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September 24, 2015

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

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

Re: Definition of the Term Fiduciary (RIN 1210-AB32)  
Best Interest Contract Exemption (ZRIN 1210-ZA25)  
Amendment of PTE 84-24 (ZRIN 1210-ZA25)

Ladies and Gentlemen:

In light of the testimony received by the Department of Labor (“Department”) in public hearings held from August 10 through August 13, 2015 and statements made by Department officials during that testimony, The Guardian Life Insurance Company of America (“Guardian”) and its affiliates submit this follow-up comment letter regarding the Department’s proposed changes to the definition of “fiduciary” under the Employee Retirement Income Security Act, as amended (“ERISA”) and the Internal Revenue Code of 1986, as amended (the “Code”), the proposed introduction of two new exemptions, including the best interest contract exemption

(“BIC Exemption”), and the proposed changes to class exemptions on which Guardian and other insurance companies rely (the “Proposal”).<sup>1</sup>

Guardian previously submitted an initial comment letter on July 21, 2015. We reaffirm those comments. As stated in our prior letter, Guardian generally supports a best interest standard for individuals and their affiliated entities who act as investment advice fiduciaries to ERISA plans, plan participants, and IRA owners. We support the Department’s efforts to ensure that financial advisors are acting in the best interests of clients, not in the advisors’ self interest.

However, we believe that the proposed rule, as written, unintentionally impedes the Department’s efforts to promote the best interests of these clients by limiting access to products that may well be in the clients’ long term best interests. Low cost products typically do not provide lifetime guaranteed income, a product feature that has proven to help millions of American families over the years. By equaling low-cost with the best interest of the customer, the Proposal has the unintended consequence of potentially harming middle income consumers who want long term, lifetime income streams to supplement Social Security. This element of the proposed rule is particularly troubling for consumers given the declining number of Americans who have lifetime income streams guaranteed through employer-sponsored defined benefit plans.

Therefore, we wish to reinforce certain changes that we strongly believe should be made to the Proposal and included in the final regulation and exemptions. Guardian is concerned that the failure to make these changes will have negative unintended consequences for consumers.

In particular, Guardian urges the Department to focus on the following areas when considering comments on how to improve the Proposal:

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<sup>1</sup> All capitalized terms in this letter not defined in this letter have the same meaning of those terms in the Proposal.

- Recognize the importance of annuity products, which are only issued by insurance companies, in providing the security of lifetime income for consumers saving for retirement by removing the bias in the Proposal against the sale of these products.
- Protect the ability of middle income and working class consumers saving for retirement to choose among a variety of products and services to help fund their retirement by removing the emphasis on low-cost alternatives in the Proposal that generally do not provide financial guarantees.
- Modify the definition of “investment advice” to exclude, among other things, pure selling activities.
- Expressly exclude the sale of insurance products to health and welfare plans from the Proposal.
- Remove the elements of the Proposal that would jeopardize the sale of proprietary products by proprietary distribution channels.

Without the modifications that are discussed in this letter and our prior letter of July 21, the Proposal will result in unnecessary disruption in this marketplace and, more importantly, negative impacts to retirement plans, plan participants and individual IRA investors.

Specifically, without these changes, the Proposal will:

- Make it harder for retirees to obtain guaranteed lifetime income options.
- Make it harder for small businesses to offer retirement plans to employees.
- Make it harder for workers to obtain information and guidance on retirement products.

## **Consumers Should Have a Fair and Open Marketplace That Does Not Favor One Type of Product over Another**

Guardian is a mutual life insurer with a 150 year history of fulfilling promises to our customers. As a mutual company, we are owned by our policyholders, naturally aligning our shared ‘best interests.’ Guardian continues to hold some of the strongest financial ratings in the industry. These are the kinds of characteristics that consumers, especially those saving for retirement or interested in the lifetime income promise of an annuity, consider when making decisions about their retirement nest eggs.

