July 21, 2015

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Conflicts of Interest Rule
U.S. Department of Labor
200 Constitution Avenue NW, Room N-5655
Washington D.C. 20210

Re: Comments on Department of Labor Proposed Redefinition of "Fiduciary" (RIN 1210-AB32); Proposed Best Interest Contract Exemption (ZRIN 1210-ZA25); and Proposed Amendment to Prohibited Transaction Class Exemption 84-24 (ZRIN 1210-ZA25)

Dear Sir or Madam:

The Association for Advanced Life Underwriting ("AALU") and the National Association of Independent Life Brokerage Agencies ("NAILBA") appreciate the opportunity to provide these comments to the Department of Labor ("Department" or "DOL") in response to the above-referenced proposed rule ("Rule" or "Proposal") to redefine who is a fiduciary of an employee benefit plan under the Employee Retirement Income Security Act of 1974 (ERISA) and Section 4975 of the Internal Revenue Code of 1986, including individual retirement accounts (IRAs).

AALU is the leading organization of life insurance professionals who are a trusted voice on policy issues impacting Americans' financial security and retirement savings. Our 2,200 members are primarily engaged in sales of life insurance used as part of estate, charitable, retirement, and deferred compensation and employment benefit services. NAILBA is a nonprofit trade association with over 300 member agencies in the U.S. Since 1981, NAILBA has represented independent wholesale life brokerage agencies, promoting financial security and consumer choice through the use of independent brokerage distribution.

As life insurance industry professionals, we work in the best interest of savers every day, enabling individuals and families from all economic brackets to maintain independence in the face of potential financial catastrophe and to secure their retirement. The products that our industry provides guarantee the delivery of financial security at precisely the moment it is needed, while contributing significantly to the nation's storehouse of savings and investment capital.

Seventy-five million American families rely upon the important financial security that life insurance products provide, and one out of every six dollars of long-term savings is invested in those products. Further, the life insurance industry is a key driver of the economy, serving as the largest institutional

source of bond financing for American companies in addition to creating 2.5 million jobs and devoting $5.6 trillion to investment in economic expansion.[i]

We appreciate the intent of the Department and support efforts to ensure savers' best interests are being served, but this complex rule is unworkable as written and not compatible with current business models in the life insurance industry, which currently serve millions of Americans well. It imposes unreasonable limitations, requirements, and additional costs on life insurance companies and agents, making it difficult to provide advice and financial products to retirement savers that need them the most. Average Americans will bear the burden by having significantly less access to professional financial advice and fewer options to save for retirement, particularly through lifetime income products such as annuities.

Our letter does not comment on all of the questions in the Proposal, but rather those that most directly impact our members and the families and businesses they serve. We have endeavored to provide detailed information in areas where we believe the AALU and NAILBA, based upon our members' businesses and expertise, can be most helpful in furthering the Department's understanding of the marketplace for retirement savers.

Unfortunately, more time would have been helpful to evaluate the Proposal and provide even more thorough analysis. As the Department is aware, this Rule is much larger than the 2010 proposed fiduciary rule, with amendments to current PTEs, the establishment of a new exemption, and a lengthy regulatory impact analysis that wasn't part of the previous proposal. Yet the comment period for this Proposal is 14 days shorter than in 2010, despite the increased length and complexity. It is therefore challenging to provide a comprehensive assessment regarding all of the practical effects of the Proposal and its long-term impact on American retirement savers. Given the unworkability of the Proposal, the AALU and NAILBA encourage the Department to provide stakeholders an opportunity to review the Rule after initial changes have been made—and a chance to provide further comment—to ensure the Proposal is not only compatible with business models in the life insurance industry but also serves the people whom it currently purports to serve.

The Current Regulation of Life Insurance Professionals and our Industry is Robust

Broker-dealers and their registered representatives are currently subject to strict supervisory, disclosure and consumer protection rules, and are regularly inspected for their compliance with all rules. Life insurance professionals affiliated with broker-dealers are overseen by the SEC ("Commission"), FINRA, DOL, and by state insurance departments and insurance carriers, who adopt and enforce additional standards of conduct. They must conduct a thorough 'needs analysis' and product underwriting for clients to ensure that their individual needs and goals are being met. Life insurance professionals develop personal relationships with families, as well as an extensive knowledge of their specific situation, so they can ensure that their clients are getting the right products that best fit their needs.[ii]

The regulatory regime is particularly robust when it comes to the sale of variable annuities. Broker-dealers are subject to comprehensive SEC and FINRA requirements for the recommendation and sale of securities. FINRA Rule 2111 requires a broker-dealer to have a reasonable basis to believe that each securities transaction or investment strategy involving a security recommended by a broker-dealer is "suitable" for the customer based upon very specific information that the broker-dealer is required to gather from the customer and maintain, regarding the customer's age, other investments, financial situation and needs, tax status, investment objectives, investment experience, time horizon, liquidity

needs, risk tolerance, and any other information the customer may disclose.[iii] As the SEC has acknowledged, specific suitability, disclosure, and due diligence requirements apply to certain securities products, including penny stocks, options, mutual fund share classes, debt securities and bond funds, municipal securities, hedge funds, variable insurance products, and non-traditional products, such as structured products and leveraged and inverse exchange-traded funds.[iv]

