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Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Room N-5655  
United States Department of Labor  
200 Constitution Avenue NW  
Washington, D.C. 20210

Attn: Fiduciary Rule Examination

RIN 1210-AB79

Ladies and Gentlemen:

This letter is written on behalf of AE Wealth Management, LLC (“AE Wealth or AEWM”), a Topeka, Kansas based investment adviser registered with the United States Securities and Exchange Commission (“SEC”). Thank you for the opportunity to comment on the United States Department of Labor’s (“DOL or Department”) proposed Conflicts of Interest Rule (“Rule”) and related prohibited transaction exemptions (“PTEs”) including the Best Interest Contract Exemption (“BICE”) in light of the President Trump’s February 3, 2017 directive to the DOL Secretary.

AE Wealth wholly supports the intent of the Rule of acting in the best interest of the Retirement Investor. Acting in the best interest of the Retirement Investor is the current practice of the large majority of financial professionals. As a registered investment adviser, AE Wealth already has a fiduciary duty to its clients and currently acts in the best interest of its clients.

Pursuant to the March 2, 2017, request by the Department seeking comments on the Rule and related PTEs in response to the regarding the Presidential Memorandum on the Fiduciary Duty Rule dated February 3, 2017, AE Wealth submits the comments below in support of a revision or repeal of the Rule as currently promulgated for the following reasons set forth below.

AE Wealth believes the Rule, as currently written, is likely to harm Retirement Investors due to a reduction of Americans’ access to certain retirement savings offerings, retirement product structures, retirement savings information, or related financial advice. Further, AE Wealth believes the Rule will result in dislocations and disruptions within the retirement services industry that will adversely affect Investors or retirees. Finally, AE Wealth believes the Rule is

likely to cause a significant increase in litigation and increase the price Investors and retirees must pay to gain access to retirement services.

### Harm to Investors

AE Wealth believes the Rule, if implemented in its current form will have a detrimental impact on Retirement Investors due to loss of access to sound retirement planning. The threat of private causes of action driven by incentivized plaintiffs' lawyers will result in financial advisors abandoning lower to middle income Investors to the detriment of these clients. Retirement Investors will lose access to financial planning advice that has been shown to benefit their retirement funds. Additionally, Retirement Investors will likely be presented with scaled down product choices due to advisors streamlining their product shelf in an effort to mitigate liability and second guessing from plaintiff's attorneys. Further, the push toward robo-advising as a method to avoid "conflicted advice" contains serious flaws and will result in a retirement advice gap which will harm Investors. Finally, the experience of Retirement Investors in the United Kingdom should serve as a warning to the Department to re-evaluate the Rule as currently written to mitigate the loss of advice for Retirement Investors.

A report of the United States Senate Committee on Homeland Security and Governmental Affairs citing a 2015 Oliver Wyman study states that among individuals with \$100,000 or less in annual income, Retirement Investors who receive investment advice save 38% more than individuals that do not receive investment advice. Committee on Homeland Security and Governmental Affairs & Senator Ron Johnson, *The Labor Department's Fiduciary Rule: How a Flawed Process Could Hurt Retirement Savers* (2d Sess. 2016). The same Senate report, citing data from Quantria Strategies, indicates the Rule will cause a loss of retirement savings of \$68-80 billion per year and will jeopardize retirement readiness for 11.9 million IRA and retirement participants. *Id.* at 3. Further, testimony before a Senate Subcommittee on Employment and Workplace Safety indicates up to 7 million small Investors could lose their current broker as an effect of the Rule being put in place. *Restricting Advice and Education: DOL's Unworkable Investment Proposal for American Families and Retirees*, Hearing Before the Subcomm. on Emp't & Workplace Safety of the S. Comm. on Health, Educ., Labor & Pensions, 114th Cong. (2015) (statement of Peter Schneider, President, Primerica, Inc.).

