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April 17, 2017

Submitted Electronically to [EBSA.FiduciaryRuleExamination@dol.gov](mailto:EBSA.FiduciaryRuleExamination@dol.gov)

The Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Attn: Proposed Definition of Fiduciary Regulation  
Room N-5655  
U.S. Department of Labor  
200 Constitution Avenue, N.W.  
Washington, DC 20210

**Re: RIN 1210-AB79  
Proposed Delay and Reconsideration of DOL Conflict of Interest Regulation  
("Fiduciary Rule")**

Ladies and Gentlemen:

The Transamerica companies ("Transamerica") are pleased to submit these comments regarding the Department of Labor's proposed delay and reconsideration of its regulation under the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and the Internal Revenue Code of 1986, as amended ("Code") pursuant to President Trump's Memorandum dated February 3, 2017 (the "President's Memorandum") regarding the effects of the following rules: the new definition of fiduciary, the new prohibited transaction exemptions, and the modifications of existing exemptions (collectively, the "Rule").

Transamerica markets life insurance, annuities, retirement plans, and supplemental health insurance, as well as mutual funds and related investment products. Transamerica products and services are designed to help Americans protect against financial risk, build financial security and create successful retirements. Currently, Transamerica is among the ten largest providers in the U.S. of variable annuities. Transamerica provides services and products through life insurance agents, broker-dealers, banks, wholesalers, and direct marketing channels as well as through the workplace. Transamerica has 269,776 licensed producers in the United States. In 2016, Transamerica paid \$6.9 billion in benefits to its policyholders.

Transamerica has consistently supported the spirit of the Rule that financial professionals adhere to a best interest standard when providing investment advice. Transamerica has also steadfastly maintained that the Rule is not workable in its current form and will result in fewer opportunities for Americans to access investment advice in saving for a secure retirement. To fully ensure that financial professionals providing investment advice act in the best interest of their customers without limiting access to investment advice by those who need it most, the Rule must be significantly reformed and the Department must work with the Securities & Exchange Commission and the States in implementing a harmonized, manageable, well-defined best interest standard across product lines and distribution channels.

Transamerica has reviewed and incorporates by reference the market data and suggestions for reform in the letters provided by the American Council of Life Insurers, the Financial Services Roundtable, the Insured Retirement Institute, the Securities Industry and Financial Markets Association, the U.S. Chamber of Commerce, Groom Law Group, the American Benefits Counsel and Kent Mason of Davis & Harman (the “Association Letters”). Transamerica will focus its comments on its own observations and experience consistent with the market data and in support of the recommended reforms noted in the above referenced letters.

## **EXECUTIVE SUMMARY**

Transamerica’s comments regarding the proposed delay and the request for reforms to the Rule are summarized as follows.

### **Request for longer delay**

Transamerica requests the postponement of the applicability date of the Rule to at least 120 days after the questions raised in the President’s order have been addressed and the Rule is amended or rescinded as necessary. Without the further delay, Transamerica and the industry will expend more time and resources in unnecessarily continuing to implement aspects of the Rule that may be significantly amended or withdrawn. If the delay is not extended, this will lead to even greater confusion among consumers and disproportionate further injury to non-affluent savers.

### **Flawed Cost Benefit Analysis by the Department**

The Department has consistently pointed to \$17 billion year in lost savings due to conflicted advice. As many of the Association Letters referenced herein note, the method of the Department’s calculations are significantly flawed. In addition, behavioral analysis cited in this letter notes that the primary cause of poor investment performance is not conflicted advice, but investor impulsive behavior in response to market fluctuations.

The role of a financial professional is critical in helping individuals avoid behavioral pitfalls and invest wisely for the long-term.

**Impact of the Rule based on the Criteria noted in the President's Memorandum.**

As Transamerica has worked diligently to implement the Rule over the last year, we have gained further insight and experience relative to each of these three questions which we will share in this letter. Transamerica has found that the Rule has and will likely continue to:

1. Negatively impact access to investment advice, primarily by those less affluent customers who need it most. In 2016, Transamerica annuity sales fell by approximately 50% from the previous year. This figure translates 35,000 fewer Americans that were not counseled to consider a solution that would provide them with guaranteed income in their retirement;
2. Result in market dislocations and disruptions. In order to avoid the BICE, many financial professionals have indicated that they will eliminate their commission based sales in favor of a fee for service arrangement. This approach will likely lead to increased cost for investors who follow a buy and hold method of investing and moreover, fee-for service arrangements will likely be unaffordable or simply unavailable for many middle to low income individuals; and
3. Result in increased litigation and in higher prices for consumers. By eliminating mutual understanding as a requirement of fiduciary, the Department opens the door to nearly indefensible claims by any person who, in hindsight, is upset with a recommended investment decision even when made adhering diligently to the requirements of the Rule. The costs resulting from the increase threat of litigation and liability insurance will be passed onto customers through higher prices.

