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**By Email:** EBSAFiduciaryRuleExamination@dol.gov

Office of Exemption Determinations
Employee Benefits Security Administration
Attention: D-11933

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

**RE: Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions, RIN 1210-AB82**

Ladies and Gentlemen:

Ameriprise Financial appreciates the opportunity to provide comments on the Department of Labor's (the "Department") Request for Information ("RFI") regarding the Definition of the Term "Fiduciary"; Best Interest Contract Exemption (the "BICE") and other related exemptions (collectively, the "Fiduciary Rule" or the "Rule").

We share our perspective as a leader in financial planning with nearly $800 billion in assets under management and administration. Our more than 2 million clients across the United States depend on our nearly 10,000 Ameriprise Financial advisors 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 enhance their long-term financial wellbeing.

**We support a best interest standard that puts our clients' interests first.** In fact, Ameriprise has long supported one uniform best interest standard across a client's entire portfolio. In practice, a **nonqualified brokerage account holder, managed account client, IRA owner, small business owner, 401(k) plan participant and annuitant could potentially be the same client.** We believe advice is holistic and clients view all their assets as available for planning – whether sending their children to college or saving for retirement. Throughout the regulatory process on this Rule, we have consistently advocated for

effective and appropriate regulation that preserves choice for American retirement savers and retirees. We've advocated for choice in how clients receive advice, the range of solutions to which they have access and how they compensate their advisors, while enhancing consumer protection across all their investments.

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 clients are well served not only by the comprehensive financial advice and solutions we offer, but by our robust compliance infrastructure and overall financial strength.

**We believe the Department's Rule, in its current form, has already had, and will continue to give rise to, disruptive and adverse impacts to average Americans saving for retirement.**

In reference to the Rule, Secretary Acosta stated that "[T]he administration presumes that Americans can be trusted to decide for themselves what is best for them."[1] Yet, the Rule as currently written is in direct conflict with this sentiment. Far from entrusting Americans to make their own decisions, the Rule is stifling the ability of retirement savers and retirees to receive the products, services and guidance which they had previously enjoyed. Notably, the Rule unnecessarily casts a shadow on commission-based accounts and products to the detriment of middle class Americans who have long relied on these vehicles to save for a secure retirement.

With this in mind, we believe the Rule needs material revisions if it is to align with the Secretary's statement. Absent significant modifications, we believe it will continue to create new barriers to guidance for existing clients and will continue to diminish access to beneficial investment products and services clients desire and need.

Ideally, the Department would coordinate with the SEC, FINRA and State insurance commissioners to develop a harmonized standard that preserves choice in how American retirement savers receive advice, what solutions they have access to, and how their advisor is compensated - while enhancing consumer protection. With coordination, both goals can be achieved to the benefit of retirement savers and retirees.

To the extent this optimal approach cannot be achieved, then we believe the Rule and its exemptions, particularly the BICE, must be materially revised if the Department is to reverse the negative trends currently occurring in the marketplace as a direct result of the Rule.

As the Department considers potential modifications to its Rule, Ameriprise Financial emphasizes the following:

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[1] Acosta, Alexander, "Deregulators Must Follow the Law, So Regulators Will Too – As the Labor Department acts to revise the Fiduciary Rule and others, the process requires patience," *Wall Street Journal*, May 22, 2017.

- **We Support a Harmonized Standard that Preserves Choice for American Retirement Savers and Retirees.** We have long supported and continue to support one harmonized best interest standard across a client's entire portfolio. We believe a harmonized approach would strike the right balance of enhancing consumer protection without reducing access to products and services that American retirement savers and retirees desire and need.

- **The Rule and Best Interest Contract Exemption Requires Substantial Revisions to Advance Consumer Protection and Retirement Security.** We do not believe that the Rule and Exemptions as currently written appropriately balance the interests of consumers in receiving broad-based investment advice while protecting them from conflicts of interest. By introducing unnecessary risk and uncertainty for commission based accounts, products and services, the Rule has had a chilling effect on the current retirement system, which has long served and benefited millions of Americans.

- **A Special Streamlined Exemption for a Select Few Investments Runs Counter to a Best Interest Standard.** We do not believe it is in retirement savers' best interests for the Department to institutionalize a preference for some investments over others. Instead of implementing a simpler exemption for a select few investments, we suggest that the Department focus on making the Rule and Exemptions simpler for all investments.

- **Rollover Conversations Enhance Retirement Savings.** Making rollovers a fiduciary act does not enhance consumer protection; it makes rollover recommendations prohibited transactions requiring exceptive relief in order for individuals to work with the financial professional of their choice. We believe creating barriers to providing guidance at times of transition is in no one's best interest and we urge the Department to provide a clear path to permit these beneficial conversations to continue.

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"), U.S. Chamber of Commerce (the "Chamber"), Investment Company Institute ("ICI"), Financial Services Roundtable ("FSR") and the Committee of Annuity Insurers ("CAI"). These submissions provide a vital perspective on the broad range of issues that must be addressed to stop the unfortunate momentum of the Rule's limitation of access and choice for retirement savers and retirees.

