COMMENT

LOYALTY THROUGH UNLAWFULNESS: STANDING UP TO THE DEPARTMENT OF LABOR'S FIDUCIARY RULE

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ABSTRACT

This Comment examines the Department of Labor's (DOL's) Fiduciary Rule, and argues that the DOL failed to comply with Executive Order 13,563's requirements for inter-agency collaboration and for a qualitative and quantitative cost-benefit analysis of rulemaking alternatives. This Comment highlights how a newly established fiduciary can challenge the Fiduciary Rule through a cause of action under the Administrative Procedure Act (APA), where that fiduciary has standing to sue since it can show that it suffered from an actual and/or imminent injury that is concrete and particularized on account of the Fiduciary Rule. Since a newly established fiduciary may successfully challenge the Fiduciary Rule, this Comment recommends that Congress repeal the Fiduciary Rule, while the DOL and the Securities and Exchange Commission (SEC) replace the Fiduciary Rule with a uniform fiduciary standard.

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INTRODUCTION

A fiduciary is an individual or entity that obliges itself to provide loyalty and care to a client, corporation, shareholder, beneficiary, or patient, by putting the recipient's interests before its interests.[1] The Employee Retirement Income Security Act (ERISA) of 1974 extends these duties to financial advisers and institutions.[2] ERISA requires financial advisers and institutions to act in their clients' best interests when exercising discretionary authority and control over the management, or disposition of assets. This requirement includes investment advice about any amounts of money or other property for a fee or compensation that is direct or indirect.[3]

Recent business and economic trends have led to individuals being tasked with managing their retirement savings themselves rather than their

1. John F. Mariana, Christopher W. Kammerer, & Nancy Guffey-Landers, *Understanding Fiduciary Duty*, 84 FL. B. J. 20, 22 (2010); *see* Thomas L. Hafemeister & Selina Spinos, *Lean on Me: A Physician's Fiduciary Duty to Disclose an Emergent Medical Risk to the Patient*, 86 WASH. U. L. REV. 1167, 1187–88 (2009).

2. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 832 (codified as amended at 29 U.S.C. §§1001–1461 (2012)); *see* Barbara Black, *How to Improve Retail Investor Protection After the Dodd–Frank Wall Street Reform and Consumer Protection Act*, 13 U. PA. J. BUS. L. 59, 75 (2010) (noting that fiduciaries include retirement advisers and institutions under the Employment Retirement Income Security Act (ERISA)).

3. 29 U.S.C. § 1002(21)(A) (2012).

employers.[4] This shift has caused retirement plans, such as 401(k)s, to be transferred into private, individual retirement accounts (IRAs),[5] as people find the deferred tax benefits very attractive.[6] However, under the Department of Labor's (DOL's) 1975 Rulemaking, some financial advisers and institutions are not required to adhere to fiduciary standards.[7] As a result, beneficiaries of IRAs are losing upwards of $17 billion annually through conflicting advice that works against their best interests.[8] The DOL addressed these alarming gaps by promulgating the Fiduciary Rule to extend fiduciary protections to IRAs.[9]

While the Fiduciary Rule pushes the retirement industry away from lucrative, commission-based compensation models and toward fee-based models,[10] it provides this industry with the Best Interest Contract Exemption (BICE) as a means of continuing commission-based compensation.[11] Nonetheless, financial advisers and institutions,[12] members of both parties

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4. *See* Michael Molinski, *Disappearing Pensions Hurt U.S. Economy as well as Workers*, USA TODAY, Apr. 23, 2016, http://www.usatoday.com/story/money/2016/04/23/pensions-economy-workers/83292892/ (noting that between 1980 and 2015, the proportion of private, defined benefit pension plans fell by 23% due to costs for employers); Walter Updegrave, *How Much Do I Really Need to Save for Retirement?*, CNN, Oct. 29, 2015, http://money.cnn.com/2015/10/29/retirement/how-much-retirement-savings/ (breaking down how much individuals should be saving for retirement).

5. *See* COUNCIL OF ECON. ADVISERS, EXEC. OFFICE OF THE PRESIDENT, THE EFFECTS OF CONFLICTED INVESTMENT ADVICE ON RETIREMENT SAVINGS 1, 2–3 (2015).

6. *See* TIMOTHY W. KOCH & S. S. MACDONALD, BANK MANAGEMENT 382 (8th ed. 2014) (explaining that individual retirement accounts (IRAs), have deferred tax benefits for beneficiaries that allow taxes to be paid upon withdrawal, not upon growth); *see also* INTERNAL REVENUE SERV., CHOOSING A RETIREMENT PLAN: DEFINED BENEFIT PLAN, (2016) (highlighting defined benefit plans as being the highest cost and heavily taxed plan).

7. *See* Definition of the Term 'Fiduciary', 81 Fed. Reg. 20,946, 20,951 (Apr. 8, 2016) (to be codified at 29 C.F.R. pts. 2509, 2510).

8. *See* COUNCIL OF ECON. ADVISERS, *supra* note 5, at 2–3.

9. Definition of the Term 'Fiduciary', 81 Fed. Reg. at 20,951 (explaining that this modernized approach covers IRA owners who seek advice due and lack investment expertise).

10. *See* Liz Skinner, *Figuring Out Fiduciary: Now Comes the Hard Part*, INVESTMENT NEWS (May 9, 2016), http://www.investmentnews.com/article/20160509/FEATURE/160509939/the-dol-fiduciary-rule-will-forever-change-financial-advice-and-the (highlighting that this will cause decreased profits and increased costs).

11. Best Interest Contract Exemption, 81 Fed. Reg. 21,002 (proposed Apr. 8, 2016) (to be codified at 29 C.F.R. pt. 2550) (allowing for the continued use of traditional commission-based compensation models that would otherwise become prohibited under ERISA).

12. *See* Kim O'Brien, *What to Expect from DOL Fiduciary Rule Lawsuits,* INS. NEWS NET, (Aug. 24, 2016), http://advisornews.com/innarticle/expect-dol-fiduciary-rule-lawsuits (explaining how financial interest groups have been trying to attack the rule).

in Congress,[13] and those it is intended to protect strongly oppose the rule.[14] The opposition may have risen out of the DOL's non-compliance with Executive Order 13,563.[15] Before making any amendments to the 1975 Rule regarding fiduciary duties, the order required the DOL to conduct a full quantitative and qualitative cost-benefit analysis for alternatives to the rule, and to collaborate and coordinate with other agencies, such as the Securities and Exchange Commission (SEC).[16] Based upon a senate report and unforeseen effects,[17] there is strong evidence showing that the DOL did not comply with the executive order.[18]

This Comment asserts that the DOL's non-compliance with Executive Order 13,563 allows newly established fiduciaries to challenge the Fiduciary Rule in court. Part I explains the history of fiduciary duty under ERISA, including past fiduciary rulemakings. Part II introduces Executive Order 13,563 and the history behind this order, and reveals how the DOL's non-compliance with that order caused unforeseen consequences. Part III argues that the Fiduciary Rule can be challenged because of the DOL's non-compliance. Part IV recommends that (1) Congress repeal the Fiduciary Rule; (2) the DOL, SEC, and representatives from the financial industry come together through a Presidential Study Commission, White House Task Force, or negotiated rulemaking to review and recommend ways to recreate the Fiduciary Rule; and (3) the DOL and SEC accept those recommendations to establish a new Fiduciary Rule that not only complies with Executive Order 13,563, but sets a uniform fiduciary standard for financial advisers, brokers, and institutions, under each respective

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13. *See* John Berlau, *How Fiduciary Rule May Censor Financial Broadcasters Like Dave Ramsey*, FORBES (Mar. 4, 2016), http://www.forbes.com/sites/johnberlau/2016/03/04/how-fiduciary-rule-may-censor-financial-broadcasters-like-dave-ramsey/#4e4ce82ae696.

