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VIA EMAIL

Employee Benefits Security Administration
Office of Regulations and Interpretations
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210
EBSA.FiduciaryRuleExamination@dol.gov (Subject: RIN 1210-AB-79)

RE: 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 2016-01); Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 84-24, and 86-128 (RIN 1210-AB-79)

Ladies and Gentlemen:

On behalf of Western & Southern Financial Group, Inc. (“W&SFG”)¹ and its subsidiaries, we appreciate the opportunity to offer comments on the questions raised in President Trump’s Memorandum issued on February 3, 2017 (the “President’s Memorandum”)² and generally on questions of law and policy concerning the final *Definition of the Term “Fiduciary”; Conflict of Interest Rule–Retirement Investment Advice*, published in the *Federal Register* on April 8, 2016, and associated prohibited transaction exemptions (collectively, the “Fiduciary Duty Rule”), and the extension of the applicability date of the Fiduciary Duty Rule published by the Department of Labor (the “Department”) in the *Federal Register* on April 7, 2017 (the “Extension”).³ W&SFG is a member of, and generally supports the comment letters regarding the Fiduciary Duty Rule of, the American Council of Life Insurers (“ACLI”), the Financial Services Roundtable (“FSR”), the Financial Services Institute (“FSI”), and the Insured Retirement Institute (“IRI”). We provide our comments to the Fiduciary Duty Rule to emphasize issues of particular concern to W&SFG’s businesses and their customers.

¹ W&SFG is wholly owned by Western & Southern Mutual Holding Company, a mutual insurance holding company.

² Presidential Memorandum on Fiduciary Duty Rule – Memorandum for the Secretary of Labor, 82 Fed. Reg. 9,675 (Feb. 7, 2017).

³ 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, 82 Fed. Reg. 16,902 (April 7, 2017) (the “Extension”).

W&SFG is a Fortune 500, diversified, and customer-oriented family of companies, as well as a nationally recognized leader in consumer and business financial services. W&SFG and its subsidiaries manufacture a diverse array of products, including a variety of life insurance products, annuities, mutual funds, registered investment advisory services and private funds. In addition, W&SFG companies distribute these products to consumers through a variety of distribution models, including a captive sales force, registered investment advisers, third party intermediaries such as banks, broker-dealers, insurance marketing organizations, and independent agents that are often small business owners. We share the interest of the Department in seeing that plan sponsors, plan participants, and IRA owners receive advice that is in their best interest and will help them achieve lifetime financial security. We strongly believe, however, that the Fiduciary Duty Rule will reduce Americans' access to guaranteed lifetime income products, will cause an increase in litigation, and will increase the prices that retirement investors must pay to gain access to retirement products and services. As a result, retirement savers will have less access to and fewer affordable options for retirement advice and products.

While we appreciate that the Department provided the Extension until at least the end of the year, we believe that the Department's decision to move forward with core parts of the Fiduciary Duty Rule on June 9, 2017 is contrary to the President's Memorandum directing the Department to review the regulation in its entirety. As set forth in the Extension, the Department concludes that it cannot delay the implementation of the Fiduciary Duty Rule's fiduciary definition and the impartial conduct standards beyond June 9 because those provisions are "among the least controversial aspects of the rulemaking project."⁴ We could not disagree more.

The Department appears to equate broad general support for "a best interest standard" to support for the Fiduciary Duty Rule. We have previously raised, and continue to have, serious concerns about the expansive definition of the term "fiduciary" in the Fiduciary Duty Rule. Moreover, allowing key elements of the Fiduciary Duty Rule to take effect before completion of the Department's mandated review pursuant to the President's Memorandum creates a significant risk that the Fiduciary Duty Rule and associated prohibited transaction exemptions will be changed multiple times over the course of this year, which would cause market disruption, unnecessary and duplicative effort and cost, and ultimately considerable confusion for retirement investors and advisers. Therefore, we respectfully urge the Department to delay the applicability date of all aspects of the Fiduciary Duty Rule until the Department completes the holistic review mandated by the President's Memorandum.

⁴ 82 Fed. Reg. 16,906 (April 7, 2017).

Ultimately, and as described in detail below, despite the actions taken and the conclusions drawn by the Department as reflected in the Extension, W&SFG believes it is unequivocally clear that the Department's required re-examination of the Fiduciary Duty Rule should lead it to rescind the Fiduciary Duty Rule, and a new regulation should be proposed that ensures that retirement investors receive advice in their best interest without unintended, negative consequences to retirement investors. We offer six principles to guide a new, proposed regulation.

I. Fiduciary Duty Regulation Will Result in Reduced Access to Guaranteed Lifetime Income Products, Increased Litigation, and Increased Prices for Retirement Investors.