One such product-specific rule is FINRA Rule 2330, which sets forth extensive and detailed sales practice requirements for recommended purchases or exchanges of variable annuities, including: (1) detailed information that must be provided by the registered representative to the customer regarding the investment; (2) the registered representative's thorough assessment that the particular variable annuity is suitable for the customer, based upon specified factors; (3) detailed due diligence that must be performed by the registered representative regarding the customer, including age, income, financial situation and needs, investment experience, investment objectives, intended use of the annuity, investment time horizon, liquidity needs, liquid net worth, risk tolerance, tax status, and other relevant information; (4) the requirement that the registered representative who recommends the variable annuity must promptly send a complete application package to supervisory personnel; (5) the requirement that a registered principal review and determine whether to approve the recommendation (only after making and documenting his/her own suitability analysis); (6) the requirement for enhanced supervisory procedures for variable annuity sales and exchanges; (7) specific training policies; and (8) other requirements regarding the depositing of funds prior to approval and other requirements. Nothing even approaching this level of due diligence, supervision, and standard of care exists for investment advisors.

Further, insurance producers who sell variable products, which are among the most highly-regulated financial products sold to retail customers, are subject to multiple layers of regulation and oversight—by the Commission, FINRA, state securities regulators (including in each state in which they operate, which often results in oversight by multiple state securities regulators), and state insurance regulators (also in each state in which they are licensed and operate, which again results in oversight by multiple state insurance regulators). Insurance producers are subject to detailed requirements by the carriers who appoint them; robust internal supervisory procedures by the broker-dealers with which they are affiliated, and frequent and comprehensive regulatory examinations by the regulators who exercise jurisdiction over them. Indeed, the scope and level of regulation is significantly higher for variable life insurance products than for other securities under the existing standard of care.

Registered Investment Advisors Face Much Less Regulatory Scrutiny

Ironically, the Department asserts that fee-based business models are superior to commission-based models when it comes to serving clients' best interest. However, if there are gaps in regulation or imbalances in customer protection, they exist in the investment advisor regime. To begin, investment advisors with less than $100 million in assets under management—those most likely to serve smaller customers—are subject only to state regulation and inspection. Further, even the SEC admits that its inspection cycle for advisors who register is woefully inadequate, inspecting advisors once every 11 years on average—and 40% of current advisors have never received an audit.[v]

When becoming an investment advisor, there is no assessment by the SEC or any other regulator as to whether the investment advisor has a credible business, has adequate controls in place, or is qualified to advise investors concerning securities. If the advisor completes the required Form ADV and is not a felon or subject to other statutory disqualifications, then the applying individual or firm will be approved for

registration. Further, while registered representatives of broker-dealers are subject to requirements for training and continuing education, investment advisors are not. In each of these, as well as other, areas, the regulatory and oversight regime applicable to broker-dealers is far more robust in protecting investors than the investment advisor regime.

It is important to note that no standard of care is effective without a mechanism to monitor and enforce its application. Broker-dealers are inspected at least once every 18-24 months. The anticipation of a near-term examination has a deterrent effect on adverse behavior and creates a strong incentive for broker-dealers to continuously monitor and adhere to regulatory requirements, including the various disclosure requirements mentioned above.[vi]

The Commission and other regulators and self-regulatory organizations already devote the clear majority of their oversight and inspection resources to broker-dealers. Yet an investment advisor who is compensated based on assets under management can be just as likely to make an inappropriate recommendation. The inspection regime for registered advisors is far less rigorous, and we believe that few investors understand the significant disparity between the oversight of broker-dealers and the oversight of investment advisors.

Rather than adopt a one-size-fits-all rule that significantly increases compliance burdens on sectors with already robust consumer protection laws, regulators should focus efforts on areas where protection may be inadequate. The current proposal does not reflect such narrow tailoring.

The Department Failed to Analyze the Impact of Existing Regulations on Investor Understanding

The DOL has failed to show that its recent efforts to improve investor understanding in the ERISA marketplace are not working, or that such initiatives could not be successfully refined to address any remaining issues in the marketplace.

In February 2012, the DOL issued final 408(b)(2) disclosure rules requiring advisors to qualified plans to disclose to plan sponsors: 1) the services they provide, 2) whether these services are provided in a fiduciary or brokerage capacity, and 3) the fees charged for such services. This regulation was designed to improve transparency for retirement savers.

Yet despite the considerable time and effort that both the DOL put into crafting these rules and that the financial services industry expended to comply with the regulation, the Department has not demonstrated that these rules have been analyzed to determine their effectiveness or the need for additional rules.

This lack of analysis is concerning, especially considering initial indications from our Members. One prominent AALU member firm examined their business metrics from 2013—the first full business year following these final disclosure regulations—and 2014, and identified a clear trend towards advisors becoming fiduciaries and charging fees as opposed to selling services to plans as brokers for a commission. From year-end 2013 to year-end 2014, plans utilizing commission-based services grew by 26% whereas plans using fee-based services grew by 114%, and for firms whose primary business is qualified plans the trend was even more prominent with broker relationships declining 85% as fiduciary relationships increased 21%.[vii]

While this analysis is preliminary, it indicates that in the environment of enhanced disclosure under Section 408(b)(2) regulations there seems to be a move to fee-based services while at the same time some still choose to engage advisors in a brokerage capacity—especially when specialty solutions are needed that manage longevity risk and sequence of return risk.

