



July 20, 2015

FILED ELECTRONICALLY (Email to: *e-ORI@dol.gov*; *e-OED@dol.gov*)

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

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

Re: RIN 1210-AB32: Definition of the Term “Fiduciary”;
Conflict of Interest Rule—Retirement Investment Advice

ZRIN: 1210-ZA25: Proposed Best Interest Contract Exemption and
Proposed Amendments and Partial Revocation of Certain Exemptions

Dear Sir or Madam:

The Transamerica companies (“Transamerica”) appreciate the opportunity to comment and provide their views on the Department of Labor’s (the “Department” or “DOL”) proposed regulation (the “Proposed Fiduciary Rule”) defining who is a “fiduciary” of an employee benefit plan under the Employee Retirement Income Security Act of 1974 (ERISA), or of a plan (including an individual retirement account (IRA)) under section 4975 of the Internal Revenue Code of 1986 (Code), as a result of giving investment advice to a plan or its participants or beneficiaries. (The Proposed Fiduciary Rule also withdraws a prior proposed regulation published in 2010 (the “2010 Proposal”) concerning this same subject matter.) We also take this opportunity, through this letter, to comment and provide our views on the Department’s proposed exemption, referred to as the Best Interest Contract Exemption (the “BIC Exemption” or “BICE”), as well as proposed amendments and/or revocations of certain existing exemptions, from the prohibited transactions provisions of ERISA and the Code. These proposals (collectively referred to in this letter as the “Re-proposal”) were released on April 14, 2015.

Transamerica strongly supports the adoption of a best interest standard for financial professionals who provide personalized investment advice to defined contribution plan participants and IRA account holders to help ensure that the financial professionals can help Americans meet the challenge of translating savings to income and achieving a financially secure retirement. The Re-proposal, however, in its current form does not advance these

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objectives. Significant modification of the Re-proposal is needed in order to ensure that it does not disrupt Americans' current level of access to retirement savings assistance from the retirement industry. We look forward to working with the Department in improving the Re-proposal. We expect that the Department will receive voluminous comments in response to the Re-proposal. Transamerica has reviewed the comment letters being submitted to you by the American Council of Life Insurers (ACLI), Defined Contribution Institutional Investment Association (DCIIA), the Financial Services Institute (FSI), the Financial Services Roundtable (FSR), the Insured Retirement Institute (IRI), the Investment Company Institute (ICI), the Securities Industry & Financial Markets Association (SIFMA), and the U.S. Chamber of Commerce (Chamber) and agrees with their positions. We intend for our comments to supplement the submissions of the ACLI, DCIIA, FSI, FSR, IRI, ICI, SIFMA, and the Chamber, and we incorporate by reference the comments of those groups in this comment letter.

This letter outlines the following key points advocated by Transamerica:

Transamerica's Ten Key Points

1. Transamerica supports a best interest standard that **preserves consumer choice** regarding how to receive advice (e.g., so long as the advice is in the best interest of the retirement saver, it should be up to the customer whether the advice is fee neutral or generates differential compensation for the advisor).
2. The definition of investment advice should be based on a *mutual understanding* with the customer that the advice will be *materially relied* upon in deciding the investment course of action. (Secondarily, we urge the Department to coordinate with the Securities and Exchange Commission (SEC) in order to adopt a uniform definition of "recommendation" for purposes of the Proposed Fiduciary Rule.)
3. Given the proposed broad definition of an investment advice fiduciary, a **broad seller's exception** is required that would allow a plan service provider to sell to **all** retirement plan investors, so long as it is clear to the customer that the provider is engaged in selling.
4. The investment education exception should be a safe harbor provision that does not bar retirement savers from investment **fund-specific information** that is **objective and factual** (such as comparative investment charts, etc.).
5. Investment platforms should simply be objective and accurate. The regulations should accordingly preserve the current law treatment of asset valuations as non-fiduciary acts.
6. Asset valuations should not impact routine recordkeeper functions (such as RMD calculations, rate setting on a stable value product, annuity determinations, etc.).
7. **Preserve existing exemptions** (e.g., PTEs 84-24 and 75-1) without modification except to incorporate a best interest standard of conduct in order to allow Americans to have continuing access to **variable annuities** as a lifetime income opportunity.

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8. A Best Interest Contract Exemption should:

- a. Define the term “Retirement Investor” to include **any** retirement saver or investor including participant-directed small plans.
- b. Define the term “Assets” to include all investment assets and **services** to preserve the current level of *distribution and rollover services* to plan participants as well as preserve their access to *investment services*, such as advisory, asset allocation, and managed account services.
- c. Permit **unilateral contracts** that may be delivered reasonably prior to the transaction and through electronic means.
- d. Permit differential compensation and **proprietary products** so long as the customer’s best interest is served.
- e. Provide for **streamlined and manageable disclosures** that are clear and understandable, and state that compliance with the disclosures required under federal securities law and/or state insurance regulations also satisfy the disclosure obligations under the BIC Exemption.
- f. Provide for primary enforcement of the Best Interest Contract through the Department (the Internal Revenue Service in the case of IRAs) and not state law litigation.

9. Exemption relief (**grandfathering**) should be made available for current advice (and continuing transactions related to such advice) to prevent the unraveling of existing service relationships; otherwise, valuable investment services would be disrupted.

10. In order for service providers to be adequately prepared to comply with the new requirements, transition provisions should grant **at least an additional two (2) years** before the effective (applicability) date as well as grant a non-enforcement interim period of two (2) years (during which the BICE’s contract requirement would not apply) following the applicability date.

Section I of this letter provides background information about Transamerica and its parent company, Aegon. Section II provides an executive summary of our comments and views expressed in this letter. Section III contains our detailed analysis of the potential impact of the Re-proposal for our customers in general. Section III also offers our suggested solutions to help prevent the harm that could result if the Re-proposal were to be adopted in its current form. This section also discusses the transition challenges posed by the Re-proposal and the need to have appropriate “grandfathering” and effective date provisions.

SECTION I. About Transamerica

Transamerica markets life insurance, annuities, pensions, and supplemental health insurance as well as mutual funds and related investment products throughout the United States and in selected countries worldwide. Transamerica is ranked among the top insurance groups in the U.S., based on admitted assets, and employs approximately 12,500 people nationwide. As of December 31, 2014, Transamerica had over \$200 billion in admitted assets. Transamerica has offices in Arkansas, California, Colorado, Florida, Georgia, Iowa, Maryland, Minnesota, New York, Ohio, and Texas.

Transamerica’s mission is to Transform Tomorrow® by helping people take responsibility for their financial future at every major stage of their lives. Through its Life & Protection division, Transamerica provides life insurance and supplemental health insurance products. Currently, Transamerica is among the ten largest providers in the U.S. of variable annuities, individual universal life, individual term life and equity-indexed universal life insurance, supplemental health, and voluntary worksite products. Transamerica provides services

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and products through life insurance agents, broker-dealers, banks, wholesalers, and direct marketing channels as well as through the workplace. Transamerica has 286,894 licensed producers in the United States. In 2014, Transamerica paid \$19.768 billion in benefits to its policyholders.¹

Transamerica's Investment and Retirement ("I&R") division serves customers to and through retirement with total investment solutions including workforce retirement plans, mutual funds, and variable annuities. Transamerica provides administrative and recordkeeping services to retirement savings plans (401(k) and 403(b)) for over 25,000 plan sponsors in the small- and mid- to large-employer markets.² As of December 31, 2014, these plans held in the aggregate over \$152 billion in assets for 4.1 million participants. Transamerica is a market leader in servicing multiple employer plans ("MEPs") and other small-plan associations or cooperatives that cannot offer a MEP, such as the Transamerica Retirement Plan Exchange (the "Exchange").³ As of December 31, 2014, Transamerica's I&R division serviced more than 250 MEPs (representing more than 10,000 adopting employers and more than 490,000 plan participants).

For mid- to large-sized businesses, Transamerica offers the entire spectrum of defined benefit and defined contribution plans including traditional and Roth 401(k) plans, traditional and Roth 403(b) plans, 457 plans, and traditional and Roth individual retirement arrangements ("IRAs"). Transamerica's I&R division also provides customized retirement solutions to meet the needs of small-sized businesses by marketing and distributing its products through consulting firms, broker-dealers, wirehouses, independent agents, third-party administrators ("TPAs") and banks. Transamerica's I&R division is also dedicated to helping individuals transitioning into retirement. More information about Transamerica can be found on its website at <http://www.transamerica.com>. In addition, Transamerica's I&R division provides resources, education, and strategies to help workers transition into retirement.

Transamerica provides charitable funding to the [Transamerica Institute®](#), a nonprofit private foundation, which includes the [Transamerica Center for Retirement Studies®](#) (TCRS) and [Transamerica Center for Health Studies®](#). TCRS is dedicated to conducting research and educating the public on emerging trends surrounding retirement security in the United States.

Transamerica uses retirement-related research from TCRS and other leading industry organizations, nonprofits, and think tanks. Based on the research findings from these organizations, Transamerica believes that

¹ Following publication of the Re-proposal, we learned that senior Department officials publicly, yet informally, stated the Proposed Fiduciary Rule is not intended to apply to "employee welfare benefit plans" under ERISA. Accordingly, we ask the Department to formally clarify that the Rule only covers "employee pension benefit plans" as defined in section 3(2) of ERISA. Alternatively, we request that the Department reserve the issue of whether the Rule applies to employee welfare benefit plans pending further study of how it would apply specifically to those types of plans and provide an opportunity for further public comment.

² Transamerica Retirement Solutions was awarded 66 "Best in Class" Cups in the under \$5 million to \$1 billion markets in PLANSPONSOR® magazine's 2014 Defined Contribution Survey for sponsor and participant services. The complete results of the Defined Contribution Survey were announced in the November 2014 issue of PLANSPONSOR magazine. The survey polled 5,291 clients. "Best in Class" awards are given to the three highest-scoring providers in each area of service and any other providers with scores that exceed the benchmark score established for a given asset range.