The President's Memorandum directs the Department to examine the Fiduciary Duty Rule, and specifically consider

(i) Whether the anticipated applicability of the Fiduciary Duty Rule has harmed or *is likely to harm investors due to a reduction of Americans' access to certain retirement savings offerings*, retirement product structures, retirement savings information, or related financial advice;

(ii) Whether the anticipated applicability of the Fiduciary Duty Rule has resulted in dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees; and

(iii) Whether the Fiduciary Duty 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.*⁵

W&SFG strongly believes that the answer to each of these questions is yes, and we generally support the points raised regarding the President's Memorandum in the comment letters of ACLI, FSR, FSI, and IRI in support of those conclusions. However, based on our position as a manufacturer of annuities that distributes those products through a broad array of distribution channels, we are particularly well-situated to provide comments regarding how the Fiduciary Duty Rule will result in (i) reduced access to guaranteed lifetime income products, and (ii) increased litigation, with a related increase in the prices that retirement investor must pay to gain access to retirement advice, products, and services.

⁵ Presidential Memorandum on Fiduciary Duty Rule – Memorandum for the Secretary of Labor, 82 Fed. Reg. 9,675 (Feb. 7, 2017) (emphasis added).

A. The Fiduciary Duty Rule is Likely to Harm Investors Due to a Reduction of Americans' Access to Guaranteed Lifetime Income Products

American retirement investors need products that will provide a guaranteed source of income in retirement. For Americans without a defined benefit plan,⁶ an annuity may be the *only* way to obtain this benefit and protect against the risk of outliving one's assets. The federal government and the Department have recognized the need for greater access to annuities. For example, in 2010, the White House Task Force on the Middle Class addressed the crucial need to "promot[e] the availability of annuities and other forms of guaranteed lifetime income, which transform savings into guaranteed future income, reducing the risks that retirees will outlive their savings."⁷ In 2010, the Department and the Department of the Treasury ("Treasury") jointly requested information on how they could "facilitate access to, and use of, lifetime income or other arrangements designed to provide a stream of income after retirement."⁸ And in 2014, Treasury issued guidance to 'put the pension back' into 401(k) retirement savings by making it easier to convert 401(k) savings into longevity income annuities that provide guaranteed lifetime income.

In short, key stakeholders agree that Americans need *more* access to these products, not less. W&SFG manufactures a variety of annuities including variable, equity or fixed-indexed, fixed, and immediate annuities. These products each offer different benefits and features that meet retirement investor and other consumer needs before, during, and after retirement. For example, a variable annuity can be used to accumulate retirement assets with multiple deposits that can appreciate based on the performance of various asset types. These products also offer a guaranteed income stream at a later date or a death benefit. Alternatively, an immediate annuity can offer an immediate income stream in exchange for a lump sum payment, and may also offer 'commutation' rights, or the right to withdraw funds with a reduction in future payments. Compared to a fixed annuity, a fixed-indexed annuity offers increased upside potential based on the performance of an index, but with downside protection based on state anti-forfeiture laws.⁹

The variety of annuity product designs and related benefits and features help Americans meet their varying retirement needs and can be useful for retirement investors

⁶ U.S. Dept. of Labor and U.S. Bureau of Labor Statistics, *National Compensation Survey: Employee Benefits in the United States*, March 2016, at page 193 (Sept. 2016) available at <https://www.bls.gov/ncs/ebs/benefits/2016/ebbl0059.pdf> (noting that 15% of private industry workers participated in a traditional defined benefit plan through their jobs in 2016).

⁷ White House Fact Sheet: Supporting Middle Class Families, available at https://obamawhitehouse.archives.gov/sites/default/files/Fact_Sheet-Middle_Class_Task_Force.pdf

⁸ See Request for Information Regarding Lifetime Income Options for Participants and Beneficiaries in Retirement Plan, 75 Fed. Reg. 5,254 (Feb. 2, 2010).

⁹ Subject to applicable surrender charges.

with a wide range of risk tolerances, financial circumstances, and financial objectives. Without a doubt, these products will be an important part of our nation's response to the impending retirement crisis.¹⁰ Under the Fiduciary Duty Rule, however, Americans will have less access to annuities because (1) insurance agents unaffiliated with a broker-dealer, bank or registered investment adviser may struggle to offer fixed-indexed annuities *at all*, and (2) distributors are generally reducing the number of products they offer retirement investors in order to comply with the requirement of leveled compensation within a product type.¹¹

With respect to the availability of fixed-indexed annuities in the independent channel, these products will be less available to retirement investors because the Department revoked PTE 84-24 for sales of all fixed-indexed annuities and variable annuities.¹² Thus, under the Fiduciary Duty Rule, fixed-indexed annuities must be sold pursuant to the Best Interest Contract Exemption (“BICE”) in order to receive any conflicted compensation. Importantly, BICE requires that each transaction involve a “Financial Institution,” which is defined as a registered investment adviser, a bank, an insurance company, or a broker or dealer registered under the Securities Exchange Act of 1934.¹³ Notably, the Department expressly declined to extend the definition of a Financial Institution to independent marketing organizations (“IMOs”), but chose instead to “limit[] the definition of Financial Institution to the regulated entities... which are subject to well-established regulatory conditions and oversight.”¹⁴ The Department did add a provision in the final regulation permitting other entities to apply for Financial Institution status,¹⁵ and, after receiving numerous requests for Financial Institution status, the Department proposed a Best Interest Contract Exemption for Insurance Intermediaries with extremely stringent requirements for these entities to become a Financial Institution and additional requirements for each transaction.¹⁶

