Ameriprise Financial

January 2, 2024

Submitted Electronically via www.regulations.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655

U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210
Attention: Definition of Fiduciary, PTE 2020-02 and Related Proposals – RIN-1210-AC02, RIN 1210-ZA32, RIN 1210-ZA33, and RIN 1210-ZA34

RE: Retirement Security Rule; Definition of the Term "Fiduciary;" Prohibited Transaction Exemption 2020-02 and other Related Proposals, RIN-1210-AC02, RIN 1210-ZA32, RIN 1210-ZA33, and RIN 1210-ZA34

Ameriprise Financial appreciates the opportunity to provide comments on the Department of Labor's (the "Department") proposals regarding the Definition of the Term "Investment Advice Fiduciary;" Prohibited Transaction Exemption 2020-02 ("PTE 2020-02") and other related proposals (collectively, the "Proposal").[1]

Executive Summary

We write to share our perspective as a longstanding leader in financial planning and advice in the U.S. We serve more than 2 million individual, institutional and small business clients who entrust us to manage and advise their assets and help them achieve their goals, including long-term financial security. Through our multiple businesses, we manage and administer more than $1.2 trillion, and we are a leading wealth manager with more than 10,000 financial professionals in the U.S., a global asset manager and a strong and stable insurance and annuity company. The broad capabilities and personal, long-term relationships that we develop with clients consistently result in Ameriprise being listed among the most trusted financial services firms.

[1] *Retirement Security Rule: Definition of an Investment Advice Fiduciary*, 88 Fed. Reg. 75,980 (Nov. 3, 2023); *Proposed Amendment to Prohibited Transaction Exemption 2020-02*, 88 Fed. Reg. 75,979 (Nov. 3, 2023); *Proposed Amendment to Prohibited Transaction Exemption 84-24*, 88 Fed. Reg. 76,004 (Nov. 3, 2023); *Proposed Amendment to Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, and 86-128*, 88 Fed. Reg. 76,032 (Nov. 3, 2023).

- Ameriprise Financial is a longstanding leader in financial planning and advice.
    - Our financial professionals focus on comprehensive financial planning tailored to the unique needs and goals of each investor. We currently employ or associate with more than 10,000 dually-registered financial advisors, including 4,000 CERTIFIED FINANCIAL PLANNER™ professionals.
    - We serve retail clients and provide solutions for investors with moderately sized accounts as well as those who have more substantial savings.
    - Our firm offers insurance and annuity products, which provide important protection, growth and guaranteed retirement income solutions to our clients.
    - We operate Columbia Threadneedle Investments, a leading global asset manager offering mutual funds, separate accounts, ETFs, and institutional asset management capabilities with over $580 billion in assets under management.

Our financial professionals are focused on providing comprehensive financial advice, investment education and literacy, and other services. Personal financial needs change over time as do the multiple products and solutions our financial professionals use to help clients identify and reach their individual goals. Access to personalized education, guidance and advice is essential both during the years when individuals are accumulating wealth and as they determine the best approach to converting their savings to a reliable income stream in retirement.

When we provide advisory services to a retirement investor, where we are in a relationship of trust and confidence, we proudly act as a fiduciary under the retirement laws. Our clients also benefit from educational and other services that historically have not been, and should not be, deemed to be fiduciary investment advice under the retirement laws, and we are concerned that the Department's Proposal would sweep these services into scope. Clients should be free to determine and structure the scope and level of engagement they have with their financial services provider. Forcing upon all clients an effectively one-size fits all fiduciary relationship is harmful to clients.

We strongly support the Securities and Exchange Commission's ("SEC") standards of care, including its best interest standard for broker-dealers in Regulation Best Interest ("Reg BI") and the fiduciary duty that applies to investment advisers under the Investment Advisers Act of 1940 ("Advisers Act"). The SEC's standards of care not only enhance consumer protection, but also support diverse business models and support client choice in selecting accounts and fee structures most aligned with their investment preferences and objectives. We believe the SEC struck the right balance with Regulation Best Interest, allowing our clients to maintain access to, and retain choice in, selecting valuable products and services while ensuring that recommendations are made in their best interest. Similarly, the NAIC model best interest rule helps to ensure that state-regulated insurance agents who recommend annuities will do so in the client's best interest.

In contrast, we believe the Department's Proposal will result in new barriers, including additional expenses, to serving clients and will limit access to beneficial investment products and services our clients desire and need. While we share the Department's goal to help Americans achieve retirement security, we believe the Department's Proposal will have unnecessary disruptive and adverse impacts to average Americans saving for, and in, retirement – and therefore should be withdrawn in its entirety.

Ameriprise Financial supports the comment letters filed by our trade association partners, including those by the Securities Industry and Financial Markets Association ("SIFMA"), American Council of Life Insurers ("ACLI"), the U.S. Chamber of Commerce (the "Chamber"), the Investment Company Institute ("ICI"), the American Securities Association ("ASA") and Committee of Annuity Insurers ("CAI").

As the Department considers our comments, Ameriprise Financial emphasizes the following:

- ***The Current Regulatory Framework Benefits Clients.*** Notwithstanding the Department's concerns, the current regulatory framework overseeing the financial services market is strong, robust, working to protect investors, and evolving. Reg BI has provided a strong foundation that has advanced consumer protection and meets the expectations of the American public: a standard of care that requires that financial professionals and financial services firms operate under an explicit federal obligation to act in a client's best interest, regardless of whether the account is taxable or tax-advantaged and whether recommendations are made during asset accumulation or in the spend-down phase in retirement. At the same time, state insurance laws stringently regulate the insurance industry and appropriately protect customers who purchase insurance products.

