April 17, 2017

<u>By Email: EBSA.FiduciaryRule Examination@dol.gov</u>
Office of Regulations and Interpretations
Employee Benefits Security Administration
Attention: Fiduciary Rule Examination
Room N-5655

U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

RE: Examination of the Definition of the Term "Fiduciary" Rule; Retirement Investment Advice, Best Interest Contract Exemption and other Related Proposals, RIN 1210-AB79

Ladies and Gentlemen:

Ameriprise Financial appreciates the opportunity to provide comments on the Department of Labor's (the "Department") examination of the Definition of the Term "Fiduciary;" Retirement Investment Advice, Best Interest Contract Exemption (the "BICE") and other related exemptions (collectively, the "Fiduciary Rule" or the "Rule").

Executive Summary

As the leader in financial planning, we share the Department's goal of helping Americans achieve a secure retirement. More than 2 million clients across the United States depend on Ameriprise Financial to help navigate the road to retirement, and we've earned their trust through a proven track-record of success and integrity. Under the personalized care of their Ameriprise advisors, our clients have saved and invested billions of dollars to fund their long-term financial objectives leading up to and into retirement.

We support acting in our clients' best interests. We have long supported and continue to support one uniform best interest standard across a client's entire portfolio, and we believe that any regulation should build upon existing regulations rather than create a completely new framework that only addresses tax advantaged accounts while also overlapping and potentially conflicting with other regulations that cover a broader universe of accounts.

The Department should withdraw the Rule to avoid unintended negative consequences. We support a withdrawal of the Rule to give Congress or the Executive Branch time to develop a more thoughtful regulatory framework that enhances consumer protection without creating new barriers to guidance for retirement investors and limiting access to beneficial investment products and services Americans rely upon to achieve and sustain a secure retirement. We believe enhancing consumer protection while maintaining access and choice are essential to achieve together.

Examples of negative consequences to retirement investors that have already occurred, or are likely to occur, across the marketplace include:

- Reduction of choice and access to important retirement products and services, including access to guaranteed retirement income to build a paycheck in retirement;

- Creation of an ever growing "advice gap" for retail investors for whom fee-based accounts may not be their best option, or affordable; and

- Increase in costs for retail investors that will diminish their retirement savings.

The Department did not consider the substantial positive benefits of access to Financial Planning and comprehensive advice, which are key to a secure retirement. The Department did not consider the value of comprehensive advice in its final Regulatory Impact Analysis ("RIA") or what the loss of, or diminished access to, that advice would mean to Americans' ability to meet critical financial objectives for retirement: generating sufficient income to meet essential and lifestyle expenses, protecting against the unexpected which could derail their retirement (such as long-term care) and preserving financial assets. It is vital that any legislative or regulatory path forward fully takes into account the value of comprehensive advice, especially in a market downturn where financial planning and advice can be the key to remaining appropriately invested.

The Department greatly underestimated the cost impact of the Rule. The costs incurred are more significant than estimated by the Department in its final RIA. We believe it imperative that the Department factor in the complete costs when analyzing any benefits of the Rule.

Americans deserve a coordinated regulatory framework that works in their best interest across all of their assets. The Department should champion a regulatory framework that enhances consumer protection while preserving choice in how American retirement savers wish to receive advice, what solutions they have access to, and how their advisor is compensated. We support a legislative or regulatory approach that applies to both the taxable and tax-advantaged portions of a client's portfolio in the form of a uniform fiduciary standard. A nonqualified brokerage account holder, managed account client, IRA owner, small business owner, 401(k) plan participant and annuitant could all be the same person. Advice is holistic; clients see all of their assets as available for planning – whether it is sending their children to college or saving for retirement. Any regulatory or legislative approach should facilitate a holistic regulatory framework, with input from the Department and the Securities & Exchange Commission ("SEC"), as well as the Financial Industry Regulatory Authority ("FINRA") and the State insurance regulators to develop a consistent approach.

Ameriprise Financial supports the comment letters that have been filed by our trade association partners, including those by the Securities Industry and Financial Markets Association ("SIFMA"), American Council of Life Insurers ("ACLI"), Investment Company Institute ("ICI"), U.S. Chamber of Commerce ("the Chamber") and the Financial Services Roundtable ("FSR"). These submissions provide a vital perspective on the broad range of issues that must be considered in order to avoid the unintended negative consequences of limiting access and choice for retirement savers and retirees.

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I. We Support A Uniform Best Interest Standard

We have long supported and continue to support one uniform best interest standard across a client's entire portfolio. We believe this strikes the right balance of enhancing consumer protection without reducing access to products and services that American retirement savers and retirees desire and need to achieve a confident retirement.

The Department's Fiduciary Rule does not create a uniform fiduciary standard of care for investors but rather creates a new, third standard of care that only applies to the tax-favored portion of a retirement investor's portfolio. We believe that any rule should build on existing regulations promulgated by the Department, the SEC, FINRA and State insurance regulators rather than create a completely new framework that only addresses tax-advantaged accounts.

II. The Department Must Withdraw the Rule to Limit Further Negative Consequences

The February 3, 2017 Presidential Memorandum on the Fiduciary Rule (directing the Department to examine the Rule to determine whether it may adversely affect the ability of Americans to gain access to retirement information and financial advice) is encouraging because the Department did not sufficiently consider the Rule's disruptive and adverse impacts upon average Americans saving for, or already living in, retirement.