14. *See* Michael Wursthorn, *Watch Out, Retirement Savers, Your Choices Are Poised to Shrink*, WALL ST. J., Aug. 18, 2016, http://www.wsj.com/articles/watch-out-retirement-savers-your-choices-are-poised-to-shrink-1471560128.

15. Exec. Order No. 13,563, 3 C.F.R. § 407 (2012).

16. *See id*.

17. *See* MAJORITY STAFF OF S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, 114TH CONG., THE LABOR DEPARTMENT'S FIDUCIARY RULE: HOW A FLAWED PROCESS COULD HURT RETIREMENT SAVERS 1, 2 (Comm. Print 2016) [hereinafter S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS] (indicating that the Department of Labor's (DOL's) failure to complete a full cost-benefit analysis and substantially collaborate and coordinate with other agencies, has caused numerous problems for the Fiduciary Rule).

18. *See* Jeanne Marie Zokovitch Paben, *Green Power & Environmental Justice-Does Green Discriminate?*, 46 TEX. TECH L. REV. 1067, 1098 (2014) (indicating that executive orders are lawful and may have the force of law when directing agencies to promulgate rules in a way that does not violate a congressional act or the Constitution).

agency's statutory authority.

I. HOW WE GOT TO WHERE WE ARE TODAY WITH FIDUCIARY PROTECTION

In 1974, ERISA was signed to protect the American workforce's private pensions from perceived abuses.[19] ERISA created a uniform regulatory regime for employee benefit plans,[20] which included a cause of action for breach of fiduciary duty.[21]

A. ERISA's Impact on Fiduciary Duties

ERISA prescribes a strict fiduciary standard that those overseeing retirement plans must obey or face civil liability under a private right of action.[22] The fiduciary standard is a functional test that defines minimum standards for administrating a retirement plan or account.[23] ERISA has an exclusive benefit provision that creates a duty of loyalty for fiduciaries,[24] and bars prohibited transactions that are unique dangers to retirement benefits.[25]

A prohibited transaction applies to anyone who gives investment advice

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19. *See* Joshua Foster, *ERISA, Trust Law, and the Appropriate Standard of Review: A De Novo Review of Why the Elimination of Discretionary Clauses Would Be an Abuse of Discretion*, 82 ST. JOHN'S L. REV. 735, 739–40 (2012) (explaining that this response was necessary because of the Internal Revenue Service's (IRS's) handling of pensions while Congress passed several laws that lacked fiduciary conduct criteria for regulating pensions and retirement accounts); John H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule* 55 U. CHI. L. REV. 1105, 1158 (1988) (noting that this standard has been the centerpiece of the common law of trusts, whereby ERISA embodied such protection from the Teamsters Union raiding union-controlled pensions).

20. *See* Aetna Health, Inc. v. Davila, 542 U.S. 200, 208 (2004) (explaining that ERISA creates an integrated system of enforcement mechanisms).

21. *See* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 53 (1987).

22. 29 U.S.C. § 1132(a)(1)(B) (2012).

23. *See* Yeseta v. Baima, 837 F.2d 380, 384 (9th Cir. 1989) (noting that an individual was a fiduciary because he exercised control even when it was unclear whether he was authorized to act as a fiduciary); *see also* EMP. BENEFITS SEC. ADMIN., U.S. DEP'T OF LABOR., MEETING YOUR FIDUCIARY RESPONSIBILITIES 1 (May 2004) (highlighting that fiduciary status is based on the functions performed, rather than a particular title).

24. 29 U.S.C. § 1104(a)(1)(A)(i) (2012); Langbein, *supra* note 19, at 1108 (noting three different sections at the heart of the duty of loyalty, including an exclusive benefit rule).

25. *See* Alden J. Bianchi, *Department of Labor's 2016 Final Fiduciary and Conflict of Interest Regulations: New Fiduciary Standard*, NAT'L L. REV. 1 (May 12, 2016), http://www.natlawreview.com/article/department-labor-s-2016-final-fiduciary-and-conflict-interest-regulations-new.

for a fee.[26] Specifically, a prohibited transaction occurs when a financial institution, financial adviser, or broker-dealer, renders investment advice[27] that will serve the fiduciary's interest, acts in the beneficiary's conflicting interests, or when the fiduciary receives any consideration for their account from another party dealing with that plan's assets.[28] These are prohibited transactions because the fiduciary is self-dealing when providing investment advice; they are acting for their own benefit rather than the beneficiary's "exclusive benefit."[29] Congress did not define investment advice when drafting ERISA and gave the Secretary of Labor the authority to administer rules, regulations, and practices that clarify ambiguities in ERISA.[30]

B. Rulemaking to Ensure Fiduciary Protection

The DOL first addressed fiduciary protection regarding investment advice in its 1975 Rulemaking, which established that a financial professional or institution is considered a fiduciary upon rendering: (1) advice to the value of securities or other property, or recommendations of investing in, purchasing, or selling securities or other property; (2) on a regular basis; (3) pursuant to a mutual agreement, arrangement, or understanding between such person and the plan or a fiduciary with respect to the plan; (4) that is the primary basis for which the retirement investor's decisions is made; and (5) is individualized pursuant to the needs of the plan.[31] Decades later, IRAs and 401(k)s expanded the retirement market,[32] but the protections of the 1975 Rule did not extend fiduciary protection to 401(k)s or IRAs because every element was not met.[33] This provided advisers the opportunity

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26. Nat'l Ass'n for Fixed Annuities v. Perez, No. 16-1035, 2016 WL 6573480, at *6 (D.D.C. Nov. 4, 2016).

27. 29 U.S.C. § 1002(21)(A)(ii) (2012) (establishing the rule that fiduciary status is invoked for a financial adviser or institution under an ERISA plan or IRA if that individual or entity renders investment advice for a fee or other compensation or has any authority or responsibility to do so).

28. 29 U.S.C § 1106 (2012).

29. *See* Kristina M. Zanotti, *Beyond the Soundbite: Why the New DOL Fiduciary Rule Means More Than Acting in a Client's Best Interest*, 29 BENEFITS L.J., no. 2, Summer 2016, at 4, 8 (noting that the fiduciary is getting something in return for the specific transaction whether direct or indirect).

30. 29 U.S.C. § 1204 (2012) (noting that the Secretary of the Treasury also has the power, and that both should coordinate with one another); *See* Zanotti, *supra* note 29, at 4.

31. 29 C.F.R. § 2510.3-21(c)(1) (2015).

32. *See* Nat'l Ass'n for Fixed Annuities v. Perez, No. 16-1035, 2016 WL 6573480, at *10 (D.D.C. Nov. 28, 2016) (noting that this rule was effective when promulgated, since 401(k)s were rarely used and IRAs were not in existence).

33. *See* Zanotti, *supra* note 29, at 3 (explaining that fiduciary standards would not apply

to put themselves before their clients in order to receive massive compensation.[34]

In 2010, the DOL issued a notice of proposed rulemaking[35] which began the process for today's Fiduciary Rule that required nearly every adviser or institution rendering investment advice to adhere to a fiduciary standard.[36] However, the proposal met steep opposition because of its industry-wide effects,[37] and the DOL withdrew it accordingly. In 2015, the DOL proposed a similar rule to address the gaps left under the 1975 Rule,[38] since beneficiaries lost on average $17 billion annually due to self-dealing advice that was permissible with 401(k)s and IRAs.[39] This proposal broadened the definition of financial advice to close the gaps left in the 1975 Rule,[40] and allowed fiduciaries, through rigorous requirements, to use commission-based and variable-fee compensation models that were not present in the 2010 proposal and would otherwise be considered ERISA prohibited, self-dealing transactions.[41]

After the required notice-and-comment period, the DOL published the result and adopted it as the Fiduciary Rule. The Fiduciary Rule requires the fiduciary to render advice based on the particular investment needs of the recipient, with respect to monies or other property of a plan or IRA.[42]

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when (1) advice was given regarding one-time rollovers or regarding what plan to select, since this advice was not given on a regular basis, and (2) advisers denied that the advice was the primary basis for an investment decision).

