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Filed Electronically

Office of Exemption Determinations
Employee Benefits Security Administration (Attn: D-11933)
U.S. Department of Labor
200 Constitution Avenue, N.W., Suite 400
Washington, D.C. 20210

Re: Request for Information Regarding the Fiduciary Rule and Related Prohibited Transaction Exemptions; RIN 1210-AB82

Ladies and Gentlemen:

Groom Law Group, Chartered is providing these comments on behalf of a group of client companies, each of which is a major provider of annuity and insurance products to employer-sponsored plans subject to ERISA and to individual retirement accounts (the “Groom Group”). Our comments are responsive to RFI Items 3, 5-6 and 16-18, which raise topics that are of particular interest to the insurance and annuity provider community. In addition, the Groom Group believes the Department must conclude that changes to the “Definition of the Term ‘Fiduciary’; Conflict of Interest Rule--Retirement Investment Advice”, 81 Fed. Reg. 20946 (April 8, 2016) (“Rule”) and related PTEs beyond those suggested in the RFI are necessary. Such changes are necessary to achieve the President’s stated objective of “empower[ing] Americans to make their own financial decisions, to facilitate their ability 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.”¹

Significant disruption and dislocation to the financial services industry has occurred and is continuing to occur as a result of the Rule and related PTEs. This disruption has been particularly pronounced in regards to commission-based distribution organizations. The disruption is a foreshadowing of the dire consequences that will befall American retirement investors unless the Rule is substantially changed. In its current form, the Rule is inapposite to the President’s stated policy objectives, particularly the objective of empowering American workers with access to products and advice that will allow them *to withstand unexpected financial emergencies*. The life insurance industry and its distribution partners provide the only

¹ See Executive Order 13772 on Core Principles for Regulating the United States Financial System (February 3, 2017), published at 82 Fed. Reg. 9965 (Feb. 7, 2017).

true source of guaranteed protection against unexpected financial emergencies. The products the industry and its partners offer protect against the risks of, among other things, outliving one's retirement savings and the risk of precipitous and prolonged declines in financial markets.

The best interests of retirement investors can only be rationally advanced under a legal and regulatory environment that will permit retirement investors to gain ready access to information about risk protected products, including individual annuity products. These products ensure the availability of lifetime income and stand to provide retirees with lasting financial security.² The Rule in its current form undermines the ready access to information and other benefits enjoyed by retirement investors under the established distribution networks that life insurance and annuity product manufacturers have developed over a period of many years.

The Rule's decided tilt in favor of fee-based advice is directly at odds with the President's core policy objective of affording retirement investors with the means to withstand *unexpected financial emergencies*. Many, if not most, retail investors are unwilling to pay the charges of a fee-based adviser. As a result, retail investors will suffer the most under the Rule. Another is that fee-based advice services tend to be uneconomical in the long run for all but the very affluent. Perhaps most importantly, it is incontrovertibly true that fee-based advisers, as a group, tend to rarely discuss or recommend risk-reducing insurance and annuity products. But clients who can ill afford to withstand financial emergencies on their own need to be informed of such products.

The Groom Group supports the Department's laudable goal of ensuring that investment recommendations to retirement investors are sound and advance the best interests of clients. Unfortunately, the unrealistic and costly conditions that the Rule would superimpose upon the delivery of that advice do a grave disservice to the millions of retirement investors who can ill withstand the risk of unexpected financial emergencies, including the risk of outliving one's retirement savings.

Specifically, and as described below, the Department should revise the Rule and related PTEs to—

1. Recognize the legitimate distinction between advice and sales activity;
2. Eliminate private litigation as the primary enforcement mechanism;
3. Extend the grandfathering provision of the BIC Exemption through the Transition Period and expand the scope of grandfathering relief to fully cover recommendations of new contributions to grandfathered products;
4. Expand PTE 84-24 to cover the sale of all insurance products;

² *Id.*

5. Narrow the definition of “investment advice” so that it will not include communications that occur when there is no mutual understanding as to the provision of fiduciary advice;
6. Include a realistic “Best Interest” standard that seeks to regulate financial interests on the part of advice providers in an appropriate manner; and
7. Ensure that principles-based prohibited transaction exemptions are widely available.