**Reforms proposed by Transamerica**

Transamerica lists among its recommendations for reform in the Rule:

1. Require mutual understanding for fiduciary status under the DOL Rule. This change is required to ensure that fiduciary status is not imposed on parties merely engaging in transactions offering products and services;
2. Clearly define the line between education and advice under ERISA in favor of education;
3. The Best Interest Contract Exemption ("BICE") requirement must be rescinded or substantially revised to (a) eliminate class action litigation as the primary enforcement mechanism; (b) to eliminate the vague requirement that differential compensation be supported by neutral factors; (c) to eliminate the hundreds of

onerous documentation and compliance requirements; and (d) rationalize disclosures such that they become useful to consumers;

4. Reform PTE 84-24 to, among other matters, exempt all annuity products;
5. Include a broad sellers' exemption modeled after the Department's 2010 proposal; and
6. Affirm that the sale of proprietary products shall not in itself be considered a prohibited transaction under ERISA (or subject to a clear exemption) provided that conflicts of interest arising from such sales are disclosed.

## **FULL DISCUSSION OF POINTS IN EXECUTIVE SUMMARY**

### **Request for Longer Delay**

Further delay is needed to enable review of the Rule without further disruption to the market and harm to Individuals. Transamerica welcomes the review of the Rule against the criteria noted in the President's Memorandum. However, in order to adequately review the Rule without further market disruptions and harm to consumers, the applicability date must be extended beyond June 9th as provided in the Department's final rule effective April 7, 2017.

The Department has acknowledged that the delay of the applicability date of the Rule until June 9 does not give the Department sufficient time to complete its review. Therefore, Transamerica believes this brief delay violates the spirit of the President's order and should instead be delayed until the DOL has had adequate time to review and respond to all comments on the Rule as provided in this letter and in letters submitted by others.

Specifically Transamerica requests the postponement of each of the June 9, 2017 and January 1, 2018 applicability dates - be extended by at least 120 days after the questions raised in the President's order have been addressed and the Rule is amended or rescinded as necessary. Without the further delay, Transamerica and the industry will be in a position of expending more time and resources in unnecessarily continuing to implement aspects of the Rule that may be significantly amended or withdrawn. Confusion among consumers and injuries to non-affluent American savers will only compound in the marketplace as the access to advice continues to shift away from the non-affluent in favor of affluent clients. As a result, individuals and families who are in most need of the security provided by guaranteed lifetime income during retirement will not be able to access the counsel and education necessary to advise them in their retirement planning. Finally, the mounting additional costs associated with compliance with the Rule will inevitably be borne by retirement savers.

### **Flawed Cost Benefit Analysis by the Department**

The Department has consistently pointed to \$17 billion year in lost savings due to conflicted advice. As many of the Association Letters referenced herein note, the method of the Department's calculations are significantly flawed. In addition, the Rule's requirements are based on the premise that conflicted advice is the primary cause of diminished retirement savings and that no advice is better than conflicted advice. Dalbar's 22nd Annual Quantitative Analysis of Investor Behavior 2016 Report finds (and has consistently found) by contrast that the primary cause of poor performance is investor behavior such as liquidating investments to meet cash needs and panic selling/ manic buying in attempts to time the market. The Association Letters incorporated herein reference numerous studies finding that individuals using financial professionals in their investment and retirement planning decisions achieve significantly better results than individuals who do not use financial professionals. The role of a financial professional is critical in helping individuals avoid behavioral pitfalls and invest wisely for the long-term.

### **Criteria for Review**

The President's Memorandum poses three criteria that the Department is directed to consider in its review of the Rule:

1. Harm or likely harm to investors due to a reduction of Americans' access to certain retirement savings offerings, retirement product structures, retirement savings information, or related financial advice.
2. Dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees.
3. Increase in litigation, and an increase in the prices that investors and retirees must pay to gain access to retirement services.

### **Analysis**

The Rule's impact on the access to advice, market disruptions, and higher costs addressed in these three questions are in many cases interrelated. Therefore, Transamerica's analysis below cannot be neatly separated according to the above criteria. The harm to investors, dislocations in the industry and increase in litigation and pricing resulting from the Rule build upon and aggravate each other.