³ The Exchange is a pooled retirement plan vehicle that allows small businesses to transfer the administrative burden of maintaining a qualified plan and delegate certain fiduciary responsibilities to third parties so more time and energy can be focused on business initiatives and not plan administration. The Exchange is a collection of single employer plans or "component plans" where each plan sponsor files its own Form 5500 and maintains its own document. The Form 5500 is signed by the delegated 3(16) plan administrator and document updates are made by the designated third-party administrator (TPA).

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implementing a best interest requirement, along with substantial modifications to the Re-proposal, can help workers attain a financially secure retirement.

Transamerica is committed to preserving and enhancing the voluntary workplace retirement plan system. These plans help millions of American families achieve a secure retirement. Employer sponsorship of retirement plans has proven extremely effective in providing employees with significant education on the need for saving for retirement and on how they can help achieve a secure retirement. Transamerica supports removing obstacles to small business plan formation through reforms to multiple employer plans (MEPs) and retirement plan exchanges (these are associations of plans that are each required to be treated as a single plan but use the same plan administration and investment platform⁴), expanding access by American savers to financial planning, education, and investment services, both in-plan and with respect to their distribution and rollover options, as well as removing obstacles to in-plan annuities and annuities as a distribution option from retirement plans.

Transamerica is also a provider of “qualified” variable annuity products to small plans and rollover IRAs. Transamerica Financial Advisors, Inc. (TFA) is a full service broker-dealer and registered investment advisor that is dually registered with FINRA and the SEC. TFA has approximately 5,000 registered representatives located throughout the United States. Approximately 2,000 of these registered representatives are also investment advisor representatives. TFA provides advisory services and sells investment products to all segments of the retirement market including small and large retirement plans, plan participants, and IRAs.

Even though many strategies that base investing on age and expected retirement date currently exist, and can be facilitated through lifecycle or target date funds, full reliance on these passive strategies may not be right for everyone given their individual financial priorities. While individuals do have varying needs, they generally do not understand financial matters well enough to act on these needs and benefit significantly through access to an advisor. As part of its 16th Annual Retirement Survey of Workers, TCRS published [*Retirement Throughout the Ages: Expectations and Preparations of American Workers*](#), a research report which assesses, compares, and contrasts the savings and investment habits of workers in their 20s, 30s, 40s, 50s, 60s, and older. The survey found that, overall, while the majority of individuals are saving for retirement, many are not saving enough or investing appropriately. The survey found that despite competing financial priorities, an impressive 67% of workers in their twenties are saving for retirement. However, a concerning 37% know “nothing” about asset allocation principles, which are fundamental to retirement investing. Some (24%) are investing in low-risk, low-return investments, which may be too conservative given their time horizon, while others (27%) are “not sure” how their savings are invested. Thirtysomethings surveyed reported similar results. Two-thirds (68%) of thirtysomethings say they don’t know as much as they should about retirement investing. Fifty-seven percent say they “guessed” their retirement savings needs.

⁴ While there are features of the Exchange which sound like a multiple employer plan, a MEP is governed by one plan document and a “participation agreement” for adopting employers. There is one overarching Form 5500 and one plan audit filed at the MEP sponsor level. With the Exchange, associations or cooperatives that cannot offer a MEP due to their bylaws or structure in general can now opt to offer their members a retirement vehicle that affords many of the same benefits as a MEP. Small businesses that belong to chambers of commerce or are not part of a professional employer organization (PEO) or professional association can now opt into this pooled retirement vehicle. Previously they had few options to lower risk, burden, and potentially, cost. Aggregating clients under one Exchange eliminates the need for selection and monitoring of multiple investment lineups. Nevertheless, Transamerica continues to vigorously advocate for legislative and regulatory fixes to permit “open” MEPs to help reduce the additional administrative costs and burdens from treating each employer plan as a separate plan.

Financial advisors can help individuals navigate through complex financial decisions to help them prepare for retirement and other financial needs. In its 2014 consumer survey, LIMRA Secure Retirement Institute found that households that use financial advisors are three-times as likely as non-advised households to have \$250,000 or more in retirement savings. The LIMRA survey also found that people who engage financial advisors are more likely to participate in their employers' defined contribution plans, and they do so at a higher rate (55% contribute 10% or more of their compensation, and 18% contribute 20% or more of their compensation). Finally, the LIMRA survey found that individuals who consult a financial advisor are more likely to have a holistic financial plan in which they are saving for education, home purchase, medical costs, unexpected expenses, and retirement.

Small businesses face unique challenges in helping their employees prepare for retirement. They typically do not have the advantage of internal staff with investment and plan administration expertise to set up and administer retirement plans for their workers. According to a recent survey by Greenwald & Associates, roughly 67% of small employers that offer a retirement plan rely on an advisor or recordkeeper affiliated with a plan provider to provide support in investment selection and monitoring.

It is from this perspective of significant expertise and experience in the retirement security marketplace, as supported by research noted above, that Transamerica provides the following views and comments on the Re-proposal.

SECTION II. Executive Summary

The following two points summarize Transamerica's support of a rational, pro-consumer, best interest proposal:

- **We agree with the Department's core objectives in the Re-proposal and support requiring financial professionals who provide personalized investment advice to act in the best interest of their retirement customers.** Retirement plan clients, particularly in the mid- and large-plans space, increasingly require that their plan service providers be fiduciaries and to be fee neutral when providing retirement investment services and products. There are also retirement plan clients who have determined that their best interest could still be served even if their advisor provides them with advice that could affect the compensation of the advisor and his or her firm.
- **We also support preserving our customers' desire for personal choice regarding how to receive advice and, most importantly, preserving access to personalized advice for small businesses and low- and middle-income individuals.** While Transamerica supports a best interest standard for the provision of investment advice, this requires a workable approach, one that is amenable to harmonization across the entire investment industry. Dodd-Frank authorized the Securities and Exchange Commission to determine whether to establish a harmonized best interest standard for providing personalized investment advice to retail customers. This authorization was subject to the condition that the regulations not eliminate access to current advice models. We believe that the concepts within a uniform approach can be instructive to an expanded ERISA fiduciary rule. Moreover, the use of a uniform approach may help avoid over-lapping and inconsistent regulations with respect to retirement and non-retirement accounts that will only serve to confuse consumers.

A uniform, workable approach would include the following components:

- **Definition of an investment advice fiduciary should be based on a mutual understanding that the retirement investor will materially rely on personalized advice when engaging in the transaction.** The Proposed Fiduciary Rule broadly expands the category of investment advice fiduciaries to include anyone selling a product or service to any category of retirement investors. Under a uniform approach, the definition of an investment advice fiduciary and the Department's proposed exceptions to the definition could be adopted along with a few modifications as described below. Investment or distribution advice should not give rise to fiduciary status unless it is personalized and there is a "mutual understanding" that there will be "material reliance" on the advice provided. For example, casual discussions about investments or distributions that do not involve any material reliance would not give rise to fiduciary status. This change—requiring the existence of a "mutual understanding" that there will be "material reliance" on the advice—is **critical** to a workable definition.
- **The presence of exceptions ("carve-outs") that allow for consumer choice and education under fair and transparent terms.** Under the Department's Re-proposal, there are specific exceptions (carve-outs) from the definition of a fiduciary for: selling (counterparties); swap transactions; employees of a plan sponsor providing advice to a plan fiduciary; providers of platforms of investment options; asset valuations; and investment education. To be workable, these exceptions would require the following modifications:

- ***Sellers should be permitted to sell their own products and services to any category of retirement investors and their advisors as non-fiduciaries.*** Financial professionals and service providers who make it clear that they are selling products or services and not advising should not be considered fiduciaries, regardless of the type of investor being sold to (individuals, large or small plans). Selling activity inevitably includes some amount of incidental advice to use the product or service being sold. As long as it is made clear that this is part of the selling process, and provided that the appropriate disclosures are made regarding the fact that the individual or entity is acting as a seller, selling activity should not be subject to the Re-proposal.

This rule was in the Department's original 2010 Proposal with respect to products, but is now limited to sales of products to large plan sponsors in the Re-proposal. All categories of employees, agents, and registered representatives of selling entities, as well as the business entities themselves, should be eligible under a modified seller's exception. Also, the seller's exception should not preclude the provision of incidental advice as part of the sales process.

- ***Investment education should not bar retirement investors from fund-specific information.*** The Department's guidance in Interpretive Bulletin (IB) 96-1 established an important line between "investment education" provided to plan participants, which does not trigger fiduciary status, and "investment advice," which gives rise to fiduciary duties and triggers the prohibited transaction rules. We commend the Department for the Re-proposal's extension of the education/advice distinction to additional areas, i.e., education provided to plan sponsors and IRA owners, education regarding lifetime income options, and education regarding distributions and rollovers. This extremely helpful guidance, which was preserved in the 2010 Proposal but not in the Re-proposal, has led to enormous increases in beneficial information available to plan participants. The 2010 Proposal, unlike the Re-proposal, would have continued to allow education to include the provision of examples of investment

alternatives within asset classes. This carve-out should be expanded further to allow education to include factual information about the plan's investment alternatives and educate participants about their specific distribution and rollover options, the specific investment products or services that are available to them, and which of the investment options satisfy an asset allocation model's asset class category (all of which investment options have been approved by the plan fiduciary). Without this reform, even the Department's own mandated disclosure materials, such as the comparative investment chart required under the participant fee disclosure regulation and fund mapping or qualified default investment alternative notices, would be prohibited. These disclosure materials are required to have funds-specific information and are actionable by encouraging participants to make an investment decision based on the fund information provided.