A. Item 3. Striking an Appropriate Balance –

The Rule and its related PTEs do not appropriately balance the interests of consumers in receiving broad-based investment advice while protecting them from conflicts of interest nor do they effectively allow advisers to provide a wide range of products that can meet each investor’s particular needs. The Rule’s fundamental premise – that all retail-level sales of investment products to plans, participants and IRA holders should be classified as fiduciary investment advice – is unnecessarily paternalistic. The Rule imposes conditions on responsible selling activity that are nearly impossible to satisfy. Therefore, the Rule is having the predictable effect of curtailing the availability of professional investment assistance to middle-class and low income savers while funneling more affluent investors toward fee-based advice service models.

These consequences are being felt most acutely in the annuity provider community. Annuity products have traditionally been distributed through commissioned sales professionals. Historically, fee-based advisers rarely recommend annuity products to their clients except in the non-qualified marketplace, for purposes of sheltering underlying fund transactions from capital gains taxes. There is little reason to expect that this will change. We believe the RFI mistakenly refers to fee-based annuities as a recent marketplace innovation. In fact, fee-based annuities have existed for years. While some annuity manufacturers are developing fee-based annuities in response to the seismic shifts the Rule has wrought in favor of fee-based advice models, there is little reason at present to believe that those products will have much in the way of take-up.

The annuity provider community has seen a steep increase in the numbers of annuity holder accounts being “orphaned” immediately preceding and since the Rule’s applicability date. As professional advisers shift away from transaction-based to fee-based compensation models, many firms have declined to further service the accounts of annuity holder clients. That phenomenon is most definitely adverse to the interests of most such clients, who will now need to independently confront decisions on how to optimize their annuity-based benefits.

In this regard, the Rule runs directly counter to the Department’s long-stated public policy objective of promoting the use of annuity products as a means of enhancing American workers’ retirement security. To correct this dangerous imbalance, the Rule needs to make appropriate and fair allowances for non-fiduciary selling activity at the retail investor level. The

Department's proposed regulation "Definition of the Term 'Fiduciary,'" 75 Fed. Reg. 65263 (Oct. 22, 2010) (the "2010 Proposal") contained such a seller's exception. We would urge the Department to re-introduce a disclosure-based seller's exception into the Rule as a means of restoring balance and choice to the retail investor marketplace.

B. Items 5-6. Contract Requirements –

The BIC Exemption should be rewritten to eliminate burdensome disclosure requirements as well as the contract requirement. Advisers and financial institutions should not be compelled to provide complex warranties that defy compliance and subject themselves to resulting contract-based or quasi-contract based litigation in order to obtain exemptive relief. The Rule as drafted will undoubtedly lead to increases in litigation and litigation-related costs. Rather than requiring a written contract or disclosure, we suggest that the better approach is making the standard of care a condition of the exemption, as is the case under PTE 84-24. In other words, the basis for enforcement should be the loss of exemptive relief. The threat of a non-exempt prohibited transaction and potentially substantial excise tax liabilities would be an effective enforcement mechanism.

C. Item 16. Grandfathering –

Our clients report widespread interest in the grandfathering relief made available under Section VII of the BIC Exemption. The grandfathering relief has been applied, with limited utility, by individual advisers and supervising firms seeking to continue the provision of services to client holders of annuity products acquired prior to June 9, 2017. In many instances, firms and individual advisers rely upon grandfathering relief for purposes of advising retail investors about re-balancing transactions, whether or not to continue to hold the product and as to distribution features.

The utility of the grandfathering exemption would increase enormously if the scope of relief were expanded to cover recommendations to add additional amounts to grandfathered products. That limitation has frustrated the efforts of many advisers and firms who would like to be able to more fully serve the investment needs of retail annuity investors. Moreover, while firm compliance and supervisory personnel are readily able to track whether or not post-June 9, 2017 deposits are being made to grandfathered products, it is not possible to distinguish between deposit activity that may be occurring on the basis of an independent (i.e., non-recommended) client investment decision from deposits that may have been recommended. Concerns over that issue have caused some firms to refrain from providing any further advice to accounts eligible for grandfathering relief.

In addition to urging that the scope of the grandfathering relief exemption be expanded to cover recommendations of additional deposits, we believe the Department should extend grandfathered status to annuity products sold on the basis of recommendations provided prior to the end of the Transition Period, as opposed to the June 9, 2017 applicability date. The need for

an extension is particularly acute with regard to fixed indexed product sales that may be occurring in the “gap period” between June 9, 2017 and the Transition Period’s end.

Absent some major change, neither PTE 84-24 nor the BIC Exemption will be available to independent advisers involved in the recommendation of fixed indexed products during the Transition Period who are seeking to continue the provision of services in the post-Transition Period.

