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Office of Exemption Determinations
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Washington, DC 20210

Re: RIN 1210-AB32 – Definition of the Term Fiduciary; Conflict of Interest Rule
ZRIN 1210-ZA25 – Proposed Amendment to Proposed Partial Revocation of Prohibited Transaction Exemption 84-24
ZRIN 1210-ZA25 – Proposed Best Interest Contract Exemption

Dear Sir or Madam,

I am a Senior Executive Director and Head of U.S. Life and Retirement at AXA.[1] In addition to serving on the company's Executive Management Committee, I am Chairman of the Board, President and Chief Executive Officer of AXA Distributors, LLC, the wholesale distribution arm of AXA. I also serve as a member of the Board of Directors of AXA Advisors, LLC, AXA's retail broker-dealer and registered investment adviser.

AXA was founded in 1859 and is one of the country's largest life insurance and retirement savings companies with nearly 2.5 million customers nationwide. Based on the foregoing, we are uniquely qualified to provide meaningful and constructive comments on the Conflict of Interest Proposed Rule and related exemptions (the "Proposed Rule") released by the Department of Labor (the "Department") on April 20, 2015.

We share the Department's objective of ensuring that retirement plan participants, individual retirement savers, and their families as well as small business plan sponsors and potential sponsors have ongoing access to high quality, impartial and affordable retirement

[1] "AXA" is the brand name of AXA Equitable Financial Services, LLC and its family of companies, including AXA Equitable Life Insurance Company (NY, NY), MONY Life Insurance Company of America (AZ stock company, administrative office: Jersey City, NJ), AXA Advisors, LLC (NY, NY) and AXA Distributors, LLC (NY, NY).

savings education and advice. However, we believe that the means by which the Department intends to accomplish this goal are significantly flawed. Not only will the Proposed Rule restrict the opportunities for retirement savers to obtain even basic investment education, more fundamentally, the Proposed Rule will inevitably cause a dramatic reduction in choice for retirement savers – choice as to when and how to receive investment advice and choice as to the retirement products available for purchase – without meaningfully enhancing consumer protection, particularly for the 40 million U.S. households that own IRAs. [2]

I. The existing regulatory framework functions well for consumers

The defining characteristic of the current regulatory framework governing the retirement savings marketplace is that it fosters broad choice and lasting value for consumers. Market participants offer retirement savers and small business plan sponsors a wide array of options for obtaining investment advice and retirement products, and they provide those options at a range of price points. The current system achieves this desirable outcome by:

(1) providing regulatory certainty;
(2) effectively regulating – without mandating or proscribing – many different business and investment models and product; and
(3) not creating unreasonable barriers to entry for new market entrants.

These features help sustain a healthy and competitive marketplace that encourages product innovation and the provision of high quality, affordable retirement solutions. As a result, retirement savers and small business plan sponsors can choose from a robust selection of retirement products and investment advice models in order to accomplish their savings goals.

The existing model offers distinct retirement solutions for all types of retirement savers

The choice and flexibility enabled by the current regulatory framework is crucial to serving the needs of today's retirement savers, who seek varying levels of retirement services and preferred methods of paying for those services. The following chart illustrates some of the broad types of retirement savers and how they interact with the retirement savings marketplace:

[2] Source: Insured Retirement Institute, *The Role of IRAs in U.S. Households' Saving for Retirement 2014*.

	Educational needs	Services offered	Preferred payment and service provider structure	Regulatory oversight
First time and/or younger	• Significant • Professional help to understand financial and planning concepts and make informed choices • Inspiration and encouragement to save for retirement	• Advice to determine and refine objectives • Non-advisory needs analysis • Advice regarding selection of products and services • Significant administrative and brokerage transactional support	• Purchases commission-based products and no-load investment options • Unable to afford out-of-pocket fees for initial or ongoing advice • Purchases products from manufacturer salespersons/advisers	• FINRA/SEC and state securities department oversight of broker-dealers • State insurance department oversight over insurance and annuities sales
Modest means	• Significant • Professional help to understand financial and planning concepts and make informed choices	• Advice to refine objectives • Non-advisory needs analysis • Advice regarding selection of products and services • Significant administrative and brokerage transactional support	• Purchases commission-based products and no-load investment options • Unable to afford out-of-pocket fees for initial or ongoing advice • Low cost passive and index fund investing and buy-and-hold strategies • Purchases products from manufacturer salespersons/advisers	• FINRA/SEC and state securities department oversight of broker-dealers • State insurance department oversight over insurance and annuities sales
Self-directed	• Significant • Self-motivated; prefers to do independent research	• Little or no advice • Significant administrative and brokerage transactional support • Non-advisory needs analysis	• Purchases low-cost, “do-it-yourself” services, such as robo-advice and direct-to-consumer offerings • Pays for advice only if and when needed.	• FINRA/SEC and state securities department oversight of broker-dealers • State insurance department oversight over insurance and annuities sales
Wealthy	• Minimal • Relies on adviser to make appropriate investment decisions	• Comprehensive asset management services • Ongoing advice • Discretionary and non-discretionary • Fee-based financial plan • Advice tailored to individual needs • Significant administrative and brokerage transactional support	• Pays annual fee of up to 3% of assets under management • Pays for ongoing access to advice from investment advisers	• FINRA/SEC and state securities department oversight of broker-dealers • Investment advisory/SEC fiduciary rules and examinations

