GUARDIAN®

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

Re: RIN 1210-AB79

Ladies and Gentlemen:

On behalf of The Guardian Life Insurance Company of America and its affiliates ("Guardian"), I am pleased to respond to the Department of Labor's (the "Department") request for comments related to the regulation "Definition of the Term 'Fiduciary;' Conflict of Interest Rule – Retirement Investment Advice," 81 Fed. Reg. 20946 (April 8, 2016), Prohibited Transactions 2016-01 and 2016-02 and the 2016 amendments to Prohibited Transactions 75-1, 77-4, 80-83, 83-1, 84-24, 86-128, (together the "Fiduciary Rule").

Guardian is a Fortune 250 global financial services company that provides individual retirement savers and small businesses with diversified financial product and service solutions, including life insurance, disability income insurance, annuities, wealth management and investments, which can help Americans achieve long-term financial security and guaranteed income for life. Guardian has approximately 8,800 employees and a network of over 2,750 financial representatives in more than 58 agencies nationwide. For nearly 160 years, Guardian's success as a mutual company has been inextricably linked to ensuring our customers receive advice that is in their best interest. It is from this customer-focused perspective that I submit this letter to inform the Department's review of the Fiduciary Rule, as directed by the President's Executive Memorandum (the "President's Memorandum").[1]

The Fiduciary Rule has the effect of limiting the availability of financial products that can provide a wide variety of different solutions to fund Americans' retirement, including lifetime income and protection products. This limitation is caused by the threat of litigation, coupled with the onerous exemption requirements for more complex but customizable retirement products, like variable annuities and fixed indexed annuities. These annuity products typically include optional guaranteed lifetime income benefits which shift the investment risk from the individual retirement investor to the insurance company. These products are inherently more expensive than simply making available a suite of mutual funds or other investments outside of an annuity. However, it is the guarantees in these products that afford retirement investors the security of lifetime income. These limitations on financial products run counter to the Department's objective of encouraging retirement savers to focus on products that provide

[1] Presidential Memorandum on Fiduciary Duty Rule for the Secretary of Labor (February 3, 2017), published at 82 Fed. Reg. 9675 (Feb. 7, 2017)

income during retirement years. The Fiduciary Rule also favors a fee-based advice model over a transaction-based commission model, which may not be appropriate for all retirement investors, especially those who have modest account balances and those who trade infrequently.

Generally speaking, the anticipated applicability of the Fiduciary Rule has already begun to limit retirement savers' access to information and products. These constraints suggest that the Fiduciary Rule conflicts with the President's priority to "empower 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."[2] Guardian appreciates the 60-day extension of the Fiduciary Rule's applicability date to provide the Department additional time to review the regulation. However, the implication that improvements to the definition of an investment advice fiduciary and the impartial conduct standards may not be necessary beyond June 9, 2017, does not comply with the spirit of the President's Memorandum, which directs the Department to conduct a thorough legal and economic analysis of the comprehensive regulation. We respectfully urge the Department to complete a full review of the Fiduciary Rule, as directed by the President, prior to allowing key components of the regulation to become applicable.

As explained below, Guardian believes that the Fiduciary Rule fails the three tests outlined in the President's Memorandum.

The Anticipated Applicability of the Fiduciary Rule Has Reduced Retirement Savers' Access to Lifetime Income Products

The Fiduciary Rule may challenge financial representatives' efforts to best serve retirement investors by limiting customer access to a full range of potentially appropriate lifetime income and protection products. The technical compliance burdens of the Fiduciary Rule and the costs associated with the risks of increased litigation, both at the individual financial representative and the financial institution levels, may result in limited financial advice for Americans that need it the most. The technical requirements of the available exemptions present unnecessary burdens for financial representatives who, in acting in a customer's best interest, may appropriately recommend higher cost or proprietary products to their customers. The effort required to comply with subjective terms like "reasonable compensation" contained in the impartial conduct standards or the Best Interest Contract Exemption ("BICE") warranties, coupled with the associated litigation risks, may prove too onerous for financial representatives and financial institutions.

Unlike other financial institutions, Guardian made a conscious decision not to enforce customer account minimums in response to the Fiduciary Rule. However, as financial representatives weigh increased litigation and compliance costs alongside the value proposition of serving a broader range of American savers, it is possible that they will choose to forgo servicing smaller balance accounts as it may be too costly for them to comply with the BICE. These anticipated compliance and litigation burdens may also prompt some of the most skilled and effective financial representatives to consider scaling back their practices related to

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[2] Presidential Memorandum on Fiduciary Duty Rule for the Secretary of Labor (February 3, 2017), published at 82 Fed. Reg. 9675 (Feb. 7, 2017)

retirement accounts. If that were to happen, retirement savers would lose access to needed investment information, professional financial advice, and insurance products.

