TRANSAMERICA®

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August 4, 2017

Office of Exemption Determinations
Employee Benefits Security Administration
Attn: D-11933
Suite 400
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

RE: RIN 1210-AB82 – Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions

Ladies and Gentlemen:

The Transamerica companies ("Transamerica")[1] are pleased to provide comments on the Department of Labor's ("Department") "Request for Information ("RFI") Regarding the Rule and Prohibited Transaction Exemptions" (collectively, the "Rule") published in the Federal Register on July 6, 2017 and referenced above.

Transamerica has consistently supported and continues to support a best interest standard, transparency, and treating its customers fairly. As such, we have always operated and continue to operate within the spirit of what was intended by the Rule. Transamerica also consistently maintained that the Rule is significantly flawed and results in harm to the very consumers that the Rule purports to protect. The President's memorandum dated February 3, 2017 directing a study of the negative effects of the Rule on the American investor is well founded and deserves full consideration. Unlike other regulatory projects, this and other letters document the real time negative effect that the Rule has had on retirement savings and consumers.

[1] 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 meaningful retirements. Currently, Transamerica is among the ten largest distributors 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 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 and Kent Mason of Davis & Harman (the "Association Letters"). Transamerica also incorporates herein by reference its comment letters dated April 17, 2017 and July 21, 2017 to the Proposed Delay and Reconsideration of the Rule and this RFI, respectively (the "Transamerica Letters"). Many of Transamerica's comments and data provided in this letter reiterate recommendations made in the Transamerica Letters and are consistent with the market data and the recommended reforms noted in the Association Letters.

Summary

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 ("SEC") and the States in implementing a harmonized, manageable, well-defined best interest standard for both retirement savers and retail investors.

Transamerica reaffirms its request, by letter dated July 21, 2017, that the Department extend the January 1, 2018 applicability date of certain prohibited transaction exemptions for a meaningful period following promulgation of changes to the Rule pursuant to this RFI. Failure to extend the January 1 applicability date will result in companies such as Transamerica continuing to incur costs and business model changes to prepare for and implement a regulatory regime that might differ materially from the regime that results from the Rule in effect today, as well as continued disruption, increased price and/or loss of services and loss of choice for retirement savers. Transamerica will need time to balance any and all changes to the Rule resulting from full and thorough review resulting from the RFI process.

In this letter, Transamerica has suggested a number of needed reforms to the Rule to balance the interests of consumers in receiving investment advice that is in their best interest without limiting choice of or access to retirement savings products and services, including:

- Redefine "fiduciary" to require mutual understanding for fiduciary status;
- Make permanent the Amended PTE 84-24 in effect during the transition period application to advisers selling all insurance products and annuities: fixed, variable and indexed;
- Simplify and streamline the Amended PTE 84-24 disclosure requirements and make such disclosures consistent with the BIC Exemption disclosures and other exemptions to the Rule;
- Eliminate the vague BIC Exemption requirement that differential compensation be supported by neutral factors;
- Remove the contract requirement of the BIC Exemption which in turn will eliminate class action litigation as the primary enforcement mechanism;
- Add a Seller's exception;

- Add an exemption for regulated institutions subject to a consistent best interest standard under State law or SEC/FINRA regulation;
- Provide for an expanded grandfather exemption that would facilitate ongoing advice with respect to investments that predate the Rule; and
- Ensure that the Rule does not inadvertently favor any particular products.

General Discussion

Transamerica's comments below, although referencing specific numbered questions in the RFI, are provided as general comments applicable to various aspects of the Rule.

[3]. The Rule and PTEs do not appropriately balance the interests of consumers in receiving broad-based investment advice while protecting them from conflicts of interest and result in less choice and access to investment advice by the consumers the Rule purports to protect.

There are a number of imbalances in the Rule that do not result in increased consumer protection:

- The overly expansive definition of "fiduciary" in the Rule;
- Exceedingly complex disclosure requirements of the Best Interest Contract ("BIC") Exemption;
- Exemptions weighted to favor certain products;
- The litigation risk assumed by advisers;
- The lack of a Seller's exception; and
- Differing standards for retirement and retail products and services provided by the same financial services profession.

All serve to add confusion on the part of the consumer and result in loss of choice, as well as increased cost of retirement services and products that remain available. This result is not in the best interest of consumers.