Fixed-indexed annuities, however, are often sold through independent insurance agents who are not employed by any of the entities included in the definition of the term “Financial Institution” in BICE. These agents may be general agents or may be affiliated with an IMO, but are typically appointed as independent agents with multiple insurance companies, and thus can offer retirement investors more choice. These agents are usually

¹⁰ See, e.g. Sabri Ben-Achour, *America's Coming Retirement Crisis*, MARKETPLACE (Feb. 6, 2017) available at <https://www.marketplace.org/2017/02/06/world/americas-retirement-crisis> (60 % of households are not on track for retirement per study by National Institute on Retirement Security)

¹¹ BICE §II(d)(3). 81 Fed. Reg. 21,077 (April 8, 2016).

¹² See generally Amendment to and Partial Revocation of Prohibited Transaction Exemption (PTE) 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters, 81 Fed. Reg. 21,147 (April 8, 2016).

¹³ BICE §VIII(e); 81 Fed. Reg. 21,083 (April 8, 2016).

¹⁴ *Id.* at 21,067.

¹⁵ *Id.*

¹⁶ Proposed Best Interest Contract Exemption for Insurance Intermediaries, 82 Fed. Reg. 7, 336 (Jan. 19, 2017).

state insurance-only licensed and thus cannot easily affiliate with a registered investment adviser, broker-dealer, or bank. In these circumstances, the only potential “Financial Institution” in the current transaction model is the insurance company that manufactures the fixed-indexed annuity.

But, BICE has several requirements that are, at best, very difficult for the insurance company to satisfy in this situation. Among other requirements, BICE requires that the Financial Institution (i) identify, mitigate, supervise and disclose the adviser’s material conflicts of interests; (ii) treat the sale of the Financial Institution’s own products as a proprietary sale with additional requirements; and (iii) make broad disclosures about the Financial Institution’s business practices and compensation schemes on a publicly-available Web site. Each of these requirements assumes that the Financial Institution has broad authority to dictate the adviser’s product offerings and sales practices – authority an insurance company does not have with respect to independent agents. To make matters more difficult, in discussing the situation in which two entities could serve as the Financial Institution, the Department stated that “the Financial Institution exercising supervisory authority must adhere to the conditions of the exemption, including the policies and procedures requirement and the obligation to insulate the Adviser from incentives to violate the Best Interest Standard, *including incentives created by any other Financial Institution.*”¹⁷ In a non-binding FAQ, the Department clarified: “While the independent agent may recommend products issued by a variety of insurers, the full BIC Exemption does not require insurance companies to exercise supervisory responsibility with respect to the practices of unrelated and unaffiliated insurance companies. If an insurer chooses to act as the supervisory financial institution for purposes of the exemption, its obligation is simply to ensure that the insurer, its affiliates, and related parties meet the exemption’s terms with respect to the insurer’s annuity which is the subject of the transaction.”¹⁸

We note, however, that an insurance company would still need to ensure (and warrant to the retirement investor) that the independent agent is providing a recommendation that is in the best interest of the retirement investor *without regard* to the adviser’s interests and would have to ensure that the independent agent is appropriately disclosing his or her material conflicts of interest. This task is extremely difficult, as the insurance company does not have full information regarding an agent’s available products or the requisite control of the independent agent’s sales process. Quite simply, an insurance company acting as the Financial Institution in these circumstances is impracticable. Considering the substantial third-party litigation risk (discussed more fully below), W&SFG believes that few, if any, insurance companies will undertake this responsibility.

¹⁷ BICE, 81 Fed. Reg. 21,067 (April 8, 2016) (emphasis added).

¹⁸ Conflict of Interest Exemptions FAQs, #22 (pg. 18) (Oct. 27, 2016) *available at* <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/coi-rules-and-exemptions-part-1.pdf>.

Without a Financial Institution to satisfy BICE's requirements and with no other available exemption, independent agents are left *without any exemption* to make recommendations regarding fixed-indexed annuities.¹⁹ This will undoubtedly result in a "reduction of Americans' access" to this "retirement product structure"²⁰ and a reduction in related advice as a majority of fixed-indexed annuity sales are made by independent agents.²¹ Unfortunately, this is not the only way Americans will lose access to annuities under the Fiduciary Duty Rule. Many distributors of these products are reducing the number of annuities they offer to retirement investors to comply with BICE's strict limitation on differential compensation within a 'type' of investment. BICE requires a warranty that the Financial Institution does not rely on differential compensation that is intended or would reasonably be expected to cause advisers to make recommendations that are not in the retirement investor's best interest.²² Notwithstanding that broad warranty, differential compensation is permitted to the extent that the Financial Institution's policies and procedures are reasonably and prudently designed to avoid a misalignment of the interests of the advisers with the interests of the retirement investors they serve. This compensation can include "differential compensation based on neutral factors tied to the differences in the services delivered to the Retirement Investor with respect to the different types of investments...."²³