It does not seem prudent for the Department to move forward with new sweeping regulation in the ERISA marketplace without a full examination of comparable rules recently issued in this same space. Particularly given preliminary trends observed by our respective memberships, sufficient time should be given to fully evaluate Section 408(b)(2) rules. If this regulation is found to be insufficient, then it would seem appropriate to build on it rather than enacting a complex and unworkable set of new requirements.

The DOL Analysis Fails to Prove That Financial Markets are Harming Retirement Savers

Not only has the Department failed to analyze its own framework for improving investor understanding in the retirement savings marketplace, but despite years of study the Department has not developed a definitive analysis proving there are significant problems in financial and insurance markets that are currently harming retirement savers, or even that changes to current standards of conduct would improve the products, services, and advice provided to investors.

For example, a January 2015 White House Report ("Report") asserts that conflicts of interest between broker-dealers and investors cost savers between $8 billion to $17 billion a year, and the Administration and Department have repeatedly used this statistic as a central justification for the proposed fiduciary rule. Yet that figure is not found in any academically sound study; rather, it is a number calculated by the authors using methods and assumptions unsupported by any academic literature cited by the Department.[viii]

To take but one academic study (Bergstresser et al. (2009)) cited in the Report, the paper finds that some funds sold by brokers underperform those funds that are sold directly to investors, while some funds sold by brokers over-perform directly-sold funds. The study asserts that broker-dealers cost investors between 50bps-100bps but not with respect to the whole market. Yet the authors of the Report don't take this data limitation into account when applying this study to their calculation—they simply apply the claimed losses to the entire market. The authors repeatedly use methods and assumptions that are not endorsed by academic materials supporting this Rule.

In another example, the Report relies heavily on a 2011 Government Accountability Office ("GAO") study to assert that financial professionals are recommending inappropriate rollovers into IRA's. The GAO study explains that certain advisors could earn between $6,000 and $9,000 in commissions when advising a client to rollover a qualified plan into an IRA. But that GAO report relies upon only **one** interview to make this assertion—hardly enough data to provide sound conclusions.

Further, the GAO wasn't asked to examine the benefits that IRA's provide; rather, the study specifically focused on circumstances where there may have been conflicts of interest. IRA accounts provide important benefits for retirement savers, including access to a wide variety of financial instruments for diversification and a reduced burden for investors who need to keep track of funds in 401(k) plans from a number of employers.[ix]

The Proposal Underestimates the Costs Imposed on the Financial Industry

The DOL also significantly underestimates the costs that the Proposal will impose. According to a recent U.S. Chamber of Commerce analysis, the DOL did not conduct adequate research to support their cost estimates—the Department failed to conduct sufficient experiments, sample surveys, and evaluations of comparable data that would be necessary to adequately estimate the resources for industry to comply with the Rule. Further, the DOL consistently underestimates the level of skill, training, and responsibility that would be necessary to comply with the many requirements of this Proposal, and frequently fails to provide any rationale for the assumptions and estimates presented in their supporting materials.[x]

These shortcomings result in mistakes such as the examples below:[xi]

- The six Information Collection Requests required by the Department under this Proposal are estimated by the DOL to cost industry $792 million over 10 years. Yet the U.S. Chamber of Commerce estimates that the actual costs would likely be 5 to 10 times that estimate.

- In one calculation, the Department estimates that each financial institution would require in-house attorney's to expend 60 hours of time to draft and review the required disclosures related to compliance with the Best Interest Contract Exemption ("BICE"). Yet the Department provides no data or even rationale for the 60 hour figure. As the U.S. Chamber of Commerce pointed out, the DOL could have surveyed experienced attorneys about the time required to comply with this aspect of the rule, researched the necessary time parameters, or even had its own lawyers perform the task. Yet it seems the Department just guessed at the number. These types of assertions of time parameters without supporting evidence or rationale are prevalent throughout the DOL cost analysis.

- The DOL asserts that roughly half of all brokers will utilize the Seller's Carve-Out and the BICE. Yet there is no analysis or rationale presented for this assertion, and preliminary analysis from the life insurance industry indicates that a much larger percentage of firms and advisors would have to rely on these exemptions. Greater utilization of these exemptions would of course increase the overall costs to industry. In contrast, if the industry, as is likely, decides compliance is simply too costly and unworkable, then they will simply stop serving average retirement savers. In either case, the outcome hurts consumers.

The Proposal Contains Unworkable Exemptions for Commission-Based Business Models

The DOL claims that the Proposal is business-model neutral, yet the restrictions and requirements in the Rule are not compatible with current commission-based business models which serve most Americans—as FINRA CEO Rick Ketchum has himself noted.[xii]

The AALU and NAILBA continue to support clear, concise disclosures about the roles and obligations, product offerings, and material conflicts for all financial advisors, including broker-dealers and life insurance professionals. Yet while it is important to alleviate any investor confusion in the marketplace, regulators must ensure that consumers have meaningful choice when making decisions about their investments and retirement savings.