The spectrum of services, educational requirements and payment structures specified in this chart reflects a vibrant marketplace in which retirement savers have plenty of options to choose from to satisfy their needs. This marketplace creates space for all types of retirement services providers, including fee-for-service investment advisers who offer education and advice only; product manufacturers who sell their products to retirement savers either directly or through captive agents; third party distributors who sell products sourced from multiple manufacturers; "hybrid" broker-dealers/retirement investment advisers who offer both fee-only advice and commission-based products; 401(a)/401(k) turnkey retirement plan providers who focus mainly on servicing small businesses; and robo-advisers and other do-it-yourself services that offer more limited and less-personalized education and advice. A recent survey shows that investors are happy with the current model, with the vast majority indicating that they would be likely or highly likely to recommend their financial planner to a friend or relative.[3]

The existing model incorporates extensive consumer protections for retirement savers

The flexibility of the current regulatory framework is accompanied by strict regulatory oversight that affords retirement savers significant protections. In addition to the Department's existing oversight of retirement plans subject to ERISA, retirement services providers must also comply with SEC and Financial Industry Regulatory Authority ("FINRA") rules governing the sale of registered securities, as well as state insurance department regulations applicable to insurance companies and products – rules which apply to the sale of both retirement and non-retirement products. This comprehensive regulatory regime has consumer protection as its overarching priority and effectively furthers that goal while providing regulatory certainty to retirement services providers.

II. The Proposed Rule unnecessarily disrupts the current retirement marketplace

The crux of the Proposed Rule is a dramatic expansion in the circumstances in which investment advisers, insurance agents and other retirement planners and intermediaries would be deemed fiduciaries under ERISA, including extension of fiduciary status to financial professionals who advise clients on IRA rollovers and distributions. At the same time, the Proposed Rule sharply narrows longstanding exceptions to the prohibition against fiduciaries receiving any compensation from third parties in connection with their advice, while also creating a new "Best Interest Contract Exemption" to which broker-dealers, investment advisory fiduciaries and sellers of certain proprietary products must adhere in order to receive commission-based compensation.

This blanket approach – which imposes the highest legal duty upon retirement services providers in virtually all retirement-related transactions – will almost certainly reshape the retirement services marketplace by disrupting effective business models that provide both significant choice for retirement savers and appropriate consumer protection, in favor of mandated "one size fits all" business models which sacrifice client choice for the Department's judgment as to the appropriate relationship between retirement savers and retirement service providers. This view is shared by many stakeholders in the retirement marketplace, including SEC Commissioner Daniel Gallagher, who recently stated that if adopted, the Proposed Rule could lead "entire categories of products and services that are now available to investors [to] . . . disappear," and further noted that "the negative impact of this loss will be borne by low and moderate-income workers."[4]

[3] Source: Insured Retirement Institute, *Retirement Planning: A Changing Dynamic*, August 19, 2014
[4] The SEC Speaks, February 20, 2015 (accessed via http://www.sec.gov/news/speech/022015-spchcdmg.html).

In the interest of brevity, this letter does not address every concern we have with the Proposed Rule; particularly those we believe may be addressed by other commenters. Instead, we address below our key concerns and note our support via the appendix to this letter for certain comments that may be made by others. Specifically, the Proposed Rule:

- unduly expands the traditional definition of a fiduciary;
- conflicts with the SEC investment advisory fiduciary standard;
- deems providers of even the most basic investment education to be fiduciaries;
- discourages the sale of annuities – particularly variable annuities – by excluding them from PTE 84-24; and
- forces retirement services providers to rely on an impractical and legally uncertain Best Interest Contract Exemption ("BICE") in order to receive commission-based compensation for their services.

Key Concern #1: The Proposed Rule's new fiduciary definition will likely lead to fewer affordable investment advice options and retirement products

Today, retirement services providers are free to define the terms of their relationships with clients and potential clients, who in turn are free to engage and pay for a fiduciary with respect to receipt of investment advice and/or a retirement product purchase only when they want to. This freedom allows retirement services providers to offer other product and advice options with varying payment structures. And the Seller's Exemption facilitates the provision of transactional advice from salespersons/advisers – a key for first-time and modest means retirement savers – by ensuring that salespersons/advisers have a clear regulatory pathway to offer advice in the context of such purchases without triggering fiduciary status.

