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Office of Exemption Determinations
Employee Benefits Security Administration
Attn: D-11850
Room N-5655
U.S. Department of Labor
200 Constitution Ave., N.W., Suite 400
Washington, D.C. 20001

Re: Amendment to, and Proposed Partial Revocation of, Prohibited Transaction Exemption 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies and Investment Company Principal Underwriters (ZRIN: 1210-ZA25)

Ladies and Gentlemen:

We respectfully submit our comments to the Department of Labor's ("Department" or "DOL") proposed amendment to, and proposed partial revocation of, prohibited transaction exemption 84-24 ("PTE 84-24"). We have also submitted comments to the Department's proposed rule redefining the term "fiduciary" with respect to the provision of investment advice under Section 3(21)(A)(ii) of ERISA and Section 4975(e)(3)(B) of the Internal Revenue Code (the "Code").

Ameritas Life Insurance Corp. ("Ameritas Life" or "Ameritas"), formed in 1887 and domiciled in Nebraska, offers fixed, indexed and variable life insurance and annuities to individuals and individual retirement accounts. Ameritas Life also offers retirement plan products and services primarily through group annuity contracts to businesses and their tax-qualified pension and profit sharing plans. We offer, through our affiliated broker-dealers, investment advisers and mutual fund complex, mutual funds, asset management services, securities brokerage and investment advisory services to individuals, businesses and their tax-qualified plans.

The Department's proposed amendment to PTE 84-24 results from the Department's concurrently proposed expansion of fiduciary status to: (1) insurance agents that recommend and sell annuities; (2) insurance companies that issue annuity products; and (3) insurance companies that provide recordkeeping platforms, each of (1), (2) and (3) for compensation to tax-qualified retirement plans and tax-qualified individual retirement accounts (collectively "Retirement Accounts"). Ameritas Life and its agents have relied, and currently rely, on PTE

84-24 as non-fiduciary service providers who receive commissions for the sale of a product, or compensation for services, to Retirement Accounts.

This existing PTE 84-24 is necessary for the insurance industry's continued issuance and sale of, and provision of services relating to, individual fixed, indexed and variable annuities to Retirement Accounts, and fixed and variable group annuities to employer-sponsored retirement plans. We recommend the following changes to the Department's proposed amendment to, and partial revocation of, PTE 84-24 to enable such continued reliance to: (1) allow the individual variable annuity to remain covered by the exemption; (2) amend the proposed "Best Interest" definition; and (3) broaden the exemption to broker-dealers and their representatives.

I. Individual Variable Annuity

First, eliminate the proposed partial revocation of the exemption for issuance, sale and servicing of individual variable annuities to individual retirement accounts. The individual variable annuity should have the same prohibited transaction exemption as all other annuities (i.e., individual fixed and indexed annuities, and group fixed and variable annuities) under PTE 84-24.

An annuity does not convert from an insurance product to a securities product with the addition of a variable investment feature. A variable annuity combines traditional insurance concepts with certain mutual fund principles to solve two increasingly important problems in retirement planning – rising life expectancy and the declining value of the dollar. Variable annuities share many of the features of fixed annuities, including a fixed (general account) option with interest guarantees, mortality-based investment guarantees, retirement income guarantees, and the availability of additional life-contingent withdrawal options. These features are not available in other securities investments. Also unlike an investment in securities, both fixed and variable annuities provide for the liquidation of principal and income actuarially over a lifetime with the insurance company assuming the risk of miscalculating mortality predictions in computing benefit payments. Whether an annuity contract is fixed or variable, the insurance company bears the longevity risk.