To provide the needed time to conduct the review, the Department proposed a 60-day delay of the applicability date of April 10, 2017. Ameriprise filed a comment letter responding to the Department's request for information, and, along with many other commenters, explained that the implementation of the Rule has resulted in more significant costs than estimated by the Department and that the Department had failed to include the direct costs borne by asset managers. In addition, Ameriprise and other commenters highlighted the decreased access to financial products, including annuities, and the move to transition clients to self-directed accounts or increased account minimums.

The Department issued a final rule to extend the applicability date for 60 days, to June 9, 2017 ("Delay of Final Rule").[1] Despite significant evidence of harm, the Department determined that further relief would

[1] 82 Fed. Reg. 16902.

not be granted despite the need for a substantive review to be completed, as directed by the President's Memorandum of February 3.

We believe that, upon a fact-based examination of the Rule, the Department will find that the Fiduciary Rule (i) has already harmed investors due to a reduction of Americans' access to retirement savings offerings, products, education and financial advice, (ii) has already resulted in dislocations and disruptions of the retirement services industry that have adversely impacted retirement investors and retirees and (iii) is likely to cause an increase in litigation with no corresponding benefit to investors. We note that the market disruption further described below is likely just the beginning as many industry participants have delayed announcements related to the most disruptive changes given the uncertainty facing the Rule.

A. Growing advice gap puts retirement security at risk

Recent market developments confirm that investors of modest means will lose access to advice if the Rule goes into effect. Over the last several months, multiple brokerage firms have announced plans to reduce or eliminate the use of brokerage accounts for retirement savings, especially harmful to investors with lower account balances who rely upon commission-based products and services in order to afford guidance to achieve and maintain a secure retirement.

In the United States, an estimated 311,000 financial advisors help manage a collective $16.4 trillion in assets[2] for over 32 million households.[3] However, this landscape will evolve quickly due to the impact of the Fiduciary Rule. Industry analysis suggests that the Rule will lead to decreased advisor headcount and fewer households with affordable access to advice. Estimates of the impact of the Rule indicate the impact will be significant. One estimate suggests that 10.6 million households with investable assets of less than $100,000 currently using full-service advisors could lose access to advice as firms establish or increase account minimums to maintain profitability.[4]

The Department has acknowledged that the Fiduciary Rule will result in decreased access but insists that investing in all passive index funds is the solution or that relying upon a robo-advisor is a fair substitute for the loss of a relationship with an advisor.

A regulatory framework that favors one investment strategy as a one-size-fits-all solution is not in the best interest of retirement investors. Both active management and passive/index products add value and have benefits. The Rule favors the use of one versus the other when it should have fostered processes that support appropriate use of either. Whether active or passive strategies are appropriate will depend on the investment objectives and risk tolerances of each retirement investor. For a retirement saver, owning the index can actually have more risk, especially when indexes become distorted. In 2000, a 401(k) plan participant in a Russell 1000 Growth Index would have effectively owned over 50% in information technology stocks, which as a sector lost over a third of its value later that year when the tech bubble burst. This example illustrates how market weighted indices can be pro-cyclical, which at times

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[2] Cerulli Associates, U.S. Intermediary Distribution 2016, Exhibits 2.11, 2.03.
[3] Strategic Business Insights, 2016-17 MacroMonitor, Variable NOW_F.
[4] Ibid.

substantially increase individual and market risk. As Americans move into retirement, and begin drawing income, indexes pose additional challenges. For example, market capitalization weighted fixed income indices concentrate investors' assets in borrowers that have the most debt outstanding. In contrast, active managers could make valuation and diversification judgments, and for example, reduce their technology holdings. Finally, there is some evidence that active management tends to outperform passive strategies more significantly in normalized or rising interest rate environments,[5] which the U.S. is now entering, after a prolonged declining or low rate environment.

Furthermore, we disagree that robo-advice will address the disenfranchisement of millions of households currently receiving holistic financial planning advice. The services provided under robo-arrangements are typically limited to one type of investment or will address only one savings goal, offering some level of asset allocation and rebalancing. For example, these services do not assess the utility of any guaranteed lifetime income solutions as a baby boomer nears retirement or assist a small business owner with the responsibility of administering a SIMPLE IRA for her employees. It is not unusual for robo-advice providers to refer their clients to financial planners for holistic advice that covers multiple financial goals or more complex financial planning strategies. This means that a retirement saver will also need to pay a financial planner an additional fee for comprehensive advice not provided by the robo-arrangement, increasing her costs and decreasing her savings.

Similar changes have already occurred in the United Kingdom (U.K.) and resulted in a review of the negative impacts of the regulation after major disruptions in the market. As the Department is aware, the U.K. instituted the Retail Distribution Review ("RDR") which bans the receipt of commissions for advisory services. The Department cited the RDR as supporting its changes to the Fiduciary Rule in 2015.[6]

During the pendency of the proposed Department Rule, the U.K. launched a Financial Advice Market Review ("FAMR" or "Review") "in light of concerns that the market for financial advice was not working well for all consumers."[7] The Review examined, among other things, whether the commission ban had created an "advice gap" for investors with smaller balances. The final report of this Review was published on March 24, 2016, and was mentioned in the Department's final RIA just a few weeks later, but was dismissed as not providing "an apples-to-apples comparison" because the Department's Rule does not completely ban commissions.[8] We believe that this is a distinction without a difference. A rule that explicitly bans commissions will not have a different economic outcome from a rule that makes offering commission-based products and services so risk-laden that firms decide to stop offering this choice altogether or limit their offering to high net worth investors. As discussed earlier, several large

