asset management group

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By Email (EBSA.FiduciaryRuleExamination@dol.gov)

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Fiduciary Rule Examination
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

RE: Comment Letter on Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice; Best Interest Contract Exemption (Prohibited Transaction Exemption 2016-01); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Prohibited Transaction Exemption 2016-02); Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, 84-24 and 86-128. (RIN 1210-AB79)

Ladies and Gentlemen:

The Securities Industry and Financial Markets Association's ("SIFMA") Asset Management Group ("AMG")[1] appreciates the opportunity to provide the U.S. Department of Labor's ("Department") Employee Benefits Security Administration with comments on (1) the questions posed in its Proposed Rule and Extension of Applicability Date, dated February 27, 2017 concerning the Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice and related exemptions, including the Best Interest Contract Exemption (the "BIC Exemption") (collectively, the "Fiduciary Rule") to address questions of law and policy, and (2) questions posed by the President's Memorandum to the Secretary of Labor, dated February 3, 2017, directing the Department to examine whether the Fiduciary Rule may adversely affect the ability of Americans to gain access to retirement information and financial advice, and to prepare an updated economic and legal analysis concerning the likely impact of the Fiduciary Rule as part of that examination (the "President's Memorandum").[2]

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[1] SIFMA's Asset Management Group ("AMG") brings the asset management community together to provide views on policy matters and to create industry best practices. SIFMA AMG's members represent U.S. and multinational asset management firms whose combined global assets under management exceed $39 trillion. The clients of SIFMA AMG member firms include, among others, tens of millions of individual investors, registered investment companies, endowments, public and private pension funds, UCITS and private funds such as hedge funds and private equity funds.

[2] The Fiduciary Rule and related exemptions may be found at 81 Fed. Reg. 20946 through 21221. The Department's Full Report Regulatory Impact Analysis for Final Rule and Exemptions (RIA), and the additional RIA documents are posted on the Department's Web site at *www.dol.gov/agencies/ebsa/laws-and-*

AMG's members—fiduciaries that manage investments for pension funds, retail investor funds and private funds, among others—share the Department's concern that Americans are not saving enough for retirement and agree with the Department's goal of ensuring that Plans[3] receive advice that is in Plans' best interest and receive assistance for optimal retirement benefits. Like the Department, AMG members work to support the ability of Americans "to save for retirement and build the individual wealth necessary to afford typical lifetime expenses, such as buying a home and paying for college, and to withstand unexpected financial emergencies."[4] AMG, however, believes that the Fiduciary Rule is not the best means by which this goal can be achieved. In many ways, the Fiduciary Rule unnecessarily disadvantages investors and will lead to significant negative consequences.

Asset managers, as manufacturers of products, have already observed intermediaries beginning to reconfigure costs and cull products and services available to retail investors, including those made available for Plans. The Fiduciary Rule's broad definition of investment advice, narrow exceptions and the onerous requirements of the BIC Exemption have led and will continue to lead broker-dealers to restrict products they offer. In a similar vein, many asset managers likely will offer less information and education and fewer analytical tools, even information that has been generally available on their websites, for fear of inadvertently becoming subject to the many additional burdens and risks created by the Fiduciary Rule.

AMG members believe that the Fiduciary Rule has already resulted in and will likely continue to result in dislocations and disruptions of retirement services that adversely affect investors and retirees. All investors, particularly small investors, will see an adverse impact on the availability of investment advice. Further, business decisions, including product offerings, are being reshaped by fear of litigation over uncertainties in how many aspects of the Fiduciary Rule will be interpreted by courts. The BIC Exemption's affirmative authorization of class action lawsuits coupled with the extraordinary number of conditions and opportunities for inadvertent "foot faults" make increased litigation almost inevitable. These risks will likely have the effect of stifling development of truly innovate retirement products and strategies at a time when people are living longer lives and thus need greater returns through such innovation.

Rather than have the Fiduciary Rule's flawed approach imposed upon Plans, AMG strongly supports a uniform best interest standard for all retail investment accounts. A uniform best interest standard imposed by a regulator with broader remit than the Department, such as the Securities and

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regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2. The President's Memorandum may be found at 82 Fed. Reg. 9675, or at https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-memorandum-fiduciary-duty-rule.

[3] We use the term "Plan" in this letter to refer collectively to employee benefit plans subject to the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), individual retirement accounts ("IRAs") and other plans subject to Section 4975 of the Internal Revenue Code of 1986, as amended (the "Code"), and their participants, beneficiaries and owners in the case of an IRA, as well as entities that may be deemed to constitute "plan assets" by reason of 29 CFR 2510.3-101 as amended by Section 3(42) of ERISA or otherwise.