This requirement is problematic for annuities and is resulting in a decrease in distributors' product offerings and retirement investor choice. If annuities with all their variations and differing structures are considered one product type, levelization is practically impossible. Currently, these products have commission rates that are widely disparate because the products offer a wide range of benefits and features. Even if one considers each of "immediate annuities," "fixed annuities," "fixed-indexed annuities," and "variable annuities" different product types, levelization is difficult because variations in product design usually require commensurate variation in commission rates. For example, a fixed annuity with a seven-year surrender charge will have a different commission rate than a fixed annuity with a ten-year surrender charge. This is because the insurance company will have a shorter investment horizon for a seven-year product than for a ten-year product. Accordingly, the agent is typically paid a lower commission

¹⁹ The Department's proposed Best Interest Contract Exemption for Insurance Intermediaries does not provide even the hope of relief. It is our understanding that only 5-7 of the more than 350 IMOs can meet the proposed requirements of this exemption.

²⁰ Presidential Memorandum on Fiduciary Duty Rule – Memorandum for the Secretary of Labor § 1(a)(i), 82 Fed. Reg. 9,675 (Feb. 7, 2017).

²¹ In the fourth quarter of 2015, six out of 10 fixed-indexed annuity sales were done by these independent insurance agents. Greg Iacurci, *Broker-dealers could see higher share of fixed indexed annuity sales thanks to DOL fiduciary rule*, INVESTMENT NEWS (May 5, 2016) available at <http://www.investmentnews.com/article/20160505/FREE/160509950/broker-dealers-could-see-higher-share-of-fixed-indexed-annuity-sales> (citing Wink, Inc. market research).

²² BICE §II(d)(3), 81 Fed. Reg. 21,077 (April 8, 2016).

²³ *Id.*

for the seven-year product. Furthermore, if a distributor levelized fixed annuities with different surrender charge periods, the agent would be incentivized to recommend the annuity with the shortest surrender charge period – permitting a subsequent sale and commission at an earlier date.

This analysis is complicated by the existence of both single-premium annuities and flexible-premium annuities, and the differing structures of flexible-premium products. A flexible-premium annuity permits multiple deposits, whereas a single-premium annuity is a one-time purchase. If a retirement investor has an existing flexible-premium annuity, it may be in that individual's best interest to make an additional deposit in that product, as opposed to buying a second annuity. However, these different contribution structures require different commission structures as well. Moreover, some flexible-premium annuities provide a new surrender charge period for each deposit with a commission on the subsequent deposit at the same rate as the commission on the initial deposit. In contrast, some flexible-premium annuities do not have a new surrender charge period and have a descending commission rate during the surrender charge period and no or limited commissions on deposits outside the surrender charge period. The various product designs meet the multitude of objectives, financial circumstances, and needs of retirement investors. But, the levelization requirement is leading many distributors to narrow their offerings, depriving retirement investors of the variety of annuity features and benefits that have been developed in a free market.

As a result of the Fiduciary Duty Rule, Americans are already losing access to annuities – consumers are being offered variable annuities at a much lower rate, which has been attributed to the 'looming' Fiduciary Duty Rule.²⁴ As discussed above, under the Fiduciary Duty Rule, retirement investors will clearly have less access to annuities generally and fixed-indexed annuities specifically. Accordingly, the Department *must* revise or revoke the Fiduciary Duty Rule.

B. The Fiduciary Duty 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.

Concerned about its resources and practical ability to oversee enforcement of the Fiduciary Duty Rule, we believe that the Department has "outsourced" this task to plaintiffs' lawyers. In doing so, the Department has somewhat ironically created an enormous conflict of interest: it has incentivized the trial bar to test innumerable and currently unforeseeable legal theories in the court system to determine which ones may

²⁴ Greg Iacurci, *Department of Labor's fiduciary rule blamed for insurer's massive hit on variable annuity sales*, INVESTMENT NEWS (March 28, 2017) available at <http://www.investmentnews.com/article/20170328/FREE/170329922/departments-of-labors-fiduciary-rule-blamed-for-insurers-massive-hit> ("It's not a particular product or company's strategic decision moving the industry itself.... It truly is the forces specifically with the DOL rule.").

gain traction against the financial services industry. It is fair to state that the resultant class actions will be filed largely for the personal enrichment of the attorneys who prosecute them, and not for the benefit of class member retirement investors allegedly affected adversely by a violation of BICE, including the impartial conduct standards.

Given that BICE appears to be intended to be enforced primarily through class-action litigation,²⁵ the great majority of lawsuits that are filed will likely not involve discrete, individual situations where an agent truly failed to act in a retirement investor's best interest, thereby causing real harm and identifiable damages. Those unfortunate situations should be the focus of an attorney seeking to put an injured client where he or she otherwise would have been. But the conflicts created by the enforcement mechanism of the Fiduciary Duty Rule will lead to situations in which those retirement investors' interests are not prioritized because that's not where the real money is. Rather, creative plaintiffs' lawyers can reasonably be expected to leverage these matters into complex and expansive lawsuits to maximize their own financial benefit. The plaintiffs' bar can be expected to use class actions to discern the furthest boundaries of fiduciary law, and will stretch notions of commonality and predominance to try to do so—likely to the potential detriment of the retirement investor who arguably did suffer harm.