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[5] Mezrich, Joseph and Ishikawa, Yasushi, "*Interest Rates and Asset Management's Outlook; Could Rising Rates Reverse the Active Outflow*?" Nomura, December 2014.
[6] U.S. Dep't of Labor, *Fiduciary Investment Advice: Regulatory Impact Analysis*, April 14, 2015, 44, available at: http://www.dol.gov/ebsa/pdf/conflictsofinterestria.pdf
[7] Financial Conduct Authority, *Financial Advice Market Review – Final Report*, March 2016, 3, available at: https://www.fca.org.uk/publication/corporate/famr-final-report.pdf
[8] U.S. Dep't 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, 91, available at: https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/conflict-of-interest-ria.pdf

brokerage firms have already made the decision to cease offering commission-based accounts to clients with IRAs. Therefore, the Department should be vastly concerned with the learnings from the U.K.'s RDR roll out.

We urge the Department to reconsider the findings of the FAMR, which is directly relevant to the 2016 Fiduciary Rule and the President's directive to the Department to consider whether the Rule "has harmed or is likely to harm investors due to a reduction of Americans' access to certain retirement savings offerings, retirement product structures, retirement savings information, or related financial advice." In particular, we note the following findings of the FAMR:

- Over the past few years, there have been major improvements to the quality of financial advice, driven by the RDR and other regulatory initiatives. These have raised standards of professionalism and enhanced consumer protection. *However, at present, this high standard of advice is primarily accessible and affordable only for the more affluent in society.*[9]*(italics added for emphasis)*

- [A] survey of advice firms suggested that, over the last two years, the proportion of firms who ask for a minimum portfolio of more than £100,000 has more than doubled, from around 13 percent in 2013 to 32 percent in 2015. The FCA's recent survey of advisers also supports this, suggesting that 45 percent of firms very rarely advise customers on retirement income options, if those customers have small funds (i.e., less than £30,000) to invest.

- A consistent theme emerging from the Call for Input was that there are significant minimum costs per customer associated with supplying face-to-face advice. This means that it is less cost-effective for individuals with small pot sizes to obtain advice, which inevitably affects commercial decisions about whether to offer services to consumers with lower amounts to invest.[10]

The U.K.'s study of the impact of the RDR on the availability of advice is relevant to the Department's reexamination of the 2016 Rule, and should prompt the Department to take a closer look at the RDR's effects on the availability of advice for those with smaller accounts.

Our affiliate, Columbia Threadneedle, operates in the U.K. and has observed that many retail investors are moving to execution-only platforms because they either do not want, or cannot afford, to pay externalized advice fees. Columbia Threadneedle developed myThreadneedle.com as a place for U.K. retail investors to transact directly on an execution-only basis with Columbia Threadneedle's U.K.-based funds. However, this service is not an "advice" platform; the provision of advice requires a fuller understanding of client needs and financial circumstances than is economically feasible to provide on this platform. Similarly, many retail investors are retaining existing investments with fund manufacturers

[9] Financial Conduct Authority, *Financial Advice Market Review – Final Report,* March 2016, 13, available at: https://www.fca.org.uk/publication/corporate/famr-final-report.pdf
[10] Id. at 19 (citations omitted).

without the benefit of ongoing advice from a financial advisor. Columbia Threadneedle and other fund manufacturers have sought to, and do, provide investment education materials, but these materials cannot substitute for advice based on an individual's full financial circumstances.

B. Costs to retirement investors will likely increase

As we and many others had previously commented, the requirements of the Best Interest Contract Exemption ("BICE") are not business model-neutral and has already reduced access to retirement saving and guaranteed retirement income opportunities for those who can least afford to be disenfranchised. According to the Department's own preamble accompanying the 2015 Proposed Rule, advisers should be required to "put the interests of the Retirement Investor ahead of the financial interests of the Adviser."[11] We support this standard, and act as a fiduciary today when providing financial planning or investment advisory services. Unfortunately, the Department added multiple conditions that as a practical matter have caused many in the industry to determine that commission-based products and services are not feasible under the exemption. Furthermore, the Department has added to investor confusion by implying that the BICE's impartial conduct standards are one and the same with acting in a client's best interest;[12] which is not true. A firm can act in both a prudent and loyal manner, putting client interests first, in a regulatory framework that does not come saddled with the investor-harming baggage of the BICE.

We have long offered choice as to how our clients work with us to achieve their long-term financial goals, depending on their circumstances, financial position and the level of advice they desire. Ameriprise Financial is dually registered as a broker-dealer and as an investment adviser, and our advisors operate under the current standards of care applicable to each. Our advisors are held to a fiduciary standard under the Investment Advisers Act of 1940 when providing recommendations under managed account programs or in their financial-planning based relationship.

With several financial services companies limiting their commission-based products and services because of the Rule, middle-class Americans may find that fee-based advisory accounts are the only accounts available in order to continue to receive guidance. In some circumstances, savers and retirees with more modest accounts may find they must fend for themselves. Advisory-fee-based accounts typically require minimum investments (*e.g.*, $50,000 to $250,000), so commission-based accounts are often the only way in which investors with less to invest can obtain guidance. Furthermore, fee-based advisory programs, which charge ongoing fees based upon assets under management, can be more expensive and are generally not a good choice for buy-and-hold investors. FINRA and the SEC do not consider advisory accounts suitable for investors who do not trade very often.