- ***The Department's Proposal Conflicts with Reg BI to the Detriment of Retirement Investors.*** Contrary to the Department's claims, the Department's Proposal conflicts in meaningful ways with Reg BI:

    - *The Department's proposed fiduciary definition captures non-fiduciary activities and will create client confusion.* Reg BI meaningfully elevates and enhances the standards that apply to broker-dealers when making recommendations to retail investors to align more closely with the Advisers Act fiduciary standard while respecting the differences between the brokerage and advisory business models. Similarly, in developing its model best interest rule, the NAIC took into account the SEC's best interest standard to avoid creating unnecessary conflicts with its model rules.[2] The

[2] To the extent the Department intends to "level the playing field" by creating a uniform federal standard for retirement advice, we urge the Department to consider that the US Congress left regulation of insurance products to the states. *See McCarran-Ferguson Act,* 15 U.S.C. § 6701 (Mar. 9, 1945). Specifically, we have concerns that the attempt to federalize the insurance markets without express Congressional authorization will only be met with litigation and result in unnecessary expense and confusion.

Department veers from Reg BI and the NAIC model rule by inappropriately labeling all services as fiduciary which will create client confusion.

- *The Department's Proposal is not business model neutral and will have a negative impact on retirement security.* The SEC's framework establishes standards for acting in the client's best interest and, importantly. maintains choice. In contrast, the Department's Proposal is not business model neutral, and like prior Department regulatory efforts, puts pressure on commission-based accounts and products to the detriment of retirement investors with modest accounts.

The Department should withdraw its Proposal rather than create a conflicting framework that only addresses tax advantaged accounts. In light of the current regulatory framework, a new layered conflicting framework introduces unnecessary and harmful uncertainty and expense. The Department's Proposal would have a chilling effect on the current retirement system, which has long served and benefited millions of Americans.

- ***Main Street's Financial Security Cannot Withstand the Department's Proposal.*** The current retirement marketplace is a success story, facilitating continued innovation and enhanced access to efficient retirement savings vehicles. Financial professionals play a critical role in helping millions of Americans take the necessary steps to save for retirement and strategically spend down their investments in retirement so that they do not outlive their nest eggs. It is vital that educational offerings and point-in-time recommendations remain available for retirement investors. This is even more important for those clients who cannot afford a managed or fee-only account, or for whom an ongoing advice relationship is not appropriate. The Department's Proposal is not business model neutral and is detrimental to the financial security of those saving for, nearing, and in retirement. It also disproportionally adversely impacts those clients who either cannot afford or choose not to pay an express advisory fee.

- ***PTE 2020-02 Requires Substantial Revisions to Be a Viable Solution.*** As currently proposed, PTE 2020-02 creates uncertainty while adding unnecessary cost and complexity for financial institutions that endeavor to provide a full range of products and services to clients. To the extent the Department does not withdraw its Proposal in its entirety, we urge the Department to eliminate operational hurdles that will confuse investors, as well as vague, risk-laden elements that do not enhance consumer protection.

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I. The Current Regulatory Framework Benefits Clients

Today, financial institutions are subject to extensive regulation and oversight and are held to high industry standards. Broker-dealers and their registered representatives are regulated by SEC and FINRA rules for registered securities products as well as by state regulators; investment advisers and their representatives are regulated by either the SEC or state securities regulators depending on their registration status; insurance companies and agents are regulated by state insurance regulations for non-registered products, including the majority of states which have adopted the NAIC model best interest rule for annuities[3]; banks are regulated by federal banking laws and/or state trust laws, and state regulators can and do regulate promoters of securities under state blue sky laws. The Internal Revenue Service is charged with regulating non-bank IRA custodians and enforcing the Internal Revenue Code's prohibited transaction regime, including any prohibited transactions that result from the failure to meet the conditions of the Department's own PTE 2020-02.

Current regulatory oversight includes rigorous registration, testing, and continuing education requirements, as well as publicly available disclosures about financial professionals' and financial institutions' background and conduct. In other words, the providers of investment products and services are heavily regulated. There are no retail clients left unprotected that the Department needs to cover.[4]

As an example, the SEC took a marked step forward in investor protection by promulgating Reg BI, with the requirement to "act in the best interest of the retail customer… without placing the financial or other interest" of the broker-dealer "ahead of the retail customer."[5] This standard shows knowledge of the market and what consumers expect. In that respect, it gets right what the Department's Proposal gets wrong by recognizing an individual's desire and need for a diverse range of products and services, and flexibility in choosing how to pay for such products and services.

II. The Department's Proposal Conflicts with Reg BI to the Detriment of Retirement Investors

The Department's Proposal, contrary to Reg BI and the Fifth Circuit Court of Appeals' holding in *Chamber of Commerce of United States of America v. United States Department of Labor*, 885 F.3d 360 (5th Cir. 2018) creates a presumption that any recommendation to a retirement investor provided by a person operating in the financial services space is fiduciary investment advice, regardless of whether it is provided in a relationship of trust and confidence.

We believe that any regulatory or legislative approach should facilitate a holistic regulatory framework, and that the SEC is the appropriate regulator to take the lead in promulgating standards

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[3] As of November 11, 2023, 40 states have adopted the NAIC best interest model for annuities. *See* Annuity Suitability & Best Interest Standard, The National Association of Insurance Commissioners (Nov. 1, 2023).

[4] If the Department is concerned with non-retail clients that are beyond the scope of Reg. BI., such as ERISA plan sponsors, trustees or other fiduciary, then addressing their obligations under ERISA Section 404 would be more targeted and an appropriate use of Department resources.