34. *See* Bianchi, *supra* note 25, at 2.

35. 2010 Proposed Fiduciary Definition, 75 Fed. Reg. 65,263 (proposed Oct. 22, 2010) (to be codified at 29 C.F.R. pt. 2510) (noting the gaps in the 1975 Rulemaking).

36. *Id.* at 65,271 (noting that this standard applies even if the advice did not occur on a regular basis or serve as the primary basis for an investment decision).

37. *See* Zanotti, *supra* note 29, at 5 (discussing how the 2010 proposal tied the hands of financial advisers and institutions by preventing the use of traditional means of variable compensation); *see also* SECS. INDUS. & FIN. MKTS. ASS., *DOL Fiduciary Standard Resource Center* (2016) http://www.sifma.org/issues/savings-and-retirement/dol-fiduciary-standard/overview/ (noting objections from financial interest groups and members of Congress).

38. 2015 Proposed Fiduciary Definition, 80 Fed. Reg. 21,928 (proposed Apr. 20, 2015) (to be codified at 29 C.F.R. pts. 2509 and 2510).

39. *See* COUNCIL OF ECON. ADVISERS, *supra* note 5, at 2–3.

40. *See* 2015 Proposed Fiduciary Definition, 80 Fed. Reg. at 21,951 (defining advice as nearly any recommendation to acquire, hold, dispose, distribute or exchange different securities, for a plan to rollover from one to another, opinions regarding transactions, and recommendations that derive an additional fee or compensation for the adviser).

41. Best Interest Contract Exemption, 81 Fed. Reg. 21,002, 21,075–76 (proposed Apr. 8, 2016) (to be codified at 29 C.F.R. pt. 2550); *see* Zanotti, *supra* note 29, at 5.

42. 29 C.F.R. § 2510.3–21(b)(1) (2017) (explaining that factors include: the individuali-

That advice must be provided through a recommendation, pursuant to a written or verbal agreement, arrangement, or understanding.[43] The Fiduciary Rule's obligations are simple; newly established fiduciaries must act in the best interest of their clients with additional considerations provided for traditional, commission-based compensation models.[44] The DOL also provided a list of example recommendations,[45] while naming different exceptions that would have otherwise invoked fiduciary standards.[46] The Fiduciary Rule also expanded the scope of BICE by allowing fiduciaries to use variable-fee models through standard requirements.[47]

II. NON-COMPLIANCE WITH EXECUTIVE ORDER 13,563

A. Executive Orders Paving the Way for Efficiency and Effectiveness

Executive orders are normalized as directives for federal agencies, department heads, and federal employees to carry out the President's statutory and constitutional duties.[48] Executive orders have the force of law in directing executive agency action, including an agency's approach to rulemaking,[49] so long as the order does not violate a congressional act or the Constitution.[50] President Reagan's Executive Order 12,291, which provides the mechanism for monitoring and influencing agencies, is a

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zation of advice; a selective list of products; and whether there is a series of actions that may not have constituted a recommendation on their own, but nonetheless may amount to one when aggregated together).

43. *See generally* 29 C.F.R. § 2510.3–21.

44. *See* Definition of Term Fiduciary, 81 Fed. Reg., 20,946, 20,951 (proposed Apr. 8, 2016) (to be codified at 29 C.F.R. pts. 2509, 2510, & 2550).

45. 29 C.F.R. § 2510.3–21(a)(1).

46. 29 C.F.R. § 2510.3–21(b)(1).

47. *See* Nat'l Ass'n for Fixed Annuities v. Perez, No. 16-1035, 2016 WL 6573480, at *2 (D.D.C. Nov. 4, 2016) (explaining that this requires compliance with the Impartial Conduct Standards as well as the development of policies, procedures, disclosures, and reporting structures).

48. *See* Paben, *supra* note 18, at 1098 (explaining that executive orders have been continuously used to direct those under the President's control to execute executive power).

49. *See* ANDREW F. POPPER ET AL., ADMINISTRATIVE LAW A CONTEMPORARY APPROACH 7 (3d ed. 2016) (discussing President Reagan's use of Executive Order 12,291 to force regulatory transition because of changes in ideology between himself and President Carter).

50. U.S. CONST. art. II, § 3; *see* Paben, supra note 18, at 1098 (citing John C. Duncan, Jr., *A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role*, 35 VT. L. REV. 333, 335 (2010) (noting that directives through executive orders have the force of law when directing those under the President's control)).

prime example of executive control over agency rulemaking.[51] President Clinton, continuing the presidential trend of exerting influence, expanded the cost-effectiveness and distributional effects of all regulatory and non-regulatory alternatives.[52]

President Obama followed suit by issuing Executive Order 13,563,[53] which reaffirmed and supplemented Executive Order 12,866's call to adopt regulations, or alternatives to regulations, by considering the qualitative and quantitative costs and benefits to reasonably justify the benefits over the costs.[54] Executive Order 13,563 also requires federal agencies to coordinate with each other to develop regulatory actions for the purpose of simplifying and harmonizing redundant, inconsistent, or overlapping regulations.[55] Executive Order 13,563 required the DOL to do two things when promulgating the Fiduciary Rule: (1) conduct a full, qualitative and quantitative cost-benefit analysis for alternatives to rulemaking, and (2) adequately coordinate with relevant federal agencies, such as the SEC,[56] to create the rule.

Under the Dodd–Frank Act,[57] the SEC has the same rulemaking authority as the DOL under ERISA in promulgating an effective and well-balanced fiduciary standard for financial advisers and financial institutions.[58] The DOL, however, did not comply with this executive order.[59]

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51. *See* Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM L. REV. 1749, 1763 (2007) (explaining that agencies consider the costs and benefits when submitting a Regulatory Impact Analysis to the Office of Management and Budget (OMB) for review).

52. Exec. Order No. 12,866, 3 C.F.R. § 638 (1994).

53. Exec. Order No. 13,563, 3 C.F.R. § 215 (2012); *see* McKesson Corp. v. Grisham, No. 3:15-CV-03026, 2015 WL 9238962, at *10 (W.D. Ark. Dec. 17, 2015) (noting that the executive order requires the open exchange of information and perspectives among federal agencies, experts, affected stakeholders, the public, and state, local, and tribal officials).

54. Exec. Order No. 13,563, 3 C.F.R. § 215 (2012) (requiring regulations be tailored in the least burdensome fashion, such as conducting a qualitative analysis in place of quantitative analysis where costs and benefits are either too difficult or impossible to quantify).

55. *See id.*; *see also* King & Spalding, President Obama Signs Executive Order to Require Rulemaking and Regulatory Review, 1, 3 (Jan. 24, 2011), https://s3.amazonaws.com/documents.lexology.com/9957ccec-5ad9-49da-bd8b-65ec42260529.pdf (explaining that Executive Order 13,563 requires inter-agency coordination to simplify and harmonize regulations).

56. *See* 15 U.S.C. § 78(d) (2012) (highlighting that the Securities and Exchange Commission (SEC) is the independent agency tasked by Congress to regulate federal securities law).

57. Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (codified in scattered sections of 15 U.S.C.).

