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By Email: EBSA.FiduciaryRuleExamination@dol.gov

Office of Exemption Determinations
Employee Benefits Security Administration
Attention: D-11712, 11713, 11850

U.S. Department of Labor
200 Constitution Avenue, N.W., Suite 400
Washington, D.C. 20210

RE: Extension of Transition and Delay of Applicability Dates, RIN 1210-AB82

Ladies and Gentlemen:

Ameriprise Financial appreciates the opportunity to provide comments on the Department of Labor's (the "Department") Proposal to extend the Transition Period and Delay the Applicability Dates of the Best Interest Contract Exemption (the "BICE") and other related exemptions (collectively, the "Proposal").

We share our perspective as a leader in financial planning with more than \$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, 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.

As the Department considers new approaches to strengthening retirement security, Ameriprise Financial emphasizes the following:



We strongly support at least an 18-month delay and believe a fresh start with a focus on a harmonized standard will enhance retirement security and benefit all clients. We are encouraged by the Department's Proposal, as we believe at least an 18-month delay would provide the time the Department needs in order to coordinate with the Securities & Exchange Commission ("SEC"), Financial Industry Regulatory Authority ("FINRA") and the State insurance regulators 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, these objectives can be achieved to the benefit of all clients.

Importantly, we note that it is challenging to provide definitive comments on the length of the delay and whether it should begin from a specific event (e.g., the beginning of a new exemption), without first knowing the final form of the rule defining who is fiduciary under section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), and its related exemptions (collectively, the "Fiduciary Rule" or the "Rule and related Exemptions") and evaluating its impact on clients, advisors and the firm.

A sufficient delay in order to develop either a legislative or regulatory harmonized standard brings real benefits, not the least of which include clarity for clients who do not differentiate between retirement and non-retirement assets. A delay also allows financial services firms to newly reinvigorate focus on innovative solutions for clients and enhance client services rather than pouring resources into a regulatory framework under review that may very well be significantly revised.

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, would serve to eliminate the substantial inefficiencies and costs created by the Fiduciary Rule. While we support an elevated or enhanced standard of care, we note that current SEC and FINRA standards are not to be dismissed as lacking and should be viewed as a foundation on which to build. FINRA has increasingly interpreted and enforced its suitability standard as one in which a firm is to act in a client's best interest at the time of product or service recommendation and the SEC has a well-established best interest standard for advisory accounts and financial planning engagements. The enforcement mechanism favored under the Fiduciary Rule – class action lawsuits brought in potentially all 50 states – is expected to significantly increase the costs of providing products and services to retirement investors. In 2016, there was about \$7.5 trillion held in IRAs; the vast majority of these assets are held at federally regulated institutions subject to the oversight of the SEC or bank regulators.¹ The SEC has substantial expertise in overseeing the relationships between individuals and their investments, including retirement assets invested in IRAs and would be a strong partner with the Department in developing a harmonized standard.

To the extent this optimal approach cannot be achieved, then we believe an 18-month delay will afford the Department the opportunity to conclude the review outlined in the February 2017 Presidential Memorandum. We believe the Department will find that the Rule and its Related 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.

¹ 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>.

Either in conjunction with the SEC or independently if coordination is not feasible, we believe Department reforms should include a more streamlined exemption that recognizes a standard of care established by the SEC. Such an exemption should make clear that meeting an SEC best interest standard that requires the management and disclosure of conflicts of interest along with diligence in understanding a client's investment characteristics and goals will not result in a prohibited transaction. This would allow for financial advisors to loyally and prudently act in a client's best interests under a consistent standard. The continued application of the Internal Revenue Code's excise tax regime would be expected; however, any exemption that requires compliance with a standard of care must include a corrections procedure for minor violations of the requirements including unintentional violations of an SEC standard of care. The excise tax penalties are not appropriate for violations of a subjective standard of care and it is not appropriate for an excise tax to be assessed where a fiduciary is unable to prove that he or she met the standard of care. Perhaps this is the reason Congress declined to make a breach of fiduciary duty a prohibited transaction when it enacted ERISA in 1974 or in any of the numerous amendments made to ERISA since that time. Furthermore, if the SEC promulgates a standard of care then the SEC will have enforcement authority with respect to violations of the standard of care removing the need for further enforcement mechanisms.

A Delay Will Benefit Retirement Investors and Retirees because it affords the Department the opportunity to include **the value of advice** in its cost benefit analysis when evaluating the Rule's impact on retirement security. We remain concerned that the Department has not given the proper weight to the value clients receive in terms of increased retirement security through working with a financial advisor.