[5] *Regulation Best Interest*, 83 Fed. Reg. 21,681 (May 9, 2018).

in the brokerage and investment advisory channels. The Department's Proposal does not take this approach because it creates a new standard of care that only applies to the tax-favored portion of a retirement investor's portfolio.

The Department's Proposal would force the firm and financial professional into the strict liability prohibited transaction regime and necessitate reliance upon PTE 2020-02, which, like the Department's 2016 vacated rule, once again includes (A) the requirement to acknowledge a fiduciary standard in writing, and (B) the problematic overly broad "differential compensation" verbiage creating uncertainty as to whether common forms of compensation in the commission-based advice model can be continued. Following are just a few examples of the many inconsistencies and confusion the Proposal would create.

A. *The Department's Proposal Will Create Unnecessary Confusion for Clients Who Often Hold Both Taxable and Tax-Favored Accounts.*

The SEC, the regulator tasked by Congress to look into the standard of care owed by brokers to their clients, determined that it would not be appropriate to hold brokers to a fiduciary standard of care and instead promulgated Reg BI and Form CRS to reduce consumer confusion.

In contrast, the Department's Proposal requires a fiduciary standard, as opposed to Reg BI's best interest standard, for tax favored commission based accounts. Under the Department's fiduciary standard, the recommendation must be in the client's best interest at the time a recommendation is made, regardless of the nature of the relationship, as opposed to the SEC's fiduciary standard which applies when recommendations are made to clients who are in a relationship which provides ongoing advice and monitoring. The Department's Proposal will bring back the confusion for investors that the SEC worked hard to mitigate.

The Department's requirement to acknowledge fiduciary status in writing will also directly conflict with the SEC's required disclosures. For example, the SEC requires each firm provide clients with a straightforward, four-page client relationship summary that clearly outlines the standards of care provided for different products and services – referred to as "Form CRS." The SEC performed consumer testing to develop this form with the intent to reduce client confusion about the standard of care that is applicable to recommendations made by brokers and investment advisers.

Dually registered firms must include the following specific language in Form CRS to describe the standard of care owed to clients:

"If you are a dual registrant that prepares a single relationship summary and you provide recommendations subject to Regulation Best Interest as a broker-dealer, include (emphasis required): "***When we provide you with a recommendation as your broker-dealer or act as your investment adviser, we have to act in your best interest and not put our interest ahead of yours***." (emphasis added)[6]

[6] *See* Form CRS Instructions at p. 15.

For consistency and simplicity purposes, firms are not allowed to add extraneous language to the Form CRS – and cannot update that client summary indicating they are fiduciaries under ERISA for purposes of providing recommendations to a subset of the accounts.

Under the Department's current Proposal, firms would be in the position of disclosing that they are fiduciaries in a different document – but only under ERISA for purposes of providing recommendations to tax-advantaged accounts --inconsistent with the Form CRS firms have been providing clients. And to what purpose? Clients want, and deserve to know, that they are receiving recommendations in their best interest – which they currently *are* receiving – under Reg BI, the Advisers Act, and under states' insurance regulations for the very same accounts the Department is concerned about, as well as taxable accounts that are not in the Department's purview.

Ameriprise has long offered choice in how our clients work with us to achieve their long-term financial goals, depending on their circumstances. Our firm is dually registered as a broker-dealer and as an investment adviser, and our representatives operate under the current standards of care applicable to each. Our financial professionals are held to a fiduciary standard under the Advisers Act when ***providing recommendations*** under advisory programs or ***when providing financial-planning advice***. Our financial professionals are also subject to a best interest standard ***when providing securities and strategies involving securities (e.g., account level) recommendations*** under Reg BI and various state regulations for fixed annuities.

We support the SEC's client-centric standard of care for financial advice. The SEC's standards of care provide for the care and transparency that should be expected by clients when receiving financial advice. By covering three key pillars - 1) a best interest standard of care for broker dealers, 2) clarified existing fiduciary standards for investment advisers and 3) a client relationship summary that ensures clients understand the nature of their relationship, the standard of care owed to clients, and the services offered and their costs -- the SEC framework protects clients regardless of what type of relationship or account they have chosen.

Importantly, the SEC framework applies to both taxable and tax-advantaged (e.g., IRAs) accounts. Broadening the ERISA fiduciary standard and introducing conflicting disclosure that indicates that a firm is a fiduciary for a certain portion of the client's portfolio (including for client assets where the SEC indicates the firm is not a fiduciary) will bring about client confusion without elevating the standard of care.

B. The Department's Proposal Disfavors Commission Based Accounts Which Serve Retirement Investors with Modest Accounts.

We also support the SEC standards because they allow for the flexibility that enables clients to choose a relationship based on their individual needs, with client-centric standards that are tailored to the specific relationship chosen by the client. We have consistently advocated for effective and appropriate regulation that preserves choice in how clients receive advice, the range of solutions to which clients have access and how clients compensate their financial professionals, while enhancing consumer protection across all their investments. The Department's Proposal would restrict client choice by putting pressure on best interest recommendations to clients who prefer to pay on a transaction basis.

PTE 2020-02, which, like the Department's 2016 vacated rule, once again includes the problematic, overly broad "differential compensation" verbiage, which creates uncertainty as to whether common forms of compensation in the commission-based advice model can be continued.

Specifically, the Department proposes to add to PTE 2020-02, the following provision:

"Financial Institutions may not use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other similar actions or incentives that are intended, or that a reasonable person would conclude are likely, to result in recommendations that are not in Retirement Investors' Best Interest."[7]

The reference to "differential compensation" puts inappropriate pressure on commission-based products and services which serve investors with modest holdings or long term buy and hold objectives (i.e., the Main Street investors the Department seeks to protect). This, along with the vague reference to "or other similar actions or incentives" in PTE 2020-02 unnecessarily creates uncertainty and presents regulatory risk. It leaves firms vulnerable to the Department, deciding on a whim, to issue subregulatory guidance (e.g., FAQs) or take an enforcement position indicating that it no longer favors certain compensation structures, and upending products and services that serve clients today.