58. 15 U.S.C. § 78(g) (2012); *see* Black, *supra* note 2, at 82 (explaining that Dodd–Frank

B. Senate Report and Unforeseen Costs Speak to Non-Compliance

According to a Majority Staff Report from the Committee on Homeland Security and a report from Governmental Affairs for the U.S. Senate, the DOL failed in its approach to the Fiduciary Rule.[60]

Cost-Benefit Analysis: Executive Order 13,563 requires agencies to adopt regulations or alternatives to regulations that consider the quantified and qualitative costs and benefits in order to justify creating a regulation.[61] The order permits executive agencies to conduct a qualitative analysis *only* if quantitative aspects are difficult or impossible to quantify; however, this is not the case here.[62] According to the report, a quantitative analysis must still be conducted, where the Office of Information and Regulatory Affairs (OIRA) provides agencies with a list of items that are difficult or impossible to quantify.[63] In its analysis, the costs-benefits and forecasts are not factors that are listed by OIRA.[64] This report also highlights that the DOL rejected the SEC's nonpartisan experts' requests for the DOL to quantify the costs-benefits of alternative approaches to the Fiduciary Rule that were previously considered and rejected *only* under a qualitative approach.[65] In an exchange between the DOL and SEC, a DOL employee explained that the agency believed that quantifying the costs-benefits of an alternative approach to the Fiduciary Rule would appreciably delay the rule with very little return;[66] this shows the DOL non-compliance with Executive Order

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enables the SEC to work to create federal standards of care and competence for those who provide investment advice).

59. Exec. Order No. 13,563, 3 C.F.R. § 215 (2012).

60. S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, *supra* note 17, at 1–2 (explaining how the DOL prioritized the Fiduciary Rule for expeditious completion at the expense of thoughtful deliberation and ignored the concerns and recommendations of nonpartisan experts from the SEC).

61. Exec. Order No. 13,563, 3 C.F.R. § 215.

62. *See* S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, *supra* note 17, at 20 (noting the DOL's failure to meet the thresholds, as privacy, dignity, and aesthetic beauty, for example, are values that the Office of Information and Regulatory Affairs (OIRA) considers).

63. *See id.*

64. *See id.* at 20–21 (explaining that while these are not the easiest items to calculate, OIRA provides multiple sections of guidance for agencies to properly conduct the quantitative portion of a cost-benefit analysis that provides scenarios, value ranges, and impact probabilities).

65. *See id.* at 19–20 (highlighting an SEC call to analyze the costs-benefits and risks associated with the Fiduciary Rule, as there is the belief that the rule will decrease the availability of investment advice and lead to increases in the cost of such advice through supply and demand).

66. *See id.* at 2, 19 (noting that the DOL wanted to wait for OMB's feedback on such

13,563.

Agency Collaboration and Cooperation: Executive Order 13,563 requires federal agencies to coordinate with each other when developing regulatory actions for the purpose of simplifying and harmonizing redundant, inconsistent, or overlapping regulations.[67] The DOL did not comply with this order by rejecting non-partisan, SEC experts' calls for the DOL to quantify the costs and benefits of alternative approaches to the rule that were previously considered and rejected under a qualitative approach.[68] This is not the only instance where the DOL did not coordinate with the SEC, as the DOL declined to fully resolve at least twenty-six items of concern brought forth by career, non-partisan SEC staff.[69] The DOL also rejected recommendations and comments from the career, non-partisan professional staff at OIRA and the Treasury Department.[70] Finally, a heated e-mail exchange between the DOL and SEC encompasses the lack of collaboration between the agencies.[71] This demonstrates that the DOL did not engage in a noteworthy effort to collaborate and coordinate with the SEC, as well as other federal agencies.

Unforeseen Costs & Effect: Collaborative rulemaking has a tendency of providing well-rounded and well-balanced rules that achieve regulatory goals while reducing redundancy, inconsistencies, confusion, and costs through simplification and harmonization.[72] Non-coordination by agencies means increased costs, confusion, and inconsistencies, which are evident with the Fiduciary Rule.[73]

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analysis, but decided against it after receiving OMB's feedback).

67. Exec. Order No. 13,563, 3 C.F.R. § 215 (2012); King & Spalding, *supra*, note 55.

68. *See* S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, *supra* note 17, at 19.

69. *See id.* at 2, 8–21 (explaining that SEC officials' concerns included: reduced pricing options; rising costs and limited access to retirement advice for retail investors; some advisers and dealers ceasing operations because of the number of conditions, likely compliance costs, and lack of clarity around multiple provisions; and the lack of incorporating securities laws).

70. *See id*. at 3, 23–25 (rejecting ORIA's recommendations to clarify language, terms, and fiduciary compensation, while quickly dismissing the Treasury Department's concerns over the impact of new compensation requirements fiduciaries and the Fiduciary Rule's reach).

71. *See id*. at 2 (highlighting an email chain between the DOL and SEC, where a DOL employee stated, "Well, I hate to break it to you, but you're wrong," and "We have now gone far beyond the point where your input was helpful to me. . . . If you have nothing new to bring up, please stop emailing me." The SEC employee responded with, "I am now also utterly confused as to what the purpose of the proposed DOL rule is . . . .").

72. Exec. Order No. 13,563, 3 C.F.R. § 215 (2012).

73. *See* Paul Purcel et al., *Why saving for retirement is about to get a lot more expensive*, CNBC (June 6, 2016, 12:46 PM), http://www.cnbc.com/2016/06/06/why-obamas-retirement-advice-rule-is-bad-for-investors-commentary.html (highlighting the DOL's multi-billion-

The DOL estimated that the compliance cost for newly established fiduciaries will be between $10 billion and $31.5 billion over the next ten years, while overall gains for retirement investors would be between $33 billion and $36 billion over ten years.[74] At one point, the DOL only estimated compliance costs between $195 million to $891 million.[75] Additionally, there is no evidence that the DOL studied the revenue impact that the Fiduciary Rule placed on newly established fiduciaries during its 2015 and 2016 regulatory impact analyses.[76] However, A.T. Kearney, a global management consulting firm, conducted a study showing a $20 billion industry-wide revenue impact through 2020, as well as significant industry-shifts in assets.[77] This shows that there is a clear financial harm for newly established fiduciaries, some of whom might be forced out of the business entirely,[78] because of decreased revenue, increased compliance costs, and looming litigation risks.[79]

The Fiduciary Rule's unforeseen financial effects extend to the retire-

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dollar price tag on regulating the Fiduciary Rule where the SEC could have promulgated a uniform fiduciary rule pursuant to Dodd–Frank).

74. Definition of the Term 'Fiduciary', 81 Fed. Reg. 20,946, 20,951 (Apr. 8, 2016) (to be codified at 29 C.F.R. pts. 2509, 2510, and 2550) (noting that the estimated cost would be $16 billion over the next ten years to comply with fiduciary requirements and consumer-protective prohibited transaction exemptions under Best Interest Contract Exemption).

75. OXFORD ECON. & FIN. SERVS. INSTIT., ECON. CONSEQUENCES OF THE U.S. DEP'T OF LABOR'S PROPOSED NEW FIDUCIARY STANDARD 21 (2016).

76. *See* U.S. DEP'T OF LABOR, REGULATING ADVICE MARKETS: REGULATORY IMPACT ANALYSIS FOR FINAL RULE AND EXEMPTIONS (2016); U.S. DEP'T OF LABOR, FIDUCIARY INVESTMENT ADVICE: REGULATORY IMPACT ANALYSIS (2015).

77. *See* A.T. KEARNEY, THE $20 BILLION IMPACT OF THE NEW FIDUCIARY RULE ON THE U.S. WEALTH MANAGEMENT INDUSTRY 1 (2016).