Financial advisors play an integral role in retirement planning for lower to middle income Retirement Investors that would potentially be lost if the Rule is enacted as currently written. The 2015 Oliver Wyman report indicates 58% of households with under \$100,000 in investable assets and 75% of households with over \$100,000 in investable assets solicit professional financial advice. Oliver Wyman, *The Role of Financial Advisors in the US Retirement Market 5* (2015). Financial advisors moving away from lower to middle income Investors due to the Rule only harms access for Investors by limiting their pool of options for financial advice.

In the absence of financial adviser provided retirement advice, it appears the Department believes a move to robo-advisors may fill the void. However the use of robo-advisors as an alternative means of financial advice under the Rule completely ignores the personalized element

of financial advice that Retirement Investors seek. In an April 1, 2016, Policy Statement, the Massachusetts Securities Division astutely identified that Retirement Investors hire investment professionals to gain access to professionally personalized investment advice which cannot be provided by robo-advisors. The Policy Statement further illustrates the lack of due diligence performed by robo-advisors and highlights the problems which would exist in a robo-advisor driven industry. “Specifically, robo-advisers’ failure to conduct due diligence, as well as robo-advisers’ depersonalized structure, may render them unable to provide adequately personalized investment advice and make appropriate investment decisions.” *Policy Statement of the Massachusetts Securities Division, April 1, 2016*. Reducing access to personalized financial advice and driving Americans toward robo-advisors will only exacerbate problems and leave people financially vulnerable in their retirement years. Similar to the effect stated above, robo-advice will limit the product shelf available to consumers due to the structure of robo-advisors which is why robo-advisors have begun to introduce human advisors into their business models. Tom Anderson, *More robo-advisors are adding a human touch to their services*, CNBC (January 31, 2017), <http://www.cnbc.com/2017/01/31/more-robo-advisors-are-adding-that-human-touch.html>.

Finally, it is worth noting that predictions of financial advisers leaving lower to middle income Investors are rooted in recent history. In 2006, the United Kingdom’s Financial Conduct Authority (“FCA”) developed the Retail Distribution Review (“RDR”) which was implemented in 2013. Predictions of an increased advice gap accompanied the RDR with estimates that 43 million adults would fall into the guidance gap in Britain. Joe Tomlinson, *The DOL Fiduciary Rule: What We Can Learn from the U.K.*, Advisor Perspectives (September 28, 2015), <https://www.advisorperspectives.com/articles/2015/09/28/the-dol-s-fiduciary-rule-what-we-can-learn-from-the-u-k>. In July 2016, the Chief Executive Officer of the FCA admitted the RDR played a role in creating the advice gap. Emma Ann Hughes, *FCA admits RDR contributed to Advice Gap*, Financial Times Adviser (July 19, 2016), [www.ftadviser.com](http://www.ftadviser.com). The article indicates the number of financial advisers offering professional advice in England has decreased from approximately 26,000 in 2011 to 24,000 in 2014 and indicated the proportion of retail investment products – including pensions, retirement income products and investments – sold without advice increased from around 40% in 2011 to 2012 to around 66% in 2014 to 2015. *Id.* Accordingly, predictions of loss of investment advice are not hyperbolic and given the experience of Investors in England with a similar regulatory initiative it is predictable the same will likely occur in the United States if the Rule is implemented as proposed. Based upon the foregoing, it is clear implementation of the Rule as currently written will bring harm to Retirement Investors.

