July 20, 2015

By U.S. Mail and Email: e-ORI@dol.gov and e-OED@dol.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attention: Conflicts of Interest Rule
Room N-5655

Office of Exemption Determinations
Employee Benefits Security Administration
Attention: D-11712, D-11850, D-11820 and D-11327

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

RE: Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, Best Interest Contract Exemption and other Related Proposals, RIN-1210-AB32 and ZRIN-1210-ZA25

Ladies and Gentlemen:

Ameriprise Financial appreciates the opportunity to provide comments on the Department of Labor's (the "Department") proposals regarding the Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, Best Interest Contract Exemption (the "BIC Exemption") and other related proposals (collectively the "Proposal").

Executive Summary

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

While we have this goal in common, we believe the Department's Proposal, in its current form, will have disruptive and adverse impacts to average Americans saving for retirement. Absent significant modifications, we believe the Proposal will result in new barriers to guidance for existing clients and will limit access to beneficial investment products and services our clients desire and need.

We further believe the Department should revise the Proposal to preserve choice in how American retirement savers wish to receive advice, what solutions they have access to, and how their advisor is compensated while enhancing consumer protection. We deem the two goals to be compatible and not mutually exclusive.

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

- **Our Commitment to Serving Clients with Integrity and Ensuring Their Needs Are Met.** Providing sound financial advice tailored to the specific needs of our clients is at the core of how we operate at Ameriprise Financial. It is essential for our clients and millions of other Americans that any new regulation paves the path for an easier and more successful retirement.

- **We Support Acting in Our Clients' Best Interests.** We have long supported and continue to support one uniform best interest standard across a client's entire portfolio and we believe that any proposal should build on existing regulations rather than create a completely new framework that only addresses tax advantaged accounts. By hampering companies with a litany of unworkable operational barriers and introducing unnecessary risk and uncertainty, the Proposal would have a chilling effect on the current retirement system, which has long served and benefited millions of Americans.

- **Rollover Conversations Enhance Retirement Savings.** 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 provide the relief necessary to permit these beneficial conversations to continue.

- **Small Business Owners and Employees Benefit from Financial Assistance.** Financial advisors are often a key advisor to small businesses, helping owners through the process of setting up a defined contribution plan for their employees. By eliminating the ability of small business owners to work with financial advisors on a commission basis, the proposed regulation would cause fewer small employers to adopt retirement plans for their employees and reduce retirement security for those employed by small businesses.

- **The Best Interest Contract Exemption Requires Substantial Revisions to be a Viable Solution.** As currently stated, the BIC Exemption creates uncertainty while adding unnecessary cost and complexity for financial institutions that endeavor to provide a full range of products and services to clients. Therefore, we request that the Department remove all of the restrictions on scope so that the BIC Exemption covers all recommendations that are in the best interests of clients. We further urge the Department to eliminate operational hurdles that will only serve to confuse investors and do not enhance consumer protection.

- **A Special Streamlined Exemption For "Low-fee, High-quality" 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. In addition, we believe the Department will ultimately find it difficult to determine whether investment options are high quality and low fee. Instead of implementing a simpler exemption for a select few investments, we suggest that the Department focus on making the BIC Exemption simpler for all investments in the retirement saver's and retiree's best interests.

- **The Department Must Make Material Changes to Other Elements of the Proposal to Avoid Severe Unintended Negative Consequences.** As explained further in the letter, the disclosure and transition requirements, the limitation on employees of an advisor's firm in selecting their preferred financial advisor and the effective date all need to be reconsidered from this perspective.

Ameriprise Financial supports the comment letters that have been filed by our trade association partners, including those by the Securities Industry and Financial Markets Association ("SIFMA"), American Council of Life Insurers ("ACLI"), Investment Company Institute ("ICI"), Financial Services Institute ("FSI"), 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 before the Department publishes a final regulation in order to avoid the unintended negative consequences of limiting access and choice for retirement savers and retirees.

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Ameriprise Financial is a diversified financial services firm based in Minnesota serving more than two million Americans – from individual investors to small business owners and institutions. We are the leader in financial planning in the U.S. with a nationwide network of approximately 10,000 financial advisors and extensive asset management, advisory, insurance and annuity capabilities.[1] Ameriprise Financial has established a proud legacy over 120 years and we have the strength and expertise to serve the full range of our clients' needs.

Our advisors are focused on providing comprehensive financial advice over a client's lifetime. Financial needs change over time as do the multiple products and solutions our advisors use to help clients reach

[1] Ameriprise helped pioneer the financial planning process more than 30 years ago. We have more CERTIFIED FINANCIAL PLANNER™ professionals than any other company in the U.S. as documented by the Certified Financial Planner Board of Standards, Inc., as of Dec. 31, 2014.

their goals. Access to personalized guidance and advice is essential both during the years when individuals are accumulating wealth and as they determine the best approach to converting their savings to a reliable income stream in retirement. For clients leading small businesses, this includes finding retirement benefits that fit their needs and the needs of their employees.

A holistic financial planning framework that utilizes multiple products can help individuals meet two critical financial objectives for retirement: generating sufficient income and preserving financial assets. As such, our clients have access to investment products such as annuities and mutual funds we manufacture, as well as an extensive array of products from other companies, including individual securities, mutual funds, separate and managed accounts, annuities, real estate investments, trust services, and other products.

We have long offered choice in how our clients work with us to achieve their long-term financial goals, depending on their circumstances, financial position and the level of advice they desire. Ameriprise Financial is dually registered as a broker-dealer and as an investment adviser, and our advisors operate under the current standards of care applicable to each. Our advisors are held to a fiduciary standard under the Investment Advisers Act of 1940 when providing recommendations under managed account programs or in their financial-planning based relationship. We've established a significant infrastructure to help assure our advisors meet these standards supplemented by comprehensive policies and procedures, including extensive and appropriate disclosures.

Providing sound financial advice tailored to the specific needs of our clients is at the core of how we operate at Ameriprise Financial. It is essential that any new regulation paves the path for our clients and millions of other Americans to receive the advice they require to achieve an easier and more successful retirement.