[4] 82 Fed. Reg. 9675.

Exchange Commission ("SEC"), would have the benefit of applying a single standard of care across all investment recommendations made to retail investors, whether for retirement savings or otherwise, and would avoid the complexities and challenges that the Department has, to date, chosen to ignore.

The first step towards a more effective best interest standard is to have the Department answer the President's questions regarding the effects of the Fiduciary Rule upon Americans' access to retirement services—and for the Department to do so without implementation until it has this analysis and can make any changes required. As discussed below, we believe that these answers will lead to conclusions that are strongly against implementation of the Fiduciary Rule in its current form and strongly supportive of a uniform best interest standard.

For these reasons, AMG urges the Department to delay implementation of the Fiduciary Rule beyond the June 9, 2017 applicability date and ultimately rescind or revise the Fiduciary Rule after completion of the review mandated by the President, providing at least 180 days for market participants to adjust to the Department's actions.

I. THE DEPARTMENT'S ANSWERS TO THE PRESIDENT'S QUESTIONS WILL DEMONSTRATE THE NEED TO RESCIND OR REVISE THE FIDUCIARY RULE

A. Diminished Access to Services, Products and Retirement Savings Information

The separate letter submitted today by SIFMA in response to the same request for comment (the "SIFMA Letter") identifies in great detail the many ways that the Fiduciary Rule will restrict the ability of broker-dealers to provide services, products and retirement savings information. AMG members have witnessed this contraction already as broker-dealers have taken steps to prepare for the applicability date.

Asset managers, likewise, out of concern for inadvertently becoming subject to the additional burdens and risks of the Fiduciary Rule, are also moving forward with plans to restrict services, products and retirement savings information. Asset managers already are fiduciaries in their management of investments; however, the flaws with the Fiduciary Rule combined with other challenges make a number of services currently offered not worth the cost and risk for many firms.

For example, many asset managers may cease communications with retirement investors who have direct at-fund (*i.e.*, accounts not serviced by a broker-dealer or other intermediary and maintained with the fund sponsor) or "orphaned" retirement accounts (*i.e.*, accounts previously serviced by a broker-dealer who have ceased having an account relationship). The costs and uncertainty of continuing to service direct-at-fund retirement accounts under the Fiduciary Rule will incentivize fund sponsors to eliminate those accounts and/or eliminate services currently provided. Asset managers, in their role as fund sponsor, have historically provided support for these direct-at-fund accounts (including IRA accounts) despite the high costs of doing so. This role historically has not been a fiduciary one, nor is the role akin to ERISA fiduciary status supportable by the statutory language.

As another example, many fund sponsors, in addition to making information available through third-party distributors and other public channels of information, have a call center run by an affiliated transfer agent, provide online account access and send traditional mail to service direct-at fund

retirement savers' accounts.[5] An IRA owner with a $3,000 direct-at-fund account may contact the call center and ask if the mutual fund sponsor offers a target date fund and ask for additional information about how a target date fund works. Due to the flaws with the Fiduciary Rule, described below, simply answering the question and providing the requested information now raises substantial concerns that the response results in investment advice. Many asset managers will no longer answer the question for fear of being an inadvertent fiduciary.

Similar concerns are created by the Fiduciary Rule for those direct-at-fund account owners who use the fund company's website to obtain information and make investment decisions online especially if the fund company's website provides information for IRA owners to consider when deciding on a fund to purchase. Asset managers have struggled with how to avoid inadvertent fiduciary status when a retail IRA investor simply accesses the member's public website and chooses among different research and white papers and other examples of thought leadership. Many asset managers have concluded that they are at risk merely for having these materials broadly available because perhaps they fall outside of "general communications". Some fund companies have been concerned enough to consider establishing firewalls on their websites, with access denied to general thought leadership and product information except to the extent that the web visitor is able to certify that it meets one of the categories of the Independent Fiduciary Exception (discussed below).

For asset managers and fund sponsors that will not restrict access outright to anyone that is not an investment professional, the provision of these basic informational materials is significantly burdened due to the flaws in the Fiduciary Rule. As such, they will incur costs reviewing thought leadership, every investment idea, every research paper to determine whether it could be regarded as a "suggestion" or "recommendation."