The U.S. Securities and Exchange Commission ("SEC") requires that individual variable annuities and their underlying separate accounts be registered. Financial Institution Regulatory Authority ("FINRA") imposes its own Rule regulating the sale of variable annuities.¹ Additionally, state insurance departments regulate annuities including product approval, advertising, and market conduct practices. Variable annuities must be designed to comply with Code provisions that impose investment diversification requirements. The Code and state law also require that variable annuity assets must be invested in separate accounts maintained by insurance companies that are variable annuity dedicated. Extensive prospectus disclosure, state annuity disclosure and tax disclosure is required during the sale and life of every variable annuity. It is completely unreasonable and contrary to the history of ERISA and Department

¹ See FINRA Rule 2320.

regulation² to subject this insurance and securities product to additional regulation by revoking PTE 84-24 and offering relief from prohibited transactions only under the highly prescriptive proposed Best Interests Contract exemption.

Consequently, the following language should be deleted from Section I. Covered Transactions, (b) Scope of the Exemptions:

“(1) a variable annuity contract or other annuity contract that is a security under federal securities law, or 2.”

II. Definition of “Best Interest”

Second, the definition of “Best Interest” in the proposed Impartial Conduct Standards needs to be deleted and replaced.

The proposed Section II. Impartial Conduct Standards, subsection (a), provides:

“When exercising fiduciary authority described in ERISA Section 3(21)(A)(ii) or Code Section 4975(E)(3)(B) with respect to the assets involved in the transaction, the insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter acts in the ***Best Interest*** of the plan or IRA” (bold and italics emphasis added.)

Proposed Section VI. Definitions, subsection (b) provides:

“The insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter that is a fiduciary acts in the “***Best Interest***” of the plan or IRA when the fiduciary acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances and needs of the plan or IRA, *without regard to* the financial or other interests of the fiduciary, any affiliate or other party.” (italics and underscoring added).

It is impossible and impractical in a sales context, for the insurance agent, its insurance company, or its broker-dealer to act “*without regard to*” the financial or other interests of the fiduciary, or any affiliate.” Under other laws and regulations, financial institutions have capital requirements, solvency requirements, and other financial considerations they are required to consider.

Consequently, the definition of “Best Interest” in the proposed Impartial Conduct Standards should be deleted and replaced with “before the” financial interests and other interests of the insurance agent, broker-dealer and insurance company.

² Section 404(b)(1) of ERISA excludes from “plan assets” underlying assets of registered investment companies and Section 404(b)(2) excludes from “plan assets” assets under guaranteed benefit policies. Congress recognized that the SEC provides regulatory oversight for registered products and state insurance departments regulate insurance. See also DOL Regulation §2510.3.101–Definition of “plan assets” and §2550.401c-1-Definition of plan assets-insurance company general accounts.

III. Broker-Dealers and their Representatives

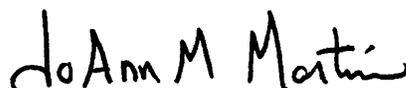
Third, the proposed amendment to PTE 84-24 should be broadened to extend to broker-dealers that underwrite and distribute, and whose registered representatives recommend and sell, variable annuities to Retirement Accounts.

Group Variable Annuity. According to FINRA regulations, an insurance agent who is a registered representative of a broker dealer who recommends and sells a group variable annuity is subject to the broker-dealer's supervision. Thus, PTE 84-24 needs to clarify that when a group variable annuity is sold to a retirement plan and the insurance agent is also a registered representative of a broker-dealer that reasonable compensation paid to and through the broker-dealer and such registered representative is also covered by the PTE.

Individual Variable Annuity. When an individual variable annuity is distributed, it must be underwritten by a broker-dealer and sold by either the registered representatives of such underwriting broker-dealer, or by the registered representatives of one or more other distributing broker-dealers. PTE 84-24 must cover the reasonable and customary compensation paid to, and through, each of the broker-dealers and the registered representatives who are required by the SEC and FINRA to be part of the distribution process for individual variable annuities.

Conclusion. Thank you for the opportunity to comment on the Department's proposed amendments to PTE 84-24. We look forward to working with you to improve the consumer protections available to Retirement Accounts while ensuring access to lifetime income solutions. We would be happy to answer any questions you may have. Please feel free to contact Robert-John H. Sands at 301-280-1035.

Very truly,



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