The Proposed Rule would impose fiduciary status – the highest duty under the law and one which imposes personal liability even for individuals who act within the scope of their employment – on both providers of investment advice and manufacturers and distributors of retirement products as to virtually all transactions with their clients (and sometimes potential clients) with only a few, overly narrow and often impractical exceptions and carve-outs available.

As a result, retirement savers will essentially be forced to hire a fiduciary in order to receive investment advice or purchase a retirement product. In turn, the cost of the products and services offered by retirement services providers will almost surely increase due to the compliance costs and heightened liability associated with near-universal fiduciary status, leaving a bifurcated market where:

- wealthy investors will continue to have access to the same advice and products they utilize today as they are able to afford fiduciary-level services with ongoing costs;

- self-directed savers will have access to low-cost direct to consumer offerings with no advice component, which suits their inclination to perform independent research; and

- first-time or younger savers and savers with modest means – for whom the availability and accessibility of appropriate investment advice and retirement products is often a critical motivator – will essentially be left out; they will likely face a marketplace in which (1) fewer affordable retirement products are available, (2) the only affordable investment advice available will be automated investment services, or robo-advisers, that cannot possibly meet their individualized goals,[5] and (3) access to comprehensive financial planning which takes into account both retirement and non-retirement assets will be unavailable to them because they cannot afford to hire a fiduciary.

Key Concern #2: The conflict between the current SEC investment advisory fiduciary standard and the new fiduciary definition could cause retirement services providers to increase the cost of their offerings or exit the market altogether

The Proposed Rule seeks to solve one purported problem – conflicts of interest – by creating another one: conflicting regulatory regimes. For example:

- The very nature of the fiduciary standard under the Proposed Rule – the sole interest standard, which forbids even mutually beneficial transactions and does not permit disclosure to remedy an apparent conflict – differs from the SEC's best interest fiduciary standard, which recognizes that sometimes the client's best interest aligns with that of the fiduciary and that disclosure can such conflicts. Thus, even if the Proposed Rule and the SEC fiduciary standard were in sync with respect to when someone is considered a fiduciary, they are in utter conflict as to the import of that status.

- While the Investment Advisers Act of 1940 (the "Advisers Act") currently exempts "incidental" advice from fiduciary status, under the Proposed Rule broker-dealers will instead be required to admit fiduciary status at the outset of any sales transaction – irrespective of whether any investment advice they provide is "incidental" to such sale – which in and of itself could cause the broker-dealer to fall outside of the current exception.

- While the Advisers Act recognizes solicitor activity as a distinct advisory activity not subject to its comprehensive requirements, under the Proposed Rule, solicitor activity can trigger fiduciary status.

[5] Nor does funneling retirement savers to low-cost, depersonalized investment advice and retirement products ensure that retirement savers will be better off. According to Bloomberg, investors in passive funds bore billions in hidden costs in 2014 alone: "As the popularity of index investing soars to new heights, the emergence of index front-running is raising fundamental questions about so-called passive investment strategies, as well as how indexes are compiled and the role the funds themselves play in elevating costs. By one estimate, it gouges owners of funds tracking the Standard & Poor's 500 Index to the tune of $4.3 billion a year, a sum that can double or even triple the cost of such investments." The Hugely Profitable, Wholly Legal Way to Game the Stock Market, by Yuji Nakamura, BloombergBusiness July 7, 2015. http://www.bloomberg.com/news/articles/2015-07-07/the-hugely-profitable-wholly-legal-way-to-game-the-stock-market

- The Proposed Rule requires certain point of sale disclosures regarding total costs of investment and reasonable assumptions about future investment performance that contradict both the Advisers Act and FINRA rules regarding investment performance projections.

Retirement services providers are likely to respond to the significant regulatory uncertainty created by this conflict by passing along increased compliance costs – multiple fiduciary standards equals multiple monitoring regimes for providers to account for – or paring down their product and advice offerings, as pointed out by Rick Ketchum, CEO of FINRA:

> I fear that the uncertainties stemming from contractual analysis and the shortage of useful guidance will lead many firms to close their IRA business entirely or substantially constrain the clients that they will serve.[6]

This is particularly true for broker-dealers, investment advisers, and other SEC-regulated retirement services providers, who by definition cannot ever satisfy the Proposed Rule's fiduciary standard by satisfying the SEC standard as they do today. According to FINRA, "[t]he proposal would impose a best-interest standard on broker-dealers that differs significantly from the fiduciary standard applicable to investment advisors registered under the federal and state securities laws, and it would impose the best-interest standard only on retirement accounts . . . [t]his fractured approach will confuse retirement investors, financial institutions and advisors."[7]