- ***The Platform exception should be clarified to confirm that it covers menus of investment options within, for example, a variable annuity, IRA, or collective investment trust.*** This exception, which applies only to plans under the Re-proposal, would permit service providers to offer plans menus of available investment options without being treated as endorsing all such options as a fiduciary. Our view is this exception should clarify that it applies to IRAs and all retirement plans (or portions thereof) including plans that do not permit the participants to direct the investment of plan assets. In addition, this exception should not restrict the size of the platform such that limited platforms (e.g., platforms provided within a variable annuity contract, IRA, or collective investment trust) may be provided under this exception.
- ***Asset valuations should not impact routine recordkeeper functions.*** Generally, the Re-proposal would make asset valuations a fiduciary act. However, the Re-proposal creates exceptions for ESOP valuations and certain other valuations (such as for reporting and disclosure). But the Department's Re-proposal continues to subject to fiduciary requirements countless routine valuation functions, such as valuing common assets (e.g., annuity contracts, GICs and stable value products) for purposes of making regular and required minimum distributions to participants. There is no apparent purpose for this requirement, nor any public policy issue that has been identified. Imposing fiduciary obligations on routine valuations would cause costs to rise dramatically and would pose unprecedented questions for appraisers about how to comply with their fiduciary duty. Asset valuations should simply be objective and accurate. Thus, the Re-proposal should continue the current-law treatment of asset valuations as non-fiduciary acts.
- ***The BIC Exemption should have a broader application and be substantially revised in order to be operationally workable.*** Plan and IRA fiduciaries are subject to a series of prohibited transaction rules, which preclude such fiduciaries from engaging in certain transactions involving potential self-dealing and conflicts of interest. ERISA provides a mechanism for the Department to issue exemptions (a form of relief from the prohibited transaction rules) to allow fiduciaries to engage in transactions that are beneficial to retirement investors and that would otherwise not be permitted to occur. Transamerica supports a best interest standard for financial professionals who provide personalized investment advice. However, because the Proposed Fiduciary Rule would result in an expansion of those recognized as fiduciaries, the BIC Exemption should be broadened and made workable.

Under ERISA, financial professionals treated as fiduciaries are required to act in the best interest of their retirement customers. Any new or modified exemption must be feasible; otherwise, it cannot be used, and retirement savers would be cut off from beneficial products and services because many retirement providers would no longer be able to operate in this space. We believe that a workable exemption is a principles-based exemption that would explicitly contain the following guidelines:

- ***Preservation of investor access to investment services and distribution/rollover assistance.*** Consumer access to all forms of investment assistance, services, and products (subject to securities and insurance laws) should be maintained. A principles-based exemption should not be restricted to a DOL pre-approved list of investments. Such an exemption should explicitly cover the recommendation of an investment advisory, asset allocation, or asset management service (such as a managed account program), and recommendations regarding plan distributions and rollovers. Without this reform, and the recommended modifications of the Seller's Carve-out, retirement investors would be effectively cut off from these services under the Re-proposal.
- ***The sale of proprietary products does not per se trigger a fiduciary relationship.*** The principles-based exemption should be consistent with the Dodd-Frank provisions instructing the SEC to consider a harmonized standard of care for broker-dealers and registered investment advisors including clarifying (1) that the sale of proprietary products or a limited range of products is not an indication of a violation of the advisor's fiduciary duty, and (2) that the structure of an advisor's compensation is not an indication of a breach of the advisor's fiduciary duty. These clarifications are consistent with a principles-based approach.
- ***Ongoing fiduciary duty or duty limited to a specific transaction.*** To be consistent with standards required by Dodd-Frank with respect to retail investments, any advisor may, through clear disclosure, define the scope of his or her fiduciary duty including whether the advisor has an ongoing duty to provide advice or whether the fiduciary advice was rendered with respect to a discrete time and transaction.
- ***Manageable provisions for disclosure that do not confuse retirement investors or overwhelm them.*** A workable approach could be achieved by providing the exemption from the prohibited transaction rules if the financial professional, in addition to complying with the best interest standard, (1) provides clear and accurate disclosure of its material conflicts of interest, so that customers can understand the professional's financial incentives, and (2) is consistent and coordinated with similar disclosures required by the SEC. The voluminous disclosure obligations under the BIC Exemption will only work to confuse many retirement investors and overwhelm them with information that most will not find useful; in addition, the requirements under the BIC Exemption render it unusable. More manageable provisions are required for disclosure, which should permit electronic delivery. A written contract provision, if one is required, should permit unilateral contracts that do not require a signature so long as delivered to the retirement customer within a reasonable amount of time after the advice is offered, as further described below in this letter.

Other critical issues that must be addressed under the Re-proposal:

- ***Grandfathering of existing advisory relationships.*** There should be an exemption that specifically grandfathers existing advice arrangements even if they result in continuing transactions after the effective or “applicability” date of the Re-proposal. (In section III of this letter, we discuss how a grandfathering provision can be narrowly tailored to address the potential harm to investors from an unraveling of existing relationships without undermining the overall effectiveness of the Proposed Fiduciary Rule.) This should apply whether the advice was treated as fiduciary advice at the time it was given because the advisor relied on an exemption that is being modified or withdrawn under the Re-proposal, or the advice was not treated as fiduciary advice at the time it was given and the advisor relied on the existing investment advice rule or IB 96-1 on investment education. Furthermore, such a grandfathering exemption should provide relief for any and all IB 96-1 investment education materials issued before the applicability date of the Re-proposal but continue to remain in participants’ hands after the effective date.
- ***Sensible effective date and transition period.*** The effective date issue applies to both the Proposed Fiduciary Rule and related new exemptions and/or changes to existing exemptions. Compliance with the Re-proposal will require significant investment by retirement plan service providers in business planning, systems technology, training, legal and compliance resources, printing and communications, website development, etc. The Re-proposal should set an effective date that gives the industry adequate time to come into compliance with a final rule and exemptions. This is especially true with respect to any required investor contract requirements, data collection, and disclosure obligations. The Department should also consider appropriate transition rules regarding the new definition of a fiduciary including a provision under which enforcement action would not be brought by the Department for a reasonable period under the Re-proposal subject to good faith interpretation of the new requirements. During this interim non-enforcement period, a separate transitional provision should permit financial institutions to limit the ability of retirement investors to participate in a class action or other representative action in court pursuant to the BIC Exemption so long as an alternative form of dispute resolution is provided in the financial institution’s contract with the investor.

SECTION III. Analysis of the Re-proposal, its Harmful Effects, and Proposed Solutions

The Re-proposal would substantially change our ability to provide the range of retirement services and products from which investors can choose to meet their own specific needs. Most of these changes will not only fail to benefit our customers, but also could adversely affect their continued access to the high quality, transparent products and services to which they have become accustomed. Our objective in submitting this comment letter to the Department is to express our concern and offer potential solutions for improvement. In the process of preparing this comment letter for submission to the Department, we at Transamerica have actively engaged our customers and distribution partners for their viewpoints and reactions. In addition, Transamerica continues to participate in industry and trade initiatives to address concerns directly with Department officials. Consequently, it is our view that this letter is consistent with, and supports the views of, many in the industry and, in particular, the positions of the ACLI, DCIIA, FSI, FSR, IRI, ICI, SIFMA, and the Chamber.

A. The Re-proposal’s Harmful Impact on Small Businesses and Individual Investors

Transamerica believes that financial professionals who provide personalized investment advice should be required to act in their customers’ best interests and supports a workable “best interest” standard for personalized investment advice. However, in some cases, the prohibited transaction rules conflict with a best

interest standard by generally prohibiting fiduciaries from providing advice when that advice could affect the compensation of the fiduciary (defined to include the advisor's firm) even if the advice is in the best interest of the customer. The Rule may result in advisors simply referring customers to the least costly product when that product may not actually be the best match for the customer's needs. Such differential compensation exists in the advice models that serve small accounts and small businesses, and is permitted by current exemptions for securities and insurance commissions, and is necessary to preserve access to advice across all account sizes. Losing access to advice is not in a plan sponsor's or investor's best interest, but this is exactly what could happen if the Re-proposal is adopted as currently written.

Furthermore, the marketplace trend toward more fee neutrality is accelerating and is spilling over into the small-to mid-sized-plans market. Fee neutrality has been a core component of Transamerica's service delivery model.⁵ Our experience with fee neutrality gives us unique insights on the mitigation of potential conflicts of interest when delivering investment products and services to both plan sponsors and plan participants. While the Department's goals and objectives are consistent with these trends in the marketplace, we believe the practical application of the Department's Re-proposal may actually undermine the growth and development of all products and services, including those designed or structured to be fee neutral, by denying a workable carve-out or exemption for the promotion of products and services. A concrete example of this is Transamerica's managed account service for plan participants. This service is an investment management service offered by a Transamerica registered investment advisor affiliate as a managed account qualified default investment alternative (QDIA) under ERISA but could also be affirmatively elected by a participant. The investment advisor fiduciary allocates the assets of the participant's individual account to achieve varying degrees of long-term appreciation and capital preservation through a mix of equity and fixed income exposures, offered through investment alternatives available under the plan, based on the participant's target retirement date. This proprietary, but conflict-free, service is offered only in plans under the FRE or EBA plan-pricing model. As further clarified below in our analysis of the Re-proposal, it is our view that, under the DOL Re-proposal as currently written, Transamerica could be precluded from promoting this valuable service to small plans and to plan participants in both small and large plans. The ultimate result would be to discourage plan recordkeepers, such as Transamerica, from developing fee-neutral service delivery models and, thereby, hurt small investors' potential access to valuable retirement-planning services and products.

How to Revise the Re-proposal to Address Small Business Concerns

Specifically, to address these concerns with respect to small business, we suggest revising the Re-proposal as follows:

- 1. Financial institutions should be permitted to promote their own services and products, thereby allowing small business plans continued access to the retirement-plans market.***

⁵ Through such plan pricing initiatives as fund revenue equalization ("FRE") or expense budget accounts ("EBA"), most new retirement plan sales of Transamerica's recordkeeping services are revenue neutral. (Under the FRE plan-pricing model, any investment fund under the plan that pays revenue exceeding the recordkeeper's targeted compensation generates a plan credit to the investing participant in an amount equal to the excess. Under the EBA plan-pricing model, all revenue-sharing payments generated by the plan's funds lineup are deposited in the plan's expense budget account, from which the recordkeeper's target compensation is paid and the excess allocated to investing participants' accounts or used to pay other plan expenses.) In addition, the group annuity contracts (GACs) that we are now offering in the small-plans market are structured to be largely fee neutral.