B. Dislocation and Disruption of Retirement Savings Information and Services

Asset managers have seen a multiplicity—indeed outright proliferation—of conflicting product design changes requested by broker-dealers that result in cutbacks to retirement services, products and retirement savings information currently available to Plans. Numerous news articles have reported on the shrinking platforms and brokerage practices at some of the major broker-dealers. Likewise, the new mutual fund "Transaction" shares, or T-Shares, exemplify the type of market changes created solely to thread the needle of the Fiduciary Rule's restrictions. For T-Shares, the upfront and ongoing fees are the same for all mutual funds regardless of fund sponsor – thus satisfying the BIC Exemption's "neutrality" requirement. But, they do not have certain shareholder rights (e.g., the right to exchange shares without paying a fee or the right to accumulate holdings to pay a lower sales charge) that generally would otherwise benefit retirement investors.

Some products and services may no longer fit within the narrow exemptions of the Fiduciary Rule notwithstanding the utility of these products for Plans. For example, registered closed-end fund initial public offerings, may not fit either the BIC Exemption or Prohibited Transaction Exemption 2016-01. As a result, even though retirement investors may view this product as attractive, it will be excluded from offerings due to the Fiduciary Rule. Negative effects may also follow for the market

[5] For these traditional direct-at-fund accounts, only funds in the family of funds sponsored by the asset manager or its affiliates are available.

generally by shrinking the scale of the market and the capital investment generated by closed end fund portfolios.

Equally concerning is the dislocation that is occurring for accounts *not* subject to the Department's oversight. Clients often come to financial institutions with a number of personal accounts. Some may be Plans, such as IRAs, but much of the client's relationship may be other non-retirement assets. Due to the flaws in the Fiduciary rule, broker-dealers may be concerned that, for example, asset allocation information it provides to a client for his non-retirement, brokerage account may be regarded as "individualized" by the client and applied to his or her IRA as well.

C. Investment Offerings Driven by Fear of Litigation Over Ambiguous and Flawed Requirements

The increase in litigation that will be caused by the Fiduciary Rule is undeniable. The BIC Exemption, including its prohibition of contractual limitations on class action litigation, was designed to achieve this result. At the same time, these costs were largely ignored by the Department in promulgating the Fiduciary Rule.[6]

These litigations will inevitably focus on the Fiduciary Rule's many flaws, including the absence of a mutuality requirement and the many inscrutable provisions. In the next section, we outline the known flaws that will feed into this burden and risk for fiduciaries subject to the Fiduciary Rule.

II. THE FIDUCIARY RULE IS SIGNIFICANTLY FLAWED

A. Absence of Mutuality Requirement

The Fiduciary Rule ignores the basic legal tenant of mutuality, including a common understanding of the services to be provided, whenever an agreement underlies an obligation or liability. As written, the Fiduciary Rule does not require the service provider and the retirement investor to have the same understanding. While the introduction of objective or "reasonable person" terms such as "content, context and presentation" are welcome, they do little to allay the concerns as to what those terms will really mean in any given set of facts. The current standard under ERISA requires a mutual understanding or agreement between the parties regarding fiduciary advice; the new rule drops the word "mutual." As such, it is hard to imagine that litigation will *not* ensue as a result of this significant flaw.

The absence of a mutuality requirement is deeply disturbing and violates established principles of contractual assent. As AMG noted in its comment letter to the proposed rule:

> As a threshold matter, the absence of mutual assent is contrary to basic principles by which persons become bound by legal obligations. By eliminating any notion that the parties should have a meeting of the minds regarding an asset manager's role, the Department opens the door to nearly indefensible claims by any person who in hindsight is

[6] *See* "Weighing the Strategic Tradeoffs and Elephants of the U.S. Department of Labor's Fiduciary Rule," Morningstar Financial Services Observer, February 2017.

> upset with an investment decision, whether or not the person relied at all on the information provided by the asset manager.[7]

Absent a mutual agreement regarding fiduciary status, asset managers and other financial services firms will simply have more limited ability to provide even basic information commonly provided to clients, Plans and non-Plans alike. Any "recommendation" that is ***individualized*** or ***specifically directed*** to the Plan could result in the person becoming a fiduciary to that Plan. At the same time, clearly, there are situations where no reasonable Plan or other market participant would expect that the advertiser is acting as a fiduciary, and it is fair to make sure that those are not inadvertently captured by the Fiduciary Rule. And yet, the Fiduciary Rule adopts a maximalist premise that almost every communication and interaction between an asset manager and a Plan could be viewed as a "recommendation," broadly defined to mean any "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."[8]

The elimination of the "mutuality" requirement in particular will materially increase the risk of litigation and negatively impact the services asset managers can provide to Plans and the retirement outcomes of those Plans. Additionally, the inclusion of the words "specifically directed to," in the absence of a mutuality requirement, adds ambiguity that is unsupportable. While it is conceivable that advice (and not merely selling) may be fiduciary in nature if it is specifically directed to **and** individualized to a Plan, "specifically directed to" standing alone captures non-individualized information. By eliminating the notion that the parties should have a meeting of the minds regarding the financial professional's role, the Department opens the door to nearly indefensible claims by any person who in hindsight is upset with an investment decision, whether or not the person relied at all on the financial professional's related recommendations.

