Testimony

of

Stephen M. Saxon

and

Thomas Roberts

of

Groom Law Group, Chartered

before the

Employee Benefits Security Administration

U.S. Department of Labor

Hearing on Definition of the Term "Fiduciary"; Conflict of Interest

Rule-Retirement

Investment Advice and Related Proposed Prohibited Transaction

Exemptions

August 10, 2015

Good afternoon. My name is Steve Saxon and I am a principal at Groom Law Group. My colleague, Tom Roberts, is also a principal at Groom. We are testifying this afternoon on behalf of several client life insurance companies that are major providers of group and individual annuity products and related services to ERISA-covered plans, plan participants and beneficiaries and to IRA holders.

We appreciate the opportunity to comment on the Fiduciary Definition Proposal, including the Best Interest Contract, or "BIC" exemption and the proposed amendments to PTE 84-24. Our comments focus on matters of paramount importance to the retirement security of working American men and women – the need to preserve free and ready access by individuals to a competitive, well-regulated marketplace for guaranteed lifetime income products and by small employers to the group annuity products and related services that support small plan formation and growth.

Many, including the Department, have observed that the long and continuing migration away from defined benefit plans in favor of defined contribution plans has effectively shifted the responsibility for achieving adequate retirement savings and managing the spend down of those assets to individual workers. This secular event has triggered a new recognition of and appreciation for the retirement income needs that annuity products are uniquely capable of fulfilling in a defined contribution environment.

The 2010 joint initiative between the Department and the U.S. Treasury to solicit information and ideas on how defined contribution plan participants' access to and utilization of guaranteed lifetime income products might be increased was an indicator of the growing public policy concern that individual retirement savers may be ill-equipped to protect themselves against the risk that they might outlive their retirement savings. That 2010 initiative is now beginning to bear fruit. The Department's recent benefit plan statement rulemaking effort, which is aimed at encouraging plan participants to measure their defined contribution savings adequacy not merely as a lump sum, but in terms of

its adequacy to purchase an annuitized income stream at retirement, is a primary example. Our clients enthusiastically support the approach reflected in the Department's lifetime income illustration advance notice of proposed rulemaking, which would require the expression on defined contribution plan benefit statements of a participant's "total benefits accrued" as an estimated lifetime income stream, as well as a lump sum amount.

Our life insurance company clients and their professional distribution partners make available a wide variety of competing annuity products to allow individual retirement savers the opportunity to off-load the risk that they might outlive their retirement savings. The products that our clients, as well as many other insurance companies, make available range from fixed, immediate annuities to variable products that also include a guaranteed income stream for life. The breadth of life insurers' on the ground distribution capabilities is also an ideal match to support the development of plans offered by small employers through group annuity products and other ready to use solutions.

We are deeply concerned that the fiduciary definition and related exemption proposals, if adopted without significant change, would effectively shut down individual retirement savers' access to information about and utilization of guaranteed lifetime income products. Such a result would leave defined contribution plan savers unable to protect themselves from the risk that they might outlive their retirement savings. It would also undermine the Department's efforts to stimulate plan participant thinking about retirement savings adequacy. At the end of the day, what good is achieved if plan participants come to appreciate the risk that they might outlive their retirement savings, but are effectively unable to address those risks by purchasing one or more guaranteed lifetime income products? Similarly, we are concerned that small employers will be deprived of access to the insurance products and services that foster small plan growth and development.

Group and individual annuity products are readily available today through well-trained, licensed, and carefully supervised financial professionals who are knowledgeable about the features of the products and providers they represent. These are products that are *sold*. These

are products that are purchased for the long term and that generate a sales commission for the financial professionals who successfully match them with customer needs. The financial professionals who sell these products typically concentrate their sales efforts on a select number of products and issuers that they are deeply familiar with and comfortable representing.

Unfortunately, the Proposal ignores this fundamental marketplace reality. First, it re-characterizes all product marketing and selling activity involving small defined contribution plans, plan participants and IRA holders as fiduciary in nature. Second, the Proposal withholds any workable prohibited transaction exemptive relief by disallowing, as a condition of the proposed exemptions, virtually all of the financial incentives that promote responsible product sales activity.