The options that may be utilized to comply with the BICE are resulting in less choice for retirement investors across the industry. One option that mutual fund companies have considered to address the Rule's vague standards is an additional share class for transactional accounts often referred to as "T-Shares." This share class was heralded by some who support the 2016 Rule as a positive development for retirement investors. However, this solution may not yet be fully understood by the proponents. Today, mutual fund investors may reduce their total commissions paid by choosing the appropriate share class

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[11] 80 Fed. Reg. 21942.
[12] 82 Fed. Reg. 16905.

from multiple options that best matches their anticipated purchase amounts and holding period. The "T-Share" class would lack many of the rights provided for under existing mutual fund share classes, which can reduce (through rights of accumulation) or eliminate (through exchanges at NAV between funds within the same fund family) the commissions paid by a client. Thus, the T-Share class might not be a benefit to many retirement investors.

The other potential approach to mutual fund commissions might be the "clean share" approach, which was referenced in the Department's preamble of the "Delay of Final Rule." Under this approach, clean shares would not be sold subject to a commission rate set by the fund. Instead, the intermediaries selling the fund shares would set their own commissions, which generally would be levelized among funds in response to the requirements of the BICE. This option, however, would only be available to larger intermediaries that are able to maintain omnibus, rather than individual shareholder, accounts with the funds' transfer agents.

Although the clean share approach would allow more flexibility than T-Share classes in setting commission rates, it is not likely that clean shares, which were only authorized a few months ago, will be in place in the near future. The fund companies would need to create these products, and intermediaries would need to change their business models, make required systems changes, revise agreements with the funds, and communicate these changes to clients. In the interim, even those larger intermediaries that could offer clean shares might need to use T-Share classes, which might mean that financial advisors and clients would face two sets of changes as a result of the Rule, which will lead to increased investor confusion.

These changes are not going to be ready to implement industry-wide by June 9, 2017. The Department has been provided with information that underscores these hurdles but for unexplained reasons, dismisses them in the preamble of the Delay of Final Rule. The transition to different share classes is a direct response to the *Impartial Conduct Standards*, which are now scheduled to take effect on June 9, 2017. Barring additional delays, it will be impossible for all firms to be prepared on that date, particularly small firms.

Advice providers are also responding to the Rule by migrating investors to different platforms that may alter the cost of their services as well as the offerings that are available. For example, in anticipation of the Rule, Ameriprise is transitioning some clients from a legacy mutual fund only platform that was a good solution for these clients, many with small accounts making payroll contributions, to a standard brokerage relationship to create consistency across our broader client base and reduce the potential litigation risk under the BICE. And firms who plan to rely upon the grandfathering guidance in the Rule in order to mitigate litigation risk cannot recommend that investors make future contributions, or provide ongoing advice. Changes occurring in the marketplace are what many predicted in numerous comment letters filed with the Department in 2015 – a reduction in choice for retirement investors. This negative consequence is taking place across the industry, and will only accelerate if the Rule is not withdrawn in a timely manner.

C. The Rule increases the risk that retirees will outlive their retirement assets

The Rule is also harming investors by limiting the availability of guaranteed lifetime income options. The Department did not adequately consider the substantial input from the life insurance community on the important benefits these products provide or the extensive oversight and regulation that applies to them. As a result, retirement investors are already receiving less information about these products and some life insurance companies are exiting the market entirely.[13] The Department's estimates did not assume this level of investor harm or market dislocation and should re-evaluate its analysis.

Variable annuities have been a primary source of guaranteed lifetime income for American retirement investors. Purchases for variable annuities have fallen by 21 percent from 2015 to 2016, according to the Secure Retirement Institute of LIMRA.[14] This drop represents both the qualified and nonqualified segments of this market. For IRA purchases, sales of variable annuities declined 22 percent when compared to last year.[15] The ambiguous regulatory requirements of the Rule are expected to result in additional decreases in purchases of variable annuities, which represented a significant amount of IRA annuity purchases. In 2015, variable annuities represented 56 percent of IRA annuity sales and 46 percent of 2016 IRA annuity sales.[16] LIMRA projects that variable annuity purchases will decrease another 20 to 25 percent in 2017 if the 2016 Rule becomes applicable.[17]

This decrease in annuity purchase activity should be of great concern to the Department. U.S. households are facing increased longevity, requiring household retirement savings to be stretched even further. According to the Census Bureau, the U.S. average life expectancy at birth increased 62 percent from 47.3 years in 1902 to 76.8 in 2000, with expectations it will reach 79.5 in 2020.[18] Calculations based on data from the Society of Actuaries indicate that a 65 year-old couple has a 50 percent chance of one spouse living to age 92 and a 10 percent chance of one spouse living to 100.[19]

Retirement investors need guidance to understand whether these products would help them achieve greater retirement security. Without this guidance, retirement investors will be hesitant to utilize annuities. Retirement savers may not understand or consider these types of products and how they can address market volatility risk or longevity risk. A 2017 survey from Greenwald Associates found that six in 10 Americans believe that financial advisors have a responsibility to present products that offer guaranteed lifetime income as part of their planning.[20] Their need to understand and discuss additional options to promote retirement security will not be met unless this Rule is changed.