78. *See* Jane Wollman Russoff, *Ric Edelman: DOL Rule Will Kill Off Half of All Advisors, Gouge Wirehouses*, THINKADVISOR (June 9, 2016) http://www.thinkadvisor.com/2016/06/09/ric-edelman-dol-rule-will-kill-off-half-of-all-adv?slreturn=1487986343 (explaining that projections estimate that nearly half of all financial advisers currently in the industry will be forced out); *see also* Greg Iacurci, *One Unintended Consequence of DOL Fiduciary Rule*, INV. NEWS (May 2, 2016, 5:14 PM), http://www.investmentnews.com/article/20160502/FREE/160509986/one-unintended-consequence-of-dol-fiduciary-rule (noting that the Fiduciary Rule would mean fewer job opportunities for independent brokers due to decreased revenue and paralyzing restrictions).

79. *See* S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, *supra* note 17, at 30 (highlighting that large, medium, and small financial institutions and firms will have obvious and significant increases in operational costs and business and litigation risks); *see also* Nadia Yoon, *The Potential Effect of the Department of Labor's New Fiduciary Rule on Broker-Dealers and the Middle Income Retirement Investors Who Rely on Them*, 66 CATH. U. L. REV. 223, 240–41 (2016) (highlighting increased administrative, compliance, risk, penalty, and operational costs).

ment beneficiaries who the Fiduciary Rule is meant to protect,[80] and the Financial Industry Regulatory Authority (FINRA) highlights that the DOL's fractured approach did not meet the minimum norms needed for a best interest standard.[81] If the DOL performed a full cost-benefit analysis while collaborating and coordinating with agencies like the SEC, these issues may have been avoided.[82]

III. CHALLENGING THE FIDUCIARY RULE IN LIGHT OF THE DOL VIOLATING AN EXECUTIVE ORDER

Due to clear evidence that the DOL violated Executive Order 13,563, the Administrative Procedure Act (APA)[83] provides a solution for private parties affected by the Fiduciary Rule.

A. Petitioning to Amend or Repeal the Fiduciary Rule

A private party, such as a financial adviser or institution, can combat the DOL's violation of Executive Order 13,563 under APA Section 553(e), where an agency is required to provide an interested party, such as these newly established fiduciaries, the right to a petition of issuance or amendment, or repeal of a rule it has promulgated.[84] Financial advisers or institutions could petition the DOL to amend or repeal the Fiduciary Rule because of the DOL's non-compliance with Executive Order 13,563. The APA compels the DOL to answer that petition and explain why it violated this executive order and why the Fiduciary Rule should not be amended or revoked.[85]

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80. *See* S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, *supra*, note 17, at 3 (highlighting the increased costs for beneficiaries that will be incurred through the Fiduciary Rule); *see also* Wursthorn, *supra* note 14 (highlighting an individual who pays more and believes the Fiduciary Rule is against investors' best interests).

81. Financial Industry Regulatory Authority, Comment Letter on Proposed Rule to Amend the Definition of "Fiduciary," the Best Interest Contract Exemption, & the Exemption for Principal Transactions in Certain Debt Securities (July 17, 2015), https://www.finra.org/sites/default/files/FINRACommentLetter_DOL_07-17-15.pdf.

82. *See* S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, *supra* note 17, at 19–20 (indicating that a full cost-benefit analysis and coordination with other agencies may have dispelled these effects).

83. Administrative Procedure Act of 1946, Pub. L. No. 89-554-404, 60 Stat. 237 (to be codified as amended at 5 U.S.C. §§ 551–59, 701–06 (2012)).

84. 5 U.S.C. § 553(e) (2012); *see* Pub. Emps. for Envtl. Responsibility v. USDA, 197 F. Supp. 3d 93, 95–96 (D.D.C. 2016) (showing that an interested party is one who is affected or represents those affected by agency action).

85. 5 U.S.C. § 555(e) (2012) (requiring agencies to provide prompt notice of the denial of any application, petition, or request by an interested party made in connection to any

The U.S. Supreme Court explains that the right to petition is the proper procedure for a party to provide a grievance to a federal agency's rulemaking or lack thereof.[86] The DOL would be left with three options at this point: (1) respond to the petition and admit its failure to comply with the executive order, prompting either an amendment or revocation; (2) attempt to justify its actions; or (3) ignore the petition with a simple denial. The latter two options could prompt a lawsuit.[87]

B. Cause of Action Under the APA

To establish a cause of action under the APA, a financial adviser or institution must show that the challenged conduct is in fact agency action under the APA, that the action is final and the parties are without any other adequate remedy in a court,[88] and that they have standing by having suffered a legal wrong through that agency action.[89] The APA indicates, and courts have held, that administrative action taken or not taken pursuant to an executive order with the force and effect of law constitutes agency action within the meaning of the APA.[90] Executive orders have the force of law when directing federal agencies under executive power[91] without violating a

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agency action, as well as a brief statement explaining the grounds for the denial if an exception does not apply).

86. *See* Auer v. Robbins, 519 U.S. 452, 458 (1997) (indicating that the petition brought about a fundamental objection to the agency's inadequate considerations).

87. *See id*. at 459 (noting that an inadequate response can be appealed to the courts under 5 U.S.C. §§ 702, 706 (2012), compelling an adequate response, rulemaking, amendment to a rulemaking, or revocation of an agency regulation that is contrary to substantive requirements of law).

88. 5 U.S.C § 704 (2012).

89. 5 U.S.C § 702.

90. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 318 (1979) (finding that an agency's decision to disclose government contractor's affirmative action plans pursuant to Executive Order 11,246 constituted agency action under 5 U.S.C. § 551(e) (2012)). *See generally* Nat'l Wildlife Fed'n v. Adams, 629 F.2d 587, 589 (9th Cir. 1980) (noting that the failure to act in accordance with an executive order constituted agency action under the APA).

91. *See* Nat'l Wildlife Fed'n v. Babbitt, CIV. A. No. 88-0301, 1993 WL 304008, at *8 (D.D.C. July 30, 1993); *see also* Contractors Ass'n v. Sec'y of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971), *aff'g* 311 F. Supp. 1002, 1011 (E.D. Pa. 1970) (reviewing under the APA an agency's regulation to determine if it was arbitrary and capricious in light of Executive Order 11,246); Steven Ostrow, *Enforcing Executive Orders: Judicial Review of Agency Action the Administrative Procedure Act*, 55 GEO. WASH. L. REV. 659, 670 n.77 (1987) (citing Conservation Law Found. v. Clark, 590 F. Supp. 1467, 1477–78 (D. Mass. 1984) (reviewing under the APA, an agency's regulation of off-road vehicles on public lands allegedly in violation of Executive Order 11,644)).

congressional act or the Constitution.[92] Because Executive Order 13,563 has the force and effect of law through the President's power to direct federal agencies on how to execute laws and procedures during rulemaking,[93] the DOL's inaction, in fact, is agency action.

Courts have allowed agency inaction regarding executive orders to meet the finality requirement under the APA.[94] Because the Fiduciary Rule is now applicable,[95] the DOL completed its rulemaking without complying with Executive Order 13,563. Additionally, there is no other adequate judicial remedy available other than judicial review under the APA.[96] The last requirement left for a financial adviser or institution to meet for judicial review is demonstrating, through standing, that the DOL legally wronged the litigant through non-compliance of the executive order.[97]

C. Standing to Enforce an Executive Order

Standing is required to ensure that a party is entitled to have a court decide a particular issue upon its merits.[98] A litigant, such as a financial adviser or institution complying with the Fiduciary Rule, has standing to show a legal wrong through agency action[99] upon demonstrating that it has suffered: (1) a concrete and particularized injury that is either actual or imminent, (2) that is a result of the challenged action, and (3) that it is likely, rather than speculative, that a favorable judicial decision will rectify the

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92. *See* Paben, *supra* note 18, at 1098; *see also* Erica Newland, *Executive Orders in Court*, 124 YALE L.J. 2026, 2034 (2015).