Additionally, the Department adds an example to its "best interest standard" portion of the Impartial Conduct Standards which indicates that, in choosing between two investments, the financial professional is not permitted to recommend "the one that is worse for the Retirement Investor but better or more profitable for the Investment Professional or the Financial Institution."[8] This type of example is exceedingly unhelpful and vague and should be removed. This language imposes an impossible to achieve standard, as "worse for the Retirement Investor" implies the subsequent performance of the investment, which despite the prudence of the recommendation made by the financial professional at the time it is made, is subject to the vagaries of financial markets and can only be determined later with the benefit of hindsight.

Since, as the Department had noted earlier in this section, a recommendation must be in the best interest "at the time it is provided,"[9] how would anyone know until the client eventually sells the investment, whether, in hindsight, the investment was "better" for the client or "more profitable" for the financial professional and firm?

If a financial professional recommends an investment looking to balance risk and return but, in a 5 year span, it turns out that another, riskier investment would have yielded more return for the client, was the more conservative investment recommendation "worse" for the client? Or, because that client did not have an appetite for much risk, was that more conservative investment

[7] 88 Fed. Reg. 75,987.

[8] 88 Fed. Reg. 76,000.

[9] *Id*. "The Financial Institution and Investment Professional comply with the following "Impartial Conduct Standards": (1) Investment advice is, at the time it is provided, in the Best Interest of the Retirement Investor."

recommendation still in the client's best interest?

What if a financial professional receives $30 on a recommendation to invest $1000 (3% commission) in a mutual fund but, because of unforeseen market fluctuations, the investment only increases by $20 (2%) over a one year period? Is this an example of where a recommendation was "worse" for the client but "better" for the financial professional? Should the financial professional who was doing their best for the client at the time of the recommendation, return their $30 so they do not do "better" than the client? What if, in year two, that same investment increases by $100 - is it "back" to being in the client's best interest?

In order to avoid this conundrum altogether, the Department appears to believe that every retirement investor should work with a fee only planner. On the second day of the Department's hearings on its Proposal, a representative from the National Association of Personal Financial Advisors ("NAPFA") indicated that NAPFA members are fee only planners doing business in a way that aligns with the Department's goals. The representative assured the Department that NAPFA doesn't just serve the wealthy -- they also have a pro bono program where others can get access to services too. While periodically providing services for free to those who can't otherwise afford your services is admirable, we believe that middle class investors with moderate accounts shouldn't have to rely on the possibility of charity to get access to financial guidance. We believe that a recommendation in the client's best interest, paid on an affordable commission basis, is better than hoping to be one of the lucky few to get a handout of pro bono fee only services or do without any help at all.

It is not uncommon for a fee-only financial professional to charge an annual fee of 1% or greater for more modest accounts reducing the fee as the account grows. For example, a fee-only planner may charge an annual rate of 1.2% on client assets where the account holds $500,000 or less. Under this scenario, the same $1000 investment that costs a brokerage client $30 (3% commission) **one time** would cost $12 for the first year and more than $12 for **every year** thereafter on those same assets. If those assets increase by 4% every year, in year 5, the client would pay $65 for that same investment. An advisory relationship is optimal for someone who desires ongoing advice and investment monitoring and they should have access to that offering[10]– but the person who is more of a buy and hold investor or doesn't want ongoing advice should be able to choose something different -- a commission based, transaction by transaction relationship.

Furthermore, and in direct conflict with Reg BI, the Department puts additional pressure on brokerage and commission-based products through its preamble language that suggests that financial professionals' best interest recommendations can somehow be impacted by potential firm level conflicts – even where those potential conflicts have been isolated to the firm and the financial professional does not share in, and is not otherwise influenced by, the firm compensation.[11]

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[10] Indeed, ongoing advice and monitoring are valuable services that a client might choose to purchase, which is why fiduciary investment advisers might charge 1% annually on assets under management. With a 1% fee, the client would pay $5000 annually on $500,000 – illustrating the expense of a fiduciary standard.
[11] *Id.* at 75,980.

Specifically, the Department indicated that, even if the financial professional receives the same amount of compensation regardless of what they recommend, the firm could still "directly transmit" its (already mitigated or disclosed) firm level interest into the transaction.[12] The Department's view directly conflicts with Reg BI.

In contrast to the Department's Proposal, Reg BI distinguishes between: (i) firm-level financial incentives (e.g., payments to firms from product manufacturers that support valuable client services and which financial professionals do not receive), and (ii) financial professional-level financial incentives. Under Reg BI, the SEC has made clear that "rather than requiring mitigation of all firm-level incentives, we have determined to refine our approach by generally allowing firm-level conflicts to be addressed through disclosure."[13] In this respect, potential firm level conflicts must be eliminated or disclosed and any financial professional-level conflicts must be identified and mitigated. There is no vague concept of "transmission" of potential firm level conflicts to the financial professional.[14]

In fact, the SEC deliberately avoided the Department's way of thinking because of the concern that it "may result in broker-dealers narrowing their product shelf and compensation practices which would be inconsistent with the [SEC's] stated goal."[15] And, of course, that is exactly what happened the last time the Department attempted to issue a similar exemption with the same problematic "differential compensation" language and concepts of "transmitting" firm-level conflicts to a financial professional making recommendations to retirement investors.[16]

In contrast to the Department's Proposal, the SEC's best interest standard fosters "impartial conduct" without reducing investor choice. We believe that the SEC's approach balances the need for strong consumer protections while respecting the consumer's ability to make well-informed personal decisions. The Department's Proposal, again echoing the vacated 2016 rule, wrongly assumes that consumers are not capable of choosing the firms, services and products that they want to use for their own retirement accounts.