AMG believes that Plan investors are able to distinguish between a sales call and tailored investment advice and, as such, the addition of a mutuality requirement would serve to reduce litigation through documentation of both parties' intent.[9] To date, however, our comments and concerns on this fundamental flaw have been ignored.

B. Undue Restrictions on Larger Plans, Sophisticated Fiduciaries and Investors

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[7] *See* AMG Submits Comments to the DOL on Its Fiduciary Rule Proposal (Jul. 20, 2017), available at: http://www.sifma.org/issues/item.aspx?id=8589955453.

[8] 80 Fed. Reg. at 21960.

[9] Recent research suggests consumers can distinguish between a sales call and fiduciary advice. People don't trust sales calls or other unsolicited advice. *See, e.g.,* "Trust and Financial Advice," J. Burke and A. Hung, RAND Labor and Population Working Paper, WR-1075 (Jan. 2015), at 1. ("…we find that financial trust is correlated with advice usage and likelihood of seeking advisory services. Analysis of the experiment shows that trust is an important predictor of who chooses to receive advice, even after controlling for demographic characteristics and financial literacy. However, providing unsolicited advice has little impact on behavior, even for individuals with high levels of trust." This finding underscores SIFMA's view that unsolicited advice – sales conversations – should not be deemed fiduciary advice.

The Fiduciary Rule's exception for ordinary course interactions amongst sophisticated financial market participants (the "Independent Fiduciary Exception")[10] does not sufficiently cover these interactions and will likely cause unnecessary market dislocations and inefficiencies to the detriment of Plan clients. The broad expansion of the definition of "investment advice" combined with a burdensome carve-out for larger plans and sophisticated fiduciaries is reasonably expected to unduly limit services and products available and increase expenses for Plans managed by asset managers. AMG appreciates the Department's attempt to differentiate between the retail market and the institutional markets, including by its statement that "[t]he use of the term 'plan fiduciary' in the proposal was not intended to suggest that ordinary business activities among financial institutions and licensed financial professionals should become fiduciary investment advice relationships merely because the institution or professional was acting on behalf of an ERISA plan or IRA."[11] However, absent change, it will not fully achieve this result.

First, AMG believes that to take advantage of the Independent Fiduciary Exemption, a product manufacturer should not have to reach a litany of "reasonable basis" conclusions about the institution's role, competence, fiduciary status or ERISA compliance. These regulated institutions are capable of comporting with their regulatory duties, including, to the extent fiduciaries, complying with their fiduciary and/or other regulatory responsibilities thereunder. To conclude otherwise is likely to have a chilling effect on the free flow of information and ideas among financial professionals, which will likely serve to the detriment of end-user Plans.

We believe that the "reasonable basis" predicates introduced by the Independent Fiduciary Exception and in the follow up FAQs are overly restrictive and misplaced. Moreover, they provide needless opportunities for confusion and complexity. An asset manager product manufacturer should not need to live in fear of becoming an inadvertent investment advice fiduciary merely because it wants to sell its products to a registered broker-dealer, or because it wants to share some analytical tools to a registered investment advisor, or because it wants to discuss some new market ideas with an insurance company. These are the epitome of "ordinary business activities among financial institutions and licensed financial professionals."

AMG would also like to point out that where the intermediary institution is acting as a fiduciary, Plans are protected and should not require additional protections from manufacturers in the form of representations that effectively require the fiduciary to confirm its status. Intermediaries acting as fiduciaries have to comply with the whole suite of fiduciary responsibility provisions. The language of the exception effectively places manufacturers in harm's way unless they take the extraordinary step of corroborating broker-dealers' compliance. AMG believes that this is not only commercially unsettling, it is also an unnecessary hurdle simply to permit manufacturers and intermediaries to engage in ordinary course interactions.

The introduction of these "reasonable basis" provisions has been made even more challenging by the focus on who is and who is not "independent" for purposes of the Independent Fiduciary Exception under Conflict of Interest FAQ 28 (Set II). We believe that the guidance is unfortunate

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[10] Fiduciary Rule at 2510.3-21(c)(1).