Unfortunately, this Proposal makes it difficult, if not impossible, for many life insurance professionals to continue offering valuable services and retirement products to investors. Most distressingly, average

Americans will bear the burden of this rule by having significantly less access to professional financial advice and fewer options to save for retirement.

The Department currently provides workable exemptions for commission-based business models when determining who is a fiduciary of an employee benefit plan under ERISA. The Proposal modifies current exemptions and creates a new one, and the DOL maintains that financial professionals will still be able to offer commission-based services. Yet the new definition of fiduciary in the Proposal prevents advisors from offering a variety of important educational information, and the exemptions are completely unworkable for a number of reasons which are explained below.

Definition of Investment Advice Fiduciary

The Proposal defines an "investment advice fiduciary" as a person who provides investment advice to any specified retirement plans, their fiduciaries or participants, or any IRA owners, and who provides the following types of advice:

- Makes investment recommendations, including recommendations to take distributions, or how to invest the distributions or rollovers, from a plan or IRA;
- Makes investment management recommendations including with regard to assets to be rolled over or distributed from a plan or IRA;
- Provides asset appraisals or similar valuation statements (verbal or written) in connection with the plan's or IRA's acquisition, disposition, or exchange of such assets; or
- Recommends another person who will also receive a fee or other compensation for providing any advice described above.

In addition, the definition applies to a person that receives a fee or other form of compensation for providing advice—directly or indirectly—as well as a person who either directly or indirectly:

- Represents or acknowledges that he or she is acting as a fiduciary within the meaning of ERISA with respect to the advice provided; or
- Renders the advice per a written or verbal agreement, arrangement, or understanding that the advice is individualized or specifically directed to the recipient for consideration in making investment or management decisions with respect to plan or IRA assets.

For fiduciaries, ERISA and the Internal Revenue Code ("Code") generally classify, as a prohibited transaction, the payment of fiduciary compensation that varies based on their investment recommendations, which generally includes commission-based and revenue-sharing compensation. The DOL considered this to be "conflicted interest" compensation.

The definition of investment advice fiduciary is problematic because it will make it more difficult for life insurance producers to work with average retirement savers. Under the current five-point test for determining fiduciary status under ERISA, an advisor would be considered a fiduciary if they are providing advice or recommendations on a regular basis; pursuant to a mutual agreement, arrangement or understanding, with the plan or a plan fiduciary that the advice will serve as a primary basis for investment decisions with respect to plan assets, and that the advice will be individualized based on the particular needs of the plan.

The drastic changes made to this current test will result in less education and guidance for average retirement savers. The elimination of the "mutual understanding" metric could trigger ERISA liability unbeknownst to the provider of investment advice, even if he or she has taken adequate and reasonable steps to inform the recipient of the advice that he or she is not acting an in ERISA fiduciary capacity. Additionally, the changing of the "primary basis" standard for decisions following from investment advice creates an unreasonably low standard. Under this standard, advisors to qualified plans, plan participants, and IRA holders may be unwilling or unable to provide basic information about investment options—an outcome that would diminish participant access to professional financial services and deprive plans and individuals of much needed investment education.

In addition, the new definition expands the scope of fiduciary status under ERISA to apply to rollovers and distributions from qualified plans for the first time. In our view, which is supported by DOL guidance, distribution proceeds are no longer plan assets and therefore fall outside the framework of ERISA, which is of course designed to cover qualified retirement plan assets and participants.

Making matters worse, there is no exemption for advisors receiving commissions when it comes to rollovers and distributions. The BICE, which is discussed in detail below, "relates to the purchase, sale, and holding of certain assets."[xiii] By using an asset-based approach, life insurance providers are prevented from providing critical education to average retirement savers facing one of the most important investment decisions of their lives. When investors nearing retirement age contact insurance professionals with questions about options for their qualified plan, they will no longer be able to provide important information but will simply have to refuse to answer questions or serve those needing guidance.

For many working Americans, qualified plans are one of their only sources of retirement savings. Frequently, their money is invested in a Qualified Default Investment Alternative (QDIA), which means they have never really made investment decisions on their own. Under the Proposal, when average savers are at the most critical point of their retirement life cycle, when their account balances are typically at or near their apex, many financial professionals will be unable to provide any guidance to novice investors. The inevitable outcome for investors without access to professional advice is more lump sum withdrawals from qualified plans—a poor investment decision that will result in smaller nest eggs for average retirement savers.

PTE 84-24

The Department has asserted that advisors can still provide commission-based services and advice under this Rule through the use of exemptions. Yet in practice, this will not be the case.

Under current law, advisors selling life insurance products and annuities can use an exemption—PTE 84-24—that allows them to serve retirement savers while continuing to receive commissions and other third party payments. Unfortunately, the modifications to this exemption in the Proposal do not fit with marketplace realities, and will therefore make this exemption unusable for most life insurance producers.

First, it is unclear why it was necessary to exclude the sale of variable annuities from PTE 84-24 exemption. As documented above, the sale of variable annuities is strictly regulated by a variety of institutions at both the federal and state level. The Department has not come close to proving that the

sale of variable annuities is causing problems in the marketplace that would require such transactions to be excluded from this exemption, and PTE 84-24 should continue to apply to variable annuities.