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[12] *Id.* at 75,987.

[13] 84 Fed. Reg. 33,390. We acknowledge, however, that if a potential conflict of interest creates an incentive for the financial professional to place their interest ahead of the retail customer, then Reg. BI further requires the firm to mitigate the potential conflict of interest. *Id.* at 33,491.

[14] Rather, at a minimum, Reg. BI requires a broker-dealer to "[i]dentify and at a minimum disclose … or eliminate all conflicts of interest associated with such recommendations." *Id.* With respect to conflicts associated with a recommendation that create an incentive for a financial professional to place his or her interest ahead of the retail customer's interest, Reg. BI requires broker-dealers to "identify and mitigate" such conflicts.

[15] *Id.* at 33,390.

[16] *The DOL Fiduciary Rule: A Study on How Financial Institutions Have Responded and the Resulting Impacts on Retirement Investors*, The Securities Industry and Financial Markets Association (Aug. 9, 2017). This study found that, as of the Department's rule's first applicability date, 53% of study participants reported limiting or eliminating access to brokerage advice for smaller retirement accounts, impacting an estimated 10.2 million accounts and $900 billion in savings.

III. Main Street's Financial Security Would Be Adversely Impacted by the Department's Proposal

Given that multiple firms responded to the Department's previous similar rulemaking efforts by making the decision to stop offering financial-professional-supported commission-based accounts, we expect the Department's current Proposal would have the same effect, limiting millions of Americans' access to a financial professional and certain financial products.

The negative impact of the Department's Proposal on investors would be material. According to a study by the Hispanic Leadership Fund, a conservative estimate is that a rule like the Department's Proposal would (1) reduce the projected accumulated retirement savings of 2.7 million individuals with incomes below $100,000 by approximately $140 billion over 10 years and (2) have the most adverse effects on Blacks and Hispanics – reducing their projected accumulated IRA savings by approximately 20 percent over 10 years – contributing to an approximately 20% increase in the wealth gap attributable to IRAs for these individuals.[17]

Another report by the Chamber of Commerce showed that if a rule like the Department's Proposal is implemented, it could limit investment products for 11 million households, potentially cause up to 7 million IRA owners to lose access to investment advice altogether and reduce access and increase costs for individuals with more modest accounts.[18]

Moderate income retirement savers and retirees are worried that a rule like the Department's Proposal will harm their financial well-being[19] and they are right to be worried; the value of working with a financial professional is significant.

While target date mutual funds and accurate online education can be a part of the toolkit for retirement investors, recent market experience demonstrates how reliance on a single product, like a target date fund, can harm retirement outcomes. In times of market stress, target date investors nearing retirement have lost significant savings due to the glide path chosen by mutual fund providers – something a financial professional is able to factor into a recommendation. For those investors nearing retirement, not having a financial professional to help avoid these types of investment losses can mean locking in lower account values and reducing their standard of living.[20]

A recent study noted that while retirement anxiety is driving a need toward seeking financial guidance, over a third (34%) of non-retired investors aged 18-54 have encountered and then acted

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[17] Hispanic Leadership Fund, *Analysis of the Effects of the 2016 Department of Labor Fiduciary Regulation on Retirement Savings and Estimate of the Effects of Reinstatement*, Hispanic Leadership Fund (Nov. 8, 2021).

[18] *The Data is In: The Fiduciary Rule Will Harm Small Retirement Savers*, U.S. Chamber of Commerce, (May 25, 2017).

[19] *The Importance of Access to Financial Guidance to Moderate Income Retirement Savers* The American Council of Life Insurers (May 18, 2022). This survey examined views on access to financial professionals for those ages 55 to 70, with life savings in the lower half of financial wealth when compared to all Americans of their age. The survey found that a majority of moderate-income savers who are in or near retirement are concerned that a fiduciary-only regulation would keep them from the professional financial guidance they want and need, especially during difficult economic times.

[20] How Target-Date Funds Fared Amidst the Coronavirus Sell-off, Morningstar (Apr. 6, 2020)

upon financial information seen online or on social media that turned out to be misleading or factually incorrect.[21]

It is no wonder that despite the availability of information and tools designed to help investors, the demand for a hands-on financial professional continues to increase.[22] Over half of financial professionals already talk with clients about the risks of misinformation on social media--and these financial professionals are in an ideal position to help clients counter the online flow of investment misinformation.[23]

And retirement investors want the help of a financial professional. When asked about utilization of online resources, only 13% of retirement plan participants would find them to be "very helpful" and a significant percentage – 45% - did not find online chat useful.[24] In fact, most participants indicate that a financial professional would be their preferred source of financial education – with 57% of retirement plan participants indicating that consulting a financial professional who knew them and could guide them would be the most helpful.[25]

Furthermore, investors are highly satisfied with their hands-on financial professional - reporting high levels of confidence in their progress towards goals as a result of their financial planning engagements.[26] Investors nearing retirement often have a number of concerns and questions they need answered, and financial professionals play a vital role in helping these investors address their most pressing concerns and maintain progress towards their goals.[27]

It is noteworthy that while investors prefer a variety of compensation options, those seeking guidance prefer commission-based relationships.[28] Retirement savers and retirees who do not want, cannot afford or should not be in a managed account or fee-only relationship should not be left to fend for themselves.