[11] 81 Fed. Reg. 20982.

in that it could be read as implying that a broker-dealer may need to comply with the BIC to represent that it is independent. We are doubtful that this was actually intended, as the Department has already acknowledged that intermediaries may have a number of different exemptions available to them apart from the BIC Exemption, or may simply avoid fiduciary status altogether. As to the independence prong, we strongly believe that traditional norms of corporate control are well settled and should be sufficient. Finally, we note that where the intermediary is a fiduciary, it would already have a duty to assure independence of the manufacturer by avoiding situations which may affect its best interest as a fiduciary under 29 CFR 2550.408(b)-2(e). AMG requests that the Independent Fiduciary Exception be refined to be simpler and eliminate the burdensome and unnecessary conditions that make its use difficult.

While we agree that the institutions listed in the Independent Fiduciary Exception are appropriate, and understand the concept of using an asset or wealth based test as a proxy for sophistication, we disagree with the threshold chosen and do not understand why that test has not been adopted harmoniously across all plan accounts. The specific exclusion of IRAs from qualifying under the "sophisticated by reason of having a specified level of assets under management or control" test in this regard is troubling. As mentioned, the Department should use standards of sophistication that have already been adopted by other regulators well versed in the securities and financial markets. By refusing to do so in the final Fiduciary Rule, the Institutional Fiduciary Exception as crafted is simply not consistent with the view that retail customers responsible for their personal retirement savings need holistic financial planning and advice spanning taxable and non-tax accounts. As we noted in our comment for the final rule, the Department's cost-benefit study did not appear to provide any meaningful empirical support to show the prevalence of "confusion" for IRA accounts that were not determined to meet a "retail" standard for other regulatory and commercial purposes. We continue to believe that a harmonious standard of sophistication is most appropriate and that the Department should not have created yet another conflicting standard that is odds with tried and true standards adopted by the SEC. It will be IRA investors that will be severely hampered by applying different standards to what generally amounts to personal assets.[12] By refusing to exclude even the

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[12] For example, AMG continues to believe that the definition of "accredited investor" would be most appropriate. We also noted in our comment letter that the use of Qualified Client could serve as another basis for harmonization. These are "sophisticated" persons defined per Rule 205-2 promulgated by the SEC under the Investment Advisers Act of 1940 to mean (i) a natural person or company with at least $1,000,000 under the management of the investment adviser or a net worth (as defined by the Rule) of more than $2,000,000, (ii) a Qualified Purchaser (as defined under the Investment Company Act of 1940) or (iii) an individual that has certain defined roles with an investment adviser, such as an employee or officer of an investment adviser. 17 CFR 275.205-3. This standard, when first proposed by the SEC "included a financial and business knowledge test of client eligibility," such that:

> The adviser was required to reasonably believe that the client, alone, or acting with a representative, had the knowledge and experience in business and financial matters to evaluate the merits and risks of a performance fee arrangement. The purpose of the test was to ensure that the rule would be limited to advisory contracts with clients ***capable of fending for themselves***. It contemplated that ***these clients would be able to negotiate contract terms with the adviser which adequately protected their interests***." (Emphasis added). Investment Advisers Act Release No. 865, 48 FR 27771.

most sophisticated investors, the Department eliminates a lot of what these retirement investors buy – equity IPOs, municipal bonds, private equity funds, hedge funds, private placements. The Department has substituted its judgment for that of retirement investors, which prevents retirement investors from making their own choices with regard to investing their money.

Finally, although we appreciate the Department's attempt to clarify its treatment of model portfolios, we would respectfully offer a simpler solution which is consistent with the more basic principles outlined herein: the model provider should not be regarded as a fiduciary where it does not know the identity of the end user, has no privity with the end user and does not knowingly design the model for a specifically identified end-user. Further, contrary to the confusing FAQ 29, disclosure by financial institutions regarding a model provider's fees should be encouraged in the interest of greater transparency rather than penalizing the financial institutions and discouraging such disclosure.[13]

C. Inscrutability of Line Between "General Communications" and "Recommendations"

The Fact Sheet accompanying the Fiduciary Rule noted that "general communications" would not constitute a "recommendation" and that:

> general communications [are those communications] that a reasonable person would not view as an investment recommendation, including general circulation newsletters; commentary in publicly broadcast talk shows; remarks and presentations in widely attended speeches and conferences; research or news reports prepared for general distribution; general marketing materials, and general market data including data on market performance, market indices, or trading volumes, price quotes, performance reports, or prospectuses would not constitute communications that are considered recommendations.[14]

At first glance, this sounds reasonable and logical. However, careful parsing of the language and the preamble in the Fiduciary Rule suggests that there are more questions than answers.