As Americans take an increasing amount of responsibility for their own retirement savings and to ensure that these savings translate into income for the full term of their retirement, the role of financial professionals is critical. However, by subjecting more

professionals to the Rule's requirements through its overly broad definition of "fiduciary," the Rule promises to reduce, and indeed, has already reduced, Americans' access to retirement savings options and advice.

*Reduced access to retirement savings options and advice: Dramatic Reduction in Sales of Variable Annuities.*

A number of significant broker-dealers through whom we distribute our products have announced plans to discontinue offering any type of commissioned sales in a qualified account including, if not specifically identifying, variable or indexed annuities.

Transamerica has offered a fee-for-service variable annuity for a number of years and has recently enhanced the design and benefits of this offering. However, many advisors are reluctant to offer such a product to less affluent clientele as: 1) the fee-for-service model somewhat conflicts with the premise of an annuity with living or death benefits which are more compatible with a buy-and-hold strategy; (which in some circumstances, may even lead to a FINRA violation under the Investment Advisory Act of 1940) and; 2) a fee-for-service pricing scheme generally does not favor mid and smaller balance accounts. This conflict could expose the broker dealer and advisor to litigation even though, on its face, the product appears to comply with the compensation model recommended in the Rule. The Q&A issued by the Department after the publication of the Rule in the Federal Register states repeatedly "...investment advice to switch from a commission-based account to an account that charges a fixed percentage of assets under management on an ongoing basis could be a prohibited transaction." (Q5)<sup>1</sup> Yet, many advisors and a number of firms are simply eliminating that pricing choice which will cause consumers to either seek advice elsewhere or be left to fend for themselves.

Transamerica began to experience significant erosion in sales of variable annuity products beginning in the 2<sup>nd</sup> half of 2015 (subsequent to the re-proposal of the Rule) which accelerated throughout 2016. This dynamic occurred as advisors began to assess the risks to their business associated with operating under the BICE and as our distribution partners began to announce changes to their advice models precipitated in reaction to their assessment. In 2016, Transamerica annuity sales fell by approximately four billion dollars which represented a 50% reduction from the previous year. This figure translates into approximately 35,000 contracts or stated differently 35,000 fewer Americans that were not counseled to consider a solution that would provide them with guaranteed income in their retirement. While it would be disingenuous for us to suggest that 100% of this erosion in sales is as a result of the promulgation of the Rule, it is also impossible to ignore the corollary between the announcement of the rule as re-proposed in 2015 (and subsequently presented in final form in 2016) and the precipitous drop-off

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<sup>1</sup> Consumer Protections for Retirement Investors – FAQ1-Q5 on Your Rights and Financial Advisers, Employee Benefits Security Administration (January 2017)

in sales of variable annuities. This repercussion is particularly stark when one considers that prior to the proposal in 2015, Transamerica had experienced eight consecutive years of year over year growth (of which, several years were double digit growth) in our variable annuity business. While the timeline of this growth pattern in variable annuity sales suggests a number of obvious conclusions, it bears pointing out that that era of growth included the extended period of the financial crisis that began in 2008; a period in time when Americans, and Baby Boomers in particular, were exposed in dramatic fashion with the risks associated with sequence of returns in relation to their proximity to retirement age.

*Onerous Compliance Costs Result in Market Disruptions involving Financial Professionals and In Higher Prices for Consumers.*

The Rule and the BICE create an elaborate set of added conditions – including extensive disclosure, warranties and other undertakings – that dramatically increase the compliance costs for both Transamerica and the financial professionals selling Transamerica products. Transamerica has expended significant time and money to date in its efforts to comply with the Rule, including diverting resources and capital from other initiatives to help people prepare for a financially secure retirement.

In order to avoid the BICE, many financial professionals have indicated that they plan to eliminate many of their commission based sales and instead default to a fee for service arrangement, this shift in compensation structure will be especially harmful to less affluent investors. This approach will likely lead to increased cost for investors who follow a buy and hold method of investing and moreover, fee-for service arrangements will likely be unaffordable or simply unavailable for many middle to low income individuals.

*Reduction in Coverage through Reduced Offering of Plans to Small Employers.* Due to the business risks involved and changes to the definition to education vs. investment advice, firms intend to limit producers who can offer small plans – making it more difficult for small businesses to find and build a relationship with a local producer. A dramatic shift to fee-for service plans can also make smaller plans more expensive. The Rule has been particularly disruptive to our small plan business in that (among other things) many firms are reducing the number of their financial professionals that engage in retirement plan business and risk being considered a fiduciary. In addition, some financial professionals have indicated to us that they will be opting out of this line of business of their own volition due to their inability to continue to provide, in a cost effective manner, advice that small business owners need in setting up a retirement plan. As a result of these forces at work, we face the prospect of being required to finding ways to accommodate a significant number of small plans that no longer have an advisor.