Research published in the United Kingdom in July 2017 demonstrates in clear terms how the value of working with a financial professional translates into substantial gains in financial security for individual retirement savers.[29] This robust study uses a multi-year longitudinal survey of the same households to measure the value of advice. Consistent with other research, this study confirms that there is a significant positive impact on retirement savings when advice is provided. What is even more striking is that the proportionate impact is largest for those with more modest incomes – a fact that is particularly relevant when considering the need to maintain access to commission-based

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21 *A Third or More Young Investors Acted on Misleading Online Financial Advice*, PR Newswire (Dec. 4, 2023).

22 *The Evolving Future of Wealth Management*, Cerulli Associates (Nov. 30, 2023).

23 *A Third or More Young Investors Acted on Misleading Online Financial Advice*.

24 *U.S. Retirement End-Investor 2023 Personalizing the 401(k) Investor Experience*, Cerulli Associates at p. 115 (2023).

25 *Id.*

26 *The Evolving Future of Wealth Management*.

27 *Id.*

28 *Id.*

29 *The Value of Financial Advice*, The International Longevity Centre UK (July 13, 2017).

accounts.

We find it troubling that the Department's Proposal would in effect put a thumb on the scale in support of robo-advice by making it unworkable to serve clients with modest retirement accounts in the most economical way possible through a commission-based relationship. It also seems odd that the Department of Labor would promulgate a rule that seems intended to put financial professionals out of work in favor of automated advice, particularly when the studies cited above show that retirement savers prefer to receive their advice from a financial professional.

Moreover, such financial professionals provide a valuable sounding board to their clients in spending and other considerations which extend beyond retirement account recommendations, for example, referrals to skilled tax and legal advisors, saving for education expenses, proper account titling and beneficiary designations to cite just a few. Lack of such guidance will deny clients a valuable perspective on significant life considerations.

The Department's Proposal's failure to support commission-based products will also necessarily discourage companies from selling annuities - decreasing opportunities for guaranteed retirement income, guaranteed accumulation benefits, enhanced death benefits - and increasing the overall risk of Americans outliving their retirement assets.

IV. PTE 2020-02 Requires Substantial Revisions to Be a Viable Solution

While we believe it is clear that the Department's Proposal should be withdrawn in its entirety, if it is not, PTE 2020-02 must be revised to clarify and affirm that it is truly a business model-neutral solution that preserves the current accounts, products and services that help retirement investors, especially those with modest means who are most at risk to outlive their retirement assets.

In the preamble language to the current version of PTE 2020-02, the Department states that the flexibility provided under the exemption ensures that the various business models are accommodated to ensure retirement investors have full access to their preferred advice provider and method of paying for advice.[30] In keeping with this commitment, it is incumbent upon the Department to eliminate any barriers in the Proposal to continuing affordable access to products and services that underpin the retirement security of millions of Americans. As discussed above in Section II, the Department should remove all language and requirements that could discourage brokerage and other commission-based accounts and sales.

We further discuss below other important revisions that must be made for the Proposal to be a viable solution.

[30] *Prohibited Transaction Exemption 2020–02, Improving Investment Advice for Workers & Retirees*, 85 Fed. Reg. 82,798, 82,811 (Dec. 18, 2020).

A. Modification to Exemptions is Not Justified

The Department's Proposal would make all discussions with retirement investors fiduciary investment advice requiring use of an exemption and eliminates current exemptions available to permit advice incidental to brokerage – making use of PTE 2020-02 mandatory for brokerage and commission-based products. The Department has not identified any experience with any of the existing exemptions, including PTE 2020-02, that warrant its new exemption proposals.

A fiduciary relying on PTE 2020-02 must prove that it has not done something that would be against the best interests of the client – essentially being required to prove a negative. If that fiduciary is unable to do so to the Department's satisfaction, the Department reserves for itself the right to take away PTE 2020-02 for a period of 10 years. In fact, if the Department determines a financial institution (i) engaged in a pattern or practice of noncompliance with the conditions of the exemption, (ii) engaged in a systematic pattern or practice of failing to correct prohibited transactions by filing IRS Form 5330, or (iii) provided materially misleading information to the Department in connection with the conditions of the exemption – the Department can take away the exemption with the only recourse to appeal to the Department its own decision.

Through this rulemaking, the Department goes from having no enforcement authority over Title I IRAs to being able to put a broker-dealer out of business and unable to continue serving its IRA clients - with virtually no due process. This means that without any direction from Congress or any finding of harm from use of any of the prohibited transaction exemptions currently in use, the Department reserves the right to disenfranchise millions of retirement savers and retirees.

It is difficult to see how any court would permit any federal agency to exercise such power without an act of Congress. For this reason, we would respectfully ask the Department to withdraw its proposed amendments to the various prohibited transaction exemptions and to remove the ineligibility provisions from PTE 2020-02, particularly if the Department does not withdraw its expanded definition of fiduciary investment advice.

B. Allow Clients Timely Access to Their Own Money

Contrary to current law and recent court cases, the Department seeks to expand its regulatory purview over employer-sponsored retirement plans ("Plans") and IRA rollovers. And with the current Proposal, the Department proceeds across a "bridge too far" by seeking to extend proposed PTE 2020-02's new requirements relating to rollovers to many transactions that are not actually rollovers—including IRA to IRA transfers and potentially transfers from other accounts, such as 529 plans and taxable accounts, that are not subject to prohibited transaction rules under ERISA or the Code. At a minimum, the Department should define rollover to mean a rollover or transfer of assets from a "Plan" that is subject to ERISA to another account.