I. We Support Acting in Our Clients' Best Interests

We have long supported and continue to support one uniform best interest standard across a client's entire portfolio. 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 Department's Proposal does not create a uniform fiduciary standard of care for investors and does not achieve this balance but rather **creates a new, third standard of care that only applies to the tax-favored portion of a retirement investor's portfolio and is saddled with commercially impractical conditions that do not benefit clients**. By hampering companies with a litany of unworkable operational barriers and introducing unnecessary risk and uncertainty, the Proposal would have a chilling effect on the current retirement system, which has long served and benefited millions of Americans. Furthermore, we are concerned the Proposal will exacerbate rather than alleviate investor confusion about the duty owed them by their financial advisor in any given transaction. The Department's Proposal 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. While we note the Department's view that the regulation should be expanded due to the evolution of the private employer-based system since ERISA's enactment, we are concerned that the Department has not given the proper weight to the role that other regulators play in overseeing financial advisors or the benefits that have accrued from existing guidance to clients in terms of increased retirement security. We

believe that any proposal should build on existing regulations promulgated by the Department, the U.S. Securities and Exchange Commission ("SEC"), the Financial Industry Regulatory Authority ("FINRA") and State insurance commissioners rather than create a completely new framework that only addresses tax advantaged accounts.

A. The Value of Advice

The current retirement marketplace is a success story, and continues to innovate to enhance access to efficient retirement savings vehicles. The range of cost-effective, affordable products and services is greater than ever before. And given the diversity of offerings, financial advisors play a critical role in helping millions of Americans take the necessary steps to save for retirement. More people are being helped and fees are going down.[2] Without the help of financial advisors, we could very well see the momentum begin to swing the other way. We support and would draw the Department's attention to the study "The role of financial advisors in the US retirement market" to underscore the importance of advisor guidance in helping Americans achieve a secure and sustainable retirement.[3] This study found that, among other benefits, compared with individuals without a financial advisor, advised individuals own more diversified investment portfolios, take fewer premature cash distributions, and re-balance their portfolios with greater frequency to stay in line with their investment objectives and risk tolerance.[4] All of these are important factors in maximizing retirement assets. These findings hold, even when controlling for income and age, indicating the value that advisors provide to a broad spectrum of American retirement savers.[5]

As currently proposed, we have concerns about the negative unintended consequences of limiting Americans' access to and choice of retirement advice and solutions. 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 dwarfs 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 Proposal. In fact, this research shows that IRA owners pay below-average fees related to the mutual funds they hold.[8]

In order to avoid unintended negative consequences to retirement savers and retirees, the Department's Proposal must be revised to clarify and affirm that it is truly a business model-neutral solution that

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[2] Investment Company Institute, "Mutual Fund Expenses and Fees" in *2014 Investment Company Fact Book,* available at: http://www.icifactbook.org/fb_ch5.html
See also: Investment Company Institute, *ICI Research Perspective: Trends in the Expenses and Fees of Mutual Funds, 2013,* Vol.20, No. 2, May 2014, see generally.

[3] Oliver Wyman, *The role of financial advisors in the US retirement market,* July 10, 2015.

[4] Wyman, *The role of financial advisors in the US retirement market,* 2.

[5] Wyman, *The role of financial advisors in the US retirement market,* 17.

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

[7] White House Council of Economic Advisers, *The Effects of Conflicted Investment Advice on Retirement Savings,* February 2015, 2. 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 Cost and Consequences for Working Families and Retirees,"* June 17, 2015, 8.

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. The Department's Fact Sheet and the preamble language indicate that the Proposal is designed to accommodate a broad range of business practices and preserve beneficial business models.[9] In keeping with this commitment, it is incumbent upon the Department to eliminate any barriers in the Proposal to continuing affordable access to IRA brokerage accounts, IRA annuities and employer-provided retirement plans that underpin the retirement security of millions of Americans.

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

B. Without Significant Improvements, We are Concerned that the Department's Proposal Will Harm the Very People It is Designed to Protect

As currently drafted, it appears that the Department's Proposal fails to 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. The Department has proposed the BIC Exemption as the sole remaining path forward for commission-based accounts and products. Without considerable substantive changes, this exemption is not a viable solution with any benefit to investors.

With respect to IRAs, the Department has revoked two existing and workable exemptions most used for these accounts.[11] These exemptions enabled financial institutions to provide variable annuities and mutual funds to IRA owners on a commission basis. Without a workable exemption, 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. The negative impact of failing to provide a clear path forward for commission-based accounts for retirement savers and retirees is material:

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[9] US Department of Labor, *Fact Sheet: Department of Labor Proposes Rule to Address Conflicts of Interest in Retirement Advice, Saving Middle-Class Families Billions of Dollars Every Year,* available at: https://dol.gov/ebsa/newsroom/fsconflictsofinterest.html
Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice, Proposed Rule, 80 Fed. Reg. 21929 (April 20, 2015).

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

[11] 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
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).

- 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.[12] 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.[13] In the case of individuals aged 35-54 years making less than $100,000 per year in annual income, advised individuals have 51% more assets than those without a financial advisor.[14]

- 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.[15]

Specifically, several elements of the proposed BIC Exemption cause concern as detailed in Section IV below. We believe these requirements will drive up the cost of brokerage services, and will limit retirement savers' access and choice.

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).[16] An exemption that discourages commission-based products will also necessarily discourage companies from selling annuities - which would 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 limited to automated advice. In many scenarios, for example when the market experiences volatility, clients want to be able to look to 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.[17]

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[12] 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
Oliver Wyman, *Assessment of the impact of the Department of Labor's proposed "fiduciary" definition rule on IRA consumers*, April 12, 2011, 2.

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

[14] Wyman, *The role of financial advisors in the US retirement market,* 2.

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

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

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

II. Rollover Conversations Enhance Retirement Savings

The Department has proposed that IRA rollover conversations be considered fiduciary investment advice.[18] However, the Department has not explained how financial advisors could continue to provide guidance on rollovers under its Proposal. Instead the Department appears to remove the ability of financial advisors to advise 401(k) participants about rollovers. 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 provide the relief necessary to permit these beneficial conversations to continue.

The Department has informally suggested that it believes that the BIC Exemption covers IRA rollover recommendations or that it could be expanded to do so. The problem is that this exemption contains over a dozen separate and onerous requirements, many of which only make sense if the advisor intends to use the BIC Exemption after the rollover. It seems likely that subjecting rollover conversations to so many unnecessary hurdles will result in fewer conversations and potentially more imprudent cash-outs.