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[13] "MetLife is second major insurer to exit the brokerage business, in the sale of adviser unit to MassMutual;" Investment News, February 29, 2016 available at: http://www.investmentnews.com/article/20160229/FREE/160229937/metlife-is-second-major-insurer-to-exit-the-brokerage-business-in?AID=/20160229/FREE/160229937&AID=%2F20160229%2FFREE%2F160229937 (subscription required). See also, "DOL Fiduciary Rule Causes Pullback on Sale of Annuities, Funds by Insurers;" ThinkAdvisor, September 20, 2016 available at: http://www.thinkadvisor.com/2016/09/20/dol-fiduciary-rule-causes-pullback-on-sale-of-annu?migration=1

[14] LIMRA Secure Retirement Institute, U.S. Individual Annuity Sales Survey (Fourth Quarter 2016).

[15] Ibid.

[16] Ibid.

[17] LIMRA, '2017 VARIABLE ANNUITY SALES FORECAST (ASSUMING NO DELAY IN DOL RULE IMPLEMENTATION)'

[18] National Association of Insurance Commissioners, http://www.naic.org/cipr_topics/topic_longevity_risk.htm; https://www.census.gov/prod/2010pubs/p25-1138.pdf

[19] Laster, David, Vrdoljak, Nevenka and Suri, Anil, "*Strategies for Managing Retirement Risks*," The Journal of Retirement 4.1 (2016): 11-12.

[20] Greenwald Associates, 3rd Annual Guaranteed Lifetime Income Survey, March 2017.

Retirement policy experts agree that for many retirees, the use of an annuity as part of a drawdown strategy will help savings last over their lifespans. The Obama Administration devoted significant resources to solicit public comments to determine how the Department and the U.S. Treasury could facilitate access to lifetime income or other arrangements that provide a lifetime income stream in retirement.[21] The Administration also noted that this effort was aligned with its initiative to address concerns of the middle class.[22] Economists have articulated their concerns over the "annuity puzzle," which indicates the reluctance that retirement investors exhibit when selecting a suitable retirement income strategy. More recent analysis from experts in the field of behavioral finance demonstrates that behavioral factors lead to less than optimal use of annuities.[23]

The advice and education provided by an advisor is of particular importance to retirement savers who are likely relying more on personal financial resources and less on defined benefit income and income for Social Security. While the need for annuity income will be different depending on individual circumstances, utilizing variable annuities with guaranteed benefits as part of an investment portfolio does help many retirees to better manage longevity risk and market risk. Unlike immediate income annuities, variable annuity products offer more flexibility to address the aversion that many retirement investors have to other annuity products.[24]

III. Financial Planning and Advice are Key to a Secure Retirement

In determining the economic impact of the Rule, the Department failed to recognize and take into account the value of comprehensive financial advice, and this Rule is likely to adversely impact access to advice and the associated benefits to retirement savers. Ameriprise Financial is the leader in financial planning in the U.S. with a nationwide network of approximately 10,000 financial advisors and extensive asset management, advisory, insurance and annuity capabilities.[25] Our advisors are focused on providing comprehensive financial advice over a client's lifetime. Financial needs change over time as do the multiple products and solutions our clients have access to help them reach their goals. Access to personalized guidance and advice is essential both during the years when individuals are accumulating wealth and as they determine the best approach to converting their savings to a reliable income stream in retirement. In addition, this personalized guidance and advice is most needed in market downturns when keeping clients focused on their investment goals and investment plan is critical to achieving those goals.

In our 2015 comment letter to the Department, we explained that the current retirement marketplace is successful with more Americans having access to a broad range of cost-effective affordable products and

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[21] Request For Information Regarding Lifetime Income Options for Participants and Beneficiaries in Retirement Plans, February 2, 2010, 75 Fed. Reg. 5253-5258.
[22] Annual Report of the White House Task Force on the Middle Class, February 2010, 27.
[23] Sass, Steven A., Center for Retirement Research, *How Can We Realize the Value that Annuities Offer in a 401(k) World?*, July 2016.
[24] Finke, Michael S., Blanchett, David, *An Overview of Retirement Income Strategies*, The Journal of Investment Consulting, Vol. 17, Number 1, 2016, 22.
[25] Ameriprise helped pioneer the financial planning process more than 30 years ago. We have more CERTIFIED FINANCIAL PLANNER™ professionals than any other company in the U.S. as documented by the Certified Financial Planner Board of Standards, Inc., as of Dec. 31, 2016.

services than ever before. We further explained that financial advisors play a critical role in helping millions of Americans save for retirement. And we cautioned the Department that without the help of financial advisors, we could very well see the momentum swing the other way. Unfortunately, in the 20 months since we provided our perspective, the momentum has begun to swing the other way. Access to financial advisors has been taken away by some of the largest brokerage firms in anticipation of the Rule. This entirely foreseeable market reaction was completely dismissed by the Department's RIA:

> *"The Department expects that, subject to some short-term frictions as markets adjust, investment advice will continue to be readily available when the final rule and exemptions are applicable, owing to both flexibilities built into the final rule and exemptions and to the conditions and dynamics currently evident in relevant markets."*[26]

Given that multiple firms responded to the Department's Rule by making the decision to stop offering financial advisor supported commission-based accounts, we believe the Rule will prevent millions of Americans from having access to a financial advisor.