In footnotes 31 and 32 of the BICE Preamble, the Department confirms that Advisory Opinions 2001-09A (SunAmerica), 97-15A (Frost) and 2005-10A (Country) will continue to be available following the publication of a final Rule. Preservation of these Advisory Opinions is critical because they represent the regulatory guidance for many fee neutrality initiatives in the marketplace.

Under the Department's Re-proposal, promotion of a financial institution's own services and products to individuals and small businesses would be treated as fiduciary advice even if it is made clear that the financial institution is selling and not advising. As fiduciary advice, the advice would be self-interested and thus prohibited by the prohibited transaction rules unless the proposed BIC Exemption can be used. (The Seller's Carve-out would not apply under the Re-proposal.) The proposed BIC Exemption does not apply to participant-directed small plans and, even if it did, it would not seem to apply to investment services under the DOL pre-approved investment list. So, for example, personalized promotion of one's own managed account service or responses to a Request for Proposal (RFP) from a small plan regarding investment services would seem to be simply prohibited. (Using managed account services as an example, the advice regarding which managed account service to use is advice regarding services; the managed account advice itself is advice regarding products.) Personalized promotion of one's own investment services could theoretically be permitted under the proposed BIC Exemption, except that, as noted later in detail, this proposed exemption is not currently workable or available to small participant-directed plans. Instead, the Department should consider addressing this issue by making the following modifications to the Re-proposal.

- a. The Proposed Fiduciary Rule should be tailored to the enforcement objectives of the Department while preserving small investors' need for access to personalized investment assistance.

Given the importance of this issue—involving trillions of dollars of retirement assets that are needed to ensure a secure retirement for Americans across the country—the public policy discussion with respect to the ERISA definition of a fiduciary must be resolved in a manner that is consistent with maintaining access to advice for all participants. Transamerica supports broadening the definition of an investment advice fiduciary to include financial professionals providing personalized advice about investments or distributions and requiring such fiduciaries to comply with a best interest standard. However, the definition of fiduciary should be tailored to retain the essential criteria that the advice be personalized and that *there is a mutual understanding that there will be material reliance on the advice*. For example, casual discussions about investments or distributions that do not involve any material reliance should not give rise to fiduciary status. Based on Transamerica's experience, the financial advisors with whom we partner are committed to acting in the best interest of their small investor clients, but there has to be reasonable certainty as to when the line into fiduciary status is crossed. We believe that eliminating the "regular basis" and "primary basis" requirements to ensure critical enforcement by the Department while retaining the "mutual understanding" requirement combined with a "material reliance" requirement strikes the appropriate balance.

- b. The Counterparty's (or "Seller's") Carve-out should be expanded to cover sales promotion to all retirement investors so long as it is made clear that they are engaged in selling and not acting in a fiduciary capacity.

The Re-proposal contains a very broad definition of the term "recommendation" as being "a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action." [Emphases added.] The Department derived this definition from FINRA guidance (FINRA Policy Statement 01-23) that sets forth guidelines to assist brokers in evaluating whether a particular communication could be viewed as a recommendation thereby triggering application of FINRA's Rule 2111 that requires that a firm or associated person have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer. Based on this definition, retirement plan providers would be prohibited from promoting their products and services to retirement investors as non-fiduciaries.

This approach raises two separate, but related, concerns. First, we believe that the Department's application of FINRA guidance in distinguishing investment education from investment advice under ERISA is not appropriate. As the Department notes in the Proposed Fiduciary Rule's preamble, "the regulatory context for the FINRA guidance is somewhat different." The FINRA guidance (after which the DOL fashioned its Proposed Fiduciary Rule) is intended to be a lower bar for determining what form of communication by a broker constitutes a recommendation without triggering SEC registration as an investment advisor under the Investment Advisers Act of 1940. The FINRA guidance recognizes that selling activity inevitably includes some amount of incidental advice to use the product or service being sold. However, such incidental advice should not trigger investment advisor status for a broker. Likewise, incidental advice involved in the sales process should not trigger ERISA fiduciary status for a seller to a retirement plan or fiduciary status under the Code for a seller to an IRA. We urge the Department to instead coordinate with the SEC, which has rulemaking authority over investment advisors as well as brokers, to determine a uniform and consistent definition of "recommendation" (and, therefore, a definition of investment advice fiduciary) that is applicable under both ERISA and the Investment Advisers Act of 1940. Secondly, this definition is contrary to the current legal framework under ERISA for plan providers seeking a relationship with a retirement investor.

The restrictions on the Seller's Carve-out are contrary to ERISA's current legal framework which prohibits a plan fiduciary from engaging in certain transactions with parties-in-interest (or "disqualified persons" under the Code) including service-provider fiduciaries. However, there is no restriction on a plan fiduciary's ability to engage in discussions and pre-contractual negotiations with a service provider who is promoting its products or services (including investment products and services) to the plan fiduciary but who is not yet a party-in-interest to the plan. Furthermore, service providers who are parties-in-interest (or disqualified persons), including fiduciaries, to a plan are permitted to promote other products and services (including investment products and services) to an independent plan fiduciary who will make the buy or sell decision. However, in both situations, once the engagement with the plan is consummated, the engagement, or any related transactions, must not run afoul of the prohibited transaction rules.⁶ This legal framework preserves the ability of plan officials to engage the market for retirement plan services and products (such as through RFPs) and not restrict market participants from engaging in promotion and marketing (e.g., selling activities) with respect to their goods and services. This framework recognizes the fundamental view that retirement plans, including those sponsored by small businesses, should have full access to the financial services industry and that market participants can only know their potential customers during the sales process. The Department's Re-proposal would unravel this fundamental framework by treating selling activity as fiduciary advice while providing a narrow carve-out for large plans. We urge the Department to reconsider this fundamental issue by narrowing the definitional requirements as proposed above while granting a broad Seller's Carve-out for sales activity targeting any employee benefit plans, participants, and IRA owners.

The Seller's Carve-out should be expanded to cover all retirement investors. ERISA's fiduciary duty rules do not make a distinction between large and small plans. All fiduciaries, regardless of the size of the plans they represent, are under a "prudent expert" obligation when evaluating service providers and their products and services. Under ERISA, if a fiduciary does not have the competence to evaluate a service provider's products and services, it has a duty to hire professionals to help make the evaluation. Thus, the Seller's Carve-out should

⁶ If the party-in-interest is also a fiduciary, he or she has the additional duty of complying with ERISA's fiduciary duty to act in the sole interest of the plan and its participants and the duty to avoid self-dealing and potential conflicts of interest without reliance on an exemption. For example, an investment advice fiduciary who wishes to offer a proprietary investment product or service to the plan would have to ensure that the investment is in the best interest of the plan and that the investment does not generate additional non-exempt compensation to the fiduciary or his or her affiliates.

not make a distinction between large and small plans, or any other retirement investor. Furthermore, the ERISA framework for protecting plan participants should be recognized under the Seller's Carve-out. Under ERISA, the named fiduciary (which is typically the employer and/or plan sponsor) is charged with making plan investment decisions that are in the sole interest of plan participants and their beneficiaries (such as the composition of the plan's investment menu and what, if any, investment advisory or asset management services are offered under the plan). In making these decisions, the named fiduciary must prudently and independently evaluate the provider and its products or services. It is within the context of investment decisions already made by the named fiduciary that plan providers offer their products and services to plan participants. By not applying the Seller's Carve-out to plan participants, the Department is ignoring the fact that the named fiduciary was already obligated under ERISA to hire the service provider solely in the best interest of the plan participants and their beneficiaries. By restricting the service provider's ability to promote the pre-approved products or services, the Department only undermines the named fiduciary's decision.

With respect to IRA holders, the Code does not impose on IRA fiduciaries a duty to act in the sole interest of the IRA holder, and ERISA's fiduciary standard of care rules do not apply to IRA fiduciaries. As long as a transaction with an IRA does not constitute a non-exempt prohibited transaction, the Code does not impose a duty on an IRA fiduciary to act in the best interest of the IRA holder. Thus, IRA fiduciaries should be able to promote their products and services to IRAs. By implying that IRA fiduciaries cannot engage in sales activity, the Re-proposal appears to be inconsistent with the existing statutory scheme for IRAs. The purpose of the Seller's Carve-out is to relieve a seller from the fiduciary duty to act in the best interest of the retirement investor, but this duty is absent in the case of IRAs. We agree with the Department that a financial advisor who seeks to provide potentially conflicted advice to an IRA holder should be under a best interest standard; however, the best interest standard for IRA fiduciaries should be imposed through the prohibited transaction exemption process such as the BIC Exemption. In our view, the Department is overstepping its regulatory authority through the Re-proposal's treatment of IRAs. We urge the Department to apply the Seller's Carve-out to all investors, including IRAs, while imposing a best interest standard through the BIC Exemption. Otherwise, American taxpayers would effectively be cut off from the IRA market as a means for retirement saving.

The Department's rationale for restricting the Seller's Carve-out to "large plans" (e.g., the plan has 100 or more participants or the plan fiduciary manages at least \$100 million) is that the fiduciaries of such plans are sophisticated or have financial expertise and, therefore, do not need the consumer protections when they negotiate a sale with a counterparty financial institution. In this respect, we interpret the Seller's Carve-out to apply to multiple employer plans (MEPs) based on the participant count for the entire MEP, but not to apply to retirement plan exchanges on a plan-by-plan basis based on the number of participants in each plan within the exchange. The Department should confirm our interpretation of how the Seller's Carve-out applies to MEPs. However, there should not be a distinction between a MEP and a retirement plan exchange under the Seller's Carve-out. In determining whether a MEP or an exchange meets the 100-participants test, all the employers that have adopted the MEP or exchange should be treated as maintaining a single plan even if each single employer has fewer than 100 participants in the MEP or exchange. The test should be whether the MEP or exchange, as a whole, has at least 100 participants (they often have many more participants). As noted, we read the Re-proposal to reach this result with respect to MEPs but not exchanges. In the small-plans market, the average MEP or retirement plan exchange administered by Transamerica consists of 46 adopting employers and approximately 650 plan participants (with each adopting employer's plan averaging about 14 plan participants). The adopting employers, by adopting the MEP, are collectively represented by the same plan-named fiduciary who makes the buying decision for the MEP or exchange as a whole. Similarly, all plans in the retirement plan exchange are represented by the same plan fiduciary.

