dealer model, each financial adviser is a self-employed business owner. Independent broker-dealers primarily sell packaged products, such as mutual funds and variable insurance and annuity products. Some independent broker-dealers are also registered investment advisers, while others may provide investment advisory services through an affiliated registered investment adviser firm.

¹²² Wursthorn, Michael, Wall Street Journal, *A Complete List of Brokers and Their Approach to ‘The Fiduciary Rule’*, February 6, 2017, accessed at <http://wsj.com/articles/a-complete-list-of-brokers-and-their-approach-to-the-fiduciary-rule-1486413491>.

¹²³ Reuters Business News, *UBS to change how advisers get paid ahead of fiduciary rule deadline*, June 1, 2017, accessed at <https://www.reuters.com/article/us-ubs-group-fiduciary/ubs-to-change-how-advisers-get-paid-ahead-of-fiduciary-rule-deadline-idUSKBN18S6GS>.

¹²⁴ Refer to Section 3(a)(5)(A) of the Securities Exchange Act of 1934. Individuals and firms may be a broker, or a dealer, or both a broker and dealer (broker-dealer).

For the most part, it is straightforward to identify individuals or businesses that must register as a broker-dealer with the Securities and Exchange Commission (SEC). However other related activities may require someone or some entity to register as a broker. The Securities Exchange Act of 1934 details the types of activities that determine if someone is a broker.¹²⁵ For instance, there are ‘finders’ or business brokers that engage in finding clients for investors for investment companies or other securities intermediaries. Another example would include finding buyers and sellers of businesses for merger and acquisition activities.¹²⁶ Similarly, an example of activities conducted by individuals or businesses who issue or originate securities that they buy or sell may be required to register as a dealer. In both cases, the activities alone do not require registration, but if certain conditions are met under these examples, the individual or business must register as a broker-dealer.

Robo-Advisors – The definition of broker-dealers includes investment advisers as well as automated advisers (robo-advisers). Individuals or businesses that offer these automated activities provide more specialized services and act as fiduciaries to the client (by virtue of the advice or guidance provided).

Robo-advisers are types of brokerage accounts that automate the process of investing. Most robo-advisers charge lower fees than conventional financial advisers because they invest investor’s money in prebaked portfolios made primarily of specially chosen, low-fee exchange-traded funds (ETFs). Some robo-advisers also offer access to other more customized investment options for advanced investors or those with larger account balances.

Like conventional human financial advisers, robo-advisers are regulated by the Securities and Exchange Commission (SEC) as Registered Investment Advisors (RIAs), meaning they have a fiduciary responsibility to look out for customers’ best interests when it comes to investment choices. Robo-advisers generally insure their accounts via the Securities Investor Protection Corporation (SIPC).

Dual Registered Investment Advisers and Registered Advisers – Registered Investment Advisers (RIAs) manage assets of individual and institutional investors. These advisers must register with the SEC as well as State regulatory agencies. In most cases, RIAs receive compensation through a management fee (typically one percent per year of assets under management). A dually registered adviser is someone that is registered as an investment adviser (typically with the SEC) and as a Broker/Dealer with the Financial Industry Regulatory Authority (FINRA).¹²⁷

¹²⁵ Under Section 15 of the Securities Exchange Act of 1934 Section 3(a)(4)(A) of the Act generally defines the activities that would require an individual or business to register as a broker-dealer under the Act.

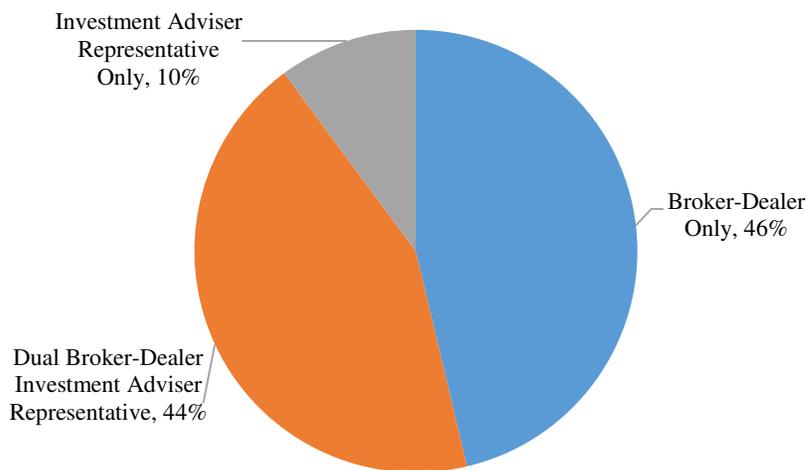
¹²⁶ Refer to Appendix X for a table detailing the activities and conditions that would require individuals or entities to register as a broker dealer.

¹²⁷ The SEC is responsible for ensuring fairness for the individual investor, and FINRA is responsible for overseeing virtually all U.S. stockbrokers and brokerage firms. The SEC oversees FINRA and acts as the first level of appeal for actions brought by FINRA. FINRA is authorized by Congress to protect America’s investors by making sure the broker-dealer industry operates fairly and honestly. They oversee more than 624,000 brokers across the country—and analyze billions of daily market events.

Graph 14 displays the total individuals that have registered as agents with FINRA. As depicted in the graph, the majority are broker-dealers only (46 percent), followed closely by dual broker-dealer investment advisers (44 percent).