When later refined in 1985, the SEC also noted that:

> "The Commission has concluded that it is consistent with the protection of investors and the purposes of the [Investment Advisers Act] ***to permit clients who are financially experienced*** and able to bear the risks associated with performance fees to ***have the opportunity to negotiate compensation arrangements which they and their advisers consider appropriate.***" (emphasis supplied). 50 FR 48556-01, "Exemption To Allow Registered Investment Advisers to Charge Fees Based Upon a Share of Capital Gains Upon or Capital Appreciation of a Client's Account" (November 26, 1985).

[13] Moreover, as noted above, where the intermediary institution is acting as a fiduciary, which is frequently the case in model portfolio advisory programs, Plans are already protected.

[14] Conflict of Interest FAQs (Part II – Rule) - https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/coi-rules-and-exemptions-part-2.pdf

Many are concerned that even if they try to get more information from the Plan customer to help winnow the products available, the questions themselves could be a "suggestion" that are not encompassed within the "general communication" ambit. For the reasons described under "investment education," we do not think this helps to expand, let alone preserve, retirement investor access to products and services. In fact, it is an illustration of the absurd results that arise because of the breadth of the Fiduciary Rule. It is also an example of its failure to take account of "real world" situations.

The Department also indicates that "commentary in publicly broadcast talk shows" should not be regarded as investment advice, but then singles out "media personalities" such as Suze Orman and Jim Cramer. The Department notes that concerns about them being regarded as providing investment advice are "unfounded" because "[w]ith respect to media personalities, the rule is focused on ensuring that paid investment professionals make recommendations that are in the best interest of retirement investors, not on regulating journalism or the entertainment industry."[15] Noticeably silent, by contrast, is the treatment of financial services professionals expressing broad views about annuities or other investment products at a conference for retirement investors. So, if the portfolio manager of an asset manager is interviewed on television to discuss her views on evolving trends in the global equity markets, there is still some concern that the asset manager could be attacked by a private plaintiff for offering a "suggestion" if a Plan listening in then subscribes to the portfolio manager's investment fund. Though likely not intended, this lack of clarity is extremely problematic.

AMG also worries that while it may exempt information contained within a prospectus, it may not cover a professional's selection for discussion with a Plan client specific prospectuses or perhaps, even, a selection of materials *within* a given prospectus. Many asset managers are concerned that if a Plan customer calls them and asks for "basic information" on, say, their fixed income funds, there will be no alternative but to simply send the manager's entire suite of fixed income fund prospectuses, which could be quite numerous (and costly). Many may be wholly irrelevant to the customer's needs (for example, those that are better suited for taxable customers). A "data dump" is likely not best suited for investment decision-making.

D. Disincentivizing Provision of Investment Education

Financial literacy is an important goal for Plans and ***both*** defined contribution and defined benefit Plans use a variety of educational tools to assist in making concrete their investment choices. In 1996, the Department adopted I.B. 96-1:

> In view of the important role that investment education can play in assisting participants and beneficiaries in making informed investment and retirement-related decisions and the uncertainty relating to the fiduciary implications of providing investment-related information to participants and beneficiaries, the Department is clarifying, herein, the application of ERISA's definition of the term "fiduciary with respect

[15] 81 Fed. Reg. 20979.

> to a plan" in section 3(21)(A)(ii) to the provision of investment-related information to participants and beneficiaries.

The Fiduciary Rule unwisely fails to fully extend the important concepts in this interpretive bulletin to IRAs.[16] The Department has not provided any empirical information to support the line it draws between IRAs and other plan investors and should revise the Fiduciary Rule so that the same rules applicable to defined contributions plans apply to IRAs and other plans subject to Section 4975 of the Code.

The Fiduciary Rule ignores the fact that all Plan investors – not just those in defined contribution plans -- want "visual" or interactive scenarios, such as different generic model asset allocations, and need suggested investments for what would be included in those asset allocations, so that they understand how to apply the information and do not get stuck. The imposition of a restriction on the use of a given asset manager's name or product will almost certainly have the result of decreasing the availability of critical information individuals need to make informed decisions. While AMG welcomes the Department's attempts to apply the principles in I.B. 96-1 beyond the purely defined contribution employer sponsored Plan world, we know that the net effect of restricting information regarding specific investment products may be to chill investment firms' appetite to provide any sort of investment education that could be viewed as crossing the line into investment advice fiduciary status. The Department's view that specifying possible investment options for consideration to IRA owners is not permissible will have the undesired result of causing IRA owners to think less about what is right for their IRA. It will either be too expensive, too time consuming, or too complicated for an individual to "connect the dots" so they can make informed investment decisions.

It is simply not plausible to assume that the limitations on education for IRAs will not harm these investors. It is also not reasonable to believe that having a different standard for IRAs won't result in a reduction of Americans' access to certain retirement savings offerings, retirement product structures, retirement savings information, or related financial advice.