Second, the proposal amends PTE 84-24 to add a specific definition of "insurance commission" to mean a sales commission paid by the insurance company or an affiliate to the insurance agent or broker or pension consultant for the service of effecting the purchase or sale of an insurance or annuity contract, including renewal fees and trailers. However, this new definition does not include revenue sharing payments, administrative fees or marketing payments, or payments from parties other than the insurance company or its affiliates.[xiv]

This definition is problematic because it is not consistent with the market for life insurance products. In part due to the unique structure of life insurance products and the need to make these products affordable for average savers, life insurance companies use a variety of compensation formulas that require differentiated payments, including compensation excluded from the definition of insurance commission in PTE 84-24. Further, insurance companies use a variety of different terms to describe similar activities, so it is important for the Department to provide a broad definition that will encompass common and appropriate compensation practices.

The AALU and NAILBA understand the need to ensure compensation practices are in keeping with services provided to savers, and we support efforts to address practices that are not in line with this approach. Yet this definition goes far beyond that goal, prohibiting compensation structures that allow average retirement savers to access critical retirement savings products, including lifetime income products.

Best Interest Contract Exemption ("BICE")

For life insurance producers who don't qualify for an exemption under PTE 84-24 as modified by the Proposal, there is a new exemption available referred to as the BICE. Yet like the modifications to PTE 84-24, this exemption is highly problematic.

Financial institutions seeking to rely on the BICE must ensure compliance with several requirements, including the execution of a pre-advice, pre-sale contract. This might sound reasonable in theory, but is unlikely to work in the real world. For example, when a current or prospective client contacts a life insurance professional, he or she can currently answer any questions and provide guidance about investment options, including examples of assets or asset classes. Under this proposal, before any advice is provided to a saver or specific products to help them in retirement are discussed, they would have to sign a complex legal document.

The idea that investors would sign such a contract shows a serious misunderstanding about how financial markets work—in fact, it shows confusion about how consumer markets work in general. Consumers don't simply purchase products and services when they don't understand the options they have available or the benefits that can be provided by the products and services being offered—particularly regarding items for which they need education and professional guidance.

The AALU and NAILBA memberships have extensive knowledge about the functioning of financial and insurance markets, and they have made it clear that in their experience very few people will ever sign such a contract unless an advisor can specifically talk about how they can help the client beforehand.

The idea that most average retirement savers would sign a complex contract without a full understanding of what services are being offered is not based in reality.

In addition, the BICE requires a financial institution to warrant that it has adopted written policies and procedures reasonably designed to mitigate the impact of "material conflicts of interest" with respect to the provision of investment advice to investors and to ensure that individual advisors adhere to the impartial conduct standards outlined in the rule. This warranty must state that in formulating its policies and procedures, the financial institution specifically identified material conflicts of interest and adopted measures to prevent those material conflicts of interest from violating the impartial conduct standards.

Specifically, one aspect of the BICE requires a financial institution and affiliates or related entities to warrant that they will not use quotas, appraisals, performance, bonuses or other differentiated compensation or incentives that tend to encourage individual advisors to make recommendations not in the investors' best interest ("conflicted interest compensation").

Unfortunately, this requirement is not compatible with business models in the life insurance industry. Compensation structures involving differentiated payments are both common and necessary to ensure retirement savers can obtain affordable life insurance products. Yet given the uncertain meaning of key terms that relate to compensation in the BICE, it could be difficult to warrant that the use of certain compensation structures would not constitute conflicted interest compensation. These rules are likely to require a wholesale reevaluation and restructuring of compensation practices for life insurance companies looking to rely on the BICE—in addition to the enormous burdens of establishing and administering the systems for monitoring producer activities—which will in turn make it harder for average retirement savers to access critical life insurance products.[xv]

Further, the BICE contains unnecessary and burdensome disclosure and data requirements. Some examples are provided below:

- Before executing a purchase, an advisor must give investors a chart that provides, with respect to each asset recommended, the total cost to the plan, participant or beneficiary account or IRA of investing in the asset for one-, five- and ten-years periods.

- An advisor must provide investors, within 45 days after the end of each year, a single disclosure containing a list of each asset bought or sold during the year and the purchase or sale price, a statement of the total dollar amount of all fees and expenses paid by the plan, participant or beneficiary account, or IRA with respect to each asset purchased, held or sold during the year, and a statement of the total amount of all compensation received by the advisor and financial institution directly or indirectly from any party as a result of each asset purchased, held or sold during the year.

- Financial institutions must maintain a web page that is freely accessible to the public showing the direct and indirect material compensation payable to the advisor, financial institution and any affiliate for services provided in connection with each asset (or each class of assets) that an investor is able to purchase, hold or sell through the advisor or financial institution, and that an investor has purchased, held or sold within the last 365 days.

- Financial institutions and advisors must agree to retain documents and data relating to investment recommendations regarding assets. Specifically, for a period of six years, the

financial institution must maintain records of inflows, outflows, holdings and returns that would enable it to satisfy data requests that may be made by the DOL or requests for examination by the DOL, the IRS, an investor, or any employer who maintains a plan covering its employees that engaged in a transaction under the BICE.