Guardian is concerned that the Proposal will be interpreted by consumers and their attorneys as requiring Guardian’s representatives to sell only low cost or non-proprietary products, particularly if relying on the BIC Exemption. For example, under the BIC Exemption standards set forth in the Proposal, sales by Guardian agents of proprietary individual variable annuities could far too often become the subject of potential litigation merely because the product fees necessary to support the guarantees provided by the products are higher than the costs of products such as indexed-based mutual funds, or because entities affiliated with Guardian agents (but not the agents themselves) received revenue sharing as a result of the product sale. We firmly believe this will result in a reduction of consumer access to annuity products because Guardian and other issuers cannot be expected to bear this substantially increased risk of litigation created by the rule as written. This reduction of consumer access harms consumers because the guarantees under these products provide extremely valuable guaranteed lifetime income benefits. Consumers will lose once again under the proposed rule if the same litigation risk causes a loss of access to proprietary products even when a proprietary product may be an appropriate fit for the client’s situation. Therefore, we urge the following points be reflected in the final regulation and exemptions:

1. Clarify that “Reasonable Compensation” under the BIC Exemption Takes Into Account Insurance Product Guarantees: The Department has required that “reasonable compensation” be paid for the services provided to a plan or IRA. The final BIC Exemption should be clarified so that the determination of “reasonable compensation” not only takes into account the value of services rendered, but also the value of the guarantees provided by the contract. The provision of an insurance company guarantee is not a “service” as contemplated under current regulations. However, such guarantees are essential to providing guaranteed lifetime income and, of course, these guarantees have costs associated with them. The failure to make this change may result in recommendations being made based solely on cost, specifically the lowest cost, even though a more expensive investment or product guaranteeing lifetime income may be the most appropriate product for the consumer.

2. Clarify that “Best Interest” of the Retirement Investor and “Without Regard To” Allow for “Incidental Benefits” and Are Product and Distribution Channel Neutral: Currently, the Proposal provides that a person acts in the Best Interest if he or she acts “without regard to the financial or other interests of the Adviser, Financial Institution, any Affiliate, Related Entity, or other party.” Guardian believes this language sets forth a standard that subjects Guardian and its agents to material litigation risk because a plaintiff’s attorney could use this language to support a claim that the sale of any product, particularly a proprietary product, is in the interest of the Adviser or Financial Institution simply because it generates a fee for the Adviser and Financial Institution. Further, this language appears to be contrary to long-standing principles established under ERISA that a fiduciary may realize “incidental benefits” as a result of performing its fiduciary duties.

Therefore, the Best Interest standard under the BIC Exemption and the other exemptions in the Proposal should be identical to the prudence requirement under section 404 of ERISA. The Best Interest should be defined to require that advice be provided with the “care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.”

Guardian believes this change will promote neutrality with regard to the products sold and business models and distribution channels utilized. Without this change, we believe Advisers who sell both proprietary and non-proprietary products will be driven to sell the non-proprietary products in order to meet the “without regard to” requirement even if the proprietary product is more appropriate for the consumer. Additionally, Financial Institutions may be driven to distribute products only through unaffiliated distribution channels so as to minimize claims that the Financial Institution, through its representative, failed to act in the best interest of the consumer. In other words, the final exemptions should be drafted in a manner so that no single business model or distribution channel is favored over another.

3. Clarify that Payments of Commissions and Revenue Sharing and Sale of Proprietary Products are Permissible under the BIC Exemption: In the preamble to the proposed BIC Exemption, the Department states that transaction-based compensation would be permissible under the BIC Exemption. However, the Department also provides in the preamble examples of fee arrangements, which do not include traditional transaction-based compensation arrangements. The Department provides this list as a non-exclusive list of compensation arrangements in which conflicts are eliminated. However, we think the inclusion of such examples, without examples of traditional transaction-based compensation arrangements, may be

interpreted as a bias against any arrangement other than those included in the preamble. The final BIC Exemption should make clear that commissions and revenue sharing, particularly revenue sharing that is paid to the issuer of a variable annuity contract rather than the selling affiliate or its representative, are permissible forms of compensation.

4. Clarify that Payments of Revenue Sharing are Exempt under Prohibited Transaction Exemption (“PTE”) 84-24: Guardian is concerned that PTE 84-24, as modified, may be interpreted to exempt the payment of Insurance Commissions or Mutual Fund Commissions, but not the payment of revenue sharing to the issuer of a variable annuity contract rather than the selling affiliate or its representative. The payment of revenue sharing allows service providers and product issuers to provide a level of service to small plans that would not otherwise be available to such plans. Therefore, the Department should clarify that PTE 84-24 exempts the payment of revenue sharing to the issuer of the insurance or annuity contract.