Graph 14.—Total Registered Individuals, 2020

Source: 2021 FINRA Industry Snapshot



The A.T. Kearney study projected that dual-registered investment advisers (RIAs) would gain \$100 billion (5 percent increase) in assets due to shifts to fee-based models (RIA, dual RIA), but overall revenues would decrease by \$0.5 billion (3 percent reduction) due to losses of retirement accounts, increased costs, and lower fees and commissions. In addition, A.T. Kearney estimated that RIAs would gain \$250 billion (10 percent increase) in assets for revenue gains of \$1.5 billion (5 percent increase).

2. Banks – Banks would be subject to the DOL Fiduciary rule with respect to interactions with their customers. These interactions could occur at many different levels and the American Bankers Association indicated that it could be very difficult to determine whether specific interactions a bank may have with customers would constitute investment advice subject to the DOL regulation.¹²⁸ The DOL’s regulatory analysis for the 2016 regulation identified 6,182 insured depository institutions in the United States, with approximately 3 percent large, 3 percent midsize, and 93 percent community banks.¹²⁹

The DOL regulatory analysis focused its attention on retail non-deposit investment products (RNDIPs) of banks including equities, fixed income securities, exchange-traded funds, and variable and fixed rate annuities. DOL also noted that banks may use networking arrangements with registered broker-dealers to provide brokerage services to a bank’s customers. DOL used Public Call Report Data to suggest that approximately 1,500 banks engaged in networking arrangements. DOL asserted that the best interest contract exemption (BICE) for bank referral compensation would impose incremental additional costs for training and oversight. DOL noted that banks providing investment advice services using their own employees could incur costs to comply with the final rule and BICE. However, because DOL did not have sufficient data to estimate these costs, it argued that these costs should be similar to what other types of entities face and also asserted that only a small number of banks would be affected.

¹²⁸ American Bankers Association, *Letter to The Honorable Jay Clayton, Chairman, U.S. Securities and Exchange Commission, Public Comments from Retail Investors and Other Interested Parties on Standards of Conduct for Investment Advisers and Broker-Dealers*, September 1, 2017.

¹²⁹ Department of Labor, *Regulatory Impact Analysis for Final Rule and Exemptions*, *supra* note 12.

3. Insurance Companies & Agents – Both insurance companies and independent insurance agents faced the implications of the DOL fiduciary regulation with respect to life insurance contracts and annuity products sold to IRA owners. At the end of the first quarter of 2021, ICI reported that life insurance companies held \$519 billion in IRA assets, representing a 4 percent market share.¹³⁰

The act of recommending the sale of insurance and annuity contracts to IRA owners imposes fiduciary liability under the DOL rule, triggering significant efforts and disclosures to comply with the requirements of the rule. The rule made it impermissible for an insurance agent to receive a commission for recommending the purchase of a variable or fixed indexed annuity contract, unless the BICE exemption requirements were met.

The insurance industry was hit especially hard by the DOL rule because (1) most annuities are sold through the brokerage model, the main target of the fiduciary rule, and (2) the DOL's rule did not allow sales of annuities through commonly used non-broker-dealer independent distribution channels.

4. Mutual Funds – A mutual fund is an open-end professionally managed investment fund that pools money from many investors to purchase securities. Mutual funds represent the largest proportion of equity of U.S. corporations. Mutual fund investors may be retail or institutional in nature.

Mutual funds may distribute shares directly to investors, creating a distribution channel in which investors interact directly with mutual funds and their service providers. These interactions can occur by mail, by telephone through call centers, and through internet websites maintained by the funds. These direct interactions could lead to application of the DOL fiduciary rule even though many of these interactions are not intended to provide investment advice, but rather to facilitate the customers' transactions.

While the DOL fiduciary rule did not directly regulate mutual funds and their primary service providers, the rule could apply to distribution channels in which investors interact directly with fund sponsors and their providers. Direct communication with customers in which the rollover of funds to an IRA are discussed could trigger application of the rule. As a result, mutual funds would need to ensure that interactions with customers through direct calls, call centers, as well as statements made on a fund's website do not rise to the level of fiduciary status under the rule (or complied with the BICE).¹³¹

In addition, unaffiliated broker-dealers that distribute mutual funds clearly would be impacted by the DOL fiduciary rule, and therefore, the changes made to compensation practices to avoid triggering fiduciary liability would have an effect on these funds.

¹³⁰ *Id.*

¹³¹ Mutual fund supermarkets would also be affected by the DOL fiduciary rule with respect to their communications with investors through financial advisers, call centers, and websites.

APPENDIX B – Description of the Empirical Analysis

1. Overview of the Analysis – This analysis outlines our approach to calculating the effects of reinstating the 2016 DOL fiduciary regulation. The effects incorporate a small benefit for certain investors representing a modest adjustment in fees paid, offset significantly by the adverse impacts of losing access to financial advice. The estimates represent conservative assumptions about the adverse impacts of the regulation.

Our analysis differs from the 2016 DOL regulatory impact analysis (RIA) in two significant aspects. First, DOL presumed that fees paid to financial advisers represented pure losses for retirement investors. In essence, DOL concluded that differences in fees between different types of products represented the cost of “conflicted advice” and ignored any benefits that investors gained from receiving financial advice.