A few of these class-action lawsuits could be successful, but in light of Congressional action and U.S. Supreme Court decisions over the last few years intended to curb exactly this kind of speculative litigation, many will not. Nevertheless, each of these claims will require substantial time, money and resources to defend, likely over a period of years. Meanwhile, the lead plaintiff who may have a viable claim must also wait for years to see whether her situation is sufficiently representative to warrant class action certification, or whether her attorney played class-action roulette with her genuine claim and lost. And still other plaintiffs' lawyers will file suspect class-action lawsuits regardless of actual harm or their ultimate likelihood of success, hoping that companies will blanch at the prospect of hundreds of thousands of dollars (or more) in litigation costs, perform a basic cost-benefit analysis, and settle these lawsuits just to make them go away. This method of enforcement is neither efficient nor effective.

The Department's chosen mechanism for enforcing BICE's requirements is unlikely to benefit retirement investors. Stories regularly appear in the media about various types of class action settlements in which the class of affected consumers receive a coupon for a de minimis amount or the opportunity to purchase a new product or service at a discounted rate, while the plaintiffs' lawyers who settled the lawsuit take home millions of dollars of "earned fees." These anecdotes and perceptions are consistent with the recent findings of a study by the law firm Mayer Brown LLP ("Mayer Brown"), which determined that class actions rarely benefit absent class members in whose interest

²⁵ See, e.g. BICE, 81 Fed. Reg. 21,043 (April 8, 2016) ("[T]he option to pursue class actions in court is an important enforcement mechanism for Retirement Investors.").

class actions are supposedly initiated.²⁶ The findings included that the overwhelming majority of class actions are dismissed or dropped with no recovery for class members, and that any recoveries that class settlements achieve are typically minimal and obtained only after long delays. Mayer Brown's analysis found that the vast majority of class actions in its sample set could not be viewed as efficient, effective, or beneficial to class members. The study concluded that "class actions do not provide class members with anything close to the benefits claimed by their proponents, although they can (and do) enrich attorneys."

The inevitable increased expenses firms will incur due to BICE class action litigation will be passed on to retirement and other investors, leading to higher costs for retirement and other financial products and services. A recent Morningstar analysis predicted *annual settlement costs* of up to \$150 million to the financial services industry.²⁷ This annual cost number does not include the associated legal and business expenses borne in connection with these settlements, which will increase the actual cost by many multiples. Attorneys' fees, time lost to and the distractions caused by these lawsuits, and the resulting drag on productivity will all contribute to real costs that can reasonably be expected to add up to hundreds of millions of dollars or more annually. Importantly, plaintiffs' attorneys typically receive one-third of any recovery, which is another significant and inefficient cost on those allegedly harmed by violations of the Fiduciary Duty Rule. These costs will not benefit retirement investors *or* financial services companies; only the lawyers will win.

Outsourcing enforcement of the Fiduciary Duty Rule to plaintiffs' lawyers is ill-advised and will lead to unforeseen and unintended consequences. It will create inappropriate incentives and conflicts of interest, and is an inefficient method for policing and enforcing compliance. The class action rights afforded by the Fiduciary Duty Rule must be replaced by a more streamlined and targeted process that addresses actual injuries to retirement investors, rather than lawsuits alleging conjectural harms that are actually vehicles for extracting settlements out of companies for the benefit of the plaintiffs' bar.

II. The Department Should Rescind the Fiduciary Duty Rule and Undertake a New Rulemaking Effort

The President's Memorandum states, in part, that if the Department makes "an affirmative determination" as to the questions discussed in Part I, then the Department

²⁶ *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions*, MAYER BROWN LLP, available at www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf (reviewing class action litigation in 2009).

²⁷ Michael Wong, *Fiduciary Rule Lawsuits Could Spur Industry Reform*, MORNINGSTAR (April 3, 2017) available at <http://www.morningstar.com/cover/videocenter.aspx?id=801452>.

“shall publish for notice and comment a proposed rule rescinding or revising the Rule...”²⁸ As discussed above, the Fiduciary Duty Rule will result in reduced access to retirement products, specifically annuities, and will result in increased and unbeneficial litigation and costs.

Accordingly, to address these deficiencies the Department should rescind the Fiduciary Duty Rule and propose an alternative rule that excludes sales activities and other traditionally non-fiduciary activities from the definition of the term “fiduciary;” propose revised prohibited transaction exemptions that focus on requiring reasonable and prudent policies and procedures; require disclosure of material conflicts of interest without any requirements to eliminate certain types of conflicts; provide a single prohibited transaction exemption for all annuities; and provide meaningful “grandfathering” of existing contractual relationships. Finally, the implementation period for any new rulemaking must provide an adequate time period for implementation. Each of these suggestions is discussed below.