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The availability of the Seller's Carve-out for sales to large retirement plan exchanges is critical if the Seller's Carve-out is not expanded as we suggested above. Transamerica is a significant retirement provider in the small-plans market with respect to retirement plan exchanges, where small businesses come together to take advantage of the economies of scale, as well as controlled group employers sponsoring multiple plans. This approach serves many public policy concerns by facilitating small employers' access to the retirement-plans market.

Transamerica is also a significant retirement provider in the hospital-plans market for ERISA 403(b) plans. In this market, it is common to have a sizeable not-for-profit healthcare employer that sponsors a "large" 403(b) plan (under the Re-proposal's definition) for the nurses and other hospital staff, while sponsoring a number of "small" 401(k) plans for its for-profit subsidiaries that provide specialized medical services. Without a modification of the Seller's Carve-out, a hospital in this scenario would be treated as both a large employer (with respect to the 403(b) plan) and a small employer (with respect to the 401(k) plans). Thus, if this hospital issues a retirement RFP for the combined plans to obtain the best pricing available, service providers responding to the RFP can promote their products and services to the large 403(b) plan while being required to act as fiduciaries for the small 401(k) plans. This would create an exceedingly difficult landscape to navigate, would not make practical sense, and could easily be addressed by aggregating the plans for purposes of the 100-participants test under the Seller's Carve-out. We are requesting that the Department make this critical change to the Seller's Carve-out if it is not made applicable to all retirement plan investors, i.e., in applying the 100-participant test, all plans within the controlled group should be aggregated, because an employer is no less sophisticated if its 150 participants are in two plans as opposed to one.

Given the ERISA framework discussed above regarding a named fiduciary's obligation to act in the sole interest of plan participants and their beneficiaries when making plan investment decisions, we also urge the Department to modify the Seller's Carve-out to permit counterparties to promote their products and services to plan participants (since an independent fiduciary has already determined that the counterparty's products and services are in the sole interest of the plan participants). If the Department does not expand the Seller's Carve-out to apply to all retirement investors, as requested above, we ask that the Department modify the Seller's Carve-out to apply to all plan participants.

Also, we recommend that the Seller's Carve-out explicitly apply to small plans represented by a professional fiduciary. In our view, just because a plan has fewer than 100 participants, or is represented by a fiduciary handling less than \$100 million in AUM, does not necessarily mean that it's not sophisticated or lacks financial expertise. There are many so-called "small plans" that have hired a 3(38) investment manager, 3(21) investment advisor, or even a professional 3(16) plan administrator to provide plan services including representing the plan in negotiations with counterparties. Having retained these professionals, it is unreasonable to characterize such plans as lacking "financial expertise." There is also concern that the Proposed Fiduciary Rule is so broad, and the Seller's Carve-out is so narrow, that it prohibits a wholesaler's selling activity with respect to retailers engaged in the retirement market unless the wholesaler engages in the selling activity as a fiduciary. Wholesalers/product manufacturers often have no way of knowing whether their retailers will offer their products or services in the large-plans space, the small-plans space, or both. If the Department does not grant our request to simplify the Seller's Carve-out by expanding it to apply to all retirement investors, as discussed above, the Seller's Carve-out should be modified to apply to small plans represented by a professional fiduciary.

The purpose of the preceding discussion is to demonstrate that segmenting the retirement market on the basis of arbitrary distinction between “large” plans, “small” plans, and plan participants creates a distinction that is ultimately unworkable and is not consistent with the ERISA framework, which makes no distinction between “large” and “small” plans under the fiduciary rules, and which imposes on the employer, as the named fiduciary, the duty to decide which investment products or services are offered under the plan based on what is in the best interest of the participants and their beneficiaries.

2. The ways in which many small businesses currently receive meaningful assistance should be preserved.

Under the Re-proposal, financial institutions selling retirement plans would be prohibited from providing meaningful assistance to small businesses in selecting investment options to offer their employees, a critical element in setting up a plan. The problem is that different investment options – such as different equity funds or equity funds versus money market funds – can generate different payment amounts to a financial institution. While it is our experience that more and more retirement plan customers are asking their plan providers to be fee neutral, differential compensation arrangements continue to represent a significant approach for cost-effective delivery of products and services to small retirement plan investors. Without effective carve-outs and exemptions, the financial institution would be prohibited from providing meaningful assistance to the small business plans even if that assistance is in the best interest of the small business plan. Notably, existing rules under ERISA section 408(b)(2) already require full disclosure to the plan of the compensation received by the plan’s service providers.

- a. The Platform Provider and Selection and Monitoring Carve-outs need to be expanded to allow meaningful assistance to small plans.

Limited range investments: The Department should explicitly acknowledge (perhaps in the preamble, if not in the Rule itself) that the Platform Provider Carve-out is broad enough to cover the offering of a limited range investment platform to small plans to ensure that small plans are not cut off from products that, for cost reasons, offer a limited range of investment options from which to choose, such as group annuity contracts and pre-packaged unit value or net asset value investment products held within a custodial arrangement, IRA, or collective investment trust. Otherwise, the Platform Provider Carve-out would be overly narrow and would prohibit the offering of limited range products to retirement plans sponsored by small businesses. These products are often “pre-packaged” to include within them funds that are screened from the overall provider “open architecture” platform. If a small employer plan sponsor, because of resource constraints, does not want to do the funds selection and monitoring from the service provider’s broader platform, the service provider may make it easier by offering the pre-packaged arrangement. The plan investor who purchases this product is required to do the funds selection and monitoring from within the product itself (such as a group variable annuity contract or IRA) and not from the broader platform provided by the service provider. This saves the retirement investor time while allowing the service provider to offer a more cost-effective solution. These arrangements are highly beneficial to small businesses that may not have the internal staff required to analyze a platform provider’s full range of investment offerings. The limited range enables the small plan to have access to funds representing the broad range of all the asset classes while limiting the number of investments to funds that have been pre-screened from the platform based on objective criteria (and often with the purpose of achieving fee neutrality). The pre-screening process, and the offering of the broad range of asset classes, should not be deemed fiduciary activity outside of the Platform Provider Carve-out. The DOL can clarify this by including in this carve-out explicit language that permits this activity.

- b. The Financial Reports and Valuation Carve-out should explicitly include routine recordkeeper valuation functions, and clarify that stable value and other insurance company general account products are examples of an “investment fund.”

Generally, the Department’s Re-proposal would make asset valuations a fiduciary act. However, the Re-proposal’s Financial Report and Valuation Carve-out creates exceptions for ESOP valuations and certain other valuations (such as for reporting and disclosure). But the Department’s Re-proposal continues to subject to fiduciary requirements countless routine valuation functions, such as valuing common assets (e.g., annuity contracts, GICs, stable value products and lifetime income products) for purposes of making regular and required minimum distributions to participants and IRA owners. There is no apparent purpose for this requirement, nor any public policy issue that has been identified. Imposing fiduciary obligations on routine valuations would cause costs to rise dramatically and would pose unprecedented questions for appraisers about how to comply with their fiduciary duty. Asset valuations should simply be objective and accurate. Thus, the Re-proposal should continue the current-law treatment of asset valuations as non-fiduciary acts and, at the very least, confirm that valuations with respect to annuity contracts, GICs, stable value products and guaranteed lifetime income products are within the carve-out. For example, recordkeepers are often required to report to plan participants the value of a qualified joint and survivor annuity (QJSA) or a qualified pre-retirement survivor annuity (QPSA). In addition, a variable annuity, or other lifetime income product, may contain a guaranteed lifetime withdrawal benefit (GLWB) or a guaranteed minimum withdrawal benefit (GMWB) that must be valued. A recordkeeper may be required to report the values of the GLWB or GMWB feature. Yet another example would be the lifetime income illustrations generated to a participant based on a valuation and projection of his retirement plan account. Requiring the recordkeeper to be a fiduciary when providing these reports could discourage recordkeepers from including these products on their investment platform notwithstanding that these products may offer unique principal preservation and lifetime income protection to plan retirees.

B. The Re-proposal’s Harmful Impact on Variable Annuity Products

1. Investment advice fiduciaries who make personalized recommendations of variable annuities should be permitted to use existing exemptions without modification except for a Best Interest Standard

Transamerica is concerned that, if the Re-proposal were to be adopted in its current form, middle-income Americans would lose access to the 408(b) variable annuity market. This would remove from the investment options the unique role of variable annuities, which offer features and benefits—such as potential upside return while preserving an investment floor—that other investment products do not share. As Baby Boomers retire over the next several years, lifetime income and principal protection are important considerations in their retirement planning. In addition to providing income guarantees, variable annuities include a menu of investment options within the contract with different risk and return characteristics that investors can choose with assistance from a financial advisor. About 50% of variable annuity sales in the retirement market are qualified variable annuities, sold primarily to IRAs, and the remainder to retirement plans. For Transamerica, approximately 60% of all variable annuity sales are qualified variable annuities. Lifetime income products, such as variable annuities, remain highly attractive to retirement savers seeking to ensure their savings will last throughout retirement.⁷ Section 408(b) variable annuities and variable annuities sold to small business plans are

⁷ Within the variable annuity market, there were \$21.1 billion in qualified sales and \$10.7 billion in non-qualified sales during the first quarter of 2015. *IRI First-Quarter 2015 Annuity Sales Report*. The 2013 Gallup Survey of Owners of Individual Annuity Contracts

critical to the retirement system. Investors associated with small business typically do not have access to defined benefit plans. Insurance products, such as variable annuities, are some of the few remaining options for small business owners and middle-class Americans to turn savings into guaranteed lifetime income for their retirement. The Department has recognized the importance of lifetime income products and has promoted their use for retirement planning. Yet, the Re-proposal would serve to undermine the Department's efforts in this regard by making it more difficult for insurance companies to make such products affordable and for financial advisors to facilitate their use by middle-class Americans.