Second, since the 2016 DOL fiduciary regulation was vacated, the SEC adopted Regulation Best Interest (Reg BI), which applies to all financial advisers and is being enforced with increasing vigor.¹³² The fees for retirement and other investment accounts have continued to converge downward, due in part to this regulation. The DOL arguments in favor of separate rules for retirement investors are undercut significantly by Reg BI and the long-term downward trends in fees. Further, because the fee structure has changed so dramatically, it reduces any potential benefits that investors might accrue from the reinstatement of the 2016 fiduciary regulation.

2. Components of the Estimates – The following steps provide the framework of this analysis:

1. Determine the overall market for IRA investors, based on current conditions and data sources;
2. Identify the IRA investors most likely to face adverse consequences of reinstatement of the 2016 DOL regulation;
3. Simulate account activity, under current conditions (i.e., net returns after fees, contributions, withdrawals, and rollover patterns varied by age and income), to determine the projected aggregate IRA account balance of the subset of IRA investors. The analysis considers the likely effects over a 10-year period;
4. Simulate potential changes to account activity assuming reinstatement of the 2016 DOL regulation (i.e., reduced net returns due to loss of advice, reduced product availability and suboptimal asset holding as well as changes to contributions, withdrawals, and rollover patterns varied by age and income) to determine the projected aggregate balance of the subset of IRA investors over a 10-year period;
5. Adjust #4 for any potential benefits of the reinstatement¹³³; and
6. Compare the results of #3 and #4 (as adjusted by #5) to determine the potential loss in accumulated retirement savings of IRA investors over a 10-year period.

¹³² The SEC’s Chief Enforcement Officer is reported to be aggressively and proactively ensuring compliance with Reg BI. Refer to [SEC’s New Enforcement Chief May Bring Wider Net to Reg BI | Wealth Management](#).

¹³³ Estimating the potential benefits, while small, follows the same steps as outlined for the costs. In other words, the lower account balance and younger individuals with assets in the higher fee investments are identified. Then, the benefits (in terms of a greater return) are estimated as an offsetting effect. However, given the changes to the fee structures outlined in section II.A.2. this effect is very small relative to the cost to investors.

Market for IRA Investors (#1) – The foundation of this analysis relies on data from the Internal Revenue Service (IRS) to develop the estimates for reinstatement of the 2016 DOL fiduciary regulation. The IRS data has strengths as well as limitations. One strength of the IRS data is that it represents one of the most accurate sources for IRA balances as well as income of the account holder. The IRA tax compliance requirements (and penalties) require extensive reporting for tax purposes. The IRS data also use third-party verification with financial institutions, which improves the reliability of this information.

The greatest limitation is that the available IRS data are tabular, not micro data, preventing an analysis of taxpayers on an individual basis. Therefore, it is necessary to rely on supplemental data sources to create a fuller picture for the analysis. In this case, the supplemental data used include the Federal Reserve Survey of Consumer Finances (SCF), Investment Company Institute (ICI) IRA survey data, and Census Bureau Survey of Income and Program Participation (SIPP).¹³⁴

Subset of IRA Investors Most Likely to Face Adverse Consequences (#2)—As discussed in the analysis above, individuals with smaller account balances represent the investors most likely to experience significant adverse impacts from reinstatement of the 2016 DOL fiduciary regulation. There are two primary characteristics of small account holders – age (younger individuals earlier in their work careers generally have significant smaller account balances) and income (lower income individuals cannot afford to invest as much toward retirement savings as higher income individuals). The IRA assets for lower income investors (those with adjusted gross incomes below \$100,000) and younger investors (those 60 years of age or younger) thus represent the primary subset of IRA investors most likely to experience the greatest impact of reinstatement of the 2016 DOL fiduciary regulation.

As detailed in the body of this paper, the response of the industry to the 2016 DOL regulation was to (1) limit the available products; (2) limit services to small accounts; and (3) limit or eliminate personalized assistance through the brokerage model services. In most cases, the mass market (small investor market) faced the greatest impact from the introduction of the 2016 regulations (refer to Table 1 in Section I). Our analysis focuses on small accounts and lower income investors as those most vulnerable to the effects of reinstating the DOL regulation and to the potential to lose access to financial advice.

Starting from the \$13 trillion in total IRA assets, we identify individuals who (1) are lower-income (below \$100,000), (2) are younger (under age 60), and (3) have smaller account balances (balances under \$50,000). These individuals hold approximately \$2.9 trillion in assets. However, analysis and understanding of tax data indicates that this group is heterogeneous. Some small accounts are held by individuals who have other, more substantial retirement assets or have higher net worth and are unlikely to lose access to personal assistance if the 2016 regulation is reinstated. Excluding these individuals from our calculations leaves individuals holding approximately \$900 billion in IRA assets. This \$900 billion subset, which represents a

¹³⁴ In tax analysis, it is accepted to use the IRS data as the foundational source and supplement the individual characteristics from Census and Federal Reserve sources. These surveys are conducted with large sample sizes and respected methodologies.

very conservative estimate of the most vulnerable individuals and assets, forms the base for our estimate and represents approximately 2.7 million or approximately 47 percent of IRA accountholders and approximately 8 percent of total IRA assets.