We do not believe the Department's additional analysis and disclosure requirements are needed or helpful where a client is considering whether to transfer assets from one IRA to another IRA, or from any account other than an ERISA-covered plan:

1. Unlike where a participant rolls assets out of a plan to an IRA, an IRA to IRA transfer generally does not change the laws that apply to the retirement investor's account. Moreover, the tax laws governing when the retirement investor can access their money and when required minimum distributions must commence remain the same. In fact, an IRA custodial transfer is non-reportable for tax purposes while a rollover is reported as a distribution on Form 1099-R and if rolled to an IRA (directly or indirectly) as a contribution on Form 5498.

2. Another key difference between a rollover and an IRA transfer is that the money can be easily moved back to the IRA account from which it came if the IRA owner changes their mind, which is not the case where money is rolled out of an ERISA-covered plan. In other words, the client can vote with their feet; a transfer is not an irrevocable decision.

As currently written, Section II(b)(5) of the proposed amendment to PTE 2020-02 regarding rollover disclosures does not apply to IRA transfers because it is limited to "rollovers" (which is not a defined term) and making a recommendation to a Plan participant as to the post-rollover investments currently held in a "Plan."[31] The term "Plan" is defined to mean an employer-sponsored retirement plan and does not cover assets held in IRA. However, the Department muddies the waters in the preamble by stating that this provision is intended to cover rollovers from an IRA to a Plan, from an IRA to another IRA, or from one type of account to another (e.g., from a commission-based account to a fee-based account).[32]

Notably, the SEC's Reg BI does not require special disclosures of the reason for a rollover or account-type recommendation and suggests that documentation of the reasons for such recommendations is not required, but may be a best practice. Despite the Department's stated intention to align its rules with Reg BI, this is another example of unnecessary divergence. As such, we urge the Department to at a minimum limit this additional requirement to recommendations with respect to accounts over which it has enforcement authority—i.e., ERISA Title I covered plans. The Department should also specifically clarify that it does not intend to cover transfers from accounts that are not subject to Title I of ERISA. Additionally, we recommend making the following changes to address concerning issues with the language in Section II(b)(5) and the preamble:

- The first clause starts with "Before engaging in a rollover…a Financial Institution and Investment Professional must…" -- Note that neither Financial Institutions nor Investment Professionals "engage in a rollover." Plan participants engage in a rollover.

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31 88 Fed. Reg. 76,000.

32 *Id.* at 75,985.

The Department should change this to state "Before accepting assets from a Plan as a result of a rollover recommended pursuant to this Exemption…"[33]

The next part of the clause "or making a recommendation to a Plan participant as to the post-rollover investment of assets currently held in a Plan," is also problematic. Here, unlike anywhere else in PTE 2020-02, disclosures would have to be provided prior to making a recommendation, instead of prior to the recommended transaction. Further, this requirement does not reflect that the Plan participant may already have independently decided to take a distribution from the Plan and roll it into a new account. In these circumstances, it makes no sense to require a comparative analysis of the Plan or to second guess the retirement investor's decision.

- The words "or account type" should be deleted in Section II(b)(5)(A). Attempting to cover IRA to IRA transfers would greatly expand the types of transactions that require the special rollover disclosures. Further, firms are not going to share their pricing and cost information so that a competing firm can perform a cost-comparison; nor are firms able to ask for this information without fear of running afoul of antitrust guardrails.

- There is no definition of "account" in the exemption leaving uncertainty as to which transactions are covered. For example, if a financial professional recommends the client take a required minimum distribution ("RMD"), or otherwise draw funds from an IRA to pay personal expenses, and move it to the client's bank account that is maintained by a firm's affiliate, that arguably would be a transfer between accounts and considered a rollover based on the language in the Department's preamble. The same example applies to a Health Savings Account, which the Proposal intends to cover. Similarly, a 529 plan account (which is not subject to Code section 4975 or ERISA) could be viewed as an "account" and recommendations to rollover assets from the 529 plan to an IRA could be viewed as a rollover recommendation subject to the disclosure requirements.

We estimate that we had over 215,000 transfers between accounts held at our firm in October of 2023 and that number does not include any withdrawals that were sent to third parties (e.g., a client's bank account). To suggest that each one of these transfers should be preceded by a rollover disclosure is unworkable and the Department does not appear to have considered the expense of this apparent requirement in its regulatory impact analysis.

Clients are not looking for firms to interject themselves into a client's decision in such a manner and we believe that this could not have been the Department's intent. However, given that the Department reserves the right to take this exemption away from firms for a pattern or practice of noncompliance, it is essential that the Department only include workable requirements and that it clearly defines those requirements through clear usage of defined terms.

We urge the Department to limit the rollover disclosure to rollovers from ERISA Title I

[33] *Id.* at 76,000.

covered plans. Such account type recommendations (to the extent they are fiduciary investment advice) should not require a rollover disclosure, but rather should be subject to the same conditions of any other (non-rollover) investment recommendation made under PTE 2020-02.

C. Discretionary Accounts Should Be Covered by PTE 2020-02

While we appreciate the Department's goal to provide a comprehensive exemption to cover non-discretionary investment recommendations and advice, we would ask that the Department expand PTE 2020-02 to cover discretionary accounts. This would simplify compliance for financial institutions without harming retirement investors given the significant protections afforded by the impartial conduct standards in the exemption.

The United States Court of Appeals for the Fifth Circuit struck down the Department's last fiduciary rule where the Department attempted to add "impartial conduct standards" to a number of different pre-existing class prohibited transaction exemptions. This time, rather than adding impartial conduct standard provisions to these exemptions, the Department has removed non-discretionary advice from the scope of each exemption. The unintended consequence of this decision is that, in many cases, the Department has created a higher standard for non-discretionary investment advice fiduciaries than for discretionary ones. Oddly enough, because the Department is proposing to allow robo-advisers to utilize PTE 2020-02, it appears that the exemption *would* apply to certain instances of discretionary advice, just not where a human is involved.