*Limitation of Choice Harms Less Affluent Customers.* A number of significant broker dealers through whom Transamerica distributes its products have already made public their plans to cease offering commission-based products for qualified accounts. Further, they have begun to segregate customers who do not meet their minimum balance requirements for their fee-based services and have communicated to customers their plan to offer only self-service and robo-asset allocation options... unless the customer is able (and chooses to) meet the minimum balances necessary to qualify for a relationship with an advisor. Finally, we have also been advised by many distributors of their intention (or in some cases of the outcome) to reduce their number of product offerings. Transamerica has specifically witnessing reductions in availability of mutual fund, retirement plan and variable annuity products. This activity has directly impacted our business as we have had several distributors decide to reduce the number of Transamerica mutual fund offerings and one significant distributor advised us in Q3 of 2015 that it would no longer make our variable annuity available for purchase in their system. This particular distributor accounted for \$202 Million in sales for Transamerica in 2014 followed by \$89 Million in sales for 2015.

We have ourselves reduced our own product offerings in response to the challenges of the Rule. To avoid the risk of fiduciary status, increased compliance costs and litigation, we have decided to discontinue one of our very popular products which provided allocation suggestions for no additional fee to plan participants. Transamerica intends to replace that product with a more robust fee-based investment advice product we developed for plan participants. Based on experience, we anticipate that many plan sponsors will be unwilling to accept the fee associated with this offering for the benefit of all participants and as a consequence, individual participants will need to opt in to the program and accept the fee. Regrettably, the well-established precepts of behavioral finance indicate that left to their own devices and without professional counsel, individuals generally do not attach appropriate relative value to the cost of investment advice<sup>2</sup> and will therefore, disproportionately choose not elect into this product offering. As a consequence, many more plan participants will be put in the position of making allocation allotments without the benefit of professional counsel or programmed guidance.

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<sup>2</sup> Behavioral Finance: The outgrowth of an unlikely collaboration of economists and psychologists, studies how people make decisions. Daniel Kahneman, a psychologist won the Nobel Prize in economics on 2002 for his contribution in this domain.

The result of this change in product offerings is that programmed guidance and the consumer benefits associated thereto will only be available to plans and/or plan participants for an additional fee.

*Less Education to Plan Participants.* To avoid the risk that education will be considered advice under the Rule, Transamerica has adopted a more conservative approach toward interactions between our client service representatives and plan participants.

Accordingly, we have expended considerable time and resources to train staff and to put in place guardrails designed to prevent our representatives from the unintentional adoption of the role of investment fiduciary with plan participants. The scaling back of the amount of information that our representatives will be able to offer means we will be less instructive when responding to customer inquiries to avoid tripping fiduciary status. This modification to our service model is likely to result in increased leakage and more cash distributions rather than rollovers to products providing retirement income.

*Change to Retail Brokerage to Minimize Litigation Exposure and Resulting Market Disruption.* To minimize the risk of lawsuits under the BICE, Transamerica has taken drastic steps to control or minimize litigation exposure by undertaking a number of precautions (some drastic) that will allow our advisors to continue to serve the public but on a more limited scale with significant restraints.

Transamerica has determined the business model that most fully complies with the Rule is one that will allow retirement investors the option to choose between products that are offered on a fee-for-service basis or a commission basis (exercising BICE option). To accommodate this decision, Transamerica's retail brokerage firm has reduced by 75% the number of financial professionals authorized to provide investment advice under the BICE. This alteration to our advice model will likely have a chilling effect on many of our retail clients who have built a trusted relationship with an investment professional who may no longer be able to service their accounts. Clients may also need to travel further to meet with a new advisor and have a longer wait for setting up appointments to meet face to face with an advisor. These factors will have a negative effect on Retirement savings and preparedness.