Based on the demographics and characteristics of this 2.7 trillion affected, we estimate that 36.6 percent are most vulnerable, Table 13 distributes the IRA investors most likely to experience adverse effects by age and income classes. The assets distributed by income represent the proportion of the base (estimated base) likely to experience adverse effects of the reinstatement.

Income Class	20 under 30 years	30 under 40 years	40 under 50 years	50 under 60 years
No AGI	0.94%	1.01%	0.92%	0.94%
\$1 under \$25,000	5.28%	5.64%	5.14%	5.27%
\$25,000 under \$50,000	6.13%	6.56%	5.97%	6.12%
\$50,000 under \$75,000	6.14%	6.57%	5.98%	6.13%
\$75,000 under \$100,000	6.26%	6.69%	6.09%	6.24%

Percentages total 100 percent of the subset of estimated investors affected by reinstatement of the DOL regulation. Details may not add due to rounding.

Additional characteristics of the investors are derived from the SCF, ICI survey data, and certain SIPP variables. (These characteristics provide the weights for the simulations by income class.)¹³⁵ After applying the statistics by characteristic of IRA investor, the overall data is aligned to target the IRS aggregate figures for account balances by income class. This analysis indicates that approximately 2.7 million IRA accounts would be affected adversely by reinstatement of the DOL regulation, representing individuals with account balances of no more than \$100,000 and who are under age 60.

Account Simulation under Current Conditions and with Reinstatement (#3 – #4) – The analysis characterizes IRA average balances by income and age of the investors. These categories of IRA investors develop the baseline for purposes of the comparison. For each category, the analysis distributes the investors by the current contributions, leakage, rollovers, as well as the estimated composition of underlying investments supporting these assets. This creates a picture of the current baseline activity, projected over the ten-year period.

For example, as shown in Table 13, our analysis estimates that 6.14 percent of IRA investors aged 20-29 with income from \$50,000 to \$74,999 are likely to experience adverse effects from a reinstatement of the 2016 fiduciary regulation. Using the age and income characteristics of that 6.14 percent, we simulate the anticipated account activity to estimate this subgroup’s projected IRA balance over a 10-year period. As mentioned, the analysis represents a comparison of the IRA balance under current conditions (step #3) compared to the IRA balance under reintroduction (step #4). This process is replicated for each income and age group included in

¹³⁵ These subsets of investors are characterized further by financial institution where they have invested the assets. Refer to Graph 5 in Section II.

Table 13. The focus of this analysis is the category of investors most likely to experience adverse effects (as other investors may be more likely to adjust to the changes). However, these estimates are conservative in the sense that the adverse effects of reinstatement could extend beyond those identified as most likely to experience adverse effects.

The following describes the variations by income and age for contributions and rollover activity, and how reintroduction of the 2016 fiduciary regulation is expected to affect that activity.

Contributions Distributed by Income – The following table shows that contributions to IRAs (all types) correlate positively with adjusted gross income. As is commonly understood, the ability to save increases with income. However, while not all accounts with small balances are lower income individuals, lower income individuals, by virtue of their lower contribution amounts, will most likely have relatively smaller account balances than their higher income counterparts.

Table 14 displays the average amount saved by income class. It is important to note that taxpayers in the “No AGI” category often are taxpayers with higher incomes who have adequate offsetting losses or deductions from income that enable them to lower their AGI to zero. Further, those individuals with lower incomes are the most likely to feel negative repercussions from the reinstatement of the DOL regulation. In other words, higher-income individuals (and higher net worth) have greater access to financial planning services and are unlikely to experience a disruption in financial advice from reinstating the DOL regulation.

On average, individuals with the lowest AGI class (from \$1 to under \$25,000) contribute only 51 percent of the highest AGI class (\$200,000 or more).¹³⁶ The pattern is even more pronounced for SEP and SIMPLE plans, where the contributions of the lowest classes are 14.3 and 13.9 percent respectively, of the highest income class.¹³⁷

¹³⁶ It is important to note that taxpayers in the “No AGI” category often are taxpayers with higher incomes, but also having adequate offsetting losses or deductions from income.

¹³⁷ Considering current IRA contributors, there are distinct patterns – those that contribute the maximum (reflecting a greater ability to save) and those that defer at a significantly lower rate. The IRA investor is reflective of the investment community at large, which is comprised of many small investors with limited means and resources for investing and those large investors with far greater means and resources.

Table 14.—Average Direct Contributions to IRAs, Tax Year 2018
(Does not include rollovers, Dollar Amounts in Millions)

Source: IRS SOI Table 3. Taxpayers with IRAs, SEP, and SIMPLE Plans

Adjusted Gross Income Range	Traditional	SEP	SIMPLE	Roth
No AGI	\$3,977	\$16,309	\$8,423	\$3,711
\$1 under \$25,000	\$2,706	\$3,110	\$1,732	\$2,110
\$25,000 under \$50,000	\$3,386	\$5,185	\$2,319	\$2,758
\$50,000 under \$75,000	\$3,624	\$7,267	\$3,614	\$3,196
\$75,000 under \$100,000	\$3,708	\$9,519	\$4,006	\$3,535
\$100,000 under \$200,000	\$4,200	\$12,197	\$6,256	\$3,924
\$200,000 or more	\$5,343	\$22,771	\$12,505	\$3,773
Total	\$4,198	\$14,645	\$5,428	\$3,408

IRA contributions are an important aspect of retirement savings and should financial advice become less available, it is possible for a portion of these contributions to cease or become intermittent. One role of financial advisers, as stated previously, is the overall financial counseling regarding the individual’s retirement income planning. Without the relationship established by many advisers, contributions will decline for certain (lower-income) individuals.