As shown above, the Department significantly underestimates the expense of the Proposal's provisions. These data request and recordkeeping requirements, in addition to the pre-transaction and annual disclosure requirements, will likely require the creation and maintenance of data files not currently preserved by insurance companies and insurance producers under their current systems—likely at substantial effort and costs.[xvi]

Further, these costs will fall disproportionately on smaller life insurance businesses. Many life insurance professionals, though they may be affiliated with large insurance companies, either operate or are employed by small firms. While the requirements of the BICE will place tremendous burdens on even the largest life insurance companies, it is hard to envision a scenario where small life insurance firms could bear these costs and still provide affordable services and products to average American savers.

Proprietary Products

Under the Proposal, a financial institution must generally offer, and the advisor must make available, a range of assets that is broad enough to enable the advisor to make recommendations with respect to all the asset classes reasonably necessary to serve the best interests of investors in light of their objectives, risk tolerance and specific financial circumstances.

A financial institution may offer a limited range of investment options based on whether the assets are proprietary products, generate third party payments, or for other reasons, provided: (a) the financial institution makes a specific written finding that the limitations do not prevent the advisor from providing best interest advice, (b) the compensation received for the services is reasonable and not in excess of fair market value, (c) the investor is given written notice of the limitations that may be placed on the assets the advisor may offer, and (d) the advisor notifies the investor if the advisor does not recommend a sufficiently broad range of assets to meet the investor's needs.

Whether intended or not, the clear implication of this provision of the BICE is that life insurance professionals offering proprietary products cannot work in the best interest of clients. The requirement to notify retirement savers that their needs can't be fully met is particularly troubling. Not only is such a statement factually incorrect, but requiring such a disclosure up front will discourage investors from getting critical retirement savings products, particularly lifetime income products.

Many life insurance companies and producers offer a suite of proprietary products that have consistently provided a diverse set of quality investment options, allowing retirement savers to meet their needs. Life insurance companies, which proudly provide proprietary products, stand behind the quality of their products—offering a guarantee that the benefits they offer will be delivered. Life insurance professionals have a detailed knowledge of the proprietary products they are offering, and have been trained to explain them to retirement savers. Limiting access to proprietary products could prevent retirement savers from obtaining outstanding products that best fit their situation.

In addition, the Seller's Carve-Out in the Proposal will impinge on the sale of proprietary products. Unlike the Seller's Rule in the 2010 DOL proposal, the new carve-out isn't nearly as broad—applying only

to qualified plans that have 100+ participants or at least $100 million in assets. Under the 2010 DOL proposed rule, life insurance professionals could avoid fiduciary status when it is clear that they are selling products and not offering advice. Yet given the narrow scope of the Seller's Carve-Out in the Proposal, life insurance professionals would be fiduciaries even when clearly selling products. Activities that are clearly marketing or sales in nature, where neither the advisor nor the customer intends to have a fiduciary relationship, should be permitted. A simple disclosure form making the clear the nature of the relationship should be sufficient to remove any confusion.

Increased Liability

The Proposal imposes additional liability on life insurance producers which will increase the cost of products and discourage them from serving average retirement savers–both by increasing the likelihood of legal action and by the vague nature of many terms in the Rule.

Under the BICE, the contract may not contain exculpatory provisions disclaiming or limiting the liability of the advisor or financial institution for a violation of the contract's terms, or a provision under which the plan, IRA or investor waives or qualifies its right to bring or participate in a class action or other representative action in court in a dispute with the advisor or investor. Even with the ability to use binding arbitration, it is anticipated that a new fiduciary standard will increase the frequency of legal matters associated with expanded customer litigation and arbitration.

In addition, the Proposal contains a variety of terms such as "reasonable compensation" that are not well-defined and could be interpreted in a number of ways. Attempting to meet the many requirements in the Proposal would involve highly subjective determinations, opening a producer to second-guessing and liability, often years after the sale of a product. The ultimate result of this increased liability and ill-defined terminology will be fewer, more expensive products and reduced access to financial advice.

Small Business Retirement Plans

In addition, both the definition of investment advice fiduciary and the restrictions in the BICE will make it much harder for small businesses to offer their employees—who make up almost half of all private sector workers—affordable retirement savings vehicles.

Many businesses are unable to meet the expense and administrative burden of traditional qualified plans, and rely on simpler plans such as SEP IRAs and SIMPLE IRAs to provide their employees with affordable retirement options. According to the U.S. Chamber of Commerce, these types of plans make up nearly 10% of all IRAs, covering more than 9 million households and $472 billion of retirement savings.[xvii]

Yet due to the restrictions imposed by the Proposal, advisors would be prevented from activities such as providing marketing materials containing examples of potential investments, or referencing specific investments that are available. This is troubling because many small business owners don't have the time or expertise to sift through the thousands of potential investment options that are available to them, and rely on professional advice to find quality options that will benefit their employees. Without access to affordable advice, it will be much harder for employers to provide these critical savings vehicles.