We strongly urge the Department to reconsider its economic impact assessment based on the current environment. The Rule will have significant negative economic impacts on the very retirement investors it was designed to protect. The Department's own analysis acknowledges that retail investors today confront a myriad of investment options that were not available or did not exist in 1975 and that permit investors "to construct and pursue financial strategies closely tailored to their unique circumstances—but also sows confusion and increases the potential for very costly mistakes."[27] We agree, and that is why access to a financial advisor is critical as most retail investors are not positioned to construct and pursue those financial strategies on their own.

As the Department itself has recognized in past rulemakings, there is evidence that retail investors often make costly investment errors due to flawed information or reasoning. The Department itself determined that those mistakes likely amounted to more than $114 billion in financial losses in 2010 alone.[28] This number dwarfs the Department's estimate of the benefit to investors of the Fiduciary Rule.[29] Given this

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[26] 81 Fed. Reg. 20952.
[27] Id. at 20949.
[28] 76 Fed. Reg. 66151. "With the growth of participant-directed retirement savings accounts, the retirement security of America's workers increasingly depends on their investment decisions. Unfortunately, there is evidence that many participants of these retirement accounts often make costly investment errors due to flawed information or reasoning. As more fully discussed in the Benefits section below, these participants may make financial mistakes which result in lower asset accumulation, and thus final retirement account balances, for these individuals and/or result in less than optimal levels of compensation risk. Financial losses (including foregone earnings) from such mistakes likely amounted to more than $114 billion in 2010. These compound and grow larger as workers progress toward and into retirement.

Such mistakes and consequent losses historically can be attributed at least in part to provisions of the Employee Retirement Income Security Act of 1974 that effectively preclude a variety or arrangements whereby financial professionals might otherwise provide retirement plan participants with expert financial advice."

[29] We agree with the Investment Company Institute's analysis that the Department's estimate of the cost to investors of so-called "conflicted advice" is flawed and note that the ICI data provided to the Department shows that IRA investors pay below-average fees related to the mutual funds they hold. Letter from Brian Reid and David W. Blass, to Office of Regulations and Interpretations, Employee Benefits Security Administration, U.S. Department of

estimate, even a small reduction in the availability of advice would be expected to have a large negative impact on the amount of savings available to retirement investors.

To help the Department in its investigation of the investor harm that would result from the Fiduciary Rule, we support and would draw the Department's attention to the 2015 Oliver Wyman study "The role of financial advisors in the US retirement market" to underscore the importance of advisor guidance in helping Americans achieve a secure and sustainable retirement. The study found that, among other benefits advised individuals own more diversified investment portfolios, take fewer premature cash distributions, and re-balance their portfolios with greater frequency to stay in line with their investment objectives and risk tolerance, compared with individuals without a financial advisor. All of these are important factors in maximizing retirement assets. Notwithstanding the Department's claims to the contrary in its RIA,[30] these findings hold, even when controlling for income and age, indicating the value that advisors provide to a broad spectrum of American retirement savers.

Financial advisors play a critical role in helping millions of Americans take the necessary steps to save for retirement and sustain a dignified lifestyle in retirement. In fact, recent research has shown:

- Prior to the Rule, more people were being helped through financial advice and fees were going down.[31]
- Americans who receive advice have a minimum of 25% more assets than non-advised individuals.[32]
- In the case of individuals aged 35-54 years making less than $100,000 in annual income, advised individuals had 51% more assets than those without a financial advisor.[33]
- Households lacking a financial advisor and with below-average financial literacy stand to lose 50 basis points annually in investment returns compared to their advised counterparts.[34]
- Financial advisors are clearly helping Americans save more for retirement. A 2014 Consumer Survey by the LIMRA Secure Retirement Institute found that households that use a financial advisor are twice as likely as non-advised households to have $100,000 or more in retirement savings, and three times as likely to have retirement savings greater than $250,000.[35]

Labor (July 21, 2015).

[30] 81 Fed. Reg. 20952.

[31] Investment Company Institute, "Mutual Fund Expenses and Fees" in *2014 Investment Company Fact Book,* available at: https://www.ici.org/pdf/2014_factbook.pdf.

See also: Investment Company Institute, "Trends in the Expenses and Fees of Mutual Funds, 2013" in *ICI Research Perspective* Vol. 20, No. 2, May 2014, available at: https://www.ici.org/pdf/per20-02.pdf.

[32] Oliver Wyman, *The role of financial advisors in the US retirement market,* 6, available at: http://fsroundtable.org/wp-content/uploads/2015/07/The-role-of-financial-advisors-in-the-US-retirement-market-Oliver-Wyman.pdf.

[33] Id. at page 2.

[34] Von Gaudecker, Hans-Martin. *How does household portfolio diversification vary with financial literacy and financial advice?* The Journal of Finance 70.2, April 2015, 489-507.

[35] LIMRA Secure Retirement Institute, *Matters of Fact: Consumers, Advisors, and Retirement Decisions (and*

- Financial advisors are often a key advisor to small businesses, helping owners through the process of setting up a defined contribution plan for their employees. When a financial advisor is involved, small businesses with 10-49 employees are 50 percent more likely to set up a workplace retirement plan. In addition, micro businesses (1– 9 employees) that work with a financial advisor are nearly twice as likely to set up a plan.[36] This is a critically important point because small business owners, through SEP and SIMPLE-type IRA plans, enhance retirement security by encouraging roughly $472 billion in retirement savings by their employees.[37]

- Financial advisors provide critical retirement planning education to the plan participants of small businesses. In fact, participants who work with financial advisors are more likely to participate in their employer's plan, and contribute at a higher rate, than those without an advisor.[38]