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## I. We Support a Harmonized Standard That Preserves Choice for American Retirement Savers and Retirees

We have long supported and continue to support one harmonized 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. The Rule as currently drafted does not achieve this balance but rather creates a new standard of care that only applies to the tax-favored portion of a retirement investor's portfolio and introduces unnecessary risk and uncertainty, creating a chilling effect on the current retirement system, which has long-served and benefited millions of Americans. Furthermore, the Rule has exacerbated investor confusion about the duty owed them by their financial advisor in any given transaction.

The Department's Rule represents a significant departure from the current regulation under the Employee Retirement Income Security Act of 1974, as amended ("ERISA") defining who is a fiduciary for purposes of providing investment advice. We remain concerned that the Department has not given the proper weight to the role that other regulators play in overseeing financial advisors or the value of professional guidance to clients in terms of increased retirement security. We believe that the Department should coordinate with the SEC, FINRA and the State insurance commissioners to build on existing regulations promulgated by these stakeholders creating a harmonized standard of care that truly benefits clients.

### A. The Value of Advice

Prior to the Department's Rule, the retirement marketplace was continuing to evolve and grow to meet the strong demand for comprehensive financial advice. Retirement services providers were helping an increasing number of people and investment costs were consistently trending lower.[2] Evidence is building that the Rule has caused the momentum to begin to swing the other way.

Recent market developments confirm that many investors of modest means have already lost access to advice and this trend will likely continue if the remaining conditions of the exemptions become applicable as drafted. 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 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[3] for over 32 million households.[4] However, unless the Rule is substantially revised, we believe this landscape will evolve quickly and will lead to decreased advisor headcount and fewer households with

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

[3] Cerulli Associates, U.S. Intermediary Distribution 2016: Evolving Roles in Distribution, Exhibits 2.11, 2.03.

[4] Strategic Business Insights, 2016-17 MacroMonitor, Variable NOW_F.

affordable access to advice. 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.[5]

The Department itself estimated that investor loss due to a lack of professional assistance would have totaled $114 billion in 2010 alone.[6] This number towers above the $17 billion benefit posited by the Administration's Council of Economic Advisers or even the range estimated by the Department.[7] Furthermore, research provided by ICI raises significant doubts related to the Department's rationale for the Rule. In fact, this research shows that IRA owners pay below-average fees related to the mutual funds they hold and that the Department's analysis is based on flawed arithmetic that overstates their findings by between 15 and 50 times.[8]

In fact, new research published in the United Kingdom last month demonstrates in clear terms how the value of working with an advisor translates into substantial gains in financial security.[9] This research uses a multi-year longitudinal survey of the same households to measure the value of advice. Other studies dismissed by the Department relied on measuring similar individuals at different points of time but not the same individuals. The study also utilized control groups and addresses another criticism of the Department which is whether the research controlled for the effect that some individuals are simply more likely to seek advice.

Consistent with other research, this robust study confirms that there is a significant positive impact on retirement savings when advice is sought. What is even more striking is that the proportionate impact is largest for those with more modest incomes – a fact that is particularly relevant when considering the need to maintain access to commission-based accounts. The study found that those who had received advice had more pension income than their peers:

- The 'affluent but advised' group earn £880 – or 16% more per year than the equivalent non-advised group
- The 'just getting by but advised' group earn £713 – or 19% more per year than the equivalent non-advised group
- The report found that 9 in 10 people are satisfied with the advice received, with the clear majority deciding to go with their adviser's recommendation.

In addition to helping retirement savers stay on track to reach their retirement goals, the guidance provided by financial advisors aids in plan adoption by small business owners. Financial advisors often

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[5] Ibid.

[6] Investment Advice – Participants and Beneficiaries, Final Rule, 76 Fed. Reg. 66151 (October 25, 2011).

[7] *See* White House Council of Economic Advisers, *The Effects of Conflicted Investment Advice on Retirement Savings,* February 2015, and U.S. Department of Labor, *Fiduciary Investment Advice Regulatory Impact Analysis,* April 14, 2015, 7, 8, 98, 102, 106.

[8] Statement of the Investment Company Institute, hearing on *"Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees,"* June 17, 2015, 8.