D. Item 17. PTE 84-24 –

We believe the Department should restore PTE 84-24 to its former role as the primary source of prohibited transaction exemption relief for fiduciary recommendations of all insurance products including fixed, fixed indexed and variable products.

The insurance features of annuity products differentiate them from mutual funds and other asset accumulation product types. Those insurance features subject the sale of those products to regulation at the state level, including insurance agent licensing and market conduct regulation that does not necessarily correspond to the broker-dealer supervisory model that the BIC Exemption is premised on. In our view, it makes little sense to limit PTE 84-24 to fixed annuity recommendations. A far better path would be to continue to make the BIC Exemption available for sales of all insurance products, including annuities, while opening an alternative exemptive relief pathway for the sale of annuity products under PTE 84-24.

Allowing dual exemptive relief pathways for the sale of annuity products would permit the broker-dealer community a choice of exemption strategies. At the same time, it would accommodate insurance distribution networks outside of the broker-dealer channel, including IMOs and FMOs. It would also do away with some of the technical but critically important practical problems that have emerged in connection with the Department’s attempts to define a “Fixed Rate Annuity Contract”. The most significant such problem with the Department’s definition is that it appears to exclude group annuity pension de-risking or buy-out products from the definition of a “Fixed Rate Annuity Contract” even though the industry generally classes those immediate and deferred pay-out products as the quintessence of a fixed annuity arrangement.³

³ As currently written, from and after the Transition Period, PTE 84-24 will define the term “Fixed Rate Annuity Contract” as an arrangement that either (i) satisfies applicable state nonforfeiture laws at the time of issue, or (ii) in the case of group fixed annuity, guarantees the return of principal net of reasonable compensation and provides a guaranteed minimum interest rate in accordance with rates applicable to individual annuity sales under state nonforfeiture laws. Pension buy-out and similar de-risking annuity products are generally made available as group annuities which are (i) exempt from state nonforfeiture laws; and (ii) have no guaranteed minimum interest rate features.

E. Item 18. Communications with Independent Fiduciaries with Financial Expertise –

The Department's stated goal in establishing the Rule's exception for transactions with independent fiduciaries with financial expertise ("IFE") was to "avoid imposing ERISA fiduciary obligations on sales pitches that are part of arm's length transactions where neither side assumes that the counterparty to the plan is acting as an impartial or trusted adviser." 81 Fed. Reg. 20946, 20980 (Apr. 8, 2016). However, parties seeking to rely on IFE can only do so confidently by obtaining representations from the parties with whom they wish to communicate. Therefore, efforts to implement the IFE have involved burdensome and time consuming exchanges of written form letters. The burden and expense associated with IFE implementation is unfortunate because the parties involved in these exchanges do not regard, and have never regarded, one another as impartial advice fiduciaries. The exchange of written letters is simply a "check-the-box" exercise. The Rule should simplify the IFE by allowing use of a disclosure-based regime similar to the approach used by the seller's exception contained in the 2010 Proposal.

In order to rely on IFE, a party must "know or reasonably believe" several factors relating to its counterparty's status, including that the counterparty is a fiduciary to a plan or IRA. 29 C.F.R. § 2510.3-21. A party may form the requisite knowledge or a reasonable belief through written representations (whether affirmatively or through the use of a negative consent process). The result has been that financial service and product providers have sent a flurry of hundreds of thousands of IFE representation letters to their clients and counterparties.

There are two main problems with this activity. First, most parties seeking to rely on IFE have developed unique representation letters, but their counterparties do not have the resources to review, comment and negotiate the hundreds or thousands of different letters they have received. As opposed to reviewing each letter, many counterparties have instead developed their own firm- or business line-wide counterproposal letters. This results in a "battle of the forms" with respect to which party's IFE letter's terms should prevail.

Second, the IFE is constructed on the premise that parties and counterparties will form a separate understanding relating to each ERISA plan or IRA that their activities relate to. However, this is not how wholesalers and financial intermediaries do business. Instead, they enter into distribution, marketing, and selling agreements that ultimately broadly cover products and services provided to large numbers of plans and IRAs. Some wholesalers have attempted to obtain IFE-related representations from their counterparties that would purportedly cover their entire relationship with the counterparty, including all plans and IRAs that may ultimately be affected. However, the counterparty may not be able to provide such representations where the counterparty acts a fiduciary to some plans and IRAs but not others. What is more, the counterparty may act as a fiduciary to the covered plans and IRAs in some situations but not others. The parties' resolution of these issues is not clear under IFE, but it may require the

burdensome approach of creating tailored representations separately addressing each plan and IRA and the circumstances under which the counterparty may or may not act as a fiduciary.