Age – The effects of reinstating the 2016 DOL fiduciary regulation do not affect all individual savers in the same way. Specifically, savers with higher incomes and ample financial resources tend to have greater access to financial advisers. On the other hand, small account balance savers (includes younger and/or lower-income investors) tend to have fewer options.¹³⁸

One important influential characteristic for retirement savers is the age of the saver. Younger savers tend to have lower incomes at the beginning of their work tenure and thus lower savings rates. This is consistent with the IRA statistics available from the IRS Statistics of Income.

Table 15.—Traditional IRA Average Contributions, Rollovers, and Year-End Balance, by Age, Tax Year 2018

Age Information	Average Contribution	Average Rollover	Average Year-End Balance
No age info/under 20 years	\$2,242	\$20,852	\$24,997
20 under 30 years	\$3,007	\$6,077	\$9,970
30 under 40 years	\$4,036	\$25,117	\$27,702
40 under 50 years	\$4,646	\$67,887	\$66,383
50 under 60 years	\$5,840	\$127,718	\$128,375
60 years and over	\$6,593	\$181,867	\$236,884

Source: Matched file of Forms 1040, 1099-R, 5498, and W-2 for Tax Year 2018.
IRS, Statistics of Income Division, Individual Retirement Arrangements Study, January 2021.

¹³⁸ The fixed costs of account management are inversely related to the account balance (i.e., it is more costly to manage many small accounts compared to one larger account).

Contributions, rollovers and accumulated savings correlate positively with age, just as with income. In other words, younger individuals are new to retirement savings and have not had the advantage of steady contributions and earnings accumulation. For purposes of our estimates, individuals under age 60 are assumed to have the greatest impact on their savings performance from the loss of financial advice.

Adjusted Gross Income	Average Rollover Amount
No AGI	\$142,782
\$1 under \$25,000	\$37,536
\$25,000 under \$50,000	\$43,586
\$50,000 under \$75,000	\$63,465
\$75,000 under \$100,000	\$96,028
\$100,000 under \$200,000	\$122,663
\$200,000 or more	\$231,407
Source: IRS SOI, Taxpayers with Individual Retirement Arrangement Plans, by Size of Adjusted Gross Income, Tax Year 2018	

IRA investor characteristics are very important to this analysis, because higher income (and those with large account balances) are less likely to feel the effects of reinstating the DOL regulation. For purposes of our simulations, we excluded high income classes of taxpayers (*although it is possible that some may face adverse effects of reinstatement of the 2016 DOL fiduciary regulation*) as the assumption is that high net worth or high account balance investors will see less disruption in the services offered to them than individuals with lower net worth and account balances.

Rollovers by Adjusted Gross Income – According to the IRS SOI data, the vast majority (70 percent) of rollover assets are from individuals with adjusted gross incomes of at least \$100,000 or more. However, 53 percent of the individuals making the rollover have adjusted gross incomes below \$100,000 representing 36.6 percent of the assets (this is consistent with contribution behavior). This suggests that there are a larger number of investors with relatively smaller account balances due to rollovers.

Taking into consideration expected trends in contributions, withdrawals, and rollovers based on current conditions, we estimate that the subgroup of IRA investors being considered in our analysis would increase their retirement savings from approximately \$900 billion to \$1.75 trillion over the next 10 years.¹³⁹

The next step is to simulate the change in behavior resulting from reintroduction of the 2016 fiduciary regulation over the ten-year period.¹⁴⁰ The simulation that characterizes the change following reinstatement of the regulation rely on the same assumptions regarding the baseline – the previous pattern of growth (rollovers, contributions, and numbers of individuals) will continue at an average rate – smoothed to eliminate anomalous features in the data. The relevant variables (based on age and income) include the weighted average contribution amounts, average rollover activity, probability of early withdrawals, and probability of uneven contributory

¹³⁹ Within the \$2.9 trillion, approximately 36.6 percent of IRA investors likely to face a significant impact from reinstatement of the DOL regulation. These IRA investors (within the \$2.9 trillion) most likely to have adverse effects hold approximately \$900 billion of these assets and about 47 percent (or approximately 2.7 million) of accountholders

¹⁴⁰ This analysis simulates the economic behavior and effects of the reinstatement of the regulation for various classes of investors, based on the detailed characteristics available in the SCF and SIPP. The estimates simulate disaggregate behavior and target the IRS data to ensure that the estimates reflect the overall market.

behavior. However, the analysis assumes there are four areas where discernable differences arise, following reinstatement of the regulation.

3. Quantifying the Impact of Reinstatement – Retirement investors will be adversely affected by the loss of services that will occur if the 2016 DOL regulation is reinstated (and did occur following the implementation of the 2016 regulation). The loss of services (including financial advice) can be reflected in a number of ways (varying by the investor’s characteristics) including (1) sub-optimal investment choices; (2) underperformance from asset allocation; (3) pre-retirement distributions (i.e., early withdrawals); and (4) uneven contributory patterns.