The detrimental impact of the Rule to the very consumer it purports to protect is not theoretical. Both the industry and the public have experienced the negative impact of the Rule in real time, as documented by this and the Association Letters submitted to the Department pursuant to this RFI as well as to the Proposed Delay and Reconsideration of the Rule[2] . As an example, in its comment letter dated April 17, 2017, Transamerica noted a significant erosion in sales of variable annuity products beginning in the 2nd half of 2015 (subsequent to the re-proposal of the Rule) which accelerated throughout 2016. This dynamic occurred as advisers began to assess the risks to their business associated with operating under the BIC Exemption and as its 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

[2] RIN 1210-AB79 Proposed Delay and Reconsideration of DOL Conflict of Interest Regulation pursuant to President Trump's Memorandum dated February 3, 2017, as published in the Federal Register on March 2, 2017 (82 FR12319).

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 in sales of variable annuities. In addition, since the partial implementation of the Rule on June 9 of this year, Transamerica received dissociation requests for eighty-four annuity contracts (orphaned by the advisor and firm). The reason provided for the action on each request was the DOL Rule. By comparison, in 2016 Transamerica received dissociation notices for three accounts, none of which listed the DOL Rule as a reason for the request. These repercussions are particularly stark when one considers that prior to the proposal in 2015, Transamerica had experienced eight consecutive years of year over year double digit growth in its 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. Finally, Transamerica's experience in this regard is entirely consistent with that of the industry.

[4] Substantial changes are recommended to be made to the Rule to reduce confusion to the consumer and appropriately balance the goal of protecting consumers from receiving conflicted advice while continuing to efficiently permitting them to access investment advice needed to help them achieve their retirement savings goals.

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

- Require mutual understanding for fiduciary status under the DOL Rule. This change is required to ensure that fiduciary status, and the higher cost that comes with it, is not imposed when there is no intention on either side;
- Clearly define the line between education and advice under ERISA in favor of education;
- Rescind or substantially revise the BIC Exemption to (a) eliminate class action litigation as the primary enforcement mechanism; (b) eliminate the vague requirement that differential compensation be supported by neutral factors; (c) eliminate the onerous documentation and compliance requirements; and (d) rationalize and/or simplify disclosures such that they become useful to consumers;
- Make permanent and further modify the PTE 84-24, as in effect during the Transition Period Pursuant to the Final Rule effective April 10, 2017[3] (the "Amended PTE 84-24")

[3] Rin 1210-AB79: Final Rule; Extension of Applicability Date effective April 10, 2017 (82 FR 16902)

to apply to all insurance products and annuities (fixed, variable and indexed) and require disclosure that conforms with the streamlined BIC Exemption disclosure requirements;

- Revise the definition of Best Interest in the BIC Exemption and the Amended PTE 84-24, as well as in other exemptions to the Rule, to clarify that advisors and financial professionals must always put their clients' interests first, but are not required to completely disregard their own legitimate business interests which are disclosed;
- Include a broad Sellers' Exemption modeled after the Department's 2010 proposal;
- 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;
- Provide an exemption for regulated institutions subject to a consistent best interest standard under State law or SEC/ FINRA regulation; and
- Provide for a grandfather provision that would facilitate ongoing advice with respect to investments that predated the Rule, and to enable advisers to continue to receive compensation for those investments.

[5]. The BIC exemption is overly complex and works to disincentivize any advice rather than provide unconflicted advice. Enforcement mechanisms of the DOL, when combined with those of the NAIC, SEC and FINRA, are sufficient to enforce the Best Interest Standard and protect consumers.

The BIC exemption's contract and warranty requirements are not necessary to incentivize compliance with the Best Interest Standard and should be eliminated. The Department, as well as Treasury/IRS, SEC/FINRA, and the state insurance and securities departments, already have adequate and effective tools at their disposal to enforce the Best Interest Standard and protect consumers.

The complexity and costs of complying with the BIC Exemption actually works as a disincentive to its use for several reasons:

- In order to receive investment advice under the BIC exemption, the consumer would be required to sign a lengthy contract with detailed representations and warranties. Consumers who are looking for guidance are likely to be intimidated by the request. In light of the substantial IRS penalties for prohibited transactions, there is no need for a contract that simply adds costs and potential liabilities.

- The nature of the required warranties and contract requirement of the BIC Exemption dramatically increases the compliance costs for both Transamerica and the financial professionals selling Transamerica products without added benefit to the consumer. This cost will ultimately be passed onto the consumer.