A. The Definition of the Term ‘Fiduciary’ Should Include a Requirement of Mutuality.

W&SFG fully agrees with and supports the ACLI comment letter of April 17, 2017 regarding the Fiduciary Duty Rule (“ACLI Comment Letter”). In particular, W&SFG notes the ACLI Comment Letter’s section explaining that a key element of any fiduciary definition includes mutuality. As discussed in the ACLI Comment Letter, absent a mutual understanding or agreement that a person is serving in a fiduciary capacity, the Fiduciary Duty Rule will unnecessarily complicate interactions with retirement investors, as well as unnecessarily increase operational and compliance costs for those retirement investors. As similarly noted in the ACLI Comment Letter, the inability to conduct traditional sales and marketing efforts impedes, if not precludes, efforts to close the retirement coverage gap. Marketing and sales activities serve to educate consumers, including retirement investors, about their choices and ensure competitive pricing of products and services. As evidenced by changes in the marketplace post-promulgation, the Fiduciary Duty Rule in particular leaves potential and existing IRA owners on their own to gather information and materials about their options.

Accordingly, the definition of “fiduciary” must be clear that, absent a mutual understanding or agreement that a person is serving in a fiduciary capacity, marketing and sales activities do not result in fiduciary status. In particular, W&SFG notes the ACLI Comment Letter discussion that IRA owners have the flexibility – and therefore an inherent protection – to transfer their assets to a competing IRA, if and when they become dissatisfied with investments and/or services. W&SFG agrees that the

²⁸ Presidential Memorandum on Fiduciary Duty Rule – Memorandum for the Secretary of Labor §1(b), 82 Fed. Reg. 9,675 (Feb. 7, 2017).

knowledge and understanding of IRA owners should not be discounted by the Department in the absence of an empirical assessment of IRA owners' capabilities and the effects of the Department's regulations on those owners.

W&SFG also agrees that, as also noted in the ACLI Comment Letter, the Department should prescribe a simplified disclosure describing the sales function, rather than forcing financial professionals to abandon small-balance investors. For example, as discussed in the ACLI Comment Letter, a seller could fairly inform the investor that (i) such person is not undertaking to provide impartial financial advice (i.e., not acting as a fiduciary for purposes of ERISA); and (ii) such person has a financial interest in the matter. This approach would achieve the Department's stated goals without codifying assumptions regarding the assumed competence – or lack thereof – of any group of plan fiduciaries or the general public.

B. Prohibited Transaction Exemptions Should Be Satisfied By Development and Maintenance of Policies and Procedures Reasonably Designed to Ensure that Advisers Satisfy Fiduciary Duties.

As discussed in W&SFG's comment letter dated July 21, 2015 regarding the Department's then-proposed definition of the term "fiduciary" and related prohibited transaction exemptions (the "W&SFG July 21, 2015 Comment Letter"), any reformulated prohibited transaction exemption should provide a "safe harbor" that will permit a fiduciary and its affiliates to develop and adhere to reasonably designed compliance procedures and processes to meet their respective fiduciary duties. W&SFG believes that such a safe harbor, rather than BICE, would better address the Department's stated goals and better preserve retirement investors' access to retirement products and advice. Absent such a safe harbor, the parameters of any future rule that includes concepts similar to BICE, including the impartial conduct standards, will likely be litigated in courts across the nation (as described in Part I.B above). The costs of this litigation will likely be passed on to retirement and other investors in the form of higher fees and less access to investment advice for many retirement investors, often those with small to mid-size plans or IRA account balances. In lieu of such unnecessary and costly litigation, we again request that the Fiduciary Duty Rule be revised to provide additional guidance and safe harbors in lieu of BICE and its extensive warranties.

Additionally, and as similarly noted in the W&SFG July 21, 2015 Comment Letter, to avoid overly broad, vague and subjective parts of the Fiduciary Duty Rule resulting in expensive class action and other litigation, the Department should also provide other safe harbors, such as a provision that deems a commission and any other compensation on annuities, mutual funds, other securities and insurance products reasonable, provided such compensation is permissible under Financial Industry Regulatory Authority, U.S. Securities and Exchange Commission, and/or state department of insurance regulations and guidance.

If an advisor or firm meets the terms of these safe harbors, including adopting and adhering to reasonable procedures and processes to mitigate and disclose conflicts of interest, otherwise act in a client's best interest, and charge reasonable fees, inadvertent failures should not result in excise taxes or liability. A fiduciary is generally expected to have a reasonable process for determination of the reasonability of compensation for engaging a third party to provide a product or service to a plan, such as requiring multiple bids. A broad prohibited transaction exemption, unlike BICE, should permit similar reliance on such reasonable processes related to meeting the best interest standard, reasonable compensation, and disclosure of material conflicts. A principles-based prohibited transaction exemption, also unlike BICE, will achieve the Department's goals without inadvertent failures that result in untenable risk and potential liability.