In the retail marketplace, it is common for clients to hold both discretionary advisory accounts and non-discretionary advisory or brokerage accounts, as any of these accounts may be in the client's best interest depending on the client's unique financial goals. It does not serve any purpose to require a separate set of rules for these accounts particularly when the Department would hold non-discretionary fiduciaries to the impartial conduct standards (which arguably is a higher standard than discretionary fiduciaries would be subject to after the changes proposed by the Department to PTEs 75-1, 77-4, 80-83, 83-1 and 86-128). There is a substantial risk that it will only serve to confuse IRA owners and financial professionals as they would operate under separate exemptions and standards for each type of advisory account. It will also increase compliance costs to maintain these otherwise similarly structured accounts in compliance with two separate sets of rules.

D. Rollover Education Should Not Be Curtailed

Reducing education on rollovers and making it a fiduciary act does not enhance consumer protection; it turns education into a prohibited transaction requiring exemptive relief in order for individuals to work with the financial professional of their choice. We believe creating barriers to providing guidance at times of transition is in no one's best interest and we urge the Department to withdraw its changes that curtail beneficial educational conversations on how plan proceeds could be invested should the client decide to rollover.

Providing a workable path for financial professionals to continue to provide robust rollover education is imperative. Financial professionals educate clients on the pros and cons of leaving assets in the employer's plan, rolling over to a new employer's plan (if available) or rolling over to an IRA. This education does not result in a recommendation but rather is an informative discussion regarding items the client should consider in making a decision, including the types of accounts and cost structures that a financial institution offers. Given the difficulty clients sometimes have in obtaining their employer's retirement plan information to inform a cost comparison between a plan account and IRA, or the fact that they often do not care to do so, clients nonetheless want to understand what they might invest in if they decide to rollover. If a financial professional is clear that they are not providing a rollover recommendation, it does not make sense to curtail the education given to a client regarding potential investments in an IRA at the financial professional's firm. Indeed, prospects and clients often want a "sample" of the services they might decide to buy in order to determine whether the financial professional has the knowledge and expertise worth buying. We urge the Department to remove all language in its Proposal that would turn education discussions into fiduciary investment advice.[34]

The biggest mistake plan participants make in planning for retirement is not rolling their plan assets to an IRA but cashing out their retirement plan account when they switch jobs often without fully appreciating the negative long-term consequences to their own financial wellbeing. This can devastate retirement savings. A Government Accountability Office report found that cash outs at job change lead to a loss of $74 billion annually from the retirement system,[35] a much greater impact than any alleged harm found by the Department that serves as the impetus for this, or any past, rulemaking effort.

E. A Financial Institution's Employees Should Not Be Forced to Seek Help Elsewhere

While the scope of PTE 2020-02 is broad, it excludes recommendations made if the firm providing the advice is the employer of employees covered by the firm's retirement plan. This exclusion appears to make it impossible for financial professionals to make rollover recommendations to participants of a plan sponsored by the firm or its affiliates. In other words, if, for example, an Ameriprise financial professional is working with an employee of Ameriprise who seeks advice related to their Ameriprise 401(k), the Ameriprise financial professional could not make a rollover recommendation even if they determined one would be in their client's best interest and otherwise meet all of the conditions of the exemption.

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[34] 88 Fed. Reg. 75,905. Proposed paragraph (f)(10)(i) also references recommendations "as to how securities or other investment property should be invested after the securities or other investment property are rolled over, transferred, or distributed from the plan or IRA." This proposed provision addresses an important concern of the Department that investment advice providers should not be able to avoid fiduciary responsibility for a rollover recommendation by focusing solely on the investment of assets after they are rolled over from the plan. In many or most cases, a recommendation to a plan participant or beneficiary regarding the investment of securities or other investment property after a rollover, transfer, or distribution involves an implicit recommendation to the participant or beneficiary to engage in the rollover, transfer, or distribution.

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

Many Ameriprise employees want to work, and do work, with our financial professionals. We would expect that financial professionals of every firm using PTE 2020-02 would also be serving their own employees. The practical result will be for those firms to structure their conversations with their employees as investment education regarding rollover options, rather than advice. However, under the Department's misguided logic that a recommendation regarding how to invest rolled over assets includes an implicit recommendation to roll out of the plan, this means that Ameriprise employees would also be prohibited from receiving advice about which products and strategies to use within an IRA if the employee decides to rollover to Ameriprise.

This leads to the absurd result that Ameriprise employees with assets eligible for rollover from an Ameriprise plan will have to go it alone when deciding whether to roll over their account or go to another financial services provider for advice on those assets, even where they know about and want Ameriprise services. And the same would be true for every other financial institution. For these reasons, we believe the Department should remove the employer exclusion and reconsider its position that advice on what to do with rollover assets implies a recommendation to roll assets out of a plan.[36]

F. The Implementation Period Should Be Longer than 60 Days

Even if the Department makes all of the improvements we have requested and believe are necessary to make PTE 2020-02 workable, compliance will be a major undertaking for most companies. In particular, approaches to rollover interactions and disclosures will need to be reconsidered and drafted in all business channels relying on PTE 2020-02, which we estimate will take a minimum of eighteen months.

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We appreciate the opportunity to submit a comment letter. Thank you for considering our comments.

Joseph E. Sweeney

President – Advice & Wealth Management, Products & Service Delivery

[36] We understand that this exclusion has not been changed by the proposal but believe that the Department's rationale in 2020 for including this provision was flawed.