Key Concern #3: Deeming providers of basic investment education to be fiduciaries will reduce access to such education

These potential adverse consequences are magnified by the fact that fiduciary status would now be triggered simply by providing any communication about investment choices that mentions specific investment products, identifies specific investment managers, or indicates the value of particular securities or other property. The average retirement saver may not necessarily be able to distinguish a small cap fund from an emerging markets fund, or between a mutual fund and an exchange traded fund, nor are they likely to be able to readily identify these types of investments on their own. Providing general information such as that outside the scope of the expanded fiduciary definition may be so unintelligible for the average retirement saver so as to be useless. And financial professionals may be unlikely to provide any information beyond that for fear of the litigation risk and increased liability associated with their new fiduciary status.

The result: only wealthy investors who can afford to purchase investment advice – the price of which will likely increase due to the fiduciary status associated with providing such advice – will have access to the most basic investment education, even though they are least likely to need it. Indeed, SEC Commissioner Daniel Gallagher recently noted the likelihood of

[6] http://www.investmentnews.com/article/20150527/FREE/150529942/finras-ketchum-criticizes-dol-fiduciary-rule.
[7] July 17, 2015 letter from FINRA to Employee Benefits Security Administration and U.S. Department of Labor regarding the Proposed Rule, page 4.

this outcome: ". . . a uniform fiduciary duty could actually harm retail investors and . . . it could limit financial advisory options or preclude investors from receiving investment advice altogether."[8] This is particularly troubling because research demonstrates that a large segment of retirement savers – including first-time and younger savers and modest means savers – will not commit to saving for retirement unless educated and prompted to do so in one-on-one conversations with a financial professional. Indeed, while 60% of baby boomers report having some money saved for retirement, that figure rises to more than 90% for baby boomers who work with investment advisers.[9]

Key Concern #4: Excluding variable annuities – one of the most effective retirement products that offer guaranteed lifetime income – from PTE 84-24 will likely drive them from the market

The Proposed Rule makes a critical change to the availability of prohibited transaction exemptions by excluding variable annuities from PTE 84-24, the prohibited transaction exemption under which they have traditionally been offered. This change explicitly limits choice for retirement savers by strongly discouraging the sale of variable annuities, which offer retirement savers an essential and unique vehicle for accessing guaranteed lifetime income while still retaining some effective control over investments. The sale of variable annuities is generally more labor-intensive than the sale of other retirement products precisely because of the investment control and uniqueness of the guaranteed lifetime income and other features they offer, as well as the wide array of such products available in the marketplace. Therefore, it is imperative that insurance companies be able to adequately and appropriately compensate their distribution partners for their services in connection with variable annuity sales, as they are today via PTE 84-24 as well as the current Seller's Exemption which, unlike PTE 84-24, also protects insurance companies and their salespersons/advisers from triggering fiduciary status.

However, if faced with the prospect of selling such products with the added compliance burden and liability of fiduciary status because neither PTE 84-24 nor the current Seller's Exemption are available, insurance companies will sell fewer variable annuities and develop fewer new ones. The availability and variety of guaranteed lifetime income products that are vital to a financially viable retirement – particularly given the steady decline in the availability of employer-sponsored defined benefit plans – would consequently be lessened. Indeed, the popularity of living benefit riders offered in variable annuities contributed to a strong year for annuity sales in 2014, serving as further evidence of the attractiveness of this product to retirement savers and the critical role these products play in helping to ensure that American retirees do not outlive their savings.[10] Furthermore, reducing the availability of options for lifetime income directly conflicts with the Department of Treasury's policy to encourage the availability of such options: "As boomers approach retirement and life expectancies increase, income annuities can be an important planning tool for a secure retirement, [and thus] Treasury is working to expand the availability of retirement income options for working families. By

[8] The SEC Speaks, February 20, 2015 (accessed via http://www.sec.gov/news/speech/022015-spchcdmg.html).
[9] Source: Insured Retirement Institute, *Boomer Expectations for Retirement 2015*, April 13, 2015.
[10] Source: Insured Retirement Institute, *Fourth-Quarter and Year-End 2014 Annuity Sales Report*.

encouraging the use of income annuities, today's guidance can help retirees protect themselves from outliving their savings."[11]

Key Concern #5: The new Best Interest Contract Exemption ("BICE") is so impractical and legally uncertain that is it unlikely to be useful except with wealthy investors