5. Clarify that PTE 84-24 Applies to Sales of All Insurance Contracts: The final PTE 84-24 should exempt prohibited transactions that arise in connection with the sale of any insurance or annuity contract, not just contracts that are not “securities” under the securities laws. PTE 84-24 has been available for insurance products, including all forms of annuities, for over 30 years and, in Guardian’s view, has proven effective in protecting consumers’ interests.

**The Final Regulation Should Not Apply to Sales of Products Without a Policyholder Investment Component to Health and Welfare Plans**

Guardian is concerned that the proposed definition of “investment advice” may be interpreted to apply to the sale and marketing of insurance to employer-sponsored health and welfare plans because of authority indicating that insurance contracts are “property” under the current law. The Proposal is clearly drafted with the intent of addressing conflicts of interest that arise in the sales and marketing of products and services to plans that provide retirement benefits

and to other retirement savings accumulation vehicles, but not health and welfare plans. The health and welfare market is substantially different than the retirement and savings markets. Any efforts by the Department to regulate the health and welfare marketplace should be undertaken through a separate rulemaking under which the Department adequately studies how and if the “investment advice” definition should apply to health and welfare plans.

Therefore, the final regulation should not apply for purposes of determining whether a person acts as a fiduciary with regard to health and welfare plans. Based upon statements made by Department officials during the hearings, our understanding is that the Department is inclined to make this clear in the final regulation as long as the underlying insurance contract does not have an investment component. However, the Department should clarify that an investment component for purposes of the final regulation does not include the variable component of an insurance contract if the variability is outside of the control of the policyholder. For example, group permanent life insurance policies sold in the health and welfare plan market provide for guaranteed cash values that can be increased only at the insurer’s discretion based on factors such as the insurer’s general account performance and/or favorable mortality experience, and are not based on investment decisions made by the policyholder. The existence of this cash value portion of the policy should not be viewed as an investment component under the final regulation.

### **Consumers Employed by Large or Small Employers Should Have Equal Access to Retirement Products and Services**

We are concerned that small businesses are disproportionately harmed by the Proposal. The Proposal negatively impacts small plan formation by limiting sales activities that encourage small business owners (with less than 100 employees) to start up, maintain, or improve their employee benefit plans. The Department draws a different line in this regard for employers with

100 employees or more-- a line which would ultimately impede the important public policy goal of expanding small plan coverage.

The Proposal requires that a plan must be a certain size or that the fiduciary acting on behalf of the plan must have a minimum amount of ERISA-governed assets over which it has discretionary control in order to carve-out from “investment advice” certain circumstances when a representative is selling a product or service. We do not believe such considerations are supported by ERISA, which does not hold fiduciaries of smaller plans to a different standard than those of larger plans. Therefore, we believe that the carve-out should apply to sales to plans of any size.

**Providing that a “Recommendation” Involves a “Call to Action” Would Preserve Access to Education for Consumers**

In the Proposal, the term “recommendation” is defined as “a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action.” The use of the word “suggestion” could be interpreted to include any number of written or verbal communications that are intended to be informational or educational in nature and no reasonable investor would ever view as investment advice. Thus, the Department needs to clarify the meaning of “recommendation” in order to avoid this outcome.

We agree with statements by the Department during the hearings that the definition of “recommendation” for purposes of the final regulation would require a “call to action” similar to that contained in FINRA Rule 2111. In our view, the Department should define the term “recommendation” in the final regulation to specifically require a “call to action” rather than a mere “suggestion.” Moreover, the Department should state in the preamble to the final regulation that the Department intends that the meaning of the term “recommendation” be

interpreted in accordance with guidance under FINRA Rule 2111. These changes will encourage Advisers and Financial Institutions to provide important investment-related information to consumers because they will not be concerned about the risk of inadvertently becoming a fiduciary when they are merely providing general information or education to consumers.

**Permitting Arbitration of Non-Class Action Disputes Provides An Efficient and Effective Method of Protecting Consumers and Resolving Disputes**

The proposed BIC Exemption provides that the written contract entered into by consumers may not contain a provision which waives or qualifies the consumer's right to bring a class action lawsuit in the event of a dispute with the Adviser or Financial Institution. However, the preamble states that this provision is not intended to limit the ability of the parties to "enter into a pre-dispute binding arbitration agreement with respect to individual contract claims."