Sub-optimal investment choices occur when an investor selects investments that will underperform relative to investments that would be chosen if a financial adviser is involved. Underperformance occurs when an investor fails to select an adequately diversified portfolio. This underperformance also occurs when small rollovers (up to \$5,000) are made from a qualified plan to an IRA, which are required to be invested in “safe” investments, like a money market account.

Without access to a financial advisor, these assets may sit in low-yield assets for a long period of time. These two potential costs to investors (investment choice and underperformance) are characterized as loss of earnings over a ten-year horizon. The latter two costs (early distributions and uneven contribution patterns) reduce investment principal and earnings associated with the IRA. Table 17 displays examples of the simulations for various behavioral assumptions. For estimating purposes, we assumed that, on average, investors would lose between 75 and 150 basis points from loss of financial services.¹⁴¹ Table 17 illustrates the effect on investors for an average (100 basis points) reduction and an outer bound (150 basis points) reduction.

The table illustrates the effects on overall account performance from the loss of access to financial services for the investments. For instance, if the investor’s rate of return underperforms relative to an identical investor, the results isolate the effects of that single underperformance. However, it is possible for more than one loss of services (investment options, loss of advice) to affect investors over the life of the investment.

The simulations focus on the potential for underperformance of retirement savings outcomes if the 2016 regulation is reinstated for the IRA owners described above (i.e., individuals with account balances under \$100,000 who are under age 60). For purposes of this analysis, while it is possible that some older investors and high-balance investors could also be adversely affected by the reinstatement of the regulation, it is assumed that these investors will be much less likely to face the same losses of retirement savings. We estimate that approximately 2.7 million individuals will be adversely affected by the reinstatement of the regulation, representing 19 percent of the investors in the affected class (i.e., under age 60 with smaller account balances).

¹⁴¹ The Vanguard study (Kinniry, *supra*, note 16) found potential underperformance of 300 basis points, but the study indicates that this estimate was not an annual figure. However, it does reflect the potential reduction in performance that could occur in a given year. A number of studies quantified the benefits of financial advice, including ING Retirement Research Institute, *Working with an Advisor, Improved Retirement Savings, Financial Knowledge and Retirement Confidence*, 2010 and Cockerline, Jon, *New Evidence on the Value of Financial Advice*, The Investment Funds Institute of Canada, 2012. Our estimates are consistent with the findings in these studies.

The average small investor age 30-40 has a year-end account balance of \$27,702 and contributes on average \$3,007 per year.¹⁴² The baseline rate of return is 5 percent (a conservative assumption was assumed, given the demographics of the affected investors), compared to the reduced return from loss of financial advice services. Our analysis assumed that reductions in account performance would vary by both income and age of the accountholder.

For purposes of this example, over ten years, the small investor would lose accumulated savings of approximately \$8,000 from a reduction of 100 basis points and approximately \$10,900 from a reduction of 150 basis points.

With respect to pre-retirement withdrawals from retirement savings, the simulation assumes that once every ten years, the small investor makes an early withdrawal of 10 percent of the account balance due to loss of financial advice, holding all else constant. The analysis recognizes that withdrawals will occur with or without financial advice. However, it is likely that in the absence of advice, these early withdrawals may occur more frequently or in larger amounts according to the EBRI longitudinal study.¹⁴³ As stated previously, financial advisers typically adopt a holistic approach to the investor’s retirement readiness plan. This simulation simply demonstrates the impact of losing access to financial advice (e.g., coaching by an adviser to preserve retirement accounts, rather than to access the funds early) and indicates that, over ten years, the account holder could erode their retirement readiness by approximately \$7,000 from an early withdrawal (holding all else constant).¹⁴⁴

Time Horizon	Relative Reduction in Account Values for Small Investor†		Withdrawals*	Uneven Contributions*
	100 basis points	150 basis points		
10-year	-8.8%	-13.4%	-8.3%	-9.9%
20-year	-16.7%	-25.6%	-16.7%	-12.7%
30-year	-25.7%	-39.7%	-26.3%	-14.0%

† Assumes baseline average account balances and average contribution rates (Refer to Table 15).
 * Assumes withdrawal and uneven contributory patterns as detailed in the EBRI Longitudinal Study (2018).

With respect to uneven contributions, the analysis assumes that investors will miss two contributions in each of the ten-year time horizons. Actual investor behavior is likely to reflect some combination of these effects (early withdrawals and uneven contribution patterns) over time. Indeed, if investors lose access to financial advice, the effects could easily cascade for some investors as they stop making retirement savings contributions and make multiple withdrawals from the assets already saved. Studies indicate that most IRA investors do not contribute consistently to these accounts, and our analysis indicates further disruption to this

¹⁴² Refer to Table 15, above.

¹⁴³ Copeland, *supra* note 66.

¹⁴⁴ Refer to the Joint Committee on Taxation, *supra* note 30 and EBRI, *supra* note 32.

uneven contributory pattern could reduce retirement readiness by approximately \$8,200 over ten years.¹⁴⁵

Taking into consideration all of the above factors, our analysis thus estimates that the subset of IRA investors taken into consideration for purposes of our simulations would increase their retirement savings from \$900 billion to only \$1.6 trillion if the 2016 fiduciary regulation is reintroduced.