[9] International Longevity Centre – UK, *The Value of Financial Advice*, Cesira Urzi Brancati, Ben Franklin, and Brian Beach, July 2017, available at: http://www.ilcuk.org.uk/images/uploads/publication-pdfs/ILC-UK_The_Value_of_Financial_Advice.pdf.

introduce small employers to the idea of adopting a retirement plan over several years, helping small businesses extend the benefits of payroll deduction savings to employees. When a financial advisor is involved, small businesses with 10-49 employees are 50% 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.[10]

Should the BICE become applicable as drafted, it will put into jeopardy the ability of small business owners to work with financial advisors on a commission-basis, causing fewer small employers to adopt retirement plans for their employees and reduce retirement security for those employed by small businesses. This is a critically important point because small business owners, through SEP and SIMPLE-type IRA plans, provide roughly $490 billion in retirement savings to their employees.[11]

### B. Pre-Rule Regulations Benefit Retirement Savers and Retirees

The existing regulatory framework which pre-dates the Rule and oversees our company and our financial advisors is very comprehensive. The SEC is ultimately responsible for the supervision of the services and many of the products that our advisors recommend. Other supervision and regulation is covered by federal banking regulators and state insurance regulation. This regulatory framework covers both the products and services as well as the sales activities of our firm.

The Department has not adequately explained how the significant additional cost of a new third standard will benefit clients, particularly when considering the robust federal and state regulation that already exists for the most impacted investors – those who are individual account owners of IRAs. To ensure that rules are being met, the SEC conducts regular exams of our firm as well as our advisors. This regulatory responsibility is also carried out by FINRA, a self-regulatory organization that is subject to oversight by the SEC.

The SEC and FINRA are able to bring enforcement actions against firms that are regulated under federal securities laws for a wide range of violations, including fraud. The Department has no such jurisdiction related to retail IRAs and other non-ERISA plans. The SEC and FINRA have experience and resources to monitor activities at the individual investor level, which the Department lacks.

The real proof is in the positive results of FINRA arbitration for investor claimants. In 2016, for example, a commendable 71% of all customer claimant cases resulted, through settlement or awards, in monetary or non-monetary recovery for the investor.[12]

The enforcement mechanism favored under the 2016 Rule – class action lawsuits brought in potentially

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[10] Oliver Wyman, *The role of financial advisors in the US retirement market,* July 10, 2015, 1, available at: http://www.fsroundtable.org/wp-content/uploads/2015/07/The-role-of-financial-advisors-in-the-US-retirement-market-Oliver-Wyman.pdf.

[11] 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. *See also* Investment Company Institute, *Report: The U.S. Retirement Market, First Quarter 2017,* Table 8, available at: https://www.ici.org/research/stats/retirement.

[12] Financial Industry Regulatory Authority, Dispute Resolution Statistics, available at: http://www.finra.org/arbitration-and-mediation/dispute-resolution-statistics.

all 50 states – is expected to significantly increase the costs of providing products and services to retirement investors. This regime is expected to lead to substantial inefficiencies and will increase costs for all investors. This inefficient approach should be replaced with a unified approach, leveraging the other federal and state regulators that already are in place to oversee the activities and products that are being held in IRAs. In 2016, there was about $7.5 trillion held in IRAs; the vast majority of these assets are held at federal regulatory institutions subject to the oversight of the SEC or bank regulators.[13]

## II. The Rule and Best Interest Contract Exemption Require Substantial Revisions to Advance Consumer Protection and Retirement Security

Several elements of the Rule and BICE cause concern, and we believe these requirements have already driven up the cost of brokerage services and have limited retirement savers' access to advice and the choice they have in the products and solutions available to them. The Department established 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 BICE, if a financial institution engages in a technical prohibited transaction, excise taxes would attach even where the client benefitted from the recommendation. Even where the advice was in the best interests of the retirement saver, the fiduciary would have to return its compensation and pay the aforementioned excise taxes.[14]

Finally, if the fiduciary is relying on a prohibited transaction exemption such as the BICE, then the fiduciary 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. The ambiguity created by this "burden of proof" standard will invite litigation and act as a strong deterrent to advisors and firms offering retirement investment advice. For these reasons, we have concerns about the approach taken by the Department and once again urge coordination with key stakeholders to develop a harmonized standard that does not contain the pitfalls of an exemption regime.

To the extent a harmonized standard is not forthcoming, significant elements of the Rule and BICE would need to be revised. In its current form, the Rule has already negatively impacted American's retirement security.

### A. Rule's Bias Against Commission-Based Accounts Harms Investors

As currently drafted, we believe the Department's Rule does not take into consideration what limiting access to the current commission-based products and services would mean for middle-class families and retirees living on a fixed income.

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[13] Investment Company Institute, ICI Research Perspective, Appendix: Additional Data on IRA Ownership in 2016, 16, 22 available at https://www.ici.org/pdf/per23-01a.pdf.

[14] If a firm engages in a prohibited transaction (regardless of the good faith of the firm), then that provider must reverse the transaction, return all fees and/or gains received as part of the prohibited transaction, and pay a 15 percent excise tax on the amount involved each year from the date of the transaction until it is corrected. An additional 100 percent excise tax is imposed if the prohibited transaction is not corrected within a reasonable amount of time after discovered by the Internal Revenue Service.