93. *See* POPPER ET AL., *supra* note 49, at 7 (noting that President Reagan demonstrated this power through Executive Order 12,291 by altering President Carter's previous agency procedures to require agencies to implement a cost-benefit analysis for major regulatory proposals).

94. *See* Ostrow, *supra* note 91, at 674 n.98 (citing Sierra Club v. Peterson, 705 F.2d 1475, 1476–77 (9th Cir. 1983) (noting the U.S. Forest Service's violation of Executive Order 12,088 by failing to secure a presidential exemption from compliance with state pollution standards); *see also* Chambers v. United States, 451 F.2d 1045, 1046–47 (Ct. Cl. 1971) (establishing the finality requirement upon an agency's failure to follow equal employment opportunity requirements of Executive Order 11,246).

95. Jamie Hopkins, *New Fiduciary Rule For Financial Advisors Moves The Needle, But In Which Direction?*, FORBES (June 14, 2017), https://www.forbes.com/sites/jamiehopkins/2017/06/14/new-fiduciary-rule-for-financial-advisors-moves-the-needle-but-in-which-direction/#5ed600f74caa.

96. 29 U.S.C. § 1132(a)(1)(B) (2012) (making no mention that ERISA provides a judicial remedy when an executive order has been violated by non-compliance with rulemaking procedure).

97. 5 U.S.C. § 702 (2012).

98. Warth v. Seldin, 422 U.S. 490, 498 (1975).

99. 5 U.S.C. § 702.

injury.[100] A lost economic interest, such as a financial adviser's or institution's increased compliance costs and lost revenue, is an injury constituting a legally protected interest.[101]

Injury: To demonstrate a concrete injury,[102] a financial adviser or institution needs to show more than just a fear that it would be harmed.[103] Here, a financial adviser or institution can provide an economic study showing that the Fiduciary Rule started to and will cause a significant financial injury through massive decreases in revenue that the DOL did not examine in its 2015 and 2016 regulatory impact analyses.[104] The litigant can also provide another study showing a history of DOL inaccuracies when estimating the Fiduciary Rule's compliance costs.[105] Further, the Fiduciary Rule will cost advisers and institutions significantly more, because it shifts the industry toward more expensive, fee-based accounts while increasing operational costs.[106] Coupling this with the bare violations of agency action, financial advisers or institutions can show a concrete injury by showing that the DOL failed to perform the proper cost-benefit analysis and did not collaborate with other federal agencies, such as the SEC, as required by executive orders.[107]

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100. Summers v. Earth Island Inst., 555 U.S. 488, 493 (2009); Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).

101. *See* Clinton v. New York, 524 U.S. 417, 432 (1998) (noting that an economic injury may have already occurred or that it can be reasonably foreseen from a policy that deprives the challenging party of some advantage or property).

102. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016) (describing a concrete injury as a real, non-abstract injury that can be intangible, but is not a simple procedural violation).

103. *Compare* Monsanto v. Geertson Seed Farms, 561 U.S. 139, 155–56 (2010) (holding that the U.S. Department of Agriculture's (USDA's) decision to deregulate a form of alfalfa gave rise to significant risk of contamination to conventional alfalfa crops that was sufficiently concrete to afford standing), *with* United Presbyterian Church in U.S.A. v. Reagan, 557 F. Supp. 61, 63 (D.D.C. 1982) (indicating that fear and concern about being the target of the intelligence community, attributable to Executive Order 12,333, is not enough to support a concrete and particularized injury without introducing evidence of harm).

104. *Compare* A.T. KEARNEY, *supra* note 77 (showing a $20 billion loss for wirehouses, broker dealers, and independent broker dealers, all of whom are financial advisers or institutions), *with* U.S. DEP'T OF LABOR, *supra* note 76 (analyzing the impacts of the Fiduciary Rule without examining future revenue costs).

105. *See* OXFORD ECON. & FIN. SERVS. INSTIT, *supra* note 75 (showing tens of millions of dollars, per category, of disparities and inconsistences in calculated compliance costs during the 2015 Proposal).

106. *See* S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, *supra* note 17, at 30 (indicating that fee-based compensation accounts with less than $25,000 are expensive to operate for large, medium, and small financial firms).

107. *See Monsanto*, 561 U.S. at 155 (indicating that the financial impact from a regulation on everyday business shows a concrete injury).

A financial adviser or institution can meet the particularization requirement by showing that the injury affects it in a personal and individual way.[108] These litigants can argue that the A.T. Kearney study and the Fiduciary Rule's compliance costs show a specific financial impact on annual revenue and operating costs.[109] Some financial advisers and institutions can further their particularization argument because of the significant financial implications and litigation risks associated with the rule, including being forced out of the industry.[110]

Additionally, a financial adviser or institution can argue that this qualifies as actual injury,[111] because newly established fiduciaries have already incurred compliance costs in preparation for the Fiduciary Rule's applicability on June 9, 2017.[112] There is a strong argument to be made for how imminent the injury is for these litigants if a court does not find actual injury has occurred (yet).[113]

Result of Challenged Action: If a court finds that there is a sufficient injury, the next hurdle to overcome would be that the injury resulted from non-

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108. *Compare* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 n.7 (2016) (explaining that while an injury may be suffered by a large group of people, this does not by itself make that injury a non-justiciable generalized grievance, since each individual has suffered a particularized harm), *and* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 n.1 (1992) (indicating that the injury just needs to individually affect the particular plaintiff), *with* United States v. Richardson, 418 U.S. 166, 172 (1974) (noting that an injury resulting from an alleged unlawful expenditure of tax monies did not correlate with particularization due to fluctuating and uncertain impacts on the taxpayer).

109. *See Monsanto*, 561 U.S. at 155 (holding that USDA's decision to deregulate a form of alfalfa that would create a significant risk of contaminating all farmers' conventional alfalfa crops was sufficiently particularized); POPPER ET AL., *supra* note 49, at 337 (explaining that there needs to be a showing of an appropriate stake in the outcome that would not be wasting the court's time).

110. *See* THINKADVISOR, *supra* note 78 (noting that approximately half of the advisers in the current market are going to be forced to exit the industry, as well as certain financial firms).

111. *See* Massachusetts v. EPA, 549 U.S. 497, 522 (2007) (highlighting that the injury is occurring, specifically in this case by the coastline being eroded away).

112. Definition of the Term 'Fiduciary', 82 Fed. Reg. 16,902, 16,917, 16,918 (Apr. 7, 2017) (to be codified at 29 C.F.R. pt. 2510) (noting that the applicability date is June 9, 2017); *see also* Sam Batkins, *Fiduciary Rule Has Already Taken Its Toll: $100 Million in Costs, Fewer Options*, AM. ACTION FORUM (Feb. 22, 2017), https://www.americanactionforum.org/insight/fiduciary-rule-already-taken-toll-100-million-costs-fewer-options/ (indicating that over of $100 million was spent in 2016 alone to comply with the Fiduciary Rule).