The Department should be cognizant about how it approaches the proposed modifications to existing prohibited transaction exemptions. PTE 84-24 (which allows insurance agents, brokers, plan consultants, and registered representatives to recommend insurance products and other proprietary investments, such as mutual funds, and receive third-party compensation) and PTE 75-1, Part II (which allows registered representatives to recommend outside mutual funds and receive third-party compensation) are examples of prohibited transaction exemptions that have been core to long-standing industry practices. The Department should be cautious about the potential unsettling of the retirement-plans market in unexpected ways such as by unfairly targeting revenue-sharing payments or applying different exemption regimes for the sale of variable annuities and fixed annuities.

The Department's goal of substantially modifying certain prohibited transaction exemptions that are central to the way the IRA market operates today could have a profound impact. Today, IRA investors have considerable access to the securities market because their financial advisors can offer them cost-effective, registered pooled investment products without fear of engaging in a prohibited transaction due to indirect compensation arrangements that advisors have with insurance companies and mutual fund complexes. This level of access is, in part, made possible by these prohibited transaction exemptions issued by the Department. These PTEs—PTE 75-1 and PTE 84-24—are significant PTEs for the IRA market.

Under the Re-proposal, the Department is proposing to make substantial modifications to PTEs 84-24 and 75-1. With regard to IRAs, the principal change to these PTEs would revoke relief for the sale of variable annuity contracts and mutual fund shares to IRAs by financial advisors who are investment advice fiduciaries to the IRA, or its owner, and who receive a commission for the sale. Financial advisors who wish to engage in these transactions would have to rely on the BIC Exemption instead. However, fixed annuities could continue to be sold under the proposed PTE 84-24. This bifurcation of the sales approach between variable annuities and fixed annuities may not be practical and could only serve to confuse investors. Often, the fixed and the variable are sold together and may be bundled under a single contract. We urge the Department not to take this course. For a myriad of reasons, including ERISA restrictions, many plans do not offer annuities as a distribution option, and the only way a plan participant can provide for a lifetime income solution is to invest in an annuity through a rollover into an IRA and investment in an annuity. Restricting access to annuities runs counter to the Department's and Administration's work to facilitate the offering of an annuity both within a plan and as a distribution option.

2. The BIC Exemption should be made workable for the sale of variable annuities

Variable annuities are typically sold to IRAs and small plans as proprietary products through financial advisors who are licensed as insurance agents and registered as broker-dealer representatives. The reality is that, unlike mutual funds, variable annuities are rarely offered in wrap accounts or fee-for-service advisory accounts due to

(non-qualified contracts) reports that Americans who own annuities have moderate incomes. Their median annual household income is \$64,000 and 80% have total annual household incomes below \$100,000.

the nature of the product as long-term investment vehicles. In addition, variable annuity products are subject to federal securities laws (given that they are often registered products), and, unlike mutual funds, they are highly regulated under state insurance laws. Thus, variable annuity sales are subject to more disclosure requirements and other restrictions. The BIC Exemption, in addition to being unworkable (specific issues about the BICE's unworkability and the potential fixes are discussed below), fails to recognize the unique features of variable annuities as a category of investments, and this could cause confusion among investors and undermine their availability in the marketplace as retirement products. For example, the disclosure requirements under state insurance law and regulations (which differ depending on the state in which the product is offered) should be deemed to satisfy the BICE requirements. For this and other reasons, we urge the Department to provide flexibility about how the BIC Exemption applies to variable annuities by, for example, permitting variable annuity providers to comply with state insurance law or regulations where the disclosure obligations under the BICE conflict with such requirements.

C. The Re-proposal's Harmful Outcomes for Individual Retirement Savers

Smaller businesses often lack the resources to allow participants to take full advantage of a qualified plan. This means small businesses often rely on financial professionals to help participants better understand how to save and plan for retirement. There is a clear need to help participants understand their choices and ensure their goals and expectations are consistent and aligned. Without understanding basic investment concepts, like dollar-cost averaging, target date funds or target risk funds, plan participants are challenged to adequately save for retirement. Lack of knowledge may also mean lower engagement and lower savings rates, all of which can have a negative impact on retirement outcomes. Participants are more likely to increase their contribution rates if they have a better understanding about available investments in their plan, have a financial professional to show them how to invest assets, and have better education materials from the company servicing their 401(k) plan. Participants in small workplaces (less than 100 employees) generally have access to fewer plan features and investment options than larger companies. Features, such as matching contributions, the existence of planning tools, access to knowledgeable telephone reps, and a fee-based managed account program, are less common in smaller organizations. Small-plan participants are also less likely to be aware of investment options such as target date funds, stable value funds, and fixed rate accounts.

Financial advisors are even more critical to IRA investors.⁸ IRAs are not employment-based retirement investment vehicles and, thus, there is no employer with an interest in ensuring they have access to effective investment communications and reasonably priced retirement planning tools.

⁸ The significant benefits that financial advisors provide to individual retirement investors were identified and measured in a recent report, *The Role of Financial Advisors in the U.S. Retirement Market* (July 10, 2015). This study, conducted by Oliver Wyman, draws upon proprietary surveys of more than 4,300 retail investors and 1,200 small businesses, datasets from IXI Services (a division of Equifax), representing approximately 20% of U.S. consumer-invested assets on a household level, and approximately 30% of U.S. consumer-invested assets on an account level. Key findings from the study include:

- Small businesses that work with a financial advisor are 50% more likely to set up a retirement plan (and micro business with 1–9 employees are almost twice as likely).
- Advised individuals, segmented by age and income, have a minimum of 25% more assets than non-advised individuals.
- In the case of individuals age 65 and older with \$100,000 or less in annual income, advised individuals have an average of 113% more assets than non-advised investors.
- Advised investors have more diversified portfolios – own twice as many asset classes, have more balanced portfolio asset allocations and use more packaged products for equity exposure compared with non-advised investors.
- Advised investors stay more invested in the market – advised individuals hold less cash in their investment accounts (36%–57% less than non-advised individuals for similar age and wealth cohorts).

We are concerned that the Department's Re-proposal may adversely impact individual retirement investors, particularly plan participants in the underserved small-plans market and IRA holders with small accounts. More specifically, we are concerned that the Re-proposal may undermine the ability of financial professionals and recordkeepers to help participants better understand how to save and plan for retirement.

How to Revise the Re-proposal to Address the Specific Concerns for Plan Participants and IRA Holders

1. The Re-proposal must preserve the current level of rollover and distribution assistance provided to individual retirement investors.

Employees who are in transition (e.g., those who have undergone a change in employment and are now joining the new employer's plan, those who are terminating employment for whatever reason, including retirement, and are considering what to do with their plan accounts, or even those who are not satisfied with their current financial institution's IRA and are considering moving to another financial institution) rely heavily on plan service providers for critical assistance on handling their retirement accounts. In the absence of effective assistance, this transition period is when leakage from retirement accounts is most likely to occur. It is also during this period that plan service providers are most able to provide assistance because the retirement investor is likely to be fully engaged in the process and attentive to his or her needs. The Department's Re-proposal would effectively cut off the availability of this form of assistance.

- a. The Investment Education Carve-out should explicitly permit investor assistance with plan and IRA investment options, provided that any reference to or discussions of specific investment products or services is factual and objective.

Given the Department's expansion of the definition of advice to include distribution and rollover services, a workable carve-out is required to avoid potentially restricting participants' access to important plan information and guidance that they need during major life events such as when they are changing jobs or retiring. Such distribution and rollover services may not include recommendations of specific funds except to provide statements of facts about which investment options are available under a plan or IRA, what their specific characteristics are (such as their asset class category, investment objectives, historical performance, fees and expenses, and other objective information). The Department appears to believe that because such distribution and rollover services could lead a participant to sell, hold, or purchase specific investment products, this constitutes investment advice. The Department appears to have the same viewpoint with regard to discussing the benefits of investment advisory or managed account services with a participant or IRA holder.

Departmental guidance in Interpretive Bulletin (IB) 96-1 established an important line between "investment education" provided to plan participants, which does not trigger fiduciary status, and "investment advice," which gives rise to fiduciary duties and triggers the prohibited transaction rules. The Department should be commended for the Re-proposal's extension of the education/advice distinction to education regarding distributions and rollovers. The issue is that this carve-out does not go far enough to cover discussions of specific options with a retirement investor in the context of a distribution or rollover decision, which investment advisory or managed account options are available under the plan, and which plan investments satisfy the asset

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- Advised investors re-balance more frequently and are 42% more likely to re-balance their portfolios at least every two years.

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classes within an asset allocation model. Under the Re-proposal, these forms of retirement assistance would be prohibited if they refer to specific investment alternatives even if such references are in the nature of factual statements or objective descriptions of the investments. This would also extend fiduciary status for advice regarding financial products which are not generally considered “investments” (for example, life insurance policies held as a backstop on lifetime income from pensions or annuities). Even if a financial advisor did want to assume a fiduciary role in providing this form of assistance, no exemption appears available for providing this type of fiduciary advice. The BIC Exemption, by its terms, would not apply and, in any event, is unworkable in its current form.

Under the Re-proposal, if a participant is leaving his or her employer for retirement or other employment and calls the plan recordkeeper’s call center for assistance regarding his or her distribution and rollover options under the plan, the call center representative would be precluded from discussing the recordkeeper’s own IRA rollover services for transferring the participant’s assets into a proprietary IRA, which funds are available under such IRA and their characteristics, such as whether or not they are the same funds available in the employer’s plan, or whether or not plan distributions could be taken in the form of an annuity provided through the recordkeeper’s insurance company affiliate (even if that annuity is the only guaranteed lifetime income option available under the plan). Evaluating options to take single life or joint and survivor annuity payout options in conjunction with possible life insurance would also be off-limits. This is extremely valuable information that a participant would want to know before making a distribution or rollover decision. Likewise, a participant who doesn’t have the time, or otherwise lacks the interest to pick funds within the plan, may find it valuable to know that the plan has an investment advisory or managed account option through which investment recommendations or decisions are made by a professional. Lastly, simply describing the asset classes in an asset allocation model may not adequately assist a participant who wants to know which investment options under the plan satisfy the various asset classes. In this respect, IB 96-1 has been extremely beneficial to such plan participants.