The burdens and compliance costs related to complying with the IFE are ultimately needless. Communications made by financial service and product providers for the purpose of selling their products and services have never formerly been thought to be fiduciary in nature. A “fiduciary” relationship arises where “special intimacy or . . . trust and confidence” exists between parties.⁴ The Rule’s chief flaw is its determined non-recognition of the fundamental tenet that selling activity is a non-fiduciary function. By reformulating the IFE as a disclosure-based regime, the Department could remedy this flaw and relieve the difficulties associated with the IFE.

The 2010 Proposal offers a way that the Department can craft a fiduciary standard that is narrow enough to exclude non-fiduciary sales activities but that can still be broad enough to capture relationships where there is an intimate legal relationship of trust and confidence. In 2010, the Department suggested that fiduciary status would not attach to a person who clearly discloses that it is acting in a selling capacity and not as a source of impartial advice. The Department should revise the Rule to include a similar exception that would provide that a person will not be deemed to be an investment advice fiduciary if such person can demonstrate that its counterparty knew, or, under the circumstances, reasonably should have known, that the person was providing its advice or recommendations (1) in its capacity as a seller of investment products or services and (2) was not undertaking to provide impartial investment advice.

F. Additional Changes to the Rule and Related PTEs

The seismic shifts now occurring in the financial services industry call for changes to the Rule and related PTEs beyond those prompted by the Department’s RFI. These changes are necessary to meet the President’s policy objective of ensuring that retirement investors’ have access to retirement information and financial advice.

1. Narrow the Definition of “Recommendation” –

The definition of “recommendation” is too vague, especially in connection with the “specifically directed to” element. This leads to the creation of fiduciary relationships where none was ever intended. As stated above, under the common law of trusts, a “fiduciary” relationship arises where “special intimacy or . . . trust and confidence” exists between parties.⁵ No recommendation should be fiduciary in nature unless there is a mutual understanding

⁴ Bogert’s The Law Of Trusts And Trustees § 481 (Breach of fiduciary obligation), Westlaw (database updated June 2017).

⁵ Bogert’s The Law Of Trusts And Trustees § 481 (Breach of fiduciary obligation), Westlaw (database updated September 2016).

between the provider and recipient that advice is being given. This should be accomplished by removing Reg. 2510.3-21(a)(2)(iii) regarding specifically directed statements.

2. Provide a Workable “Best Interest” Standard –

The BIC Exemption’s conditions call into question whether an advice provider can receive even incidental compensation in connection with its recommendation of investment products and services since advice is required to be provided “without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party.”

A far more workable and sensible standard for individuals, plans, and service providers would be to strike the “without regard to” language and be one where it is clear that an adviser is only required to provide advice that is, at the time it is made, in the best interest of the retirement investor and that does not subordinate the retirement investor’s interest to the interest of the adviser.

The Department should also clarify that consideration of lifetime income options is an appropriate, if not necessary, element of a best interest analysis if the adviser has the capacity to offer such options. Lifetime income options provide for a secure retirement and protections retirement investors would need to withstand unexpected financial emergencies.

3. Special Product Specific Exemptions Should Not Be Promulgated In Lieu of Making a Workable Principles-Based Exemption Widely Available –

As was stated many times in reaction to the 2015 proposal, the Department should not be favoring specific investment products, like clean shares or fee based annuities, through streamlined exemptions or asset lists. Rather, the Department should craft a principles-based exemption that is applicable to any investment option a fiduciary, in his or her professional discretion, can prudently recommend.

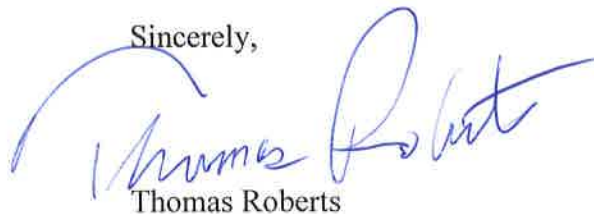
G. Conclusion

The Groom Group urges the Department to revise the Rule in a manner that will empower Americans to make their own financial decisions, to facilitate their ability to save for retirement, and to gain ready access to the insurance and annuity products that will allow them to withstand unexpected financial emergencies.

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We appreciate this opportunity to comment and would be pleased to respond to any questions.

Sincerely,

A handwritten signature in blue ink, appearing to read "Thomas Roberts", with a large, sweeping flourish above the name.

Thomas Roberts