Finally, the Proposed Rule offers retirement services providers a new prohibited transaction exemption – the Best Interest Contract Exemption ("BICE") – which is presumably designed to counterbalance the blanket nature of fiduciary status under the Proposed Rule and the exclusion of annuities from PTE 84-24. The BICE obligates a financial professional and/or a financial institution that wishes to receive commission-based compensation to contractually acknowledge that they are fiduciaries (by entering into a best interest contract ("BIC") with their clients) and imposes extensive compliance and disclosure requirements. However, the BICE presents practical difficulties – for both retirement savers and for retirement services providers – that do not account for marketplace realities, and also creates significant litigation risk. As a result, retirement savers will be unlikely to seek out BICE-compliant transactions, and for retirement services providers, entering into a BICE-compliant transaction will only make economic sense with respect to transactions involving wealthy investors, as there will be insufficient financial incentive to take on the compliance burden and legal uncertainty of the BICE for transactions with any other type of retirement saver.

By requiring that retirement savers enter into a BIC in order to take advantage of the BICE, the Department has inherently determined that retirement savers will find doing so to be in their best interest. However, as a practical matter, it is more likely than not that retirement savers – particularly first-time or younger savers and modest means savers – will instead be intimidated by having to sign a contract before even having a meaningful conversation with their salesperson/adviser, with whom they may not yet have had the opportunity to develop trust. This could severely dissuade these retirement savers from entering the market in the first place, as they often require significant motivation to do so. Or it could delay their entry to the marketplace, which would also be harmful. The benefits of starting to save for retirement at an early age are well-documented: an employee who contributes 10% of income annually to a retirement plan beginning at age 35, rather than age 30, will receive 7.6 percent less in annual retirement income at age 70, and 11% less if commencing retirement at age 65.[12]

The BICE presents two other practical difficulties for both retirement savers and retirement services providers:

- <u>BIC timing</u>: Even though an adviser will oftentimes meet with a potential client multiple times over the course of months before s/he is ready to decide upon a course of action such as rolling over assets to an IRA, the BICE requires that the parties must enter into

[11] J. Mark Iwry, Senior Advisor to the Secretary of the Treasury and Deputy Assistant Secretary for Retirement and Health Policy, October 29, 2014. Accessed via http://www.treasury.gov/press-center/press-releases/Pages/jl2673.aspx.

[12] Source: Insured Retirement Institute, *It's Time to Save For Retirement,* November 13, 2014.

the BIC prior to any advice being given. This begs the question: at what point during those months of conversations are the parties required to have entered into the BIC? Moreover, customers often consult several advisers before selecting an adviser to work with; must they enter into multiple BICs?

- BIC execution: The BICE also requires physical signature of the BIC, ignoring the growing digital retirement marketplace.

And for retirement services providers, there are yet more practical difficulties with the BICE:

- BIC warranties: The BIC is required to include a warranty stating that neither the financial institution nor the adviser nor any affiliate "uses 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." However, this warranty conflicts with longstanding compensation arrangements for "full time life insurance salesmen" ("FLTS") under the Internal Revenue Code used by insurance companies to provide employee benefits and other additional benefits to their retail sales force.

- BICE enforcement: Under the Proposed Rule, enforcement of the BICE is accomplished via private litigation under state contract and fiduciary law. However, this after-the-fact enforcement mechanism is entirely impractical. For example, though the BICE requires that both the adviser and financial institution adhere to an impartial conduct standard that includes, among other requirements, the receipt of "reasonable compensation in relation to the total services they provide to the retirement investor," the Department has not provided guidance on the standard. Thus, the parties to the BIC will not know with any certainty whether compensation was "reasonable" except upon final adjudication by a court long after the transaction that was the subject of the BIC will likely have been completed. Even good faith attempts to comply with the BICE are in danger of ultimately being deemed non-compliant – and thus in violation of prohibited transaction rules – simply because a court later determines that compensation was not reasonable.

This enforcement mechanism also creates significant litigation risk. Though the Department correctly notes in its proposal that a well-developed expertise exists among the Federal bar on ERISA fiduciary jurisprudence, the Department fails to recognize that it does not exist at the state level and, even if it did, state judges are not bound by it. Thus, enforcement via private litigation will lead to at best uneven and at worst inconsistent interpretation and enforcement across and within state courts. The uncertainty this creates renders it difficult and costly for retirement services providers to incorporate the BICE into their business models. All told, use of the BICE is likely to be viewed by many retirement savers and retirement services providers as more trouble than it is worth and, with no other exemption provided for in the Proposed Rule, the result is once again likely to be a bifurcated market with high and low-cost options for wealthy investors and self-directed savers, respectively, and few affordable and effective investment advice and retirement product options for first-time and young savers and modest means savers.