- The BIC Exemption is overly prescriptive and risky for financial professionals to follow. Financial professionals have indicated or shown that they are likely to eliminate their commission based sales in favor of a fee for service arrangement to avoid the BIC Exemption. Moving to a fee based account will likely be more costly for the consumer who is not an active trader. This approach is apt to lead to increased costs for investors who follow a buy and hold method of investing and moreover, fee-for-service arrangements have a tendency to be unaffordable or will be simply unavailable for many middle to low income individuals. In fact, we have already seen several large distributors raise their fee-based account minimums. These increases are typically accompanied by communications informing affected customers with insufficient balances they will be required to move to either a self-directed account or robo-advised platform.

- The threat of litigation does not act as an enforcement mechanism, but rather is a disincentive to using the BIC Exemption. By relying on litigation as the manner of enforcing the Rule, the Department has in effect exponentially increased the cost of advice and the risk of providing that advice regardless of whether the financial professional has fully complied with the exemption. Plaintiff attorneys will seek consumers after a market downturn, knowing that the extremely vague standards in the BIC Exemption can always be used as the basis for a class action lawsuit against Transamerica and our financial professionals selling the Transamerica products with the lawsuit filed in the hopes of a significant award. The requirements of the BIC Exemption provide a roadmap to plaintiff's attorneys in such lawsuits. Any award would be owed to the plaintiffs' 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 likely exposure to increased litigation and its inherent costs will suppress innovation, limit consumer choice, and increase pricing for investment advice from advisers to consumers. The costs resulting from the increased threat of litigation and liability insurance will be passed onto customers through higher prices. Transamerica factors the risk of litigation into decisions about its 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 adviser per year.

In addition to the above, reliance on courts to enforce the Rule will result in more confusion for both financial professionals and consumers as it will likely result in widely disparate interpretations of the Rule and uneven enforcement across the country.

7 & 9 Innovation in Products and Services should be supported by the Rule; the Rule should not favor one product over the other

A Rule that is principle based rather than prescriptive will encourage innovation in products and services that best meet consumer needs. While innovations such as clean shares are positive

developments, streamlined exemptions for a particular class of investments could have the unintended consequence of compelling institutions to focus on "favored" investments which may not always be in the best interest of the consumer. The Department should not decide which specific products are appropriate for and in the best interest of retirement savers. This creates the effect of the Department acting as an Advisor rather than Regulator. By creating this specific exemption precedent it would follow that every product innovation that may comport to the Department's opinion of a valued innovation would require its own exemption. This would lead to an unwieldy list of exemptions requiring constant updating to systems, education, and procedures. This would also give rise to an environment rife with opportunity for errors and harm to consumers. Instead, the Department should establish guiding principles, such as those associated with the impartial conduct standard, which would afford consumers substantial protections against improper conduct resulting from a conflict of interest while not artificially limiting choice or favoring one product over another.

In addition, care should be taken to ensure that the Department does not assert its jurisdiction over products subject to another regulatory authority. Products, such as clean shares, are regulated by the SEC, and may be used in retirement accounts over which the Department has jurisdiction. This is yet another reason why coordination by the Department with both the SEC and, with respect to annuities, the States, on a harmonized best interest standard, is critical and in the best interest of consumers.

8. PTE 84-24, as in effect during the Transition Period Pursuant to the Final Rule effective April 10, 2017[4] should be modified to require disclosure that conform to the streamlined BIC Exemption disclosure requirements and adopted for both Fixed and Variable Annuities

All annuity products should be subject to a revised PTE 84-24, consistent with that in effect for the transition period.

The limitation of the PTE 84-24 in the Rule promulgated in 2016 had a considerable negative impact on the access of consumers to annuity products as noted elsewhere in this letter. A number of significant broker-dealers through whom Transamerica distributes its 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 advisers are reluctant to offer such a product to less affluent clientele because:

- A 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 breach of the Investment Advisers Act of 1940) and;

[4] Rin 1210-AB79: Final Rule; Extension of Applicability Date effective April 10, 2017 (82 FR 16902)

- A fee-for service pricing scheme generally does not economically benefit customers who maintain average or smaller balance accounts; the very customers the Rule is intended to protect. These conflicts 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.

There is no basis for limiting the types of compensation for which PTE 84-24 can be used. Only insurance commissions would be eligible for PTE 84-24.

[10 & 11] Streamlined Exemptions such as a Seller's Exemption and an Exemption for Regulated Entities should be added to the Rule.