The Proposal Will Result in Reduced Choice and Access for Average Retirement Savers

The Proposal's lack of compatibility with commission-based business models, its restrictions on educational information, its lack of workable exemptions, and its onerous disclosure and data keeping requirements will result in reduced choice and access to professional financial advice for average retirement savers.

When protecting their families and saving for retirement, individuals must be able to choose what is right for them. It is essential for retirement savers to fully understand their options, and AALU and NAILBA support clear and simple disclosure that provides investors with information about the roles, obligations, product offerings, and material conflicts of financial advisors. But choice must be preserved, and average savers may prefer a commission-based relationship with an advisor over a fee-based relationship in various situations.

For example, long-term investors may prefer a single point-in-time payment over an ongoing, annual obligation that increases as does the value of their investment account. For many investors, the annual fee can add up to far more money paid than a point-in-time commission. To take away the right of consumers to choose how and when advisors are compensated for the services they provide in not in the best interest of average retirement savers.

Other markets do not restrict choice. Consumers are afforded the independence and freedom to make decisions about purchases based on their own determinants of value—including items that have a significant impact on retirement savings such as a home. Great platforms like standardized disclosures, data conformity, good faith estimates, consumer reports, and social media feedback exist to help better inform consumers. But in the end, what is preserved is consumer choice.

One concerning aspect of this Proposal is what seems to be the presumption that the cheapest products are the best products. While it is certainly important to ensure that fees being charged to retirement investors are appropriate, it is not necessarily true that a product with lower fees is superior to a product with high fees. For example, IRAs and 401(k) plans are different products and could be right or wrong for an investor depending on their objectives. The additional products and services available to IRA holders typically cost more, but that does not mean they are bad investments for every retirement saver. Many investors may choose to pay more for individualized advice and a wider variety of products that can help diversify a portfolio. Under the Proposal, judicious advice from life insurance professionals could still be considered a prohibited transaction.

Further, the restrictions on commission-based advice will significantly limit the ability of investors to access critical retirement savings products. For example, commission-based advice represent the most inexpensive option for small retail investors to receive education and access to life insurance products—in fact, it is the only compensation that makes sense for lifetime income products such as annuities. Further, qualified plans provide limited access to lifetime income products; the lack of an exemption for advice about rollovers and distributions is problematic for a number of reasons, but the reduced access to lifetime income products is particularly disturbing. Instead of the ability to secure guaranteed income in retirement, many average retirement savers will not even know about the option to access these products.

Through lifetime income products such as annuities, life insurance professionals provide the only choices consumers have for managing longevity risk and the risk of retiring just before or during a major

market crisis. Because of the restrictions in the Proposal, two of the biggest risks that cause retirement savers to run out of money in retirement are unlikely to be transferred to third parties.

This loss of access to lifetime income products is particularly troubling because Americans are increasingly unprepared for retirement. In fact, many experts feel that we are facing a retirement crisis. Americans that reach retirement age are living longer than ever, yet many Americans have very little savings at all—in fact, 40 million households have saved literally nothing for retirement.[xviii] Further, 57% of workers reported that the total value of their entire household's savings and investments—not just for retirement—was less than $25,000, and 28% had less than $1,000.[xix]

Unfortunately, the steep decline in defined benefit pensions means that guaranteed income in retirement is becoming less available and reliable, and Americans are increasingly shouldering more of the risk involved in providing for their retirement security. Survey after survey shows that retirement security is one of the top concerns for Americans.[xx] This is exactly the wrong time to be restricting access to products that provide lifetime income.

In fact, it feels like the Administration and the DOL are sending conflicting messages. Over the last few years, the Treasury Department has recognized the need to offer lifetime income streams in qualified plans, acknowledging that with the steep decline in traditional defined benefit plans many retirees have no access to guaranteed income in retirement. This realization culminated in the finalization of Treasury regulations in 2014 which promoted the use of Qualified Longevity Annuity Contracts (QLACs). Unfortunately, this Proposal directly contradicts these Treasury regulations by making it much more difficult, if not impossible, for life insurance professionals to provide these products.

Fee-Based Advisors Don't and Won't Serve Average Investors

Unfortunately, while life insurance agents and other financial professionals will be forced to significantly cut back on the products and services they can provide to average retirement savers, it is unlikely that other advisors will emerge to serve those customers. This is because registered investment advisors receiving flat fees don't typically serve small accounts—where investment returns cannot support the flat fee—but rather focus on wealthier clients who can afford the fees. In fact, even advisors touted by the DOL, such as Wealthfront, are only able to provide advice to small accounts by limiting consumer choice—in Wealthfront's case, by offering only ETF-based products.[xxi]

The marketplace reality is that under a fee-based model, providing service to small accounts costs basically the same amount as providing service to larger accounts–so it is not cost-effective to serve smaller retail investors. For example, fee-based advisors typically charge investors a flat fee of 1% of the assets in their account, so for an IRA with a $5,000 balance the advisor would get $50 in fees, not enough to cover the costs of providing round-the-clock fiduciary service and the attendant liability.

In commission-based business models, the compensation received by brokers and advisors is often determined by the amount involved in the transactions, which means smaller investors pay less than larger investors. This allows advisors that receive commissions to provide quality, affordable service to average retirement savers. Because brokers are prevented from serving investors in same capacity under the Proposal, average retirement savers will have significantly less choice of retirement products and access to professional financial advice. Thus, these one-size-fits-all rules will lead to one-size fits all advice—with equally bad results.