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,[19] a much greater impact than the alleged harm found by the Department that serves as the impetus for the Proposal. The Proposal 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.[20] 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.

There should only be one condition applied to rollover conversations– that any recommendation to roll over to an IRA be consistent with the client's best interests. In this respect, the Department could remove distribution and IRA rollover guidance from the Proposal and instead rely on current regulatory safeguards. We believe that FINRA Notice 13-45 strikes the optimal balance of providing protections for 401(k) plan participants while recognizing that an IRA rollover may be the better option depending on the investor's circumstances.[21] The Department could remove IRA rollover guidance from the Proposal and

[18] 80 Fed. Reg. 21957.

[19] U.S. Government Accountability Office, *401(k) Plans; Policy Changes Could Reduce the Long-term Effects of Leakage on Workers' Retirement Savings.* GAO-09-715, September 2009, 17.

[20] Quantria Strategies, LLC, *Access To Call Centers And Broker Dealers And Their Effects On Retirement Savings,* 2014, 1.

[21] Financial Industry Regulatory Authority, *Regulatory Notice 13-45 Rollovers to Individual Retirement Accounts,* available at: https://www.finra.org/sites/default/files/NoticeDocument/p418695.pdf

FINRA Notice 13-45 sets out rules related to rollover conversations depending on whether such conversations are

rely on current regulatory safeguards, or create a separate exemption that parallels FINRA Notice 13-45, in order to avoiding conflicting regulations for the same conversation between a retirement saver and his or her advisor.

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 with employees regarding distribution options.[22] The communications our financial advisors have with participants deter leakage. For instance, our 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. Our advisors also routinely counsel clients against cashing out – or even taking loans from - their 401(k) plan accounts.

Limiting 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.[23] Retirees and soon-to-be retirees engaging a financial advisor 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.

III. Business Owners and Employees Benefit from Financial Assistance

Small business owners are by definition excluded from the Department's seller's exception that applies only to plans with at least 100 employees.[24] Furthermore, the BIC Exemption is not available for recommendations made to small business owners with respect to establishing or maintaining a participant-directed retirement plan such as a SEP, SIMPLE IRA or 401(k) plan.[25] There is no relief under the Department's Proposal for brokers to recommend retirement plan products to small business owners who desire to adopt participant-directed plans.[26]

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educational or go beyond education to include specific recommendations. Under either situation, FINRA Notice 13-45 requires advisors to discuss the key considerations necessary for plan participants to make informed decisions as to whether to stay in their existing plan, rollover to another employer's plan, rollover to an IRA or take a cash-out. Furthermore, to the extent that the advisor makes a recommendation to roll over to an IRA, then the advisor must have "a reasonable basis to believe that the recommendation is suitable for the customer, based on information about the options obtained through reasonable diligence, and taking into account factors such as tax implications, legal ramifications, and differences in services, fees and expenses between the retirement savings alternatives."

[22] U.S. Government Accountability Office, *401(k) Plans. Labor and IRS Could Improve the Rollover Process for Participants.* GAO-13-20, March 2013, 28.

[23] Plan Sponsor Council of America, *57th Annual Survey Reflecting 2013 Plan Experience,* 2, 63-65. Out of the 613 plan sponsors surveyed, 32.5% offered investment advice and 18.3% of participants used advice when it was offered.

[24] 80 Fed. Reg. 21957.

[25] Proposed Best Interest Contract Exemption, 80 Fed. Reg. 21984 (April 20, 2015).

[26] Plan sponsors of participant-directed plans regardless of size are not considered "Retirement Investors" and BIC Exemption Section I(a) and (b) specifically limits relief under the exemption to recommendations made to

Financial advisors often 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. Fee-only planners do not usually operate in this marketplace because small businesses are often unwilling to pay an advisory fee to set up a plan. Instead of diverting capital from their business to pay a planning fee, many small business owners prefer to pay for a retirement plan through commissions. Removing the ability for brokers to work with small employers will not make the economics work for fee-only planners.

Financial advisors are often a key advisor to small businesses, helping owners through the process of setting up a defined contribution plan for their employees. When a financial advisor is involved, small businesses with 10-49 employees are 50% 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.[27]

By eliminating the ability of small business owners to work with financial advisors on a commission-basis, the Proposal would cause 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 $472 billion in retirement savings to their employees.[28]

In addition, financial advisors provide critical retirement planning education to the plan participants of small businesses. In fact, participants who work with financial advisors are more likely to participate in their employer's plan, and contribute at a higher rate, than those without an advisor.[29] In this light, we appreciate that the education safe harbor was expanded to include IRAs. However, not permitting identification of specific investments when using asset allocation models disserves the retirement investor. Sometimes plan participants simply want a financial advisor's help in identifying which investments offered in their plan are within a certain asset category or a better understanding of investment features. We believe regulations should not discourage these vital educational conversations by requiring a participant or IRA owner to enter into an agreement beforehand and we urge the Department to add back the ability to provide education on the specific investments available for the plan or IRA account.

Participants of Keogh Plans should also be covered by the BIC Exemption. Recommendations to participants of Keogh plans are excluded to the detriment of those savers and retirees. Because Section

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Retirement Investors. 80 Fed. Reg. 21983 – 21984.

[27] Wyman, *The role of financial advisors in the US retirement market,* 1.

[28] U.S. Chamber of Commerce, *Locked Out of Retirement, The Threat to Small Business Retirement Savings*, 2015, 2.

See also: Investment Company Institute, *ICI Research Perspective, The Role of IRAs in U.S. Households' Saving for Retirement, 2014,* Vol. 21, No. 1, January 2015, 3. See also: Investment Company Institute, *The U.S. Retirement Market, First Quarter 2015,* Table 8 available at: www.ici.org/info/ret_15_q1_data.xls

[29] LIMRA Secure Retirement Institute, *Matters of Fact: Consumers, Advisors, and Retirement Decisions (and Results),* May 2015, 5. "More of those with advisors also demonstrate "good" behavior — contribute 10 percent or more to their employers' plans (and are twice as likely to contribute 20 percent or more)."

