AMERICAN RETIREMENT ASSOCIATION
Working for America's Retirement

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September 23, 2015

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

Office of Exemption Determinations
Employee Benefits Security Administration
Attn: D–11712
U.S. Department of Labor
200 Constitution Avenue NW, Suite 400
Washington DC 20210

Re: Definition of the Term "Fiduciary;" Conflict of Interest Rule – Retirement Investment Advice
RIN 1210-AB32

Re: Proposed Best Interest Contract Exemption
ZRIN 1210-ZA25

Dear Madam or Sir:

The American Retirement Association (the "ARA") thanks the Department of Labor (the "Department") for the continued time and effort put into the initiative (the "Proposal") to update and redefine fiduciary investment advice under section 3(21) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). This letter is a follow-up to ARA's original comment letter submitted on July 20, 2015 (the "July Letter").

The ARA proposed in its July Letter that the Department adopt a "Level-to-Level Exemption" that recognizes that Service Providers who are paid on a levelized basis and do not maintain the same conflicts of interest as those that the Department is seeking to address in the Best Interest Contract Exemption (the "BIC Exemption") need exemptive relief that recognizes their unique position.The BIC exemption balances the compelling need for investor protection with reasonable marketplace opportunities for Service Providers. These interests, however, are already well served in the relationship between investors and advisors who are free of conflicts. In particular, the Level-to-Level Exemption would provide relief to Service Providers who provide services to a plan or IRA in return for levelized compensation. In addition, the Level-to-Level Exemption would apply to the transfer of assets from a qualified plan to an IRA and the

subsequent investment of the assets held within the IRA as long as the Service Provider utilizes a levelized compensation model. The Level-to-Level Exemption would also apply to the transfer of assets from a tax-qualified plan to another tax-qualified plan.

The ARA, in this supplemental letter, desires to amplify and clarify two aspects of the Level-to-Level Exemption:

> 1) The Level-to-Level Exemption is critically necessary because the BIC exemption would be completely unavailable to a significant majority of advisers utilizing levelized compensation models since they have investment discretion over the accounts for which they provide services; and
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> 2) The Level-to-Level Exemption, specifically should contain language (as clarified below) designed to impose a full ERISA section 404 standard on these unconflicted advisers to ensure that, even with their levelized compensation models, they are continuing to put their clients' interests first – with the potential for enforcement action if they fail to live up to that standard.

I. The Need For the Level-to-Level Exemption

The ARA appreciates the significant efforts the Department has put into the BIC Exemption and its careful consideration of the numerous suggestions made at the August 2015 hearings. As noted in the July Letter, there are four key reasons why the Department should incorporate the Level-to-Level Exemption into its final rulemaking process. Without repeating these key reasons, the ARA wishes to again emphasize that the BIC Exemption addresses concerns about potential conflicts in a way that, with respect to advisers utilizing a levelized compensation model, is at best highly burdensome and at worst holds the potential to cripple the practices of many unconflicted advisers.

In addition, the BIC Exemption is unavailable to a Service Provider who: exercises any discretionary authority or discretionary control regarding management of the Plan or IRA, or the disposition of assets; or has any discretionary authority or responsibility in the administration of the Plan or IRA.[1] It is understandable why this exclusion is included in the BIC Exemption. In the context of the Level-to-Level Exemption, however, it is an unnecessary impediment to providing participants with the information needed to make informed decisions on rollovers, post-rollover investment decisions as well as other investment decisions for covered accounts.

Under the proposed Level-to-Level Exemption, Service Providers would be unconflicted in exercising such discretion since their compensation would remain level irrespective of the investments selected or the discretion that could be exercised. This situation is in stark contrast to the BIC Exemption which permits differential compensation.In the absence of the exclusion, differential compensation could be received as a result of the exercise of such discretion. The BIC Exemption exclusion thus makes sense to stem this potential for abuse. The Level-to-Level Exemption, with the constraints and fiduciary responsibilities proposed, is not subject to this abuse potential. To the contrary, it ensures that Service Providers, who often exercise discretion,

[1] BIC Exemption § I(c)(4).

do so in an unconflicted manner. It is for this reason that the Level-to-Level Exemption is necessary as an additional alternative to the BIC Exemption. Otherwise, a significant majority of unconflicted advisers will be completely prohibited from working with participants on rollover transactions, precluding participants from working with advisers they have grown to trust.

II. ERISA Duties of Prudence and Loyalty

As set forth in the July Letter, the proposed Level-to-Level Exemption includes a condition that Service Providers utilizing the exemption would be required to represent in the agreement with the Retirement Investor that the Service Provider will operate in accordance with ERISA's section 404 prudence standards. As described in the July Letter, the ARA agrees with the Department that a high standard of conduct should apply to Service Providers that advise and manage the assets of American workers. However, the ARA remains concerned that courts will interpret the "Best Interest Standard" included in the BIC Exemption inconsistently with ERISA's standard of care. The ARA also maintains that it is important to articulate a standard that is widely known and understood by both marketplace participants and the courts to avoid any potential confusion between the standard of care known to the industry and the standard ultimately applied by the courts.

The ARA understands that, as proposed in the July Letter, the ARA's suggested standard of care in the proffered Level-to-Level Exemption may appear to only include ERISA's duty of prudence and not ERISA's duty of loyalty (which was not intended). To address this potential concern, the ARA proposes to modify and clarify the proposed Level-to-Level Exemption in two parts:

First, Section (a)(2)(C) would be modified as follows:

> **(2) (C)** *ERISA Section 404.* The Service Provider represents within the agreement described in section (2)(B) of this section that the Service Provider will discharge his duties with respect to an IRA or a plan:
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> (1) solely in the interest of the Retirement Investor and for the exclusive purpose of (i) providing benefits to the Retirement Investor and their beneficiaries, and (ii) defraying reasonable expenses of administering the IRA or the plan.
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> (2) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

Second, Section 4(A) would be modified as follows:

(4) **(A)** *Documentation of ERISA 404*. To the extent a rollover transaction occurs, for a period of six years after the transaction, the Service Provider must maintain documentation that a rollover transaction was made in a manner consistent with ERISA section 404. Such documentation shall include a description that the recommendation satisfies the ERISA section 404 obligations of prudence and loyalty to the Retirement Investor based on information about the options obtained through reasonable diligence, and taking into account factors such as tax implications, legal ramifications, and differences in services, fees and expenses between the retirement savings alternatives.

The ARA appreciates the ongoing opportunity to work with the Department on these issues of great importance to our diverse membership of retirement marketplace participants. We would welcome the opportunity to discuss these comments further with you. Please contact Craig Hoffman, ARA General Counsel, at CHoffman@USARetirement.org with respect to any questions regarding the matters discussed herein. Thank you for your time and consideration.

Sincerely,

/s/
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Executive Director/CEO
American Retirement Association

/s/
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Executive Director, ACOPA

/s/
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