With respect to mutual fund and variable annuity product offerings within IRAs, the Department has revoked two exemptions historically used by firms.[15] These exemptions enabled financial institutions to provide variable annuities and mutual funds to IRA owners on a commission basis. Without substantial revisions to the Rule and BICE, retirement investors who cannot afford a managed or fee-only account will be more likely to cash out of the retirement system, and therefore be more likely to not save enough for retirement and outlive their retirement assets. Furthermore, one study showed that clients prefer to pay commissions rather than advisory fees for investment transactions.[16] The negative impact of failing to provide a clear path forward for commission-based accounts for retirement savers and retirees is material:

- Currently, 95% of households saving for retirement have a brokerage account and 98% of investor accounts containing $25,000 in assets or less in their IRAs are in brokerage relationships.[17] This makes commission-based accounts an important means for middle-class investors to save for retirement.

- The value of the guidance provided to these retirement savers is meaningful. Americans who receive advice have a minimum of 25% more assets than non-advised individuals.[18] In the case of individuals aged 35-54 years making less than $100,000 per year in annual income, advised individuals had 51% more assets than those without a financial advisor.[19]

- Financial advisors are 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.[20]

- By helping Americans save and plan for retirement, financial advisors are filling an educational gap. Plan sponsors are already hesitant about offering education to their employees. A recent GAO report highlighted that fear of fiduciary liability and found that it inhibits communications

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[15] U.S. Department of Labor, *Prohibited Transaction Exemption 86-128 Class Exemption for Securities Transactions Involving Employee Benefit Plans and Broker Dealers*, available at: https://www.dol.gov/ebsa/regs/ClassExemptions/pte86-128.html, and *Prohibited Transaction Exemption 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, Investment Companies and Investment Company Principal Underwriters*, 49 Fed. Reg. 13208 (April 3, 1984), as corrected at 49 Fed. Reg. 24819 (June 15, 1984).

[16] Cerulli Associates, *The Cerulli Edge*, U.S. Edition, Issue No. 234, 18. In fact, 47% of investors indicated that they would prefer to pay their provider each time they make a transaction versus 33% who would prefer to pay their provider a percentage fee based on level of assets.

[17] Oliver Wyman, *Standard of Care Harmonization – Impact Assessment for SEC,* October 2010, 4, available at: http://www.sec.gov/comments/4-606/4606-2824.pdf and Oliver Wyman, *Assessment of the impact of the Department of Labor's proposed "fiduciary" definition rule on IRA consumers*, April 12, 2011, 2, available at: https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32/oliverwymanreport.pdf.

[18] Wyman, *The role of financial advisors in the US retirement market,* 6.

[19] Id. at 2.

[20] LIMRA Secure Retirement Institute, *Matters of Fact: Consumers, Advisors, and Retirement Decisions (and Results),* May 2015, 3.

> with employees regarding distribution options.[21] The communications financial advisors have with participants deter leakage. For instance, many financial advisors recommend that clients build up a cash reserve to cover at least six months of expenses in the event they were to lose their job so that they do not need to rely upon their retirement plan to cover essentials. Advisors also routinely counsel clients against cashing out – or even taking loans from – their 401(k) plan accounts.

Specifically, as drafted, the warranty in Section II(d) of the BICE related to "differential compensation" implicitly casts doubt as to the feasibility of commission-based accounts.

According to the BICE, neither the Financial Institution nor (to the best of its knowledge) any Affiliate or Related Entity may use "quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, ***differential compensation*** or other actions or incentives that are intended or would reasonably be expected to cause individual Advisers to make recommendations that are not in the Best Interest of the Retirement Investor."[22]

Section II(d) of the BICE further states, "this Section II(d)(3) does not prevent the Financial Institution or its Affiliates or Related Entities from providing Advisers with differential compensation (whether in type of amount, and including but not limited to, commissions) based on investments by Plans, participant or beneficiary accounts, or IRAs, to the extent that the Financial Institution's policies and procedures and incentive practices, when viewed as a whole, are reasonably and prudently designed to avoid a misalignment of the interests of the Advisers with the interest of the Retirement Investors they serve as fiduciaries (such compensation practices can include **differential compensation based on neutral factors tied to the differences in the services delivered to the Retirement Investor with respect to the different types of investments**, as opposed to the differences in the amounts of Third Party Payments the Financial Institution receives in connection with particular investment recommendations)" (emphasis added).[23] While we appreciate that the Department made some revisions to this section when the BICE was finalized, ultimately the standard is still too subjective and has led to some brokers discontinuing commission-based sales in IRAs due to the anticipated litigation risk from this warranty.

In order to slow down and reverse the negative consequences impacting retirement savers and retirees, the Department's Rule and Exemptions must be revised to clarify and affirm that it is truly a business model-neutral solution that preserves the current accounts, products and services that help retirement investors, especially those with modest means who are most at risk to outlive their retirement assets.