New research published in the United Kingdom this past July demonstrates in clear terms how the value of working with an advisor translates into substantial gains in financial security for individual retirement savers.² This robust research uses a multi-year longitudinal survey of the same households to measure the value of advice – a criteria the Department continually stressed the importance of when conducting its economic impact assessment. Other studies dismissed by the Department relied on measuring similar individuals at different points of time but not the same individuals. The UK 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 study confirms that there is a significant positive impact on retirement savings when advice is provided. 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

² 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.

- 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.

We strongly urge the Department to delay the Exemptions for at least 18 months to reconsider its economic impact assessment based on the current environment. 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."³ 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. In fact, the Department determined that those mistakes likely amounted to more than \$114 billion in financial losses in 2010 alone.⁴ This number eclipses the Department's estimate of the benefit to investors of the Fiduciary Rule.⁵ Given this 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.

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. We believe the Department will be well served in using a delay to incorporate the value of advice into its cost benefit analysis for the first time.

A Delay Affords the Department the Opportunity to Revise the Rule and Best Interest Contract Exemption to Advance Consumer Protection and Retirement Security. By introducing unnecessary risk and uncertainty for commission based accounts, products and services, the Rule and its Related Exemptions have had a chilling effect on the current retirement system, which has long served and benefited millions of Americans. We ask that the Department review our prior comment letters for a comprehensive discussion of necessary revisions.⁶ Briefly, in addition to other important concerns, a

³ Definition of the Term "Fiduciary," Final Rule, 81 Fed. Reg. 20949 (April 8, 2016).

⁴ Investment Advice – Participants and Beneficiaries, Final Rule, 76 Fed. Reg. 66151 (October 25, 2011). "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 of arrangements whereby financial professionals might otherwise provide retirement plan participants with expert financial advice."

⁵ 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 Labor (July 21, 2015).

⁶ Ameriprise Financial Comment Letters dated August 7, 2017, July 21 2017, April 17, 2017, March 14, 2017 and

delay will allow the Department the time to address the following:

- ***The definition of investment advice:*** The new definition is too broad and goes beyond services that are commonly considered as “fiduciary.” If one is an investment advice fiduciary under the Rule, very onerous consequences could be triggered, even for inadvertent technical errors that result in no client harm.
- ***Rollovers and Hire Me conversations:*** The current rule discourages conversations that help an advisor explain or market her services to a potential client. The reality is that one of the biggest mistakes plan participants can make in planning for retirement is cashing out their retirement plan when they switch jobs.
 - 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,⁷ a much greater impact than the alleged harm found by the Department that served 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.⁸ 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.
 - Information on rollover options and the pros and cons of those options should be considered education. Participants need to understand their options after they terminate employment as well as the pros and cons of the different options – which is different than the long-standing view of “investment advice.” FINRA has provided clear guidance to its members that could operate as the basis for a disclosure. Of course, once an investment advice recommendation is provided, the best interest standard would apply.
- ***Issues with the BICE.*** The BICE impartial conduct standards are very subjective; this subjectivity discourages financial institutions from utilizing commission arrangements in a full-service brokerage platform.

July 20, 2015 available respectively at: <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00517.pdf> (August 7, 2017); <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00246.pdf> (July 21, 2017); <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/01379.pdf> (April 17, 2017); <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/00885.pdf> (March 14, 2017); and <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/00560.pdf> (July 20, 2015).

⁷ 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.

⁸ Quantria Strategies, LLC, *Access To Call Centers And Broker Dealers And Their Effects On Retirement Savings*, April 9, 2014, 1.

- The use of the term “*differential compensation*” and “*without regard to*” are difficult to reconcile when designing compliance policies in a prohibited transaction regime. These terms will be second-guessed by the plaintiff’s bar through the private right of action.
- While some assert that the risk of litigation is low without the explicit contract requirement, it is clear that there is considerable potential liability during the transition period for recommendations made to employer-plan sponsors and participants.
- The required contractual “warranties” and resulting private right of action would create significant costs and distraction for financial advisors and their firms, would be easily abused by plaintiffs’ lawyers, and is unnecessary given the ample arbitration and litigation rights an investor has if he or she suffers actual harm.
- ***Grandfathering rules should be expanded.*** The existing grandfathering rule provides little relief to clients. Clients in brokerage have already paid for the recommendations they received and expect to continue to get some level of service. The existing rule essentially forces financial institutions to only “hold” those accounts and provide only basic maintenance services.