- Access to financial advisors helps keep retirement assets available for retirement. A Government Accountability Office ("GAO") report found that cash outs at job change lead to a loss of $74 billion annually from the retirement system,[39] a much greater impact than the alleged harm found by the Department that serves as the impetus for the current Rule. The Rule will likely increase this asset leakage by limiting rollover conversations. Employees are less likely to take cash withdrawals of their retirement savings if they discuss their distribution options with a call center or broker upon job termination.[40]

- Financial advisors help Americans sustain a secure retirement. Those households that use an advisor are also managing risk through the use of financial products that provide security and guarantees. For example, households that use a financial advisor are more than three times as likely to own an individual annuity compared to households without a financial advisor, 26% of advised households versus 7% of unadvised households.[41] The same holds true for individual life insurance (51% of advised households vs. 29% of unadvised households), individual long-term care insurance (16% of advised households versus 6% of unadvised households), and individual disability insurance (9% of advised households versus 7% of unadvised households).[42] Without access to a financial advisor, millions of households would likely forego these products. These individuals are taking personal responsibility in seeking the assistance of a knowledgeable advisor. Without these products, their savings for retirement could quickly evaporate. This also

Results), May 2015, 3.
[36] Oliver Wyman, *The role of financial advisors in the US retirement market,* 1.
[37] U.S. Chamber of Commerce, Locked Out of Retirement, The Threat to Small Business Retirement Savings, 2015, 2, available at: https://www.uschamber.com/sites/default/files/us_chamber_-_locked_out_of_retirement.pdf
[38] LIMRA Secure Retirement Institute, *Matters of Fact: Consumers, Advisors, and Retirement Decisions (and Results),* May 2015, 5. "More of those with advisors also demonstrate "good" behavior — contribute 10 percent or more to their employers' plans (and are twice as likely to contribute 20 percent or more)."
[39] U.S. Government Accountability Office, *401(k) Plans; Policy Changes Could Reduce the Long-term Effects of Leakage on Workers' Retirement Savings.* GAO-09-715, September 2009, 17, available at: http://www.gao.gov/assets/300/294520.pdf
[40] Quantria Strategies, LLC, *Access To Call Centers And Broker Dealers And Their Effects On Retirement Savings,* 2014, 1, available at: http://quantria.com/DistributionStudy_Quantria_4-1-14_final_pm.pdf
[41] Strategic Business Insights, 2016-17 MacroMonitor.
[42] Ibid.

protects our nation's social insurance programs which are undergoing significant stress due to the aging of the population.

The Department has not adequately addressed these benefits that accrue to retirement investors and society due to not only increased savings, but the actions that are taken when a relationship with an advisor is established. Based on the information provided above, we believe that it is incumbent upon the Department to eliminate any barriers to continuing affordable access to IRA brokerage accounts, IRA annuities and employer-provided retirement plans that underpin the retirement security of millions of Americans. We are concerned that the Rule will put the retirement security of millions of Americans at risk, just as 10,000 baby boomers are turning 65 each day.[43]

IV. The Department Greatly Underestimated the Cost Impact of the Rule

Another flaw in the Department's economic analysis is the gross underestimation of the costs of the Rule. The preamble of the proposed BICE indicates that it is "intended that this updated approach will ease compliance costs and reduce complexity while promoting the provision of investment advice that is in the best interest of the retirement investor."[44] In this respect, every provision must be read through this lens. And while the Department eliminated some of the technical data requirements in the final Rule, the overall impact for meeting the Rule's requirements did not result in the cost savings the Department concluded would occur. Furthermore, the Department did not even take into account costs that would be borne by asset managers, including mutual fund providers and other asset providers.

The 2016 changes to the BICE requirements did not reduce the costs of the Rule overall. While the removal of the technically complex Point of Sale and Annual Disclosure in the final Rule decreased the technological changes that were included in the proposed 2016 rule, the documentation, compliance, supervision and surveillance requirements were by no means decreased in the final Rule. In fact, due to the broad and vague conditions of the Rule, the technological changes are substantially more onerous and costly to implement.

In order to meet the requirements under the Rule, financial advisors must document and provide detailed evidence of their recommendations to clients. Companies have been working tirelessly to develop new technological support for both advisors as well as compliance oversight. Advisors will face substantial negative productivity impacts unless they have access to additional automated solutions, integrated technology and assistance to partially help bear these new burdens. Without this effort, it will be difficult for advisors to continue to serve their existing clients, let alone spend time to reach out to and serve new retirement investors. In order to implement appropriate compliance and supervision of the Rule's requirements, substantial integration, data collection and aggregation is required for processing and supervising the documentation and evidence provided by financial advisors. Developing, implementing and maintaining compliance and supervision programs to ensure the Rule's requirements are met have offset any of the savings that removal of the Point of Sale or Annual Disclosure data requirements would have gained.

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[43] U.S. Department of Labor, *Newsletter, May 21, 2015*, available at: http://www.dol.gov/_sec/newsletter/2015/20150521.pdf

[44] 80 Fed. Reg. 21966.

A. Costs to asset managers were not taken into account

The Department's final RIA also ignored significant costs to asset managers and other product providers such as annuity providers and mutual funds.[45] The Department explained that asset managers may incur indirect, frictional costs related to product re-design, training and information technology requirements,[46] but we believe the amount of financial and human capital resources borne by asset managers rise greatly above the level of being "frictional costs." Our partners, who include the largest mutual fund companies in the United States, have been diligently working to assist financial intermediaries like Ameriprise with compliance by updating or offering new products and services.