*Increase in Litigation Risk Results in Less Choice and Higher Prices for Consumers.*

An increase in litigation is an obvious consequence of the Rule and is encouraged by the Department.<sup>3</sup>The Rule inappropriately uses private litigation as the enforcement mechanism of the BICE. Reliance on state courts to enforce the federal statute and rule

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<sup>3</sup> FAQ 10, Consumer Protections for Retirement Investors – FAQs on Your Rights and Financial Advisers, Employee Benefits Security Administration (January 2017)

is misconceived and will likely result in widely disparate interpretations of the Rule across the country. In addition, by relying on litigation as the manner of enforcing the Rule, the Department has in effect increased the cost of advice further. Plaintiff attorneys will seek consumers whose investments have lost value to serve as plaintiffs in a class action lawsuit on a contingency fee arrangement against Transamerica and the financial professionals selling the Transamerica products in the hopes of a significant award. This award would be owed to plaintiff's attorney even if the suit is settled for reasons unrelated to any breach of the Rule's requirements, such as the desire to avoid potentially millions of dollars in discovery and unwarranted unfavorable publicity.

The threat of litigation is real. By eliminating mutual understanding as a requirement of fiduciary, the Department opens the door to nearly indefensible claims by any person who, in hindsight, is upset with a recommended investment decision even when made adhering diligently to the requirements of the Rule. Through the BICE, the Department has created a system where confidential client conversations, internal business decisions, and possibly private thoughts and logic used in the investment process and adhering to the "best interest" standard and made on a daily basis in good faith need to be documented in a manner that will make such documents the primary exhibits presented by a plaintiffs' lawyer in a class action. The website requirement of the BICE provides a litigation roadmap to plaintiff lawyers.

The likely exposure to increased litigation and its inherent costs will suppress innovation and increase pricing for investment advice from manufacturers to advisers and consumers. The costs resulting from the increase threat of litigation and liability insurance will be passed onto customers through higher prices. Transamerica factors the risk of litigation into decisions about our products. Morningstar recently estimated the likely annual cost of litigation to retirement services conservatively at \$70 to \$150 million. According to the National Chamber of Commerce, it is expected that Errors and Omissions (E&O) insurance premiums could rise to as high as \$10,000 per advisor per year. These costs will necessitate evaluating client accounts and leaving advisors with no choice but to eliminate clients with small accounts. There is as yet no consensus as to what should be considered a viable minimal account value but regardless of the balance, litigation, or the increased threat of litigation, will cause those that may need retirement advice most will be left with nowhere to turn.

While the financial professionals through which Transamerica sells its products will have the direct interaction with the customer and presumably will be the ones responsible to defend their actions in court, it is difficult to wall off the litigation risk at the financial professional level. In such actions, Transamerica as well as its independent producers will be sued for no reason other than a belief that Transamerica has the "deep pockets."

To mitigate the litigation risk, Transamerica will require its lawyers, and/or outside counsel, experienced in class action litigation to review and approve the procedures, documentation, licensing requirements, training, and indirectly the decisions, made by its independent producers. Such reviews will significantly increase the costs associated with the advice that is given, will limit the investment choices that are allowed, and ultimately diminish the efficacy of the products and services that can be afforded to assist individuals seeking investment advice in enhancing the value of their retirement savings.

### **Specific Reforms to Be Considered**

In particular, Transamerica urges the Department to consider the following reforms as essential to implementing a workable rule and best interest standard:

7. Require mutual understanding for fiduciary status under the DOL Rule. This change is required to ensure that fiduciary status is not imposed on parties merely engaging in transactions offering products and services;
8. Clearly define the line between education and advice under ERISA in favor of education;
9. The Best Interest Contract Exemption (“BICE”) requirement must be rescinded or substantially revised to (a) eliminate class action litigation as the primary enforcement mechanism; (b) to eliminate the vague requirement that differential compensation be supported by neutral factors; (c) to eliminate the hundreds of onerous documentation and compliance requirements; and (d) rationalize disclosures such that they become useful to consumers;
10. Reform PTE 84-24 to, among other matters, exempt all annuity products;
11. Include a broad sellers’ exemption modeled after the Department’s 2010 proposal; and
12. Affirm that the sale of proprietary products shall not in itself be considered a prohibited transaction under ERISA (or subject to a clear exemption) provided that conflicts of interest arising from such sales are disclosed.

Transamerica continues to support the spirit of the Rule and a uniform best interest standard for financial professionals providing advice for all products across all account types. However, for the reasons detailed in this letter, the Rule fails to achieve its goals. Transamerica recommends the Department substantially rescind or revise the Rule as advocated in this letter, and work with the Securities and Exchange Commission and the States to ensure that a harmonized best interest standard is implemented for financial professionals providing investment advice across distribution channels and product lines.

Sincerely,

A handwritten signature in black ink, appearing to read "Dave Paulsen", written over a light gray rectangular background.

Dave Paulsen  
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