I(b)(1) of the BIC Exemption is limited to plan participants of a Plan subject to Title I of ERISA, the exemption would not be available to firms that serve Keogh plans (i.e., plans that cover only self-employed individuals). This is particularly problematic for Keogh plans maintained by partnerships where each individual partner directs his or her own account. As currently drafted, advisors cannot provide recommendations to such Keogh plan participants under the BIC Exemption. Even for plans with only one self-employed individual, whether the plan is participant-directed or invested by the employer, is not relevant as the same individual is serving both roles: employer and participant. The availability of the BIC Exemption would turn on whether the plan document being used calls for participant-direction.[30] We ask that Keogh plans be included so as to not be inadvertently disadvantaged.

IV. The Best Interest Contract Exemption Requires Substantial Revisions to be a Viable Solution

As previously noted, the requirements of the BIC Exemption are not business model-neutral and, if left unchanged, could potentially reduce access to retirement saving and guaranteed retirement income opportunities for those who can least afford to be disenfranchised. According to the Department's own preamble, Advisers are required to "put the interests of the Retirement Investor ahead of the financial interests of the Adviser."[31] We support this standard, and act as a fiduciary today when providing financial planning or investment advisory services. Unfortunately, the Department added multiple conditions that as a practical matter, place at risk anyone who proceeds on the belief that commission-based sales and affiliated products would be permitted under the exemption.

The preamble of the BIC Exemption indicates that it is "intended that this updated approach will ease compliance costs and reduce complexity while promoting the provision of investment advice that is in the best interest of the retirement investor."[32] In this respect, every provision must be read through this lens. In our view, the Proposal will add compliance costs, add complexity, and in many instances, interfere with the provision of advice in the best interest of the investor. The Department limits the scope of the BIC Exemption in several ways as discussed below. These limitations require financial institutions to create separate policies and procedures related to different types of assets, services, and retirement investors. This will add unnecessary cost and complexity for financial institutions that endeavor to provide a full range of products and services to clients. Therefore, we request that the Department remove all of the restrictions on scope so that the BIC Exemption covers all recommendations that are in the best interests of clients.

Below we discuss in detail the items that would need to be revised or eliminated to make the exemption a viable solution.

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[30] The nature of a micro-business that uses a Keogh plan makes them challenging to track by the financial institutions that serve them. Plans can literally be Keogh plans one day and subject to Title I of ERISA the next – this is a function of whether such plans cover one or more common law employees. If a self-employed person hires a new employee that begins participating in the person's retirement plan, that plan suddenly becomes subject to ERISA. If the common-law employee quits and takes a distribution then the plan reverts back to a Keogh plan again.

[31] 80 Fed. Reg. 21942.

[32] 80 Fed. Reg. 21966.

A. Key Requirements of the BIC Exemption Must be Changed to Eliminate Ambiguity and Uncertainty that Would Cause Advisors to Avoid Serving Retirement Investors and Thus Have a Chilling Effect on the Current Retirement System

Section II's 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 for subject parties to be able to reasonably comply.[33] The standard of acting "without regard to the financial or other interests" (emphasis added) is new, undefined by precedent and could well be interpreted to bar an advisor from recommending any transaction having a financial consequence for her. Rather, as is currently the standard, the key consideration should be that neither the firm nor advisor put their own interests ahead of the interests of the retirement investor. In that regard, we are also concerned that the terms "or other interests" and "Related Entity" are too vague and tenuous, making the standard difficult to achieve and document. We believe that the language should be amended to state that the "Adviser and Financial Institution will provide investment advice that ....*does not place the financial interests of the Adviser, Financial Institution, or Affiliate before the interests of the Retirement Investor*." Such a revision would make the impartial conduct standard consistent with current federal case law defining fiduciary conduct standards and easier for the Department and other regulators to monitor for compliance. Indeed, that language is consistent with the standard cited in the preamble itself.

The Impartial Conduct Standard in Section II(c) of the BIC Exemption also includes a reasonable compensation standard.[34] In fact, the BIC Exemption as a whole contains three separate reasonable compensation standards, each worded slightly differently, some of which appear to require the matching of specific compensation streams, including those negotiated across all accounts that need servicing, to specific services for individual investors.[35] We agree with the inclusion of a reasonable compensation standard but believe it must reflect the particular circumstances in which the compensation was earned. The Department has never before required that specific services for individual investors be tied to specific payments and it is unclear how this would be workable or why it would be necessary. It should be sufficient that overall compensation be reasonable under the circumstances, within market rates and that the recommendations generating that compensation are in the best interest of the client.

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[33] 80 Fed. Reg. 21984.

[34] 80 Fed. Reg. 21984.

[35] Section II(c)(2) provides that the Adviser and Financial Institution "shall not recommend an Asset if the total amount of compensation anticipated to be received by the Adviser, Financial Institution, Affiliates and Related Entities in connection with the purchase, sale or holding of the Asset by the Plan, participant or beneficiary account, or IRA, will exceed reasonable compensation in relation to the total services they provide to the Retirement Investor" (emphasis added). Section IV(b)(2) requires "[a]ny compensation received in connection with a purchase, sale or holding of an Asset by a Plan, participant or beneficiary account, or IRA, is reasonable in relation to the value of the specific services provided to the Retirement Investor in exchange for the payments and not in excess of the service's fair market value" (emphasis added). Section VI(b)(2) requires "[t]he combined total of all fees and compensation received by the insurance company and any Affiliate is not in excess of reasonable compensation under the circumstances" (emphasis added). We support the standard set forth in Section VI(b)(2) because it permits consideration of the facts and circumstances which is consistent with past Department guidance.

We also have a concern that, as drafted, the warranty in Section II(d) of the BIC Exemption related to "differential compensation" implicitly casts doubt as to the feasibility of commission-based accounts.