Our affiliate, Columbia Threadneedle Investments, has spent significant time revising its offerings, design and business practices to meet the structural demands imposed by the Rule while seeking to preserve retail client access to products and services for the hundreds of brokerage and advisory firms it works with across the industry. Furthermore, because the line where marketing occurs and advice begins is unclear, asset providers will, in many circumstances, be unable to provide helpful and informative, product-specific information to retail investors lest they be viewed as providing fiduciary investment advice.

B. The Department underestimated litigation costs

The financial services industry also faces increased potential litigation risk and costs that the Department did not fully consider. The primary cause of these risks and costs is the Department's decision to establish a fiduciary standard for IRAs even though Congress purposefully declined to do so when ERISA was enacted. We are not opposed to being held to a best interest standard for IRAs. However, under the Rule, to the extent challenged, a firm must prove that it has not done something that would be against the best interests of the client – essentially being required to prove a negative.

Unlike the best interest standard of care that applies under the Investment Advisers Act where the adviser has a presumption of innocence, the BICE breaks new ground by establishing a presumption of guilt. In 2015, then Secretary of Labor Tom Perez often compared the Fiduciary Rule to the same standard that applies to lawyers and doctors. Again, those standards are based on well-accepted norms that do not shift the burden of proof. The ambiguity created by this "burden of proof" standard is likely to lead to an increase in litigation and is a strong deterrent to advisors and firms offering retirement investment advice to those with modest account balances.

In a recently-issued research report, Morningstar estimates that the costs to the industry from class actions would be $70 million to $150 million annually.[47] The report goes on to state that the first year class action litigation settlements could exceed this amount by a multiple and that under a bearish scenario class action lawsuits could reduce the operating margins for firms that offer commission-based advised IRAs by 24 percent to 36 percent. Under such a scenario, firms would either have to stop offering advice to

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[45] U.S. Dep't 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, 244.
[46] Ibid.
[47] Morningstar, *Weighing the Strategic Tradeoffs of the U.S. Department of Labor's Fiduciary Rule*, Financial Services Observer, February 2017.

clients with commission-based IRAs or increase those fees. As noted previously, the industry is responding by eliminating services to retirement investors with modest accounts as well as adjusting fees to compensate for these increased costs. These trends will accelerate if the Rule is not withdrawn.

V. Americans Deserve a Coordinated Regulatory Framework that Works in Their Best Interest Across All of Their Assets

We believe the Department of Labor is not the appropriate regulatory agency to establish a new framework for investment recommendations to individuals. These activities have been subject to oversight, statutory attention, and rule-making by the SEC, FINRA, and state insurance regulators for decades. ERISA, when considered in that context, is a relatively new statute and its parameters do not fit the myriad situations that individuals face when seeking assistance with their financial wealth.

The Fiduciary Rule is creating confusion for retirement investors and the financial advice market. The insertion of the prohibited transaction rules into most conversations between individuals in the marketplace is unlikely to lead to benefits to retirement investors.

The Department represented that there was little controversy regarding the definition of fiduciary and the Impartial Conduct Standards. These conclusions are contradicted by the record. As the Department well understands, these elements of the Rule are cause for concern. Ameriprise continues to believe that the BICE, Section II, impartial conduct standard, which states that the "Adviser and Financial Institution will provide investment advice that is in the Best Interest of the Retirement Investor ….without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party," is too vague a standard.[48]

The standard of acting "<u>without regard</u> to the financial or other interests" (emphasis added) is new and undefined by precedent and could well be interpreted to bar an advisor from recommending any transaction having a financial consequence for her. The key consideration should be that neither the firm nor advisor put their own interests ahead of the interests of the retirement investor.

We do not believe the Rule's flaws can be fixed by more "streamlined" exemptions.

We support a legislative or regulatory framework that, unlike the BICE, does not result in reduced retirement investor access and choice, but does require firms to:

- Put all clients' interests ahead of their own, in other words act in the client's best interest;
- Receive no more than reasonable compensation;
- Provide simple, clear and meaningful disclosure on the services and products offered to clients, as well as any material conflicts with such disclosure leveraging existing Department, SEC and FINRA regulations;

[48] 81 Fed. Reg. 21077.

- Operate under a penalty regime that is commensurate with the violation and places the burden of proof on the claimant consistent with every other fiduciary standard currently existing under the law.

Unlike the Fiduciary Rule, this framework would accomplish the goal of providing the 401(k) plan participant, small business and IRA owner a remedy to the extent she believes she has been harmed without introducing risk that has a chilling effect on the provision of advice and without adding a litany of operational burdens that only make it more difficult to serve clients.

And an even better approach would be a framework that applies to both the taxable and tax-advantaged portions of an investor's portfolio in the form of a uniform fiduciary standard. We urge the Department to work with Congress, and the SEC and FINRA to develop one standard that could truly benefit retirement savers and retirees.

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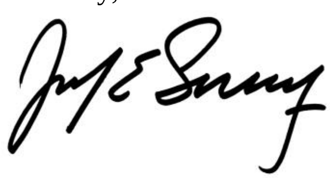
We appreciate the opportunity to submit a comment letter. Thank you for considering our comments. If you require additional information or have any questions, please do not hesitate to contact the undersigned or Theresa Seys, Vice President & Chief Counsel at theresa.seys@ampf.com.

Sincerely,



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