113. *See Monsanto*, 561 U.S. at 153–55 (finding that a litigant's injury is imminent even before a regulation is applicable to one's livelihood since the regulation can create a significant risk that is known to those within a particular industry).

compliance of the executive order.[114] A financial adviser or institution may be able to demonstrate a causal connection through the DOL's non-compliance because the compliance costs and revenue losses would have never existed if the DOL had found a feasible alternative to the Fiduciary Rule through the full cost-benefit analysis.[115] Additionally, a financial adviser or institution should be able to demonstrate that the lack of agency collaboration led to increased compliance costs and revenue impacts[116] because agency collaboration in rulemaking decreases redundant, inconsistent, or overlapping regulatory requirements while reducing costs, simplifying requirements, and harmonizing rules.[117] Both of these arguments connect the injury to the agency action.[118]

Redressability: An action is redressable if the injury or risk of injury that gave rise to the action would be reduced by some extent through judicial intervention sought by a litigant.[119] A financial adviser or institution could argue that their injury would be relieved through injunctive relief because it would stop the Fiduciary Rule from causing the financial adviser or institution harm.[120] Therefore, a financial adviser or institution, who is the object of the Fiduciary Rule through their rendered advice, could establish standing through a judicially redressable injury in fact that is casually connected

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114. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (explaining that there needs to be a causal and fairly traceable connection between the injury and the conduct being challenged); *see also* Simon v. E. Ky. Welfare Org., 426 U.S. 26, 42–43 (1976) (noting that litigants failed to show that the denial of treatment was fairly traceable to the tax ruling, by claiming, without evidence, that the ruling encouraged hospitals to deny services to indigents).

115. *See* Exec. Order No. 13,563, 3 C.F.R. § 407 (2011); S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, *supra* note 17, at 2, 20, 28.

116. *See* Definition of the Term 'Fiduciary', 81 Fed. Reg. 20,946, 20,951 (Apr. 8, 2016) (to be codified at 29 C.F.R. pts. 2509, 2510, 2550) (noting that compliance costs over the next decade could be more than $30 billion); *see also* A.T. KEARNEY, *supra* note 75 (highlighting a $20 billion revenue loss through 2020).

117. Exec. Order No. 13,563, 3 C.F.R. § 407 (2011).

118. *See Lujan*, 504 U.S. at 561 (stating that general factual allegations resulting from a defendant's conduct may suffice to meet standing requirements).

119. *See* Massachusetts v. EPA, 549 U.S. 497, 525 (2007) (acknowledging that there must be at least a modest reduction in the risk of harm provided to the litigants through judicial action, which may be through amendment and reissuance or revocation of that regulation).

120. *See* City of Los Angeles v. Lyons, 461 U.S. 95, 112–113 (1983) (highlighting that monetary relief for suffering injuries would redress past injuries, but injunctive relief against the use of a chokehold by the police would not sufficiently redress the injury since it was highly unlikely that the plaintiff would be arrested and choked again by another officer).

to the agency.[121]

D. Review Under Section 706

After establishing standing, the court would review the agency's non-compliance with Executive Order 13,563 through an arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law standard.[122] Under this standard, a court must find that there is a rational connection between the facts found and the agency's choice.[123] An appeal of a petition's inadequate response has already gone up to the U.S. Supreme Court, where the Court held that the Environmental Protection Agency (EPA) did not adequately justify its denial of a rulemaking petition; the EPA's denial was arbitrary, capricious, or otherwise not in accordance with law.[124] The Supreme Court remanded to the lower court, leaving the EPA to find an adequate reason for denying the petition.[125] When addressing the Fiduciary Rule, a court will likely not second-guess presidential wisdom by substituting the court's own judgment regarding a lawful executive order.[126] Therefore, a court may either stay with the Fiduciary Rule, so that the

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121. *Compare* Monsanto v. Geertson Seed Farms, 561 U.S. 139, 153–55 (2010) (finding that an individual alfalfa farmer had standing because of the regulation's financial impact and ability to continue within the alfalfa growing industry), *with* Massachusetts v. EPA, 549 U.S. at 521 (finding that no private litigant had standing because he did not meet all of the necessary requirements, but the Commonwealth of Massachusetts did), *and Lujan*, 504 U.S. at 556 (explaining that it is more difficult for third parties to show they have standing than it is for the object of the government action).

122. 5 U.S.C. §706(2)(A) (2012); *see* Nat. Res. Def. Council, Inc. v. EPA, 966 F.2d 1292, 1297 (9th Cir. 1992); *see also* Contractors Ass'n of E. Pa. v. Sec'y of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971), *aff'g* 311 F. Supp. 1002, 1011 (E.D. Pa. 1970) (deciding under the APA that an agency's regulation was arbitrary and capricious in light of an executive order).

123. *See Nat. Res. Def. Council, Inc.*, 966 F.2d at 1296–97 (citing Sierra Pacific Indus., v. Lyng, 866 F.2d 1099, 1105 (9th Cir. 1989) (noting an agency action can be set aside if the action is arbitrary, capricious, not based on the facts, or not the intention of Congress).

124. *See* Massachusetts v. EPA, 549 U.S. at 510, 528, 533–34 (holding that the Environmental Protection Agency (EPA) had the statutory power to regulate greenhouse gas emissions from new motor vehicles under the Clean Air Act, despite the EPA's assertions it did not, and that the EPA offered no legitimate reason in denying the petition and refusing to decide greenhouse gases impact on climate change).

125. *See* Charles De Saillan, *United States Supreme Court Rules EPA Must Take Action on Greenhouse Gas Emissions:* Massachusetts v. EPA, 47 NAT. RES. J. 793, 805 (2007) (indicating that the EPA needs to find that the pollutants do not cause or contribute to global warming, or provide reasoned justification for not making a finding in favor of the petition).

126. *See* Hirabayashi v. United States, 320 U.S. 81, 93 (1943) (highlighting the importance that separation of power has between the judicial and executive branches).

DOL can review and amend it to comply with Executive Order 13,563, or repeal the Fiduciary Rule.[127]

IV. ADDRESSING THE FIDUCIARY RULE TO CREATE A UNIFORM STANDARD

The DOL's non-compliance with Executive Order 13,563 and the Fiduciary Rule's economic impact will continue to create problems for those it affects. Since the DOL is not going to make any changes,[128] Congress needs to step in and act for the benefit of all involved parties. To do so, Congress needs to repeal the Fiduciary Rule, so all parties can come together to collaborate on a new rule that creates a uniform standard through the DOL's and SEC's respective statutory authority.

A. Congress Repealing the Fiduciary Rule

Since the DOL has not repealed the Fiduciary Rule and it has now taken effect,[129] Congress needs to step in so the rule's harmful outcome is not felt across the board. Congress is already in the process of doing just that,[130] which will give the DOL the opportunity to re-promulgate the Fiduciary Rule in compliance with Executive Order 13,563.

B. Presidential Study Commission or Taskforce to Review & Recommend Change

The next step after repeal is reevaluating the Fiduciary Rule by bringing stakeholders and their representatives to the table in a smaller forum than notice-and-comment provides for, such as a Presidential Study Commission or a White House Task Force. Presidential Study Commissions and White

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127. *See* Nat'l Broiler Council v. Fed. Labor Relations Council, 382 F. Supp. 322, 325–28 (E.D. Va. 1974) (overturning an agency's decision because it violated Executive Order 11,491).

128. Jamie Hopkins, *Labor Secretary Acosta Concedes Fiduciary Rule Cannot Be Legally Stopped Before June 9th*, FORBES (May 23, 2017), https://www.forbes.com/sites/jamiehopkins/2017/05/23/labor-secretary-acosta-concedes-fiduciary-rule-cannot-be-legally-stopped-before-june-9th/#62461ed01e82 (highlighting that the DOL will not take any action on the Fiduciary Rule since the DOL believes there is no legal ability to act).

129. Hopkins, *supra* note 95.

130. John Manganaro, *Dodd–Frank, Fiduciary Rule Repeal Progresses in Congress*, PLANSPONSOR (May 5, 2017), http://www.plansponsor.com/Dodd-Frank-and-Fiduciary-Rule-Repeal-Progresses-in-Congress/; Mark Schoeff, *House Passes Bill That Would Kill DOL Fiduciary Rule*, INV. NEWS (June 8, 2017), http://www.investmentnews.com/article/20170608/FREE/ 170609943/house-passes-bill-that-would-kill-dol-fiduciary-rule (explaining that the House took a substantive step in repealing the rule by passing a bill to do just that).