Sellers Exemption
There must be an exception for clearly disclosed selling activity. The 2010 Proposal contained such a provision and it reflected the common sense notion that when a salesperson clearly discloses that he is selling, not advising in the recipient's best interest, that recipient is able to understand the difference between sales and fiduciary advice.

Exemption for Regulated Entities complying with State and/or SEC/FINRA Best Interest Standard.
Transamerica also supports the development of a streamlined exemption for advisers subject to appropriate and workable best interest standards adopted by other regulators. Transamerica urges the Department to work with t the SEC, FINRA and the National Association of Insurance Commissioners on a harmonized workable best interest standard that is applicable to transactions involving retirement assets and retail investments. An exemption based on compliance with a single, consistent best interest standard would be in the best interest of consumers who already struggle to understand the various standards under various rules, and would avoid the problem of a financial professional potentially having to comply with the Department Rule and conflicting (or at least materially additional) duties and obligations under another regulatory regime.

13. Model Disclosure Would Not Be Helpful and would cause more burden to the advisor and likely more confusion on the part of the Consumer.

As noted previously, the disclosure requirements under the BIC Exemption are exceedingly complex, add to confusion on the part of the consumer and require massive and expensive technology redesign to support. This is due in large part to the fact that the Rule has required substantial change in business models and specific representations and warranties that differ from disclosures already provided.

Transamerica and its agents and brokers through which it sells its products and services have instituted a number of policies and procedures, apart from those required by the Rule, which have been imposed by the State Insurance Commissioners and the SEC/FINRA, adhering to a duty of fair and accurate disclosure, as well as transparency and fair dealing.

A streamlined exemption that allows for similar disclosures provided by primary regulators to be combined with the disclosures required by the Rule would be helpful. In addition, it would be helpful to revise disclosures of the various exemptions to conform to each other. However, by providing model disclosures, the Department will likely create disclosures which conflict with disclosures Transamerica and its agents and brokers already provide, or, at a minimum, would be duplicative to those disclosures.

14. Recommendations to make or increase contributions to a plan or IRA should not be considered investment advice

As the nation faces a significant shortfall in personal retirement savings, recommendations to make or increase retirement savings should be encouraged. Recommendations to make or increase contributions should not be considered investment advice.

15. Grandfathering provision applicable to the BIC Exemption should be substantially changed.

The grandfathering provision applicable to the BIC Exemption should be substantially changed to ensure that consumers can keep their current advisor. The current grandfathering provision will effectively require advisers to ignore the ongoing needs of their clients in order to take advantage of the grandfathering relief provided by the Department. This would be contrary to the overall goal of requiring firms and advisers to always act in the best interest of their clients. It would also violate FINRA's regulatory expectations that advisers periodically touch base with their clients to see if their needs or objectives have changed and if their holdings remain appropriate.

Transamerica recommends that the grandfather provision be revised to permit the adviser to simply isolate the assets in the account as of the effective date, allow no additional contributions, but allow the adviser to make suggestions and recommendations regarding grandfathered amounts, including earnings received thereon, without becoming subject to the BIC Exemption.

16. The Amended PTE 84-24 should be made permanent; a special exemption insurance intermediaries under the BIC Exemption is not needed and is not workable.

Transamerica urges the Department to make the Amended PTE 84-24 permanent in that it would apply to advisers selling all insurance products and annuities: fixed, variable and indexed. All of these annuities share the primary attribute of providing for guaranteed lifetime income. They are also sold by financial professionals licensed as insurance agents under state law, and in the case of variable annuities, registered with SEC as broker dealers as well. The consumer wishing to be advised regarding products providing lifetime income guarantees should not be subjected to conflicting disclosures and rules based on divergent exemptions depending on whether the annuity is fixed or variable.

Conclusion

Transamerica applauds the Department and its consideration of input submitted pursuant to this RFI with the goal of making changes to the Rule to ensure that it achieves the goal of providing best interest standard without harming the consumers that it purports to protect.

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 and Association Letters, the Rule fails to achieve its goals. Transamerica recommends the Department take the time to review and substantially revise the Rule and to delay the January 1, 2018 applicability date for a reasonable time following such changes. We believe that it is critical to work with the SEC 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.

We appreciate your consideration of these comments.

Sincerely,

Dave Paulsen
Executive Vice President, Chief Distribution Officer
Transamerica