If the Department retains a very broad definition of fiduciary, then it must retain an equally broad safe harbor as discussed immediately above. However, as BICE is currently formulated – a per transaction exemption to be enforced through class action litigation - we are concerned that BICE will create an untenable level of uncertainty and litigation risk. More specifically, we are concerned that the potential revenue from a small to mid-size plan and IRA accounts will not justify the potential risk and uncertainty to the fiduciary and its affiliates. Accordingly, a broad safe harbor should be formulated to provide the above-referenced, compliance-related certainty, so that W&SFG, its affiliates, and other similarly situated financial institutions can continue to serve small- to mid-size plans and IRAs, representing those retirement investors who, in many ways, most need investment advice to achieve retirement security. These changes are necessary to ensure that retirement investors across the economic spectrum continue to have access to well-trained financial professionals and quality life insurance and annuity products.

C. Prohibited Transaction Exemptions Should Not Prohibit Specific Material Conflicts of Interest.

As discussed in Part I.A of this letter, BICE requires levelization within a product type, and this requirement has already resulted in many annuity distributors decreasing the number of products they make available to retirement investors. To avoid this result, a new rulemaking process should focus on identification, supervision, mitigation, and disclosure of material conflicts of interest as opposed to singling out and prohibiting conflicts that the Department deems particularly problematic. The former approach has a number of benefits.

First and foremost, the flexibility will permit distributors to continue to offer a variety of products with differing benefits and features and encourage ingenuity in the annuity marketplace. The continued availability of a wide-range of annuity products with varying benefits and features is important for retirement investors seeking to meet differing financial objectives. Second, as with a more principles-based approach in

general (discussed above in Part II.B), a focus on identification, supervision and disclosure of material conflicts of interest will have less litigation risk for distributors, concomitantly keeping costs down for retirement investors. A class-action plaintiff's attorney could make many arguments that a distributor failed the warranty requirements and subsequently operated without an exemption. While this might be the basis for the lawsuit, it does not necessarily mean that retirement investors were harmed. But, since the exemption is an all-or-nothing proposition, plaintiffs' attorneys will find fertile ground for class actions.

Third, retirement investors will benefit from a prohibited transaction exemption that requires distributors to monitor whether conflicts of interest are affecting investment advice. The current warranty with its focus on differential compensation, neutral factors, and investment "types" is essentially unnecessary and results in unintended, negative consequences for retirement investors. Accordingly, a new prohibited transaction exemption should simply require that distributors' identify, supervise, mitigate and disclose material conflicts of interest.

D. A Single Prohibited Transaction Exemption Should Be Provided for All Types of Annuities.

As we also noted in W&SFG July 21, 2015 Comment Letter, the Fiduciary Duty Rule amends PTE 84-24 to remove coverage for variable annuities and fixed-indexed annuities sold to IRA owners and plan participants. These recommendations would instead fall under BICE, while PTE 84-24 applies to "Fixed Rate Annuities".²⁹ The Department should reverse course on this unnecessary proposed distinction between annuities. We note that, in the Extension, the Department has, determined it that *all* annuities can be appropriately covered by PTE 84-24 through December 31, 2017. For the reasons described below and in the W&SFG July 21, 2015 Comment Letter, W&SFG strongly believes the Department should reverse course on the unnecessary proposed distinction between fixed annuities on the one hand and variable and fixed-indexed annuities on the other.

First, these products share features that argue in favor of one prohibited transaction exemption for all annuities. For example, variable annuities, fixed-indexed annuities and fixed annuities may all include fixed options with interest guarantees, mortality-based investment guarantees, and retirement income guarantees, including the ability to annuitize the product and receive a stream of lifetime income.

Second, the bi-furcated prohibited transaction exemption structure creates an unnecessary level of complication for advisers who offer fixed annuities, fixed-indexed

²⁹ See Amendment to and Partial Revocation of Prohibited Transaction Exemption (PTE) 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters, 81 Fed. Reg. 21,147 (April 8, 2016).

annuities and variable annuities and will be unduly complicated for retirement investors. Consider the average independent or other insurance agent faced with documenting compliance with PTE 84-24 for fixed annuities and separately and differently documenting compliance with BICE for variable or fixed-indexed annuities. Additionally, consider the resulting confusion faced by retirement investors considering multiple annuity products. As noted above, the product features common to fixed, fixed-indexed and variable annuities warrant the same protections. Third, retirement investors purchasing variable and fixed-indexed annuities will still be protected as a result of the incorporation of the standard of care under any prohibited transaction exemption. Accordingly, we strongly urge the Department to provide one prohibited transaction exemption for all annuities.

Variable annuities have been covered under PTE 84-24 for decades. While newer to the marketplace, fixed-indexed annuities have similarly been sold pursuant to PTE 84-24 for years. In addition, for that same time period, compensation relating to variable annuity sales has included commissions, revenue sharing, administrative and marketing fees, and other payments from third parties. Without any apparent justification or reference to problematic compensation practices, the Fiduciary Duty Rule provides a new definition of “insurance commissions” within PTE 84-24 that does not include these common and currently permissible sources of compensation. This new definition should either be eliminated or revised to include these historically acceptable, non-problematic, sources of compensation. If the Department is concerned that retirement investors are unaware of these sources of compensation under current disclosure requirements, we believe the Department should promulgate a rule specifying supplemental disclosures.