Adjustment for Potential Benefits (#5) – In an effort to capture the potential benefit for some investors, this analysis assumes that a small percentage (less than 5 percent of the subset) could see an improvement in their overall services. Therefore, to capture the benefit, the estimated investment losses were offset by the potential increases for a small set of investors. We estimate the value of these benefits to the subset of] IRA investors is less than \$1 billion over 10 years.

Comparison of the Simulation to the Baseline (#6) – For purposes of this analysis, more moderate assumptions were applied so as not to overstate the potential effects. Further, in any given year of this simulation, the analysis assumes that only a portion of the subset will experience this disruptive behavior and most individuals will only have intermittent changes in behavior over a ten-year horizon (compared to the historical patterns). The actual effects could be significantly more substantial than estimated due to potential cascading effects of loss of financial advice, but clearly demonstrate the benefits of financial services for maintaining retirement readiness. The final results compare the projected baseline activity to the simulations to estimate the loss in investment over the ten-year period.

As described above, under current conditions, we estimate that the subgroup of IRA investors most likely to be affected by reintroduction would have \$1.75 in retirement savings at the end of 10 years, but they would have only \$1.6 trillion in retirement savings at the end of 10 years if DOL reintroduces its 2016 fiduciary regulation. We further estimated the potential benefits of the rule on this group of IRA investors as less than \$1 billion. Thus, the net effect would be \$140 billion – the estimated *loss* of retirement savings for IRA investors ($1.750 - 1.610 + 0.001 = \140 billion).

4. Wealth Estimates

Estimated Decline in Retirement Assets – The estimated effect of the loss of financial advice caused by a reintroduction of the 2016 fiduciary regulation (as described above) was distributed by racial composition and the account/savings characteristics of those particular investors. The SCF provides a sense of the composition of the wealth holdings by race and other characteristics. As stated previously, retirement savings represents a significant portion of wealth, and this is particularly true for households of color, as they are less likely to own other assets (other than home and retirement savings).

To incorporate the effects of the simulations, the analysis relies on the SCF details for retirement savings. Within this data are classes of retirement assets (e.g., IRAs and qualified plans). IRA

¹⁴⁵ Investment Company Institute, *Ten Important Facts About IRAs*, ICI Research, 2020.

assets were re-estimated using the previously described impact analysis and compared to the SCF IRA asset holdings. This offers a comparison of the current wealth gap to the wealth gap that would occur with reinstatement of the DOL regulation.

Racial Composition – To estimate the impact of reinstating the DOL regulation by race, it is important to reflect the racial composition by income and retirement status, which incorporates financial attributes of Black and Hispanic Americans, including certain variations in their specific behavior (e.g., higher cash out rates). In order to do so, the analysis relied on weights created by detailed income classes from the Census Bureau Current Population Survey.¹⁴⁶ In addition, the analysis relied on Census data to provide a probability of retirement asset ownership. The data do not offer the ability to match by unique identifiers (e.g., social security numbers), therefore the analysis relies on a “soft match,” meaning the characteristics of the IRS-based simulation must correspond to the CPS parameters. After matching these records, the analysis confirms the aggregate targets by investor and demographic characteristics, so as not to over- or understate the effects.

Our estimates focus on a single component of the wealth gap (i.e., IRA assets) and find that Black and Hispanic individuals will see a 20 percent decline in IRA assets during the 10-year period if the 2016 DOL regulation is reinstated, which is substantially higher than the 8 percent decline in IRA assets we estimated above before taking race into account. This greater decline in IRA assets for Black and Hispanic individuals as a result of reinstatement will contribute to an approximately 20 percent increase in the wealth gap with respect to IRAs.

¹⁴⁶ U.S. Census Bureau, Current Population Survey, 2020 Annual Social and Economic Supplement (CPS ASEC).

APPENDIX C – Long-Term Trends in Investor Fees

The DOL 2016 regulatory analysis asserted, as its primary premise, that fees charged to IRA investors reflect a conflict of interest for advisers and, as a result, these investors lose retirement savings because of the fees. However, over the long-term, market competitiveness has driven down fees paid for investments. In addition, long-term trends show a clear decline in investments in high-fee funds, reflecting consumer demand for lower cost fund options. While broker-dealers and others providing financial advice provide value for their services that deserves appropriate compensation for their services, market forces are adjusting fees to ensure that compensation to advisers is not excessive.

The ICI identified a fundamental problem with the DOL regulatory analysis of the 2016 regulation.¹⁴⁷ ICI noted that the 2016 DOL regulatory analysis used outdated research and, therefore, ignored the fundamental transformations in the mutual fund market that have occurred since 2000. In 2000, about 50 percent of funds with a front-end load share class also had a no-load share class. By 2010 more than 90 percent of funds with a front-end load share class also offered a no-load share class.

Table 5, in Section II, shows the effect of the transition to no-load funds on mutual fund gross sales percentages. In 2000, no-load mutual funds represented 46 percent of gross sales. By 2020, this percentage had increased to 88 percent.

The growth in sales of no-load mutual funds did not occur in a vacuum, but also reflects the increased competitiveness in the industry and investor demand for lower fees, including for load funds.

This is important because the DOL regulatory analysis suggested that broker-dealers encouraged investors to investments in load funds, which DOL argued per se represents conflicted advice to investors.