House Task Forces have been used in numerous instances to explore significant issues, such as the Obama administration's Presidential Commission for the Study of Bioethical Issues,[131] the White House Taskforce for National Health Care Reform,[132] and the White House Taskforce on Baltimore.[133]

A Presidential Study Commission or White House Task Force regarding fiduciary standards would consist of representatives from the SEC, other federal agencies, non-profit groups, and financial advisers and institutions. The commission or taskforce would have a constructive dialogue about the specific economic and best interest concerns with the Fiduciary Rule while identifying areas in need of improvement. It would also make recommendations on how to create a well-balanced rule, such as mandating fiduciary standards for any advice; however, relaxing potential litigation risks by allowing arbitration for disputes, creating more comprehensive ways for traditional commission and variable-based compensation, and decreasing some government oversight and compliance with recordkeeping. Finally, the taskforce would create both the framework for the new rule and the framework for a full quantitative and qualitative cost-benefit analysis and alternatives. What this taskforce does would be similar to a negotiated rulemaking, which may be another approach the DOL takes in reissuing a fiduciary standard.[134] Furthermore, this could provide the foundation for the DOL's compliance with Executive Order 13,563.

The notice-and-comment period is meant to serve a similar purpose to the taskforce.[135] This commission, task force, or body of a negotiated rulemaking would provide the effective and efficient legwork, agency coordination, and cost-benefit evaluations that should have been done when the DOL first promulgated the Fiduciary Rule. Notice-and-comment would still occur and provide valuable insight to the new version of the Fiduciary

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131. Executive Order No. 13,521, 3 C.F.R. § 279 (2009) (establishing the commission).

132. *See* Anessa Abrams, *The First Lady: Federal Employee or Citizen-Representative Under FACA?*, 62 GEO. WASH. L. REV. 855, 861 (1994) (discussing President Clinton's taskforce on health care reform that was able to listen and work with interested parties and prepare health care reform legislation).

133. *See* WHITE HOUSE TASKFORCE FOR BALT. CITY, EXEC. OFFICE OF THE PRESIDENT, INVESTING IN A SAFER, STRONGER, BALTIMORE 4–5 (noting specific changes that need to occur in Baltimore, such as an investment in vocational programs, increased health and safety programs, and a sustainable approach rather than funding a problem without a plan).

134. POPPER ET AL., *supra* note 49, at 610, 612 (explaining that this involves selecting representatives of different interests that will be affected by the rule to participate in a negotiation where a rule can be written in a collaborative way, which does not bind an agency leading the negotiation).

135. *See id.* at 49 (noting that it provides the public with participatory rights).

Rule. There has already been a call in the form of a letter indicating such a body address the issues regarding the changes and improvements needed for the DOL's Fiduciary Rule.[136] The importance of this body is simple: bring all the right minds into the right place at the right time to create the right rule.

C. Compliance Through a Uniform Standard for Fiduciary Status.

The DOL is not the only agency that has the power to promulgate a fiduciary standard for brokers, financial advisers, and financial institutions that provide advice to retirement investments. The SEC has the same exact power under Dodd–Frank.[137] Soon after the DOL started publicizing the Fiduciary Rule, the SEC announced that it intended to create a fiduciary standard that would affect the same advisers and institutions.[138] It was duly noted that the DOL's Fiduciary Rule and the SEC's potential rule may not match, which would cause massive confusion for those that may be affected by it.[139] By repealing the Fiduciary Rule and creating a body to come together to work on a fiduciary standard, this opportunity will allow both the DOL and SEC to better work together compared to when the DOL developed the Fiduciary Rule alone. The hope is that either two mirror rules or one single rule is created to form a uniform standard, and the SEC has recently indicated that it wants to coordinate with the DOL on a new rule.[140]

An SEC study regarding Dodd–Frank explicitly indicates that a uniform standard should apply to all forms of securities and investments, including retirement plans by, identifying and explaining solutions for examples of relevant and common conflicts of interests; providing examples for when fiduciary standards are implicated through personalized investment advice

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136. *See* John Taft, *It's Time for a Reset on the Fiduciary Rule*, ON WALL STREET (Jan. 24, 2017), http://www.onwallstreet.com/opinion/its-time-for-a-reset-on-the-fiduciary-rule.

137. 15 U.S.C. § 78(g)(a) (2012).

138. *See* Mark Schoeff Jr., *SEC Plans to Propose Fiduciary Rule Next April*, INV. NEWS (May. 19, 2016, 1:46 PM), http://www.investmentnews.com/article/20160519/FREE/160519907/sec-plans-to-propose-fiduciary-rule-next-april (describing the SEC's interest in a fiduciary standard).

139. *See* Mark Schoeff Jr., *DOL, SEC Fiduciary Rules Diverge, Mary Jo White Tells Lawmakers,* INV. NEWS (Mar. 22, 2016, 2:01 PM), http://www.investmentnews.com/article/20160322/FREE/160329981/dol-sec-fiduciary-rules-may-diverge-mary-jo-white-tells-lawmakers.

140. Kenneth Corbin, *SEC Chairman Promises Action on Fiduciary Rule*, FIN. PLAN. (June 27, 2017), https://www.financial-planning.com/news/sec-chairman-promises-action-on-fiduciary-rule (highlighting that the current SEC Chair, Jay Clayton, stated that the SEC and DOL need to "coordinate" on a new fiduciary rule, since this is a "very complicated issue" that affects countless individuals and the markets the SEC regulates).

about securities; ensuring outreach and collaboration in a uniform standard with those who would be affected; providing investor protection and awareness while remaining flexible and accommodating to the different existing business and compensation models; and creating a supervisory compliance system for all investment advisers, brokers, and institutions across the retirement and retail markets.[141]

The Fiduciary Rule has already been coined as a failure for being promulgated before an SEC standard,[142] which forced the SEC to issue an agency guidance report because of the wide-ranging implications and confusion that the DOL's Fiduciary Rule brought to the securities industry.[143] The only way to quell the Fiduciary Rule's problems is to repeal and recreate the rule into a single uniform fiduciary standard with the SEC.

CONCLUSION

Even though the Fiduciary Rule was well intended, it has many shortfalls: (1) it creates an undue burden, significant costs and confusion for brokers, financial advisers, and financial institutions; (2) it was not promulgated in a way that complied with an executive order; and (3) it does not properly protect those it was intended to protect. There is no legitimate reason why a retirement investor, or any investor for that matter, should be receiving advice against his best interests. However, this does not mean an entire industry needs to be turned inside-out to comply with a regulation that did not even comply with required rulemaking procedures. The best way to resolve the Fiduciary Rule's headaches and non-compliance with a binding executive order is to create a flexible, yet fair, uniform standard for all securities and retirement plans through the DOL and SEC; this starts with Congress repealing the Fiduciary Rule.

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141. SEC, STUDY ON INVESTMENT ADVISERS AND BROKER-DEALERS AS REQUIRED BY SECTION 913 OF THE DODD–FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT i–ix (2016).

142. *See* Greg Iacurci, *DOL Acting Before SEC on Fiduciary Rule is 'Failure in Public Policy'*, INV. NEWS (Apr. 7, 2016), http://www.investmentnews.com/article/20160407/FREE/160409936/dol-acting-before-sec-on-fiduciary-rule-is-failure-in-public-policy (explaining how the DOL's first move has created confusion and hurt the SEC's ability to rule-make under Dodd–Frank, because the SEC is the agency with primary responsibility).

143. SEC, NO. 2016–06, GUIDANCE UPDATE (2016).