We strongly disagree with the testimony presented by some witnesses calling for the elimination of a dispute resolution mechanism permitted under the BIC Exemption contract. We believe that provisions mandating arbitration in the event of a dispute, which have been permitted by FINRA for many years, have proven to be an efficient and effective method for protecting consumer interests and resolving disputes. Therefore, we urge the Department to continue to permit the use of arbitration provisions under the final BIC Exemption.

**Including Disclosure Provisions Like Those Required Under Current Law in the Final BIC Exemption Will Prevent Consumer Confusion**

The disclosure requirements under the proposed BIC Exemption, including the website disclosure, are unnecessarily complex, expensive to implement and will not help consumers understand the fees that they will pay. In addition, some of the disclosure requirements under the BIC Exemption conflict with, or are duplicative of, disclosure that is currently mandated under other federal and state laws. This conflicting and/or duplicative disclosure will only confuse

consumers and will not enhance their ability to make good decisions about their retirement.

Therefore, in our view, the final exemption should include simplified disclosures which follow guidance under ERISA sections 408(b)(2) and/or 404(a)(5). The American Council of Life Insurers' comment letter of July 21, 2015 at pages 36-38 is illustrative of simplified disclosure requirements Guardian believes would be adequately protective of consumer interests.

### **Deleting Overly Burdensome and Ineffective Recordkeeping Requirements from the Final BIC Exemption Promotes Cost Savings That Will Benefit Consumers**

Under Section IX of the proposed BIC Exemption, an extraordinary amount of data must be retained in order to comply with the conditions of the exemption. In Guardian's view, the data to be retained would serve no useful purpose in enabling consumers to make better informed investment decisions. As such, the benefits of maintaining the data will not outweigh the substantial costs of maintaining such data. Therefore, the Section IX proposed data retention requirement should be eliminated in its entirety.

### **Re-proposing the Regulation and the Exemptions Will Result in a Better Rulemaking Process**

Guardian believes that due to the complexity of the proposed definition of fiduciary and the proposed exemptions, particularly the BIC Exemption, the Department should re-propose the regulation and the exemptions so that they can be subject to further study and comment. In this regard, Guardian notes that the Proposal is substantially and materially different from the Department's proposal in 2010.

### **Providing for at Least a Three-Year Effective Date Will Allow for Adequate Time for Implementation**

In Guardian's view, service providers should be given at least three years to comply with the final regulation and exemptions. The proposed eight-month effective date is simply not enough time to implement the system changes and policies and procedures needed to comply

with a rulemaking of this nature and complexity. We note that many panelists testified during the public hearings that implementation within a short period of time would not be feasible.

**Providing for Grandfathered Relief for Ongoing Relationships Prior to an Effective Date Ensures Certainty for Consumers**

Advisory arrangements, annuity contracts, and other arrangements entered into or products sold prior to the effective date of the final regulation should be grandfathered under current law. The application of fundamentally different compliance requirements to these pre-existing relationships is unfair to both the service provider and the consumer. For example, the costs related to compliance with the BIC Exemption may require termination of current relationships or renegotiation of related fees. The Department should permit the bargained for relationship to continue by permitting arrangements entered into and products sold prior to the effective date to be covered under the exemptions available prior to the effective date.

**Coordinating the Department's Regulatory Activities with the SEC and FINRA Fosters Compliance with All Regulatory Requirements**

The final regulations and exemptions will have a significant impact on the compliance procedures and operations of Guardian's affiliated retail broker-dealer, which is closely and effectively regulated by the SEC and FINRA, as well as the activities of Guardian agents, most of whom are registered representatives of this broker-dealer. Therefore, the Department should coordinate its final rulemaking with those regulators in order to assure that Guardian will continue to be able to meet the panoply of federal regulations to which it is currently subject, including disclosure requirements that are provided in fund and annuity product prospectuses and Form ADV, and to which it will be subject once the Department's final regulation and exemptions are issued.

Thank you for your time and attention to these important issues. We would be happy to discuss any of these comments and any of the comments presented in our July 21, 2015 letter with representatives of the Department.

Sincerely,

A handwritten signature in cursive script, appearing to read "Tracy Rich".

Tracy L. Rich