### **Disruption to the Industry**

AE Wealth believes the Rule, and its implementation, have already caused substantial disruptions to the financial services industry which will ultimately be to the detriment of the Retirement Investor. Across the financial industry, compliance estimates range from Ameriprise spending in excess of \$11 million in the first part of 2016, Greg Iacurci, *Ameriprise spends \$11 million-plus this year on DOL fiduciary rule*, Investment News (July 29, 2016), <http://www.investmentnews.com/article/20160729/FREE/160729927/ameriprise-spends-11-million-plus-this-year-on-dol->

fiduciary-rule, to an estimate by the Securities Industry and Financial Markets Association (“SIFMA”) indicating start-up costs for large and medium broker-dealers would be \$4.7 billion with on-going costs of \$1.1 billion. Kenneth E. Bentsen, Jr., Securities Industry and Financial Markets Association Conflict of Interest Rule Comment Letter (July 20, 2015), <http://www.sifma.org/issues/item.aspx?id=8589955445>. These estimates were well above the Department’s own initial estimates of the cost to comply with the final rule being between \$10 billion and \$31.5 billion over 10 years with the primary estimate of \$16.1 billion. Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20,946, 20,951 (April 8, 2016) (to be codified at 29 C.F.R. pts. 2509, 2510, 2550). The fact that compliance cost estimates vary so significantly requires further study of the Rule to ascertain the actual costs and evaluate whether those costs outweigh the alleged benefit to consumers considering the costs will ultimately be passed on to those same consumers.

While the industry may incur the costs of compliance initially, the ultimate price will be paid by Retirement Investors. The industry in general will not absorb the costs of compliance into their bottom line. Rather, the costs of compliance will be passed on to consumers via expense allocations in products and fees associated with transactions. Given that the Department’s estimate that \$17 billion is lost to conflicted advice per year is highly disputed, Retirement Investors who did not suffer from “conflicted advice” will still pay for the compliance costs associated with the Rule’s implementation regardless of whether they suffered any of the alleged harm or not.

### **Increase in Litigation**

AE Wealth strongly believes that the Rule, coupled with the BICE requirement of a written contract with retirement investors that prohibits mandatory arbitration of class and other representative actions, will certainly cause an increase in litigation and in compliance costs designed to reduce the risk of such litigation. These litigation and compliance costs will be passed on to retirement investors in the form of higher fees. While the DOL and Internal Revenue Service (“IRS”) do maintain enforcement authority under the Rule, the practical reality is that enforcement will be carried out by a plaintiff’s bar with a financial incentive to bring lawsuits under the Rule. “It is very likely that the plaintiffs’ bar will play a primary role in enforcing the new rules in the IRA space. And it is possible if not likely, that the Fiduciary Rule will result in a spate of class action litigation in the not-too-distant future.” Michael Kreps & George M. Sepsakos, *The Impact of the Department of Labor’s Fiduciary Rule*, Business Law Today (November 2016), [http://www.americanbar.org/publications/blt/2016/11/keeping\\_current.html](http://www.americanbar.org/publications/blt/2016/11/keeping_current.html).

The Department itself realized there would be increased costs associated with the Rule and associated exemptions with regard to errors and omissions insurance. The Department’s Regulatory Impact Analysis indicates an estimated \$99.7 million increase in errors and omissions insurance premiums for broker-dealer representatives subject to the Rule. 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). What the Department conveniently fails to realize in its analysis, however, is that insurance companies do not have experience in quantifying the risk associated with the Rule and

are, therefore, quoting coverage at extremely high rates or deciding the coverage is not worth the risk, thereby refusing coverage at all.

With respect to the BICE's requirement to enter into an enforceable agreement with the retirement investor, the DOL has historically not imposed such a requirement in PTEs for individual retirement accounts and other investment vehicles excluded from ERISA but subject to the prohibited transaction provisions of the Internal Revenue Code ("Code"). The Department stated that it imposed such a requirement to give an enforceable private right of action to retirement investors investing through non-ERISA plans because it felt that the excise taxes triggered by the Code were an inadequate means of incentivizing compliance. Best Interest Contract Exemption, 81 FR 21002, 21022 (Apr. 8, 2016) ("Without a contract, the possible imposition of an excise tax provide an additional, but inadequate, incentive to ensure compliance with the exemption's standard's based approach."). However, the DOL cited no support for this conclusion even though it is a dramatic departure from the DOL's 40 plus years practice of not imposing such a requirement as a condition of relief under class PTEs for products sold to IRAs and other non-ERISA plans. We also agree with the position taken by plaintiffs challenging the validity of the Rule in litigation that the DOL should not be able to impose indirectly through BICE a private right of action for violations of the Code when it does not have the statutory authority to do so directly.