According to the BIC Exemption, 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 to the extent they would tend to encourage individual Advisers to make recommendations that are not in the Best Interest of the Retirement Investor."[36]

Section II(d) of the BIC Exemption further states, " the contractual warranty set forth in this Section II(d)(4) does not prevent the Financial Institution or its Affiliates and Related Entities from providing Advisers with differential compensation based on investments by Plans, participant or beneficiary accounts, or IRAs, to the extent such compensation would not encourage advice that runs counter to the Best Interest of the Retirement Investor (***e.g., differential compensation based on such neutral factors as the difference in time and analysis*** necessary to provide prudent advice with respect to different types of investments would be permissible)."[37] (emphasis added)

In light of these provisions, we believe it was the Department's intent to make clear that customary compensation practices, like varying commissions across diverse products, are permitted under the warranty. However, we are concerned that these provisions are not sufficiently clear to support that intent. We request the Department remove the words "differential compensation" from the Proposal altogether so as to not create an uncertainty as to the permissibility of recommending diverse products with varying commissions and provide an example in the preamble that affirms that level commissions across different product types and within a particular product category is not a requirement. Again, given that the BIC Exemption already requires advisors to act in a client's best interests and receive no more than reasonable compensation, we do not believe these warranties are necessary or add any extra level of protection for retirement investors. We, like other firms, already maintain policies, procedures and processes to review compensation structures and ensure that they do not incent inappropriate behavior.

B. Investor Access to Products Should Not be Restricted by Proposal

The BIC Exemption is only available for recommendations related to "Assets." "Assets" are defined to include a short list of securities that the Department posits are "commonly" found in IRAs.[38] Without an explanation for its methods, the Department has unilaterally determined which assets are "commonly" sold within IRAs and limited the exemption to those asset types. The Department asserts in the preamble, "Limiting the exemption in this manner ensures that the investments needed to build a basic diversified portfolio are available to plans, participant and beneficiary accounts, and IRAs, while limiting the exemption to those investments that are relatively transparent and liquid, many of which have a ready market price."[39] The Department has not shown this statement to be true nor acknowledged that clients

[36] 80 Fed. Reg. 21970.
[37] 80 Fed. Reg. 21984.
[38] 80 Fed. Reg. 21987.
[39] 80 Fed. Reg. 21967.

may desire to build more than a "basic diversified portfolio." The Department notes that many other investment types and strategies are available through pooled investment funds like mutual funds. We disagree and believe that there can be significant differences between holding an investment directly versus holding it in a mutual fund.

More generally, without regard for client demand or client need, the Department has limited which products investors can choose. If the Department determines that the product offered is not "common" for retirement accounts, then IRA owners and 401(k) plan participants are deprived of the ability to utilize it within their qualified retirement strategies. This limitation may have the unintended effect of forcing the advisor to recommend the second or third-best product to the retirement saver or retiree because the best investment product for the client was arbitrarily excluded from the exemption. Furthermore, the product limitations may prevent the client from adequately diversifying her account or accessing important benefits and thereby exposing her to needless risk as market conditions change. In fact, in some situations, an advisor may not even be acting in the client's best interests by failing to discuss assets or options not on the Department's approved list.

Diversification has a critical role in an IRA portfolio as the time horizon shortens and money is being removed from the portfolio (a "paycheck in retirement") as opposed to being added in the form of payroll contributions. Also, portfolios tend to be larger in an IRA as they represent the lifetime accumulation of workers' contributions to their retirement plans. Larger portfolios are more apt to seek diversification through investments outside of "common," often correlated assets, like mutual funds. As an example, an IRA may be used by a client to complement an existing investment portfolio by holding non-traditional assets that may be less tax efficient, making the IRA a better place to hold such assets than a taxable account.

Congress placed very few restrictions on the types of assets that can be held in an IRA, allowing virtually any investment other than collectibles.[40] Technically, compliance with the BIC Exemption is voluntary. Realistically, the only way firms can continue to recommend commission-based products and accounts to retirement savers and retirees is through the BIC Exemption. Therefore, we urge the Department not to reduce the options available to IRA investors contrary to Congressional intent, without any explanation or rationale, and to the detriment of clients. Client needs evolve over time and we request that any final regulation not limit choices that may impede an advisor from making product recommendations to meet those needs. Furthermore, clients have both taxable and tax-advantaged accounts. It would be a gross oversimplification for the Department to prescribe or proscribe any product on the basis that the account has tax deferral features.

We are also concerned that this restriction will stifle innovation. It will not be possible for new products, like the "ETF of tomorrow," to be offered by advisors without an amendment to the BIC Exemption. Such regulatory accommodations to change have historically taken years to complete and often never

[40] 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.

result in an exemption. In fact, it appears that because the Department's only criteria for inclusion in the BIC Exemption is that the asset must be "commonly" found in IRAs, there doesn't seem to be any possibility for adding new product types to the list of acceptable assets. New, innovative, and beneficial investments will have never been held in any account and therefore could never be "commonly" found in IRAs. And innovators will likely forego creating any products they know cannot be sold to IRAs owners, 401(k) plan participants and small business owners who sponsor retirement plans. Furthermore, common investor holdings have evolved over time and changed during different market conditions. The standard of "commonly held" defies precision and has no place in a fluid and innovative market.

Finally, we note that the advisor is already prohibited from recommending any asset that is not in the client's best interests. Rather than restricting the list of permissible assets within the Proposal, without regard to individual client needs, we ask that the Department remove the restriction.

C. Discretionary Accounts Should be Covered by the BIC Exemption

The BIC Exemption excludes discretionary accounts because the Department explains that advisors that have discretionary authority have always been fiduciaries so no further relief should be necessary. We respectfully disagree for the following reasons.

First, the Department has made significant changes to several of the pre-existing exemptions that can be relied upon by discretionary advisors. For instance, the Department has proposed to include the Impartial Conduct Standard in Class Prohibited Transaction Exemption 77-4 which is an exemption specifically issued for discretionary advisors.[41]

Second, in the individual market, it is common for advisors to offer both discretionary and non-discretionary advisory accounts, as either account may be in the client's best interest depending on unique financial goals. It does not serve any purpose to require a different set of rules for these accounts, particularly when the Department has historically held non-discretionary advisors to the exact same high standard as discretionary ones. There is a substantial risk that it will only serve to confuse IRA owners and advisors as they would operate under separate exemptions for each type of advisory account. It will also increase compliance costs to maintain these otherwise similarly structured accounts in compliance with two separate sets of rules. It could also create a disparity whereby non-discretionary advisory accounts will be able to take advantage of third-party payments to reduce costs to IRA owners while discretionary advisory accounts will not. We see no justification for these increased costs outside of the assertion that advisors who have discretion have always been fiduciaries - which seems like a non sequitur.