Otherwise, these retirement savers and retirees may well be forced, as a result of the Department's rule, to choose advisory accounts in order to receive the benefits professional guidance provides. Without material revisions, the Rule will put the retirement security of millions of Americans at risk, just as 10,000 baby boomers are turning 65 each day.[24]

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[21] U.S. Government Accountability Office, *401(k) Plans. Labor and IRS Could Improve the Rollover Process for Participants.* GAO-13-30, March 2013, 28.
[22] 81 Fed. Reg. 21077.
[23] Id.
[24] U.S. Department of Labor, *The DOL Newsletter May 21, 2015*, available at: http://www.dol.gov/_sec/newsletter/2015/20150521.pdf

While managed accounts are an appropriate choice for certain investors, these accounts often have minimums and are unsuitable for "buy-and-hold" clients who don't trade frequently (since these clients would be unnecessarily charged an ongoing fee when they do not have a need for significant transactions or ongoing service).[25] For example, brokerage accounts would likely be more appropriate for many millennial investors who may just be starting out in accumulating assets for retirement and perhaps cannot meet a fee based account minimum but still value professional investment advice.[26]

The BICE's discouragement of commission-based products has also necessarily discouraged companies from selling annuities – which will decrease retirees' opportunities for guaranteed retirement income, guaranteed accumulation benefits, enhanced death benefits – and increase their overall risk of their retirement portfolio – including increasing their risk of outliving their retirement assets.

Those who don't want, can't afford or shouldn't be in a managed account should not be left to fend for themselves and be limited to automated advice. For example, when the market experiences volatility, clients often rely on a financial advisor for guidance. In fact, 58% of households with under $100,000 and 75% of households with over $100,000 – in investable assets – look to a financial advisor to help them achieve a secure and sustainable retirement.[27]

The Department should take heed of the market shift that occurred in the United Kingdom (U.K.) and take greater care to prevent that negative impact from occurring in the United States. During the deliberations over the 2016 Rule, the U.K. launched a Financial Advice Market Review ("FAMR" or "Review") "considering concerns that the market for financial advice was not working well for all consumers."[28] 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 Regulatory Impact Analysis just a few weeks later, but was dismissed because the Department argued the Rule does not completely ban commissions.[29] 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 exclusively to high net worth investors.

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[25] Securities and Exchange Commission, *Examination Priorities for 2015,* 2, available at: http://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2015.pdf.

[26] According to the Fidelity *2016 Millennial Money Study: Facts, Figures and Findings*, 3, available at https://www.fidelity.com/bin-public/060_www_fidelity_com/documents/pr/millennial-money-fact-sheet.pdf, "[t]he top financial issues Millennials are trying to tackle: accumulating more savings for retirement (44%), building an emergency fund (44%), paying for essential living expenses (38%), reducing credit card debt (33%), and paying off student loans (30%)." And yet, "[c]ompared to Gen X and Boomers, Millennials are more likely to be working to pay rent, pay off student loans and purchase a home."

[27] Wyman, *The role of financial advisors in the US retirement market,* 5.

[28] 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.

[29] U.S. Department of Labor, *Regulating Advice Markets, Definition Of The Term "Fiduciary", Conflicts of Interest – Retirement Investment Advice, Regulatory Impact Analysis For Final Rule and Exemptions*, April 2016, 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.

We request the Department remove the words "differential compensation" from the regulation altogether so as to not create an uncertainty as to the permissibility of recommending diverse products with varying commissions. We, like other firms, already maintain policies, procedures and processes to review compensation structures and ensure that they do not incent inappropriate behavior.

### B. Contract Requirement Undermines Rule's Purpose

As discussed above, the existing regulatory framework which pre-dates the Rule and oversees our company and our financial advisors is robust and effective. Additional incentives to comply with the Rule, like through a new contract between firm and retirement investor, are not warranted. Indeed, the effect of a perceived increase in potential litigation risk and cost actually undermines several purposes of the Rule. An increase in potential litigation risk and cost has spurred firms to eliminate products and services that may create that potential risk without the requisite added value. We have seen firsthand evidence of this as several financial services companies have already moved to eliminate brokerage services and products.

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.

As noted in prior submissions, Morningstar estimates that the costs to the industry from class actions would be $70 million to $150 million annually.[30] Morningstar's 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 clients with commission-based IRAs or increase those fees. As noted in prior submissions, 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, and, in particular, the contract requirement, is not withdrawn.

We, like other firms, already maintain policies, procedures and processes to comply with existing laws and regulations governing the financial services industry, and would necessarily enhance or modify such policies, procedures and processes to ensure appropriate behavior in compliance with the Rule. The incentive for compliance exists independently of the issuance of warranties to retirement investors, for the same reasons as it exists independently of the existence of a new, separate contract.

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[30] Michael M. Wong, CFA, CPA, "Weighing the Strategic Tradeoffs of the U.S. Department of Labor's Fiduciary Rule," *Morningstar, Financial Services Observer*, February 2017.