We urge the Department to preserve the freedom of defined contribution plan participants and small plan sponsors to choose from among competing insurance products and providers by making three key revisions to the current proposal that Tom will now describe.

Thank you Steve. Our first suggestion is that the Department should either revise the proposed fiduciary definition itself or provide an appropriate carve-out to avoid giving rise to fiduciary status on the part of annuity providers and distributors in situations where a plan sponsor or retirement saver would not reasonably expect the person offering a product for consideration to serve as an impartial and unbiased advice resource.

Under the Proposal fiduciary status arises virtually *any* time *any* communication is made that is in *any* way suggestive of an annuity product purchase and is either individualized for or specifically directed to a retirement saver for consideration. The Proposal would have fiduciary status attach contemporaneously with the delivery of the suggestion, even in circumstances where no business relationship yet exists.

Our problem with this approach is that virtually all annuity product marketing and selling activity involves the delivery of suggestions to individuals or employers about products that may merit consideration through specifically directed communications of one sort or another.

Special responsibilities clearly should and do attach to annuity product marketing and sales activity. Consumers clearly should be able to rely on annuity providers and distributors for clear and complete explanations of the benefits, features and costs associated with the products they are offering for consideration. But conferring fiduciary status on all persons who market and sell annuity products to individuals and small employers is clearly inappropriate and unworkable.

As noted earlier, annuity products are distributed by professionals who typically concentrate their marketing and sales efforts on a select number of products and providers. Consumers who may be interested in considering a guaranteed lifetime income product purchase know that the financial professional who is offering the product is not a disinterested fiduciary. Individuals considering their future retirement situation are frequently interested in shopping the guaranteed lifetime income product marketplace by speaking with several competing providers. These shoppers are interested in obtaining information about one or more particular products, and they are entitled to rely on the accuracy of the information provided to them, but they have no

justifiable reason for believing that the person they are interacting with is impartial or unbiased. The same is true for fiduciaries of small plans engaged in the consideration of products and services to support the needs of their plans.

The Proposal's counterparty, or "sellers" carve-out is generally available only to fiduciaries responsible for managing large plans and does not cover selling activity involving small plans or individual participants and IRA holders. The Department explains that the basis for this result springs from its view that "as a rule" fiduciaries of small plans, plan participants and beneficiaries are incapable of entering into an arms' length arrangement with a financial services professional. We disagree with the Department's view. The marketplace for annuity products is extremely competitive. That competition provides consumers with real power and leverage to shop the marketplace, to assess the information and products that today are readily available to them and to make a decision about which product is the best fit for their needs.

Second, the BIC Exemption, which is proposed as a source of exemptive relief for virtually all investment and annuity product sales to individual IRA holders, is an extremely poor fit for guaranteed lifetime income products. The extensive cost and compensation comparisons required under the BIC Exemption would lump together pure investment products and annuities and suggest that all product costs should be assessed through a value of services lens. That framework assigns no value to the costs of the non-service related guarantees that differentiate annuities from investment-only products. That approach works a disservice on consumers by implying that a less expensive, non-insured product may be a better value than a guaranteed lifetime income product while ignoring the inherent costs and values of lifetime income product guarantees. At the same time, it is unclear whether sellers that offer a mix of proprietary and non-proprietary products can meet the BIC Exemption's best interest definition, which appears to require a level of disinterestedness that may be incompatible with proprietary product sales.

Third, it is absolutely vital that the Department reconsider the changes it has proposed with respect to the relief afforded to annuity products under PTE 84-24. PTE 84-24 has served for decades as a primary source of prohibited transaction exemptive relief for sales of insurance products of all types, without regard to their fixed or variable nature. We are deeply concerned that the proposed exclusion of variable annuity products sold to IRAs would make the sale of those products to IRA holders significantly more difficult relative to fixed product sales. We urge the Department to preserve a level playing field for the marketing and sale of variable as well as fixed products by removing the proposed exclusion. We would also urge the Department to expand the proposed definition of "Insurance Commission" to cover all types of compensation paid to an insurance agent, broker or pension consultant and not just sales commissions. In particular, we are concerned that the narrow scope of the proposed definition would not cover the retirement and welfare benefits that many insurance providers make available to their career agent sales forces.

* * * *

We appreciate the opportunity to appear today and look forward to taking your questions.