While we appreciate the Department's decision to provide a comprehensive exemption to cover recommendations provided by advisors, we would ask that the Department expand the BIC Exemption to cover discretionary accounts.

D. The Department Should Make Clear That BIC Exemption is Available for Brokers who Sell Affiliated as Well as Unaffiliated Products and Receive Compensation

[41] The Department proposes to add a new subsection II(g) to CPTE 77-4 which adds the three prongs of the Department's Impartial Conduct Standard - (1) compliance with the fiduciary best interest standard, (2) reasonable compensation, (3) no misleading statements/disclosure of conflicts of interest.

We also have concerns related to Section IV of the BIC Exemption which contains a number of additional requirements for financial institutions that limit their platforms by offering affiliated products or products that share revenue with them.[42] We believe Section IV of the BIC Exemption should be removed in its entirety and replaced with an obligation under the Impartial Conduct Standard in Section II(c) 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 it could be argued that 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.

E. The Structure of the Exemption and the Contract Requirement Needs to be Improved Significantly

The Department seeks to establish a fiduciary standard for IRAs even though Congress purposefully declined to do so when ERISA was enacted. We are not opposed to being held to a best interest standard for IRAs. However, under the BIC Exemption, 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.[43] Finally, if the fiduciary is relying on a prohibited transaction exemption such as the BIC Exemption, 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. However, there are improvements that the Department could make that would mitigate our concerns without compromising the Department's core objective of protecting retirement investors. We ask that the Department remove the language "and comply with" in Section II(c), so that it reads, "The Adviser and the Financial Institution affirmatively agree to the following…" This change does not impact a retirement investor's ability to enforce the contract obligation or seek damages in the case of harm but does take excise taxes off the table so long as the Financial Institution can show that a contract is in place. We believe this strikes the right balance between protecting retirement investors and providing a workable exemption.

[42] Fed. Reg. 21985-21986.

[43] 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 (IRS).

The Contract timing is not feasible. As written, the BIC Exemption requires that a client execute a contract prior to any recommendations being made.[44] This would require contracts to be executed prior to an advisor having a conversation about what products and services the advisor has to offer, a highly impractical, if not impossible, requirement to meet. We support an approach that would require a contract to be executed within a reasonable period of time of the transaction commencing so long as the contract's provisions expressly state that any recommendations made prior to entering into the contract are subject to the best interest standard. In other words, for new clients, the contract would be effective back to the date the first recommendation was made. We believe this would ensure the same level of protection for retirement investors but be workable for both clients and advisors.

Disclosure and negative consent should be permitted. For new clients, it will be workable to have the impartial conduct standard added to an advisor's account-opening agreements. However, for existing clients, it will be onerous to require new signatures and may be impossible from a practical perspective to accomplish in the allotted time. Given that the contract is intended to protect clients, we would ask the Department to clarify that the impartial conduct standard could be added via amendment to existing contracts, at least to the extent that such contracts permit amendments via negative consent. In addition, requiring the advisor to be a party to the agreement is unduly burdensome and unnecessary. Our agreements with clients do not include our advisors as parties and such a requirement would require significant efforts to keep up to date as clients work with different advisors over time. It would also have a chilling effect on advisors that work as a team, which is beneficial to clients. The investment advice client would still have recourse to the firm, the primary assurance of compliance with the best interest standard.

Materiality standard needed for conflicts of interest. Section II(d) of the BIC Exemption includes several required warranties including an obligation to disclose certain conflicts of interest. This obligation is reasonable on its face; however, there does not appear to be any materiality provision in the defined term "Material Conflicts of Interest."[45] Requiring a financial institution to identify and disclose every conflict of interest that could conceivably impact an advisor's judgment is not feasible. We request the Department to add a materiality component to its definition of Material Conflicts of Interest.

F. Disclosure Should Be Tailored to Benefit Clients without Creating Unnecessary Compliance Burdens

We support a requirement for provision of information to investment clients that is clear, uncomplicated and useful. However, the level of disclosure proposed in the BIC Exemption is unprecedented.[46] For the

[44] 80 Fed. Reg. 21969.

[45] 80 Fed. Reg. 21988.

[46] We note that the disclosure requirements under the BIC Exemption go far beyond what was required for ERISA plans under the Department's recent trilogy of disclosure regulations, Form 5500 Schedule C, 408(b)(2) reasonable compensation, and 404(a)(5) participant disclosure regulations. Specifically, Schedule C disclosures require a plan sponsor to annually report the total expenses of a plan on a dollar basis but do not require dollar amounts to be disclosed related to eligible indirect compensation. Furthermore, the Department limited Schedule C reporting to plans with 100 or more participants due to administrative burdens. The Department's 408(b)(2) regulations require disclosure of all compensation reasonably anticipated to be received by a service provider over the term of its

BIC Exemption disclosure provisions to be practicable, the Department must make significant structural changes including (a) changing the disclosure obligations to a contractual obligation rather than a condition of the exemption and (b) allowing the flexibility to provide disclosures in a way that clients find useful and meaningful. Required disclosures should focus not only on costs but also on the benefits of the products and services. We discuss both of these changes in more detail below.

Disclosure should be a contractual obligation. While we support the Department's efforts related to fee disclosures, we are concerned with the structure of the disclosure requirements. Rather than making disclosure a contractual obligation, the Department chose to make the disclosure obligations part of the exemption.[47] As discussed above, by making the disclosures a condition of the exemption, any inadvertent failure to provide the disclosure or mathematical error in calculating the amount disclosed leads to the affirmative obligation to report and pay excise taxes. This decision has the effect of making the consequences of a harmless, inadvertent technical error so great that it is doubtful that financial institutions would be comfortable relying upon the exemption. A more practical enforcement scheme would contemplate a proportional remediation of inadvertent errors and a path for clients who were harmed to be made whole. This result can easily be achieved simply by moving the disclosure obligation from a condition of the exemption to an obligation within the contract.

Disclosure should be simple, useful and meaningful to clients. Textual, descriptive and narrative disclosures are often more effective and less intimidating than formulaic and numerical charts. We believe firms must have flexibility to provide disclosures in a way that clients find useful and meaningful. In our view, many of the disclosure requirements of the Proposal are impractical and provide little benefit to the investor and, in fact, could cause confusion.