E. Prohibited Transaction Exemptions Should Provide Meaningful Grandfathering.

Any new rulemaking in this area needs to provide meaningful grandfathering that acknowledges the practical difficulties of imposing new standards on products that have been previously sold under prior standards. As both a manufacturer and distributor of flexible premium annuities, W&SFG is well aware of the difficulties that grandfathering presents. These prior sales are, in fact, contractual relationships directly between the insurer and the annuity owner that permit the annuity owner to make additional deposits. In addition, the insurer has a contractual relationship with the applicable agent to pay additional commissions on subsequent deposits for that annuity. Pursuant to these contracts, when a consumer sends one of the W&SFG insurance companies a subsequent annuity premium, the W&SFG insurer has an obligation to deposit the funds and send compensation to the agent and, if applicable, his or her firm. The agent could have (i) specifically recommended the deposit; (ii) previously recommended systemic deposits; or (iii) not made any recommendation or had any involvement in the deposit at all. Under the Fiduciary Duty Rule, the first scenario would require a new exemption, the second scenario could be eligible for grandfathering under BICE, and the third scenario arguably would not require an exemption at all.

In any event, the insurance company typically will not know which scenario applies, and the distributor may not have practical methods to ensure that its agents are complying with an exemption or the grandfathering provisions, as applicable. This creates yet another breeding ground for class action litigation that arguably will provide little benefit to retirement investors. Moreover, levelizing compensation on these existing contracts requires either (i) an intermediary that can artificially levelize to the agent, which is not available in the independent agent channel, or (ii) changes to existing contracts, which is impracticable.

Accordingly, at least with respect to insurance products (including annuities), meaningful grandfathering needs to be *product-related*, not recommendation-related. All compensation relating to products sold prior to the effective date of the rulemaking should be grandfathered. Admittedly, this may result in situations where an adviser does not have an obligation to meet the standard of care on an existing qualified annuity, but would have to meet the standard on a new qualified annuity. However, eventually all qualified business would be required to meet this standard, and distributors would likely have one set of policies and procedures for all qualified business as a matter of operational simplicity. Therefore, distributors would seek to meet the applicable standard of care, but would not have the potential liability if they do not due to the complicating factors that existing annuity business creates.³⁰

F. A New Rulemaking Should Include an Adequate Time Period for Implementation.

The Fiduciary Duty Rule will, unless the Department takes further action, become fully effective on January, 1 2018. Any new Department rulemaking in this area based on the President's Memorandum or otherwise should provide adequate time for the industry generally, and W&SFG and its affiliates specifically, to train thousands of employees and agents, build comprehensive new information technology infrastructure, create new documentation, and develop and modify new and existing compliance programs and supervisory systems. W&SFG's diverse business lines, like those of many other diverse financial services entities, will only further complicate necessary changes, as different business units will be impacted in different ways and are already currently subject to, in many cases, differing existing regulatory regimes. We believe that any implementation date from the publication of any new final rulemaking must provide an appropriate implementation time period.

Ultimately, W&SFG believes that the examination required by the President's Memorandum unequivocally requires the Department to rescind the Fiduciary Duty Rule.

³⁰ A principles-based exemption (as discussed in Part II.B of this letter) would also help resolve this issue. If the exemption requires policies and procedures reasonably designed to ensure that advisors satisfy fiduciary duties (as opposed to specific transactional requirements), these practical grandfathering issues would likely be less problematic.

As written (and as will largely be implemented on June 9th despite the President's mandated review), the Fiduciary Duty Rule will result in retirement investors having less access to annuities and their benefit of guaranteed lifetime income. Moreover, retirement investors will pay more for these important retirement products due to class action litigation that will mainly benefit attorneys. A new rulemaking can maintain retirement investor's annuity choices without increased cost and still increase the standard of care by which these products are sold by including mutuality as a part of the definition of "fiduciary," providing safe harbors based on creation of reasonable policies and procedures, not singling out specific material conflicts of interest as prohibited, and providing for one prohibited transaction exemption for all annuities. With meaningful grandfathering and an appropriate implementation time period, retirement investors will obtain financial advice that is in their best interest without confusion. The Department has an opportunity to craft a definition of fiduciary and related prohibited transaction exemptions that will truly benefit retirement investors without the unintended, negative consequences of the Fiduciary Duty Rule.

Once again, W&SFG appreciates the opportunity to comment on the Fiduciary Duty Rule and its potential impacts to retirement investors, as well as on the questions raised in the President's Memorandum. If you have any questions regarding our comments or if we can be of any assistance in your consideration of the issues discussed above, please contact Sarah Sparks Herron at 513-357-4055 or sarah.herron@westernsouthernlife.com or me. Thank you.

Sincerely,



Jonathan D. Niemeyer
Senior Vice President, Chief Administrative
Officer and General Counsel