E. Ambiguous "Hire Me" Exception

The preamble to the Fiduciary Rule indicates that:

> a person or firm can tout the quality of his, her, or its own advisory or investment management services or those of any other person known by the investor to be, or fairly identified by the adviser as, an affiliate, without triggering fiduciary obligations.[17]

And yet, the preamble to the final rule notes:

> Thus, when a recommendation to "hire me" effectively includes recommendation on how to invest or manage plan or IRA assets (*e.g.,* whether to roll assets into an IRA or

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[16] Id.

[17] 81 Fed. Reg. 20968.

plan or how to invest assets if rolled over), that recommendation would need to be evaluated separately under the provisions in the final rule.[18]

The combination of these two principles is less than helpful for asset managers. It seems to say an investment manager is able to "tout" its own quality, but only if it doesn't discuss an investment strategy. But what if the manager specializes in, say, fixed income strategies? Would such a manager run afoul of the "hire me" safe harbor from investment advice fiduciary status merely because embedded in its discussion it, almost by necessity, talks about the "quality of his or her own investment management services" with respect to fixed income? Could it realistically "tout" the quality of its investment management services without so including such a discussion? It seems that as crafted, the "hire me" exception gives with one hand and takes away with the other.

F. Adverse Impact of BIC Exemption

We echo the SIFMA Letter's concerns with the BIC Exemption. Broadly speaking, the BIC Exemption will have an adverse impact on the availability of, and access to products and services that asset managers provide directly to retail Plan investors or through intermediaries.

AMG continues to strongly believe that national retirement policy should not be guided directly or indirectly by any one regulator's judgment as to which products and services may be in the best interest of any given Plan or Plans. The BIC Exemption creates one set of winners and two sets of losers. The winners are those products and services that can better withstand the "fear factor" of legal challenges by the plaintiffs' bar. One group of losers is those products and services that are judged to be too "risky" by that standard (and not by any investment performance standard). The other "losers" are the Plans themselves. The Department has created a rule in which certain products and services are deliberately favored and others which are deliberately disfavored. What's more, as we have said throughout, fear is the defining factor in the calculus; not necessarily merit. The emphasis on fear as a guiding pillar of retirement policy is misplaced and a poor recipe for a rule designed to promote acting in a Plan's best interests.

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These flaws in the Fiduciary Rule lead to the conclusion that the questions posed in the President's Memorandum should be answered in the affirmative. The Fiduciary Rule clearly has harmed or likely will harm investors due to a reduction of Americans' access to certain retirement savings offerings, retirement product structures, retirement savings information, or related financial advice; the anticipated applicability of the Fiduciary Rule has resulted in dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees; and the Fiduciary Rule is likely to cause an increase in litigation, and an increase in the prices that investors and retirees must pay to gain access to retirement services.

The impact of potential future litigation is particularly troubling for the negative consequences upon American investors. As FINRA's chairman and chief executive officer observed, "i[n] one sweeping step, [the Fiduciary Rule] moves enforcement of these provisions to civil class action lawsuits

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[18] Id.

or arbitrations where the legal focus must be on a contractual interpretation."[19] The BIC Exemption, including its prohibition of contractual limitations on class action litigation, was designed to instill fear of litigation in firms who advise and serve investors. Firms will face the likelihood of facing numerous opportunistic litigations notwithstanding their efforts to act in a Plan's best interest. And the sheer expansion of fiduciary status, with its absence of mutuality, and its exceptions like "general communications" or "hire me," leave significant questions about their ultimate scope. Firms will either accept this uncertainty to their likely detriment or avoid these risks by severely restricting products and services. The frontiers between advice on the one hand and sales or education on the other hand remain fraught with the very type of ambiguity plaintiffs' lawyers love to explore.

III. APPLICABILITY DATES SHOULD BE DELAYED UNTIL FLAWS CAN BE ADDRESSED THROUGH REPEAL OR REVISION

AMG urges the Department to immediately propose an additional delay in the applicability dates so that the Fiduciary Rule does not go into effect until the study mandated by the President is completed, and the Department has had an opportunity to review the record underlying the report and decide and implement next steps. AMG appreciates the Department's 60-day that moved the applicability date to June 9, 2017; however, this time-period is insufficient to meaningfully carry out the President's directives.

As AMG has discussed herein, we believe there is already a very strong case that at least one, and possibly more, of the President's questions should be answered by the Department in the affirmative. If that is the case, the President has required the Department to rescind or revise the Fiduciary Rule.