A Delay to Craft a Thoughtful Harmonized Standard or Exemption that Can Accommodate Diverse Future Innovations Would be the Best Path Forward. The Proposal also includes an observation that the Department is considering whether to propose an additional exemption that would apply to so-called clean shares or fee-based annuities. We would refer you to our comment letter dated August 7, 2017, in response to the Request For Information (the “RFI”) for extensive discussion of clean shares and fee-based annuity exemptions.

We remain skeptical of an approach that provides relief to only one product category or fixates on a particular way by which the client chooses to pay his or her advisor. We encourage the Department to carefully review these comments as well as the comments of many other industry stakeholders.⁹ In our

⁹ See Letter from Lisa Bleier, Securities Industry and Financial Markets Association, to U.S. Department of Labor, 8, available at: <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00599.pdf> (August 9, 2017); Letter from Paul C. Reilly, Raymond James Financial, to Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, 7-8, available at: <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00503.pdf> (August 7, 2017); Letter from Christopher Gilkerson and R. Eric Starr, Charles Schwab & Co., Inc., to Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, 5, available at: <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00543.pdf> (August 7, 2017); Letter from Edmund F. Murphy, III, Empower Retirement, to Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, 10, available at: <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00467.pdf> (August 4, 2017); Letter from Paul R. Dougherty, National Association of Insurance and Financial Advisors, to Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, 27, available at: <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00469.pdf> (August 4, 2017); Letter from Dave Paulsen, Transamerica, to Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, 6-7, available at: <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00473.pdf> (August 4, 2017); Letter from Dennis R. Glass, Lincoln Financial Group, to Office of Exemption

review of the record, we find little support for a clean share exemption or a fee-based annuity exemption. Even earlier advocates of these structures now seem to be reconsidering this path as more information has been made available about clean shares.

The Department acknowledged in the final Rule that it had reconsidered earlier proposals to limit the application of the BICE to only certain investments. Congress placed very few restrictions on the types of assets that can be held in an IRA when it authorized these accounts under the Internal Revenue Code in 1974, allowing virtually any investment other than collectibles.¹⁰ The Department should not place itself in the position of “blessing” only certain delineated arrangements. Wisely, the Department provided additional flexibility for the inclusion of a variety of products under the BICE. Now, the Department appears to be reconsidering that direction, which we find concerning. Rather than having a government agency determine winners and losers, we support product agnostic and business model neutral reforms to the 2016 Rule.

These piecemeal approaches are unnecessarily narrow, do not allow for future innovation, and do not appear to provide any economic benefit to consumers. We strongly urge the Department to move forward with an approach that ensures that education and discussion related to marketing your services is not investment advice and to provide a more workable best interest standard that harmonizes with the expected action by the SEC to enhance the broker-dealer standards under the securities laws.

In a related topic, the Proposal also requests comments on whether a financial institution would need to “prove” that it had satisfied a “behavioral” condition to qualify for the delay. As formulated in a comment concerning the RFI, the delay “should only allow firms to take advantage of the delay if they affirmatively show they have already taken concrete steps to harness recent market developments for their compliance plans.”¹¹ Thus, under this approach, the Department would need to review potentially thousands of submissions from financial institutions between any final notice of delay and January 1, 2018. This type of conditional delay is impractical to implement and would be unprecedented in application. First, the time and the resources that would need to be expended to provide this proof are not justified by any benefit. The costs to submit and then review the material – both to the Department and to the financial institutions would be substantial, with little chance that the reviews would be concluded by the end of the year. We can discern no benefit to diverting the Department’s and financial institutions’ resources on this meaningless exercise. And in fact, the distraction of this type of endeavor would serve to further divert resources away from helping clients meet their retirement goals.

Furthermore, the proposal does not include any objective standards under which such a review would be conducted. Financial institutions have taken various approaches to compliance with the Rule; therefore, it is unclear what these standards should entail. The promulgation of such standards would require notice

Determinations, Employee Benefits Security Administration, U.S. Department of Labor, 6, available at: <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00459.pdf> (August 3, 2017).

¹⁰ 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.

¹¹ Extension of Transition Period and Delay of Applicability Dates, 82 Fed. Reg. 41369.

and comment before their implementation, which would also divert time and resources from the current review of the Rule, and delay the thousands of “behavioral” reviews well beyond January 1, 2018.

Again, we support a legislative or regulatory framework that applies to both the taxable and tax-advantaged portions of an investor’s portfolio in the form of a harmonized best interest standard. We urge the Department to work with the SEC, FINRA and other key stakeholders to develop one standard that could truly benefit retirement savers and retirees.

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,

A handwritten signature in black ink, appearing to read "Joe E. Sweeney". The signature is written in a cursive, flowing style.

Joseph E. Sweeney
President - Advice & Wealth Management, Products & Service Delivery