BICE not only impose a private right of action for breach of contract, it prohibits binding arbitration of class and other representative actions. It is well-documented that arbitration provides a more efficient means of resolving disputes rather than litigation and is favored by the Federal Arbitration Act. Moreover, nothing under ERISA prohibits an ERISA plan fiduciary from requiring participants to resolve through binding arbitration class and other representative claims. While the DOL's regulations applicable to internal claims and appeals of ERISA claims prohibit binding arbitration, that prohibition applies only to health and disability plans, and not retirement or pension plans. 29 C.F.R. §§ 2560.503-1(c)(4) and 2560.503-1(d). And the sole remedy for violating this requirement is that participants are permitted to go directly to federal court rather than exhaust their administrative remedies under the plan. 29 C.F.R. § 2560.503-1(l). Accordingly, the prohibition of binding arbitration of class and other representative actions in BICE is a requirement that is not imposed on fiduciaries of ERISA retirement plans. Consequently, this appears to be an arbitrary requirement imposed by the the DOL without adequate analysis or cost justification.

These measures -- the private right of action and prohibition on binding arbitration of class and other representative actions will undoubtedly lead to increased litigation which will result in lower product choices and higher costs for retirement investors. Accordingly, AE Wealth believes that if the Department is intent on implementing the Rule, BICE should be rewritten to eliminate the enforceable contract requirement and the prohibition on binding arbitration of class and other representative actions.

AE Wealth fully supports the removal of "bad actors" from the industry, however, the likely results of the Department's regulatory delegation are predictable. An advisor's fear of being "second guessed" by a plaintiff's attorney years after a transaction will likely result in a pullback from the market by advisors or result in restricted product recommendations regardless of a

client's investment needs. It will simply not be worth the risk to a number of advisors to serve lower to middle income Retirement Investors or recommend products which are perceived to increase the likelihood of litigation. Further, this will have the effect of opening the door for unscrupulous advisors whose motivation is the sale of products regardless of the consequences to the client. In essence, this will open the door for bad actors to operate until they are caught. Given the Department's deferral of regulatory responsibility to plaintiff's attorneys, it essentially becomes necessary for a client to seek expensive legal advice to ascertain whether they have received proper financial advice.

### Conclusion

AE Wealth appreciates the efforts undertaken to re-evaluate the Rule in its entirety. As previously stated, we believe acting in the clients' best interests is of the utmost importance and we believe this standard is adhered to by a large majority of financial advisors today. Unfortunately, this Rule as currently written will have a detrimental effect on Retirement Investors and the industry by limiting access for consumers, continuing to create substantial disruption to the investment advice industry, and lastly driving up litigation and compliance costs which will be passed on to consumers.

Simply put, the objective of this Rule is admirable, the Department's execution, however, is fatally flawed as the Rule is currently written. Respectfully, AE Wealth believes the Department's lack of subject matter understanding in this arena has led to a philosophically based Rule which is woefully short on practical guidance for implementation for the industry to rely upon. This has led to substantial confusion in the industry which will result in a chaotic patchwork scheme going forward which will ultimately only benefit plaintiff's attorneys seeking to capitalize on the confusion to their own benefit. AE Wealth believes enhanced regulation in this area should be delegated to subject matter experts that reside in state insurance departments, state securities departments and the SEC. Permitting entities who understand the objectives of the Rule and the industry to craft workable standards will result in a smoother implementation which ultimately benefits the end client.

Thank you for the opportunity to comment.

Sincerely,



Eric R. Keller  
of PAUL HASTINGS LLP

cc: Michael Spafford