The United Kingdom banned commissions in 2013, and it serves as example of what the Proposal would portend if adopted. In a study on the impacts of the Department's Proposal on U.S. life insurers, Oliver Wyman found that, "While commission structures will still exist in the US, we believe that the trajectory of change is close enough to that in the UK and Australia that similar impacts will occur here. These changes will significantly affect competitive dynamics in a manner that could have profound impacts on market participants."[xxii]

In the wake of the U.K. commission ban, the largest banks have significantly raised the minimum account balances required before they will offer financial advice to investors. For example, HSBC now only provides face-to-face advice to investors with at least an $80,000 account balance, while Lloyd's requires a $160,000 balance to provide face-to-face advice. In addition, Aviva and AXA have stopped providing advice all together. In the year before the commission ban went into effect, the number of advisors serving retail accounts plunged by 23%.[xxiii]

British leaders have expressed concern about the effect of the commission ban on small savers. Martin Wheatley, the CEO of the Financial Conduct Authority, stated, "People who have…below £50,000 or £100,000 [$78,000 - $156,000 USD] are not getting the same service they were getting. That is a concern."[xxiv]

Unfortunately, experts predict that the restrictions in the Proposal will have a similar effect in the U.S.—with the end result being that average retirement savers will have significantly less choice of retirement products and access to professional financial advice.

Average Investors Have Better Investment Performance When Using Professional Advisors

The Department has chosen to focus on one area related to saving for retirement: costs. And it is certainly worthwhile to ensure that investors are best served by their professional advisors. But besides ignoring other risks faced by retirement saves such as longevity risk, the Department creates a new one: the risk that many more investors will be making investment decisions on their own.

The prospect of average retirement savers facing critical retirement savings decisions without access to professional financial advice is disturbing, because documented studies have repeatedly concluded that investors who do not have an investment professional consistently achieve lower returns than investors who use a professional advisor.

For instance, a recently released study by Oliver Wyman found that investors using professional advisors have a minimum of 25% more assets than investors without professional advisors. Additionally, investors with professional advisors have a more balanced portfolio and stay more invested in the market rather than holding cash. Further, small businesses are 50% more likely to provide retirement savings plans if they work with a financial advisor. In fact, the Wyman report explains that, "advised individuals are more sophisticated and diligent long term investors who achieve better investing outcomes."[xxv]

As another example, according to a 2014 LIMRA study, investors receive important benefits from working with professional financial advisors. Investors who work with financial advisors are more likely to contribute to qualified plans, and are more likely to contribute 10% or more to their qualified plan. In addition, investors receiving professional advice are significantly more likely to have completed key

retirement planning activities. Further, many consumers—particularly younger investors—desire additional advice and guidance about decisions related to their financial and retirement security.[xxvi]

Recommended Changes

The proposed rule needs substantial modification to ensure that it is compatible with the commission-based models used by the life insurance industry. This would include an exemption for life insurance products under PTE 84-24 that has a broad definition of insurance commissions that consistent with the workings of the marketplace, and that covers the sale of variable annuities.

In addition, the proposed rule needs a workable Seller's Carve-Out that recognizes the distinction between selling and offering advice. Advisors that make clear they are selling products rather than offering investment advice should be allowed to serve customers without becoming fiduciaries. Further, the rule needs to make clear that advisors can sell proprietary products, and remove the impediments that make it difficult for those selling proprietary products to serve their clients.

It is also important that the Rule allows advisors to continue providing education to retirement savers. The restrictions in the Proposal make it difficult for advisors to provide basic information to investors to guide them in their investment decisions. It is particularly crucial to allow advisors to provide basic education around rollovers and distributions. Such advice should be subject to a workable exemption so advisors receiving commissions can continue providing valuable information to retirement savers.

The Department Needs to Appreciate the Impacts of its Proposal and Fundamentally Rethink Its Approach

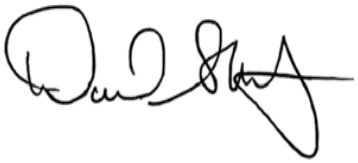
This rule will significantly limit the ability of life insurance professionals to provide educational information, professional financial advice, and critical savings products to retirement savers that need them the most.

The life insurance industry provides unique benefits—only life insurance products protect against risk of early death or a debilitating injury or illness, provide guaranteed income, and provide the flexibility to address different protection and retirement security needs at different stages of life. Further, the life insurance industry is an important component of the economy, serving as the largest institutional source of bond financing for American companies in addition to creating 2.5 million jobs and devoting $5.6 trillion to investment in economic expansion.

Unfortunately, the Department does not appear to have a firm understanding of the operational realities of the retirement savings marketplace. The Proposal makes a number of questionable assumptions that will significantly restrict the ability of average retirement savers to access professional advice and critical retirement savings products.

Given the many problems with the Proposal, we ask you to work with our industry to fundamentally revise this Rule to ensure that investors can continue to get the advice and retirement savings products they need, and to share with the public changes to the rule before making them final.

Sincerely,



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