In sum, the overarching theme of our key concerns with the Proposed Rule is clear – fewer options and less choice and value for retirement savers – due to fewer offerings from product manufacturers and other retirement services providers as well as fewer retirement services providers in the market altogether – and less flexibility for retirement services providers to meet the needs of retirement savers across the spectrum of the retirement marketplace. These concerns were specifically echoed by FINRA, which stated:

> If the proposal were adopted as is, many broker-dealers will abandon these small accounts, convert their larger accounts to advisory accounts and charge them a potentially more lucrative asset-based fee. They will do so largely because of the BICE constraints on differential compensation, the ambiguities in the best interest standard, the lack of clarity concerning various conditions, the costs of compliance, and uncertainty about the consequences of minimal non-compliance.[13]

These concerns are not academic; they are reinforced by the impact of a similar initiative on the investment advisory industry in the United Kingdom. A study by Cass Business School shows that the number of U.K. financial advisers fell by 25% during the first year following adoption of the new rules, and the remaining advisers reported that servicing accounts with less than £150,000 in assets was not profitable. In all likelihood, the Proposed Rule would lead to a similar, yet ultimately avoidable, outcome. While wealthy and self-directed investors will be minimally impacted by implementation of the Proposed Rule, the red entries in the chart below illustrate how choice of products and services are substantially limited for first-time and younger savers and modest means savers:

[13] July 17, 2015 letter from FINRA to Employee Benefits Security Administration and U.S. Department of Labor regarding the Proposed Rule, page 6.

	Services offered		**Preferred payment and service provider structure**
	Existing	*Post-implementation*	*Post-implementation*
First time and/or younger	• Advice to determine and refine objectives • Non-advisory needs analysis • Advice regarding selection of products/services • Significant administrative and brokerage transactional support	• Limited, mainly online and robo-advice • Generic advice not customized to individual needs • Limited administrative support	• Directed to a limited range of no-load and low cost investment products • Required to pay up front for online or robo-advice
Modest means	• Advice to refine objectives • Non-advisory needs analysis • Advice regarding selection of products and services • Significant administrative support	• Generic advice not customized to individual needs • Limited administrative support	• Directed to a limited range of no-load and low cost investment products • Required to pay up front for online or robo-advice

III. Recommended changes to the Proposed Rule

We believe that the Proposed Rule can help achieve the Department's objectives, but only if the Department modifies it to avoid the adverse consequences discussed above. We submit that the Proposed Rule should be changed as follows:

1. Restore a meaningful Seller's Exception. Traditionally, pure selling activities have been distinguished from fiduciary investment advice under the Seller's Exception, which reflects the common understanding of fiduciary duty and the ability of retirement savers to distinguish pure advice from advice provided in the context of sales and marketing of retirement products. This enables financial institutions to sell their proprietary products at a variety of price points, helping to ensure that small retirement plans, first-time and younger savers, and modest means savers who cannot afford or choose not to pay for individualized investment advice have access to affordable, high quality service options via a "one-stop shopping" transactional model which offers education, advice and product solutions in one transaction without the need for an ongoing relationship or ongoing advisory fees. This model is critical to engaging and servicing these plans and savers, who in addition to affordable options also often need motivation to enter the market in the first place. The Seller's Exemption provides that inspiration and an appropriate entry point to the market by facilitating the use of the transactional model.

Without the Seller's Exemption, affordable high quality options could disappear because, as noted earlier, the price of products and services offered by retirement services providers is likely to increase due to the operational and compliance costs of expanded fiduciary liability. The remaining choice for first-time and younger savers and modest means savers – as well as small business retirement plan sponsors and participants[14] – would be to either pay for ongoing and comprehensive retirement services or essentially go without the advice and expertise of a financial professional, which is really no choice at all for those who cannot afford the former. The Department has not made a compelling case to abandon this well established industry convention, which at a minimum should be reflected in an expanded carve-out that would allow sellers of proprietary products to continue to service this vital market segment with an array of choices for obtaining investment advice that includes the transactional model.

2. Restore annuities – particularly variable annuities – to PTE 84-24 and harmonize the ERISA and SEC fiduciary standards. The Department should work with the SEC to create a single fiduciary standard with a comprehensive disclosure regime that would apply to all product providers, including those servicing retirement plans and IRAs, while affording equal treatment to all retirement products within a specific category. There is no need for artificial distinctions in the regulation of the sale of fixed and variable annuities; in reality, variable annuities are far more like fixed annuities than mutual funds with respect to features and benefits:

- Both fixed and variable annuities include a fixed (general account) option with interest, mortality-based investment, and retirement income guarantees, and offer life-contingent withdrawal options. Mutual funds and other securities investments do not provide these features.