### C. **The Department Should Remove Bias Against Brokers who Sell Affiliated as well as Unaffiliated Products and Receive Compensation**

We also have concerns related to Section IV of the BICE which contains a number of additional requirements for financial institutions that limit their platforms by offering affiliated products or products that reimburse them for platform costs.[31] We believe Section IV of the BICE should be removed in its entirety and replaced with an obligation that requires disclosure of any limitations related to the investments available on the financial institution's platform and the method used to select those investments. There should be no requirement to offer a specific range of products. Clients have choice of brokerage firms and investment options. They have the freedom to choose accounts that have products that they desire without an undefined disclosure that the products offered are "limited," assuming the product recommended meets client needs. Investors do not want information overload; they want a digestible list of investments from which to choose. No firm is capable of offering 100 percent of the available investments in the marketplace (e.g., some solutions are only offered by one broker dealer), therefore all providers would be limited. This is a condition that creates unnecessary ambiguity and should be removed and replaced with a requirement for disclosure related to the criteria used by a financial institution to limit the options available on its platform.

### D. **Employees of the Advisor's Firm or its Affiliates Should be Permitted to Continue to Work with the Advisor of their Choice**

Here, the Department noted its concern that when the advisor (or the advisor's firm or affiliates) is the employer, there could be additional conflicts due to the special nature of the employee/employer relationship.[32] This is not borne out in reality. It is common for employees of a financial institution to want to work with that financial institution's advisors. Furthermore, FINRA requires brokers to monitor the trading activity in employee accounts which means that most broker-dealers already limit their employees from holding assets at other firms.[33] The Department's stance is inconsistent with existing securities regulations and would make it more difficult for firms to monitor and supervise their employees. The prohibition would inadvertently limit oversight of an employee who engages in inappropriate conduct (e.g., insider trading) by allowing, indeed forcing the firm to allow, the employee to conduct the activity away from the firm's supervisory systems. Such a result is inconsistent with sound public policy and prudent broker-dealer oversight.

### E. **Grandfather Provision Needs to be Expanded**

The scope of the Department's relief is extremely narrow. From our discussions with industry peers, we understand that many firms that believe they are using the grandfathering provision are simply not providing recommendations any longer. A true grandfathering provision would grandfather existing relationships. Existing clients who have entered into commission-based arrangements with a financial professional should have the option to keep those arrangements intact. This should apply to both the client's existing money and new money. However, we would prefer that the Department amend the

[31] 81 Fed. Reg. 21080-81.
[32] Id at 21057.
[33] Financial Industry Regulatory Authority, *Rule 3210 Accounts At Other Broker Dealers and Financial Institutions,* available at: http://finra.complinet.com/en/display/display.html?rbid=2403&element_id=12288.

definition of fiduciary to ensure that it only applies where appropriate and then provide a streamlined, workable exemption so that firms would not need to rely on a grandfathering provision to continue to provide commission-based recommendations to existing clients.

### F. Inadvertent Technical Errors Should Not be Prohibited Transactions

We would further ask the Department to add a provision to all exemptions that would permit corrections of a prohibited transaction without penalty where the prohibited transaction occurred due to the failure to meet one or more technical requirements of an exemption provided that any harm that occurred as a result of the error is promptly remediated by the financial institution.

### G. Principal Transactions Exemption Can Be Improved

Finally, we suggest that the following be considered as potential improvements to the Principal Transaction Exemption to better serve investor interest and provide market flexibility:

- Remove the requirement that every debt security purchased by a retirement investor in a principal transaction "is sufficiently liquid that [it] could be sold at or near its carrying value within a reasonably short period of time."
    a. This requirement is vague and its use of the words "sufficiently liquid" and "reasonably short period of time" are too subjective, particularly where a firm and its advisors could face litigation over the recommendation to purchase the debt security.
    b. It also ignores the fact that retirement investors who purchase individual debt securities (as opposed to collective investments such as a bond mutual fund) generally hold the debt securities for a longer period, generally to maturity. Adding a short-term liquidity metric for securities purchased for a "buy-and-hold" account seems inconsistent.

- Remove the requirement that any debt security recommended for purchase by retirement investors in a principal transaction "possess no greater than a moderate credit risk."
    a. "Moderate" is too subjective a phrase given the time that most retirement investors will hold debt securities in their retirement accounts.
    b. "Credit risk" information is generally provided by credit rating agencies, also known as Nationally Recognized Statistical Rating Organizations (NRSRO), which have access to financial and other information about debt security issuers that is not available to financial institutions that make recommendations to retirement investors. Unlike a financial institution such as ours, however, credit rating agencies and NRSROs are generally exempt from liability for the ratings or other information they provide regarding debt securities.
    c. The rule indicates that the NRSRO rating may be *a* factor, but *not the only factor*, in assessing credit risk of a debt security purchased in a principal transaction. We believe this is too subjective of a standard, as NRSRO ratings are an important third-party barometer of credit risk. We suggest that the NRSRO rating should be considered the primary determinant of credit risk.