We are also concerned that the Department's disclosure regime is solely focused on costs. While costs are certainly one important element for a client to consider, it should not be the only factor. Studies have shown that the most important factor in accumulating sufficient retirement assets is not fees but rather the amounts being saved, how early savings begin, asset allocation and diversification.[48] The

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contract or arrangement. This regulation was not extended to IRAs presumably because the Department recognized doing so would be impractical given the smaller scale of individual accounts. Furthermore, the Department specifically permitted the use of ranges and estimates. Finally, 404(a)(5) disclosure applies to plan participants and requires a plan administrator to provide participants with a chart that outlines the fees and expenses of the investment alternatives in the plan. This is a static disclosure that is not customized to each plan participant. Yet the Department's annual disclosure requirement would require a customized disclosure for each IRA owner that would reflect all of the IRA owner's account activity throughout the year.

[47] 80 Fed. Reg. 21985.

[48] Munnell, Golub-Sass, and Webb, Center for Retirement Research at Boston College, *How Much to Save for a Secure Retirement*, Nov. 2011, Number 11-13,4, "...starting early and working longer are far more effective levers for gaining a secure retirement than earning a higher return. This strategy of saving for a longer period of time is especially effective given the greater risk that comes from attempting to earn that higher return. And the further along an individual is in his career, the more effective working a few years longer becomes."

The Department's Fact Sheet, *Top 10 Ways to Prepare for Retirement*, lists "Start saving, keep saving, and stick to your goals" as number 1 with "Put money into an Individual Retirement Account" as number 8.

Department's narrow focus on fees implies that the lowest fee option is the best, which in many cases is not true. Typically, the lowest fee option will be a money market mutual fund or bank savings account. While the fees are low on these products, the expected returns are as well. For younger retirement investors particularly, fees should not be the only, or even the primary, drivers of their investment decisions. We would propose that any fee disclosure requirement permit a statement that fees are only one factor to consider. Financial institutions should also be free to add information to the disclosure that explains the value of their services.

We also believe that where the Department does require specific dollar amounts to be disclosed, firms should be permitted to use reasonable estimates and a materiality standard should be applied. For instance, the annual disclosure in the Department's exemption requires the financial institution to calculate in exact dollars both the total cost to the client and the amount of direct and indirect compensation paid to the financial institution and the advisor. Even if possible, the cost of providing this level of specificity would be prohibitive.

We are also concerned that the cost to provide even an estimate may be greater than some of the indirect compensation received by financial institutions. For instance, financial institutions may earn float revenue on checks drawn against an IRA or may receive order flow from broker counterparties. These amounts would be immaterial on an IRA-by-IRA basis but the cost to calculate them would not.

There are also significant issues with the point of sale disclosure requirement. The point of sale disclosure requires the financial institution to estimate a rate of return when calculating the expected fees over a 1, 5 and 10 year period.[49] Would the firm be expected to customize this assumption at the asset type level? FINRA rules place severe limitations on a broker's ability to project returns for good reasons. Such projections would likely be a violation of existing FINRA Rule 2210(d)(1)(F).[50] The point of sale disclosure also requires the financial institution to estimate future fees.[51] For mutual funds, is it safe to assume that the fund will charge the same operating expense ratio ten years into the future? If the fund is currently providing a 3 percent fee waiver, should the assumption be that the fee waiver would continue indefinitely? Would illustrating a continuation of that fee waiver indefinitely later be deemed a "misleading statement" because the fund company decided to decrease it or forego it altogether four years in the future such that now the 5 year fee estimate is too low? These are but a sample of the questions raised by the Department's disclosure requirements.

If no relief is granted on the point of sale disclosure requirements, then the alternative option ("cigarette warning proposal") is preferable as it is consistent with customer disclosures already being used in the securities industry.[52] This alternative option would be more easily delivered, have customer acceptance and familiarity, and establish benchmarks for guidance of customer and advisor conduct. That said, we assume firms would have the latitude to include the disclosure with other existing disclosures regarding fees and conflicts for a complete package to investors that will make it more understandable and

[49] 80 Fed. Reg. 21985.

[50] Financial Industry Regulatory Authority, *Rule 2210(d)(1)(F) Communications with the Public, Content Standards https://www.finra.org/sites/default/files/NoticeAttachment/p127016.pdf*

[51] 80 Fed. Reg. 21985.

[52] 80 Fed. Reg. 21974.

meaningful for clients. Furthermore, an alternative option would make the annual disclosure unnecessary and excessive as it would already serve to increase investor attention to loads, management fees, revenue-sharing, commissions, and other charges. Finally, given that the long-term benefits of working with an advisor have been well documented, we suggest that the Department refrain from using the term "cigarette warning."[53]

G. Transaction Reporting and Department "Option to Publish" Should be Eliminated

The reporting requirements in the BIC Exemption risk becoming an unprecedented invasion of private client personal financial information. The reporting obligation could be read expansively to require financial institutions to provide client-identifying information like name, address, social security number, account numbers, etc. in addition to the detailed financial information required. Providing such information creates immense risks for clients and firms. We believe these requirements raise a myriad of security and individual rights issues and should be removed from the Proposal.[54]

Moreover, publishing the rate of return of specific, identifiable advisors is dangerously misleading. An advisor providing well-thought out, prudent advice to a conservative client will be potentially unfairly cast in a bad light compared to a more aggressive advisor making more highly speculative recommendations. Such an approach invites clients to chase performance without any understanding of the context in which that performance was achieved.

H. 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 notes 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.[55] 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.[56] 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.

I. Transitional Rule Needs to be Expanded

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[53] Wyman, *The role of financial advisors in the US retirement market*, see generally.

[54] Even without personally identified client information in the file, a central repository of data related to retirement investors poses substantial cybersecurity concerns. Criminal or state actors could hack into this file and expose sensitive information about clients' savings and income patterns, etc. Recent security breaches at the federal government, including the IRS, illustrate the very real danger posed by collecting and storing such data.

[55] 80 Fed. Reg. 21968.