- Nor do mutual funds and other securities investments offer another key feature of both fixed and variable annuities: the ability to draw down principal and income over the investor's life expectancy while the insurance company assumes the attendant longevity risk.

In short, annuities offer virtually the only means by which retirees can access guaranteed lifetime income. Therefore, to ensure that the types of guaranteed living benefits provided by variable annuities – which have proven popular with retirement savers and which provide them with substantial value – remain a part of the robust choice of retirement products available in the retirement marketplace, variable annuities should be restored to PTE 84-24.

With respect to regulatory harmonization, coordination with the SEC's efforts to consolidate the standards of conduct, including fiduciary rules, would be in keeping with Congress' harmonization directive in the Dodd-Frank Act – a directive underpinned by Congress' agreement with the SEC's finding that a regulatory regime which facilitates maintaining multiple business models was best for investors. As then-CFTC Commissioner Scott O'Malia stated in 2013 in the context of cooperation by the CFTC and the FTC in accordance with the Dodd-Frank directive, "We must harmonize our rules to prevent regulatory

[14] The existence of employer sponsored workplace savings programs dramatically increases savings rates. According to a study by the American Society of Pension Professionals & Actuaries, the single most important factor in determining if a worker is saving for retirement is whether or not a retirement plan is available at work; a review of participation rates by workers earning $30,000 to $50,000 annually showed that 71.5% of employees with access to a workplace plan save through that plan, whereas only 4.6% save in an IRA where there is no available workplace plan.

arbitrage from undermining our comprehensive financial reforms." Instead, the Proposed Rule creates confusion and conflict in the very body of law Congress directed to be harmonized.

Harmonization would also leverage the well-developed regulatory and judicial framework for enforcing fiduciary standards for investment advisers which already exists under the SEC's jurisdiction, and would avoid the increased compliance and litigation risks associated with conflicting regulatory regimes while giving both retirement savers and retirement services providers the certainty they need in order to plan for the new retirement services marketplace. Absent such certainty, the risks and increased costs created by conflicting regimes could drive retirement services providers of all types from the retirement marketplace and thereby reduce the choices available for retirement savers seeking retirement products and/or investment advice. Alternatively, if the Department wishes to retain its own framework, we urge the Department to reformulate those provisions of the Proposed Rule that conflict with existing SEC rules.

3. Create a workable BICE. The BICE should be revised to better align with the practicalities of the retirement services marketplace and to reduce the regulatory uncertainty it creates in order to increase its utility and make it a truly viable prohibited transaction exemption. In particular, these modifications should:

- Establish more practical timing guidelines that would permit financial professionals who are not making investment recommendations to educate potential clients prior to requiring entry into one or several BICs;

- Include flexible delivery methods for the best interest contract such as telephonic delivery, electronic delivery, etc. and to dispense, if possible, with requiring physical signature of the BIC;

- Recognize longstanding industry practice by carving out or, at a minimum, providing a presumption that sales requirements used to establish FTLS status are not suspect absent factors indicating the sales advice was not in the best interest of the retirement saver;

- Reduce regulatory uncertainty by reverting to SEC and FINRA enforcement regimes that are already rigorously enforced for fiduciaries instead of providing for state law-based private causes of action for BIC enforcement; and

- Further reduce regulatory uncertainty with respect to the impartial conduct standard by explicitly stating that reasonableness is to be viewed in relation to customary practices prevailing in the marketplace at the time the compensation was earned.

4. Expand the investment education carve-out to allow reference to specific investment products as illustrative of investment type or asset class. Current longstanding investment education practices, which permit financial professionals to provide allocation models to customers that suggest specific investment products or identify specific alternatives available under a plan or IRA, have proven effective. The use of enrollment materials and in-

person meetings in which this type of information is provided continues to be the primary way that the vast majority of teachers, employees of not-for-profits, and small plan participants learn about the existence of employer-provided retirement products and the benefits they offer, and an Employee Benefit Research Institute analysis of the 2010 Survey of Consumer Finances shows that for families with a retirement savings account, almost two-thirds of the families total financial assets are in these accounts.[15] Any consumer protection concern that the Department may have would be better addressed by requiring specific disclosure regarding the illustrative nature of the specific investment alternatives being furnished.

In conclusion, we are confident that these modifications to the Proposed Rule would further the Department's goal of ensuring that all Americans have access to a broad range of high quality retirement products and investment advice at multiple price points without causing extensive and ultimately harmful disruption to the current retirement services marketplace.