## III. A Special Streamlined Exemption for a Few Select Investments Runs Counter to a Best Interest Standard

In the RFI, the Department asked a series of questions relating to whether additional exemptions for certain mutual fund share classes, fee-based annuities, or other anticipated innovations, are warranted. We appreciate the interest the Department has shown in understanding potential market trends. However, with respect to the adoption of additional prohibited transaction exemptions, the lack of certainty created by the Rule and the BICE has made it difficult to fully analyze the advantages and disadvantages of the solutions cited by the Department in the RFI.

As a provider of mutual funds through our affiliate Columbia Threadneedle Investments, we have seen only slight interest in offering new share classes for mutual funds. The so-called T share and clean share approaches would only resolve part of the compliance issue that firms must address to comply with the BICE. In theory, firms could establish one commission charge across their mutual fund offerings. However, this would cause some fund types not to be offered, such as short-term bond funds because the cost structure is different than that of the cost structure for a longer-term equity fund. So, a full-service firm such as ours must still determine the necessary compliance steps for recommending different types of funds in a way that is in the best interest of the customer. A further consideration for firms is whether the same type of clean share across a range of funds of similar type will be available. If only a handful of very large firms offer clean shares for their larger funds – a result that is likely – the value of the exemption will be of limited utility in assisting with compliance for full-service brokerage firms.

The technological changes are also substantial, leading to additional expense. If clean shares are only adopted by a few larger fund families, and only for their larger funds, the costs to develop new technology will not be warranted. Additional adjustments will likely have to be made if an exemption only focused on clean shares is available.

The Department must also consider the impact that a move to clean shares would have on existing retirement investors. Firms will not want to continue to offer existing share classes for the funds that offer clean shares. Therefore, those share classes will be closed to new contributions and be maintained in a separate account that is only used as a holding account with no advice. Many clients have already paid loads to acquire those shares and have purchased valuable rights that would not be available within clean shares such as the right to exchange to another fund within the same family without incurring a commission. As discussed in numerous submissions to the Department, the current grandfathering rule only exacerbates this problem and would need to be enhanced to avoid further disadvantaging existing clients.

As we have discussed in previous submissions, the clean share is not *de facto* less expensive for investors. Earlier commentary from third parties inaccurately stated that these shares compare favorably to front-loaded A shares. However, that is not the case as the transaction costs for these shares will be determined by the broker-dealer and could likely be subject to a transaction fee at both the point of sale as well as at the point of distribution as is common for other securities where brokers set the commission. Other existing features of A shares would also be dispensed with, including rights of accumulation and exchange rights which can result in significant cost savings for retirement investors.

Many of these same considerations exist for fee-based annuities. Through our affiliated life insurer, RiverSource Life Insurance Company, we offer variable annuities to our clients. The Department's 2016 analysis did not adequately address the distinctions between how commissions are paid for mutual funds

versus how commissions for variable annuities and other insurance products are paid. In short, the commissions for insurance products are paid by the insurer. In the case of fee-based annuities, the compensation would be paid by the client and reduce the total assets in the account.

There is already a significant decline in the number of variable annuities being offered in the marketplace, leaving clients with fewer options to create guaranteed retirement income. We strongly support revising the 2016 Rule to ensure that the barriers to utilization of variable annuities are reduced for those in a commission-based account. Fee-based annuities have existed prior to the adoption of the 2016 Rule but have not been very successful in the marketplace because many investors who qualify for advisory accounts have access to other sources of guaranteed retirement income or are wealthy enough to self-annuitize. By investing in a fee-based annuity, an investor would be replacing a commission structure (one-time fee) for an ongoing annual advisory fee charge. In many cases, such an investor would pay more in fees over time – particularly since these investments are designed to held for a longer time period.

These piecemeal approaches are unnecessarily narrow and do not allow for future innovation and harkens back to the already rejected, 2015 low-fee exemption proposal. It will not be possible for new products to be offered by advisors without an amendment to the BICE or another special exemption. Such regulatory accommodations to change have historically taken years to complete and often never result in an exemption.

The Department should develop a harmonized standard designed to accommodate a variety of commission-based arrangements and more easily accommodate diverse business models and future developments. Congress placed very few restrictions on the types of assets that can be held in an IRA, allowing virtually any investment other than collectibles.[34] The Department should not place itself in the position of "blessing" only certain delineated arrangements, and should avoid the creation of "winners" and "losers" among financial products and services. We do not believe it is in retirement savers' best interests for the Department to institutionalize a preference for some investments over others. The fact that the Department contemplates this option seems like an admission that the BICE has too many complex conditions. A harmonized standard would provide a better and more seamless client experience with a clearer understanding of their rights, allow advisors to serve clients better by eliminating duplicative and contradictory standards – and in general be better policymaking.