A more appropriate balance could be struck between a retirement saver’s need for information and the interest in not directing the participant to investment products that do not serve his or her interests. The appropriate balance can be achieved by making certain modifications to the Education Carve-out. The Investment Education Carve-out (which actually should be a safe harbor, similar to IB 96-1, rather than being a mere “carve-out”) could make it clear that discussions of specific investments with a retirement investor, whether in the context of a distribution or rollover decision, subscribing to an investment advisor or managed account service, populating the asset classes in an asset allocation model, that are in the nature of factual statements or objective descriptions of such investments are clearly covered by the carve-out. Such an approach would permit recordkeepers to, for example, distribute to plan participants DOL-required disclosure materials, such as summary plan descriptions, comparative investment charts, fund mapping notices and QDIA notices, without fear that they are engaged in providing fiduciary investment advice since such materials contain specific information about funds, investment services, and annuity forms of benefit available under the plan.

- b. The BIC Exemption is unworkable in its current form for individual retirement investors; it should be substantially revised to be workable.

Transamerica believes that, given the broadness of the Proposed Fiduciary Rule, the retirement industry will need a workable exemption to preserve assistance and consumer choice. Access to investment services, distribution and rollover services, and other assistance for all plan sponsors, participants, and IRA owners should be preserved by providing a clear disclosure-based regulatory exemption from the prohibited transaction rules based on the principle that the advisor would be required to act in the client’s best interest. The best

interest requirement is significant because, by combining a best interest standard with the preservation of consumer choice and access, the new regulatory standard would be better harmonized with the securities laws approach, thus paving the way for a fully coordinated uniform standard if and when the SEC and/or FINRA moves forward. Without this harmonization, the Re-proposal would (1) result in conflicting standards among retirement and non-retirement accounts that would confuse investors, (2) deny access to investment assistance for many investors, and (3) result in increased burdens through duplicative and inconsistent compliance regimes. As long as the best interest requirement does not preclude promotion or advice with respect to proprietary funds, products or services, or the receipt of differential compensation by financial advisors, a principle-based structure would preserve consumer choice and ensure that investors understand their advisors' financial incentives. Accordingly, we agree with the Department that a principles-based approach is the appropriate approach. However, the BIC Exemption falls far short of the mark; it is still a prescriptive approach that is unworkable.

The lack of a workable exemption from the prohibited transaction rules under the Re-proposal would force firms to completely change how they structure their relationship with clients, and in many cases would make it difficult or impossible to continue to service low- and middle-income employees and small businesses. This cannot be the Department's intention in designing the Re-proposal but it is the outcome that Transamerica and many in this sector expect to occur. The Department's desire to implement a "principles-based" exemption was on the right track, but its attempt at implementation in fact added many prescriptive conditions that result in no one being able to use the exemption. For example, the BICE is restricted to transactions with "Retirement Investors" (a restricted list of investors defined by the Department) with respect to the recommendation of an "Asset" (a restricted list of investments defined by the Department). The Department should return to a principles-based track by providing a practicable exemption applicable to all advice recipients, with respect to any type of investment they choose to consider, instead of a limited exemption that is too burdensome to be used in practice. Specific areas of the BICE that needs improvements to make it workable include:

i. DEFINITIONAL ISSUES UNDER THE BIC EXEMPTION

(A) The definition of "Retirement Investor" within the BICE should not be arbitrarily restricted to specific investors.

In the same way that there is no rational basis for restricting the Counterparty's Carve-out to large plans and sophisticated fiduciaries with at least \$100 million in AUM, there is also no logical basis for restricting the BICE to non-participant-directed small plans, plan participants and their beneficiaries, and IRA investors. The artificial differentiation between a large and a small plan is not recognized in the fiduciary rules of ERISA. Under ERISA, the fiduciary of any plan, regardless of its size, is required to retain professional assistance if the fiduciary does not have the expertise to competently evaluate a proposal from a prospective plan service provider. Likewise, the distinction between a participant-directed small plan (not eligible for the BICE) and a non-participant-directed small plan (eligible for the BICE) has no basis in the ERISA statute. In both types of plans, the plan fiduciary has a duty of prudence that obliges him to evaluate service provider proposals with competence and, if he is unable to do so, to retain expert advice. The Department should not create these artificial differentiations between plans within the BICE.

(B) The definition of "Asset" within the BICE should not be arbitrarily restricted to investment funds and products; the definition should provide for investment services and distribution/rollover services.

A strict reading of the BIC Exemption suggests that the definition of “Assets” is restricted to a Department, pre-approved list of assets. We believe this is the wrong approach. If the definition of investment advice under the Proposed Fiduciary Rule will be broad enough to cover advice with respect to plan distribution and rollover services, as well as investment advisory and management services, then the definition of Asset under the BICE should include all assets and such services as well as other investment services recommended by a financial advisor or other service provider. We believe that this oversight was simply inadvertent because there appears to be no rationale for the restriction. While the recommendation of services (such as investment advisory and/or management services and distribution and rollover services) are not covered by the BIC Exemption, since the term Assets does not include services within the definition of “Assets,” services are clearly included in the Proposed Fiduciary Rule’s definition of “advice.”

ii. CONTRACT ISSUES UNDER THE BIC EXEMPTION

(A) The timing and signature requirements under the BICE for entering into the Best Interest Contract with the investor are impractical.

Contract timing requirement should be contemporaneous with, or a reasonable time after, the recommended transaction. The BIC Exemption requires the advisor and the financial institution to enter into a written contract with the retirement investor prior to making any recommendation. The BICE’s preamble states that “[t]he contract must be executed by the advisor and the Financial Institution as well as the Retirement Investor.” As further discussed below, a more practical alternative to entering into a signed contract is available for achieving the Department’s key objective, that is, to require the advisor to abide by, and document to the investor, the terms and obligations of the advisory relationship. In addition, the proposed timing for entering into the contract is impractical. At the time that the advisor commences a discussion with the retirement investor, there is no “meeting of the minds” regarding the advisory relationship. The current contractual timing requirement in the BICE would preclude pre-contractual negotiation by the parties involved. Furthermore, it is often the case that investors do not act upon the recommendations made and may ignore the advice altogether, in which case no compensation would be earned if compensation is transaction-based. An investor may also reject the advice and execute a different transaction that was not recommended, which could also preclude compensation to the advisor. Other investors may spend a considerable amount of time pondering the advice before executing the recommended transaction. Often, the delay could be so long that it is difficult to attribute the final transaction to the advice originally given. We suggest that the Department time the best interest written contract requirement to the time immediately preceding the implementation of the recommended transaction, provided that the advice and the execution of the transaction are reasonably contemporaneous (e.g., within three months of each other). This suggested approach would give the investor adequate time to review the contract and, if desired, not proceed with the transaction.

Contract signing and delivery requirements should recognize electronic processes and unilateral contract concepts. The BICE imposes a traditional contract requirement providing for signature by both parties (in this case, potentially four parties: the investor, the advisor, his or her firm, and the financial institution offering the product or service). The traditional approach is no longer prevalent in the industry. Instead, many contracts are signed electronically. In addition, certain unilateral contracts are not required to be signed at all so long as delivered to the other party with the understanding that the delivering party will abide by the terms and conditions of the delivered contract. In today’s marketplace, many firms have developed “customer bill of rights” or “corporate codes of conduct” in which the firms outline how they and their representatives promise to behave in their dealings with prospective and current investor clients. These documents specify the standards of care that the firm and its advisors will abide by. Once these policy documents are delivered to investors with

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the understanding that when they engage in a transaction with the firm, the firm and its representative will conduct themselves accordingly, they are enforceable under state law due to the client's reliance on the promise made. In addition to permitting electronic signature and delivery under the BICE, the Department should recognize the existence of such unilateral contracts in the BICE. The BIC is a written contract that must be signed by three parties—the advisor, the firm, and the retirement investor—before any advice is rendered. The reality is that individual account retirement plans are increasingly “auto enroll” and “default investment” plans; auto enrolled participants are rarely actively engaged in the management of their retirement plan accounts. Even in the plans that do not have these automatic features, many participants fall into a form of inertia after they initially enroll and do not have much to do with the plan until some future life event such as termination of employment or retirement. The Department should take into consideration these factors when constructing a contractual requirement for individual retirement investors.

Contract signing for existing clients should not be required; instead, the BICE should permit negative consent. The contract signature requirement is not practical for existing customers. Many, having already signed a contract at the commencement of the relationship, will simply not sign the contract. Our experience is that negative consent is a more effective approach for revising an existing customer contract, particularly where the contractual revision benefits the customer. Accordingly, if the Department does not permit the concept of a unilateral contract as discussed above, the Department should permit service providers to send the contract to existing customers without requiring a signature unless the client objects to the provisions of the contract. Service providers should be given flexibility in terms of how the negative consent is obtained and how existing customers can express their objection.

(B) The burden for determining the reasonableness of compensation should not shift to the advisor.

The BIC Exemption provides that the advisor's compensation cannot exceed reasonable compensation. The BICE's preamble states that “[t]he reasonableness of the fees depends on the particular facts and circumstances,” suggesting that the advisor and his firm has the obligation of determining “reasonableness.” The BICE's shifting of the burden is contrary to ERISA where the determination of reasonableness is made by the plan fiduciary investor. The BICE should preserve placing the burden of determining reasonableness on the plan fiduciary investor.

(C) The BICE's contractual warranties are too vague and should be clarified.

The BICE requires the written best interest contract to have a number of warranties regarding compliance with all applicable federal and state laws, adoption of specific policies and procedures (regarding, for example, the mitigation of the impact of any material conflicts of interest and adherence to the BICE's Impartial Conduct Standard), specifically identifying material conflicts of interest and not encouraging advisors to make recommendations that are not in the Best Interest (a defined term) of the Retirement Investor by using certain specified actions. Transamerica finds these contractual warranty requirements to be very vague and could discourage the use of the BIC Exemption if adopted.

For example, a financial institution must warrant that it does not encourage its advisors to make recommendations not in the best interest of the retirement investor by using, among others, “differential compensation.” However, the Department goes on to specify that “*differential compensation based on such neutral factors as the difference in time and analysis necessary to provide prudent advice with respect to different types of investments would be permissible.*” [Emphasis added.]