We fail to see the justification for not allowing sufficient time for the review and follow-up steps to take place—nor has the Department provided justification. The Department indicated that no further delay may be warranted because Plans will not be adequately protected.[20] However, this conclusion relies on an outdated, inaccurate and incomplete regulatory impact analysis – the precise analysis that the President mandated be assessed. Moreover, implicit in the President's memorandum is a direction to consider the "Fiduciary Duty Rule" (viz., the Fiduciary Rule) in its entirety, which would include the rule itself apart from and in combination with its exemptions.

The Department's approach also gives short shrift to the other important regulatory protections that currently exist, including the protections in ERISA itself. Rather, as described above and in the SIFMA Letter, we believe that Plans will be harmed by the immediate applicability of the Fiduciary Rule and that healthy empirical evidence exists that supports the notion that a delay will benefit retirement investors.

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[19] Remarks from the 2015 FINRA Annual Conference of Richard Ketchum, available at https://www.finra.org/newsroom/speeches/052715-remarks-2015-finra-annual-conference.

[20] 82 Fed. Reg. 16902.

Irrespective of the President's questions, the Fiduciary Rule should not "go live" without repair of its significant defects. The notice of delay conflates the application of a "best interest" standard come June 9, 2017 with the application of a new investment advice ERISA fiduciary standard. More correctly, all the Department has really done is change the timing of the implementation of the BIC Exemption. It has done nothing with respect to the effectiveness of the Fiduciary Rule itself apart from a 60-day grace period. This elision is creative: the implication of the Department's notice is that the focus no longer need be on the four corners of the new definition itself which, of course, is central to the inquiry. We could not disagree more. The definition of investment advice itself is overly broad. Further, the Department's so-called exceptions, like that for "general communications," and for "hire me" may be little more than window dressing to appease the Rule's detractors. Ambiguities in the Independent Fiduciary Exception and missed opportunities with respect to education for IRAs combine to create a world in which these window dressing exceptions still presumptively result in de facto investment advice status for many communications that even a retail shopper in a discount department store would recognize as a sales advertisement.

AMG urges the Department to delay the applicability date and ultimately rescind or revise the Fiduciary Rule after completion of the review mandated by the President. The Department should provide sufficient time for financial institutions to understand any changes, adjust their business models to reflect those changes, and communicate the changes in an orderly fashion. In that regard, if the Fiduciary Rule and related exemptions are revised or rescinded, we urge the Department to delay the applicability dates until a date at least 180 days from publication in the Federal Register of any final revisions in the package, or a notice that there will be no such changes.

We note in this regard that if Alexander Acosta is confirmed as Labor Secretary, he has already indicated to the United States Senate that "the rule goes far beyond simply addressing the standard of conduct of investment [advisors] . . ." Moreover, when asked by Senator Warren (D-MA) " . . . [D]o you support this rule?," Mr. Acosta was quite clear in indicating: "There is an executive action that directs how the Department of Labor will approach this rule. If I am confirmed as Secretary of Labor I believe and support my following executive orders of the President who would be my boss."[21]

IV. CONCLUSION

For the reasons set forth above, we believe that it is critical that the study mandated by the President be completed before the Fiduciary Rule becomes applicable. We do not understand how the Department can embark on its chosen path when it already has a high degree of certainty that at least one of the President's questions would be answered in the affirmative and, as a result, lead to revisions at a minimum. The Department's statement that " . . .stakeholders can ***plan on and prepare for*** compliance with the Fiduciary Rule and the PTEs' Impartial Conduct Standards beginning June 9, 2017" is premature and strongly suggests that the Department has already pre-judged the outcome of its responses to the President's questions.[22]

Ultimately, we believe that retail investors would be best served by a uniform fiduciary rule

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[21] https://www.c-span.org/video/?425697-1/labor-secretary-nominee-outlines-policy-priorities-confirmation-hearing&start=8972

[22] 82 Fed. Reg. 16902 (emphasis added).

and that steps should be taken to provide for the best interest of all retail investors through that approach as opposed to fixing the many flaws of the Fiduciary Rule outlined above.

Finally, the Department must delay implementation beyond the June 9, 2017 applicability date. The Department must provide sufficient time for it to complete the review required by the President's Memorandum and, once it decides whether to rescind or revise the Fiduciary Rule, the Department must provide 180 days so that firms who serve retail investors can adjust services in an organized manner.

Should you have any question, please do not hesitate to contact Laura Martin (212-313-1176 / lmartin@sifma.org); Joseph Cox (212-313-1321 / jcox@sifma.org) or Steven W. Rabitz (212-806-6568 / srabitz@stroock.com).

Respectfully submitted,

Laura Martin
Managing Director and
Associate General Counsel
SIFMA Asset Management Group

Joseph Cox
Vice President
SIFMA Asset Management Group