## IV. Rollover Conversations Enhance Retirement Savings

The Rule has transformed many IRA rollover conversations into fiduciary investment advice.[35] Making rollovers a fiduciary act does not enhance consumer protection; it makes rollover recommendations prohibited transactions requiring exemptive relief in order for individuals to work with the financial professional of their choice. We believe creating barriers to providing guidance at times of transition is in no one's best interest and we urge the Department to revise the Rule to permit these beneficial conversations to continue without introducing unnecessary risk into the process.

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[34] Code Section 408(a)(3) prohibits IRAs from being invested in life insurance contracts. Code Section 408(m) prohibits IRAs from holding certain collectibles. Furthermore, the Secretary of Treasury was given authority by Congress under Code Section 408(m)(2)(F) to prohibit any other "tangible personal property" that it determined was a collectible. In other words, Congress chose to place very few restrictions on the type of investments available within IRAs.

[35] 81 Fed. Reg. 20997.

Frustrating the participant's ability to receive guidance on his or her options undermines the reason why retirement savers roll over their 401(k) plan assets to an IRA – to obtain individualized assistance from a qualified professional. Most 401(k) plans do not offer holistic guidance that takes into account a person's full financial picture.[36] Engaging a financial advisor, retirees and soon-to-be retirees receive efficient, cost effective help with such things as (1) when to start drawing from various accounts for retirement, (2) how to create a sustainable income stream into retirement, (3) which assets to draw from first and (4) tax diversification.

Providing a workable path for financial advisors to continue to have rollover conversations is imperative. The biggest mistake plan participants make in planning for retirement is not rolling their plan assets to an IRA but cashing out their retirement plan account when they switch jobs. This can devastate retirement savings. 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,[37] a much greater impact than the alleged harm found by the Department that serves as the impetus for the Rule. The Rule as currently drafted would 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.[38] Therefore, it is vitally important that any rulemaking in this area be carefully tailored so that it does not lead to fewer communications with plan participants and even greater leakage from the retirement system.

The Department should expand the helpful "hire-me" provision so that it works even where a "hire-me" recommendation involves an IRA rollover. The Department has made its position clear in its Rule and subsequent sub-regulatory guidance that a recommendation to rollover from an employer-sponsored retirement plan to an IRA requires the financial advisor and firm to obtain a significant amount of information related to the employer-sponsored retirement plan and do an in-depth comparison of that information with the features available through the IRA. The reality is that even after obtaining that substantial information from the client, the financial advisor will still have to make a good faith decision using her best judgment as to whether the plan participant will be better off in the existing plan or in an IRA where they may provide more advice but will likely pay higher fees. And if that advisor only gets paid if the plan participant rolls over to the IRA, her recommendation will be second-guessed and there will be no way to prove that it was made because she truly thought it was in the client's best interest. The Department has created an impossible standard for financial institutions to meet. The Department has also departed from decades of trust and fiduciary law. Because it is an impossible no-win situation, we are aware of no other situation where a fiduciary who seeks to be hired is deemed to be a fiduciary with respect to his or her own hiring.

We believe there is a better way that would continue to protect plan participants while allowing financial

[36] Plan Sponsor Council of America, *57th Annual Survey of Profit Sharing and 401(k) Plans Reflecting 2013 Plan Experience,* 63-64. Out of the 613 plan sponsors surveyed, 32.5% offered investment advice and 18.3% of participants used advice when it was offered.
[37] 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, August 2009, 17.
[38] Quantria Strategies, LLC, *Access To Call Centers And Broker Dealers And Their Effects On Retirement Savings,* April 9, 2014, 1.

professionals to fairly compete for business while helping those who desire financial advice. We propose that the Department revise the Rule and BICE such that the financial professional not be deemed a fiduciary with respect to a "hire-me" recommendation that results in an IRA rollover if the financial professional:

- Does not hold herself out as a fiduciary but rather makes clear that she is recommending herself and her services. In this respect, the financial advisor would only be a fiduciary if she indicates that she has analyzed the client's situation and the client would clearly be better off by a rollover, and

- Provides a safe harbor disclosure modeled after FINRA Notice 13-45 that explains the pros and cons of an IRA rollover. Such model disclosure would state that the retirement investor's fees will likely be higher if he or she rolls over and should only consider a rollover if he or she desires and is willing to pay for the services of the financial professional.

We also believe that the Department should provide for a solution for how a financial institution would correct a rollover that is determined to be a prohibited transaction. The Department might consider working with the Department of Treasury to provide for a corrections process should the financial institution determine that a rollover recommendation was not in the client's best interest and the plan sponsor refuses to accept the assets back into the employer sponsored plan.

## Conclusion

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 not leading 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. We continue 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.[39]

The standard of acting "without regard 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.

Again, we support a legislative or regulatory framework that, unlike the BICE, does not result in reduced retirement investor access and choice, and applies to both the taxable and tax-advantaged portions of an investor's portfolio in the form of a harmonized fiduciary standard. We urge the Department to work with

[39] 81 Fed. Reg. 21077.

the SEC, FINRA and other key stakeholders 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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