However, we are still not clear as to the meaning of this language, and it appears to contradict the Department's express objective in the BICE to preserve existing compensation practices in the retirement marketplace so long as a best interest standard is followed. The Department should provide clear guidance as to the degree of flexibility available under the BICE for designing differential compensation arrangements between different types of investment products. In essence, the Department's approach is tantamount to "comparing apples to oranges." In contrast to selling a mutual fund, when an advisor sells a lifetime income insurance product with complex features and benefits, such as an annuity, the advisor is foregoing future compensation due to the characteristic of the product as a long-term investment with an insurance company. Such a sale is only doable in a commissions-based structure where the insurance company is paying the upfront cost for the advisor's commission in exchange for the long-term relationship anticipated with a customer that purchases a lifetime income insurance product. Thus, differential compensation between investment products is not solely attributable to the "time and expertise necessary to provide prudent advice on the product." Our preference is for the Department to delete the BICE's restriction on differential compensation in its entirety and allow the retirement marketplace to evolve in the direction that customers find most beneficial to them. However, if the Department retains this restriction in the BIC Exemption, a less onerous approach for addressing the current restriction's vagueness is to clarify that the restriction on differential compensation applies only when the differential compensation is generated within the same asset class or category of investments and not between asset classes or different categories of investments. For example, any level of differential compensation that exists between a mutual fund and an annuity product would not be subject to the BICE's restriction on differential compensation. The rule in the proposal—permitting some differential based on the time and analysis needed to evaluate different types of investments—is too vague to be relied on and thus would not be used. This would mean that advisors would not have incentives to evaluate any investment needing more analysis—such as annuities—which would not be a good policy result.

There are many other issues with the BICE's contractual provisions, particularly with respect to the numerous and burdensome disclosure obligations and the ability of retirement investors to bring class action lawsuits over contract terms for which there is not yet a settled body of law interpreting the language. However, we believe we've covered the key contract issues.

iii. DISCLOSURE ISSUES UNDER THE BICE

(A) The BICE's disclosure obligations are voluminous and should be scaled back by requiring clear and understandable disclosures.

The Department is requiring five levels of disclosures in the BICE, all separately timed: (1) contractual disclosure; (2) transactional (point-of-sale) disclosure; (3) annual disclosure; (4) Web page disclosure; and (5) data disclosure to the Department. The multiple and duplicative levels of disclosures required under the BICE will increase cost and overwhelm individual investors with an avalanche of information that is not useful to them. Some aspects of the BIC Exemption, such as the requirement of the 1-, 5- and 10-year investment projections are clearly infeasible, conflict with the prohibition in securities laws regarding projections, and must be eliminated from the exemption; others are workable but will require time for service providers to bring their recordkeeping systems into compliance.

The Department has asked for comments on delaying the effective date of certain aspects of the BIC Exemption beyond the effective date announced in the final proposal. Many of the disclosure obligations will require major systems efforts over a number of years and, accordingly, some of these requirements should be phased in

gradually. In addition, investors will be overwhelmed by the level of disclosure, especially when provided in addition to other required disclosures. The disclosures will either be ignored or cause confusion. To put it simply, the disclosures are simply unworkable. Accordingly, we ask the Department to scale back the disclosures to a manageable level, as well as to permit service providers to coordinate the timing and substance of the BICE disclosures with other disclosures required by ERISA, under state insurance laws or under securities laws. In this respect, we agree with the specific disclosure changes proposed by the ACLI, DCIIA, FSI, FSR, IRI, ICI, SIFMA, and the Chamber in their respective comment letters.

The Department's proposed exemption is intended to permit the provision of personalized investment assistance to individuals in transaction-based brokerage accounts, many of which are not big enough to be in a fee-based advisory account (which, because of its asset-based fee structure, may not need an exemption). The challenge is that the proposed exemption is not workable. In fact, *far more data and additional disclosures are required with respect to a \$3,000 IRA than are required to be provided by a service provider to a retirement plan with tens or hundreds of thousands of participants. For example, under the proposed exemption, financial institutions are required to disclose—and update at least quarterly—all direct and indirect compensation received with respect to all assets of all retirement customers of the financial institution and all affiliates for the past 365 days as well as the same information with respect to all assets that a retirement customer could possibly purchase (other than certain assets less commonly purchased).*

This is only one example of the unprecedented and commercially unworkable requirements that render the exemption effectively unusable and provide such a massive amount of information that it is of little use to the customer in assessing the advisor's financial interests. Also, the difficulties of providing information on the dollar amount of indirect compensation on an account level are difficult to overstate.

Nevertheless, we commend the Department for attempting to provide a principles-based exemption approach that is intended to cover a broad variety of what would otherwise be prohibited compensation and for a wide variety of interested parties. This is an unprecedented effort on the Department's part, and clearly abundant work and research went into developing this framework, which we believe could help make our industry more creative. By not having to develop products or services that fit a prescribed approach under a pre-existing exemption, service providers will be more adaptive to market developments and the needs of their customers. While this particular BIC Exemption is unworkable, we are highly appreciative of the Department's effort and attempt to introduce a new framework in the class exemptions area.

D. The Proposal's Lack of "Grandfathering" and Reasonable Transition Provisions would be Disruptive to Existing Contractual Relationships

- 1. The Re-proposal needs a meaningful "grandfathering" exemption for pre-existing contracts in order to help avoid the unravelling of ongoing client relationships.***

The Department's Re-proposal contains a proposed exemption for pre-existing transactions that is too narrow in that it would only cover transactions that occurred prior to the final regulation's Applicability Date (defined as eight months from the publication of the final rule in the Federal Register). The proposed exemption would not cover any transactions that occur in a retirement investor's account following the Applicability Date but that are made pursuant to advice that was given before the Applicability Date. As an example, imagine a participant has been subscribed to an asset allocation service that has as a feature "automatic rebalancing" intended to transition the participant's account through a series of asset allocation models pre-selected by the participant based on an investment glide path that is appropriate for the participant according to his or her target retirement age. It

would appear that under the Re-proposal, the rebalancing that occurs in the participant's plan account after the effective date of the Rule will be considered transactions for which the provider of the rebalancing service has no relief. Unless this is fixed, firms that are not in a position to comply with the final Rule on the Applicability Date—a large group in light of the unworkability of the proposed exemption—would have to terminate the relationship or close these accounts. This could cause retirement investors to discontinue investing for retirement or even sell their positions, perhaps in an unfavorable market. We believe it is both unfair to the retirement investor and unsettling to the marketplace to force firms to discontinue their advisory services for existing retirement relationships.

Furthermore, keeping with the above example, since terminating the asset allocation service may not be in the participant's best interest, the Department needs to provide direct guidance as to the recordkeeper's obligations (fiduciary or otherwise) for the termination of the service. The Department can address this concern by grandfathering, at the very least, all pre-existing advice. Even this type of exemption would leave many accounts "orphaned," i.e., without access to investment assistance regarding existing investments. For recordkeepers that need to terminate an asset allocation service (in the absence of the participant's consent), there should be a transition period during which the service can be continued without it constituting a non-exempt fiduciary act. Also, if the proposed Investment Education Carve-out is finalized, which we would not support, the exemption for pre-existing advice should also be expanded to cover investment education materials that make references to specific investment options in reliance upon IB 96-1 (which is being superseded by the proposed Rule) but which will still be in plan participants' possession following the Applicability Date.

2. The Proposal Needs to Have more Flexible Transition Provisions and a sensible Effective Date

While we continue to evaluate the Re-proposal in terms of the time and resource commitment that will be required in order for Transamerica to come into full compliance, we have determined that there will be substantial costs and burdens associated with implementing the Re-proposal in its current form. By this reference, we hereby incorporate the ACLI's commentary in its comment letter as to the legal and technical failings associated with how the Department's Re-proposal was implemented, including the cost-benefit analysis, which we find wholly inadequate. In this regard, we believe that the Proposed Applicability Date of the Proposed Fiduciary Rule should be extended by at least two (2) years to give the retirement industry the time required to adjust to the new Rule. The Investment Education Carve-out should not supersede IB 96-1 for at least three (3) years beyond the Applicability Date to give Service Providers adequate time to revise existing materials to come into compliance with the new carve-out. Enforcement action with respect to reliance on the BIC Exemption should be delayed by at least two (2) years beyond the applicability date to give service providers adequate time to come into compliance with its requirements and conditions. Likewise, during this interim non-enforcement period, retirement investors should not be able to participate in a class action or other representative action in court pursuant to the BIC Exemption so long as an alternative form of dispute resolution is provided in the financial institution's contract with the investor.

SECTION IV. Conclusion

By submitting this comment letter, Transamerica hopes that it has constructively contributed to the debate surrounding the Re-proposal. Our goal is the same as the Department's—to ensure that Americans have access to the impartial advice and quality products that they will need to plan and save for retirement. Transamerica will continue to take part in the debate and is appreciative that the Department has offered to conduct hearings following the close of the comment period. We also appreciate that the Department will open the comment period again after the hearings have been conducted. We believe that Transamerica brings certain unique

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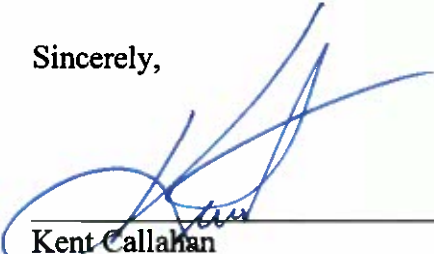
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capabilities to the marketplace, particularly around level fee initiatives, and we want to share our experience with the Department.

Again, we thank the Department for giving us this rare opportunity to offer our opinions on this critical issue. If you have any further requests, please do not hesitate to contact us. Technical questions regarding the content of this letter may be sent to Marc H. Cahn, who may be reached by phone at (914) 954-1185 or through e-mail at Marc.Cahn@transamerica.com.

Sincerely,



Kent Callahan

President & CEO – Transamerica Investment and Retirement Division

cc: Mark Mullin, President & CEO
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