ICI looked at potential mutual fund underperformance from 2008-2016 by comparing front-end load funds to retail no-load funds, which implicitly assumes that all funds that pay a load fee to brokers has potential for conflicted advice and that all no-load funds are conflict free. Using net return plus 12b-1 fees to measure performance, ICI found the difference in returns only 0.10 to 0.11 percent, which is significantly smaller than the DOL's estimated underperformance.

The growth in no-load mutual funds has also driven down average expense ratios. Since 2000, the average expense ratios for long-term mutual funds have declined significantly, particularly for equity, hybrid, and bond funds, as shown in Graph 5, Part I.¹⁴⁸ A 2019 Morningstar report identified several factors driving fees downward: (1) growth in investor awareness of the importance of minimizing investment costs, (2) intensifying competition among fund managers drives fees down to increase market share, and (3) changes in the economics of advice.¹⁴⁹

¹⁴⁷ ICI Investment Company Institute, Letter to Employee Benefits Security Administration, March 17, 2017.

¹⁴⁸ The ICI excludes money market funds, bond funds, and hybrid funds from the long-term mutual funds category.

¹⁴⁹ Morningstar, *2019 U.S. Fund Fee Study*, *supra* note 53.

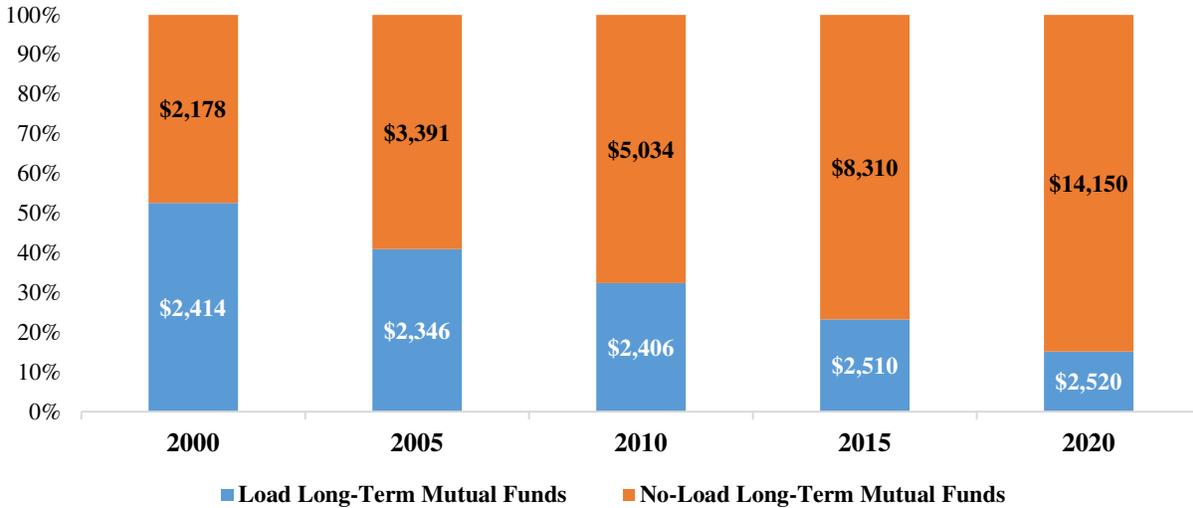
Morningstar also noted that the move to fee-based models of charging for financial advice represents a key driver in the shift to lower-cost funds, share classes, and fund types (e.g., ETFs).

Since 2000, the percentage of assets invested in no-load mutual funds has increased substantially while the percentage of assets in load funds has decreased (see Graph 15).

Graph 15.—Long-Term Mutual Funds are Concentrated in No-Load Share Classes

Gross Sales, in billions of dollars

Source: Investment Company Institute, Lipper and Morningstar, 2021



Morningstar notes that an asset-weighted average expense ratio is a better measure of the average costs because it reflects *what investors paid*, on average, for the funds in which they invested rather than *what funds charge*, on average. For example, as shown in Table 18, for 2020, equity growth funds had a simple average expense ratio of 1.16 percent, compared to an asset-weighted average of 0.50 percent. Morningstar also noted that funds with expense ratios above 1.10 percent accounted for only about 7.9 percent of assets invested in active U.S. equity funds in 2019.

**Table 18.—Mutual Fund Expense Ratios Vary
Across Investment Objectives, 2020
(Percent in Class)**

Investment objective	10th percentile	Median	90th percentile	Asset- weighted average
Equity mutual funds	0.59	1.08	1.92	0.50
Growth	0.64	1.04	1.82	0.68
Sector	0.72	1.18	2.05	0.69
Value	0.63	1.04	1.81	0.59
Blend	0.30	0.91	1.74	0.29
World	0.67	1.14	1.98	0.62
Hybrid mutual funds	0.50	1.09	1.99	0.59
Bond mutual funds	0.37	0.75	1.58	0.42
Investment grade	0.29	0.64	1.42	0.31
World	0.53	0.91	1.75	0.49
Government	0.20	0.68	1.59	0.35
High-yield	0.58	0.90	1.74	0.63
Municipal	0.41	0.68	1.54	0.46
Money market funds	0.15	0.30	0.64	0.22
<i>Memo</i>				
Index equity mutual funds	0.04	0.30	1.63	0.06
Target date mutual funds*	0.27	0.65	1.37	0.37
Sources: Investment Company Institute and Morningstar				

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