Respectfully Submitted,

Nick Lane

cc: Senator Richard Shelby, Chairman, Senate Banking, Housing & Urban Affairs Committee
Senator Sherrod Brown, Ranking Member, Senate Banking, Housing & Urban Affairs Committee
Senator Orrin G. Hatch, Chairman, Senate Finance Committee
Senator Ron Wyden, Ranking Member, Senate Finance Committee
Senator Lamar Alexander, Chairman, Senate Health, Education, Labor & Pensions Committee
Senator Patty Murray, Ranking Member, Senate Health, Education, Labor & Pensions Committee
Representative John Kline, Chairman, House Education and the Workforce Committee
Representative Robert C. "Bobby" Scott, Ranking Member, House Education and the Workforce Committee
Representative Jeb Hensarling, Chairman, House Committee on Financial Services
Representative Maxine Waters, Ranking Member, House Committee on Financial Services

Senator Charles E. Schumer, New York
Senator Kirsten E. Gillibrand, New York
Representative Lee N. Zeldin, New York 1st District
Representative Peter T. King, New York 2nd District
Representative Steve Israel, New York 3rd District

[15] Accessed via savemy401k.com.

Representative Kathleen M. Rice, New York 4th District
Representative Gregory W. Meeks, New York 5th District
Representative Grace Meng, New York 6th District
Representative Nydia M. Velazquez, New York 7th District
Representative Hakeem S. Jeffries, New York 8th District
Representative Yvette D. Clark, New York 9th District
Representative Jerrold Nadler, New York 10th District
Representative Daniel M. Donovan, Jr., New York 11th District
Representative Carolyn B. Maloney, New York 12th District
Representative Charles B. Rangel, New York 13th District
Representative Joseph Crowley, New York 14th District
Representative Jose E. Serrano, New York 15th District
Representative Eliot L. Engel, New York 16th District
Representative Nita M. Lowey, New York 17th District
Representative Sean Patrick Maloney, New York 18th District
Representative Christopher P. Gibson, New York 19th District
Representative Paul Tonko, New York 20th District
Representative Elise M. Stefanik, New York 21st District
Representative Richard L. Hanna, New York 22nd District
Representative Tom Reed, New York 23rd District
Representative John Katko, New York 24th District
Representative Louise McIntosh Slaughter, New York 25th District
Representative Brian Higgins, New York 26th District
Representative Chris Collins, New York 27th District

Appendix

We anticipate that the Department will receive a number of additional helpful comments on the proposal. We would like to note our support for the following comments and would be happy to provide additional explanation in this regard at the Department's request.

- The counterparty carve-out to the new fiduciary definition should be extended to include small defined contribution retirement plans and IRA holders.

- The definition of investment advice as it pertains to statements of value should be revised to clarify that actuarial valuations and similar routine calculations under annuity contracts are not to be deemed as investment advice.

- The platform provider carve-out should be expanded to include IRA platforms and clarified to specifically include variable annuity platforms.

- With respect to the BICE:

    - The definitions of "Financial Institution" and "Adviser" should be revised to make clear that the BIC need only include as parties (1) the individual who will receive compensation for the investment advice and (2) the entity directly paying that compensation to the individual;

    - a significant amount of additional time will be necessary to establish systems to enable compliance with the BICE;

    - the BICE's additional conditions with regard to situations where an adviser's range of investment recommendations is limited is unworkable in practice and should be replaced with a simple disclosure requirement;

    - the BICE should not narrowly limit the assets for which it is applicable;

    - the requirement for life-of-the-product disclosure via a web page maintained by financial institutions should be removed as it imposes considerable expense and strain upon parties to the BIC (as well as other entities which feed required information to such parties[16]) without providing benefit to retirement savers;

    - the BICE should incorporate existing disclosure mechanisms, rather than introducing onerous new disclosure requirements that will be of little additional benefit to retirement savers already inundated with similar information while at the same time imposing significant cost burdens on retirement services providers; and

[16] More generally, we note that the burden of information collection requests for all proposed exemptions has been significantly underestimated.

  - to the extent that the Department's final regulations include the BICE, the Department should ensure that retirement savers damaged by defective Robo-advice models have appropriate legal recourse and access to web disclosure data to assist them in identifying when and how they have been damaged and to assist in their enforcement efforts before a state court or arbitrator.

- Because a streamlined exemption for low cost investments could have unintended consequences, particularly with regard to the Department's and the Department of Treasury's policies to encourage the use of lifetime income options, it should be the subject of a separate study – insufficient time has been given to analyze and comment on a theoretical exemption as part of this already voluminous proposal.

- The final regulation should exempt contracts issued prior to the applicability date unless and until they are transferred or otherwise exchanged, otherwise it will create a class of frozen or orphaned retirement savers whose only option may be to transfer to Financial Institutions who will enter into BICs with them and thus potentially incur surrender charges and/or lose valuable IRA annuity contract benefits that may no longer be replaceable in the marketplace (e.g. pre-2008 guaranteed living withdrawal benefits).