[56] Financial Industry Regulatory Authority, *Rule 3050 Transactions for or by Associated Persons* http://finra.complinet.com/en/display/display.html?rbid=2403&element_id=3728

The scope of the Department's relief is extremely narrow. Left uncovered were a multitude of situations where relief is essential in order for the BIC Exemption to be a truly viable solution. The Department provides no transition relief for retirement investors who hold assets in IRAs that were not included on the Department's approved list of assets, i.e., there is no method for advisors to provide any assistance to these investors going forward. Without transition relief, financial institutions will be forced to decide whether to try to wall off these assets or remove them from accounts. Neither option would be beneficial for the retirement investor and both would place the financial institution at risk from a variety of perspectives.

"Walling off" the assets creates tremendous risk since most advisors will feel morally obligated to continue to provide recommendations to clients related to when to exit these investments. In most cases, these "uncommon" assets make up only a small percentage of the client's total account.[57] However, it is quite possible under the Department's expansive definition of investment advice that even an account review where these legacy assets are discussed but no action is recommended could be viewed as a "hold" recommendation. Under existing securities regulations, we question whether it would ever be appropriate for the advisor to "ignore" the "uncommon asset" when making recommendations on the "common" ones. Many financial institutions may see this as an unacceptable risk and pursue a strategy to "remove" these assets from their custody. With respect to assets that are not liquid, these would entail resigning as IRA custodian and providing the client 60 days to find a new custodian or experience a taxable event that may also be subject to early withdrawal penalties.[58] Such a result would truly be harmful to retirement investors and one that the financial services industry would want to avoid at all costs.

These issues are avoidable if the Department makes the BIC Exemption available to all investment products and services – aligning with the intention of Congress and client demand. Absent such relief, the Department should at least permit ongoing hold and sell recommendations related to "uncommon" assets to permit an orderly exit from these holdings. We would also ask for the same transition relief for any retirement investor who refuses, or simply fails to, execute a best interest contract.

V. A Special Streamlined Exemption For "Low-fee, High-quality" investments Runs Counter to a Best Interests Standard

The Department also asked for comments related to whether to provide a streamlined exemption for "high-quality, low-fee" investment alternatives that does not contain the complex and burdensome conditions of the BIC Exemption.[59] We do not believe it is in retirement savers' best interests for the Department to institutionalize a preference for some investments over others. In addition, we believe the Department will ultimately find it difficult to determine whether investment options are high quality and

[57] Investment Company Institute, *The IRA Investor Profile: Traditional IRA Investors' Activity, 2007-2013,* July 2015, 50.
See also: Investment Company Institute, *ICI Research Perspective Appendix: Additional Data on IRA Ownership in 2014,* Vol. 21, No. 1A, January 2015, 10.
[58] Code Section 408(d)(3). Note also that such an indirect rollover would not be permitted if the IRA owner had already taken an indirect rollover in the previous year pursuant to recent guidance from the Department of Treasury. See Treasury Announcements 2014-15 and 2014-32.
[59] 80 Fed. Reg. 21977-80.

low fee. The Department clearly cannot simply focus on fees without regard to the level of service being provided. The fact that the Department contemplates this option seems like an admission that the BIC Exemption has too many conditions to make it workable. Instead of implementing a simpler exemption for a select few investments, we suggest that the Department focus on making the BIC Exemption simpler for all investments in the retirement saver's and retiree's best interests.

Both active management and passive/index products add value and have benefits. Regulatory criteria should not limit the use of one versus the other but should foster processes that support appropriate use of either. Indexing is certainly one approach that investors may choose, but others may choose active management for portions of their portfolio. It is not unusual for investors to combine passive and active strategies in their portfolios, and include portfolios that are intended to be significantly out of sync relative to a benchmark index with respect to industry and sector weightings (commonly referred to as tracking error). Whether active or passive strategies are selected will depend on the investment objectives and risk tolerances of each retirement investor. In any event, fees are merely one factor that should be considered when making an investment choice.

A "low fee, high quality" exemption hopefully will not be taken to mean that index products are safer and less risky. In holding these products, 401(k) participants and IRA owners are completely exposed to volatility – which can have a significant impact on absolute performance over time. For a retirement saver, owning the index can actually have more risk, especially when indexes become distorted. Market cap weighted indices are pro-cyclical, which at times increase risk. In 2000, a 401(k) participant in a Russell 1000 Growth Index would have effectively owned over 50% in information technology stocks, which as a sector lost over a third of its value later that year when the tech bubble burst. As Americans move into retirement, and began drawing income, indexes pose additional challenges. For example, market capitalization weighted fixed income indices concentrate investors' assets in borrowers that have the most debt outstanding. We are sure the Department can agree that an issuer's greater aggregate indebtedness is not correlated with "high quality." In contrast, active managers could make valuation and diversification judgments, and for example, reduce their technology holdings.

Furthermore, it must be noted that indices typically exclude IPOs as well as smaller companies that need access to capital in order to cultivate their new or fast growing businesses. Impeding these companies' access to capital stifles job growth, given the important role that these companies play in creating jobs. Shying away from IPOs and stocks with relatively small market capitalization may provide an advantage to index investing, but starves the capital markets, and imposes on retirement savers a bar to diversification that is contrary to accepted portfolio management principles. It also foregoes a traditional source of capital appreciation that helps investors keep pace with inflation. The societal cost of greater pro-cylcical investing and more limited capital formation by encouraging qualified savings to invest in index investments needs greater study and quantification as the government assesses the costs and benefits of the Proposal.

Finally, a low-cost exemption would foreclose entirely the purchase of annuities with income and withdrawal benefits or immediate annuities in IRAs. These products currently represent a large proportion of IRA investments and are effective at providing guaranteed retirement income to retirees. The benefits that these investments provide, in terms of tax deferral, death benefits, optional accumulation and income

benefits, are not available in other investments and cannot be properly assessed with a simple comparison of returns on account values and costs.

Two-Year Delayed Effective Date is Needed

Even if the Department makes all of the improvements we have requested and believe are necessary to make the BIC Exemption a viable solution, compliance with the BIC Exemption will be a major undertaking for our company, advisors, and clients. We estimate that, at a minimum, we believe the industry would require a two-year delay in the effective date to build the infrastructure to produce the proper disclosures, train advisors to ensure compliance with each of the conditions, refresh all marketing materials, and build appropriate infrastructure to support, and to the extent feasible, automate new supervisory policies and procedures.

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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,

John C. Junek
Executive Vice President & General Counsel