The Fiduciary Rule Has Disrupted the Annuity Industry and Adversely Affected Investors and Retirees

The Fiduciary Rule's impacts are diametrically opposed to Americans' growing need for lifetime income. As Americans live longer, they run the risk of outliving their savings, and government programs are not sufficient to bridge that gap. Today, retirement savers have access to a broad range of products, some of which feature guaranteed lifetime income and other protections against the risk of outliving one's retirement assets. A recent survey found that 61 percent of retirement-age consumers highly valued access to guaranteed lifetime income products to supplement Social Security.[3] In fact, six in ten consumers believe financial advisors have a responsibility to present products that offer this benefit to their customers as part of a retirement income strategy.[4] Another recent study found that less than 10 percent of Americans will be covered by traditional pensions.[5] This statistic is particularly disturbing since 10,000 baby boomers are turning 65 years old every day for the next 17 years and life expectancy is growing every year.

Over the past year, there has been a decrease in total annuity sales, which should concern the Department, as they are the only financial product to provide guaranteed income for the life of a customer.[6] Well trained, highly regulated and ethical financial representatives currently match risk reducing insurance products with the needs, circumstances, and objectives of retirement investors. That professional assistance is vital to helping customers understand how certain products work, including the combinations of arrangements available to allow retirement savers to have access to potential investment market upside while also providing a guaranteed stream of future income through retirement.

The Fiduciary Rule Will Result in Increased Litigation and Consumer Costs

The Department has created challenges to the delivery of investment advice while creating a pathway to increased litigation. The BICE could foster a relationship of distrust between financial representatives and customers at the outset, instead of establishing a constructive connection which could promote increased retirement savings and lifetime income for millions of Americans. The anticipated increase in litigation which will result from the private right of action that is contemplated by the BICE will likely raise the operating costs of financial institutions and will, in turn, exert upward pressure on product fees and expenses. Morningstar Research Services recently stated that the retirement services industry can expect to

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[3] Greenwald and Associates/Cannex *3rd Annual Guaranteed Lifetime Income Study* (March 7,2017) as summarized at http://greenwaldresearch.com/2017/03/07/consumers-like-idea-guaranteed-lifetime-income-little-familiarity-products-offering-benefit/

[4] *Id.*

[5] Buessing, Marric, and Mauricio Soto. 2006. *The state of private pensions: Current 5500 data. Issue in Brief No. 42.* Chestnut Hill, MA: Center for Retirement Research at Boston College (February).

[6] Insured Retirement Institute, *IRI Issues Fourth-Quarter 2016 Annuity Sales Report (March 30, 2017)*, http://irionline.org/newsroom/newsroom-detail-view/iri-issues-fourth-quarter-2016-annuity-sales-report

pay up to $150 million annually in class action settlements under the Fiduciary Rule,[7] with many of those costs borne in the near-term.[8]

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As described above, the Fiduciary Rule fails the three tests outlined in the President's Memorandum and is inconsistent with his priority of empowering Americans to make their own financial decisions to save for retirement and meet other lifetime financial goals. Guardian believes that American retirement savers are best served by a disclosure-based, product-neutral, best interest standard that is harmonized across all products and regulatory jurisdictions. The Department can improve the Fiduciary Rule by implementing the below enhancements:

- The Fiduciary Rule should be investment product neutral. Different investment products satisfy a range of investor demands, and are selected appropriately based on customer age, risk appetite and other economic trends.

- Broader lifetime financial goals should not be subordinate to retirement security. Guardian shares the Department's interest in ensuring that qualified plan assets are used to save for retirement; however, the Fiduciary Rule should not limit Americans' access to investment advice that may be needed to meet their other financial objectives. An improved Fiduciary Rule should not cover plan distributions used to purchase a product like whole life insurance, which may technically include an "investment" component under the Fiduciary Rule but is primarily designed to provide intergenerational wealth rather than retirement security.

- Remove the BICE requirements, which include complex warranties that will result in increased litigation and compliance costs that will inevitably be borne by retirement savers.

The changes in the retirement landscape over the past 40 years have been dramatic. What has remained constant is that retirement savers benefit from sound investment advice and access to guaranteed lifetime income and protection products. The Department proposed the Fiduciary Rule in response to the transition from a retirement system largely comprised of defined benefit plans that provide a guaranteed income stream in retirement, to one dominated by individual retirement accounts where retirees face the risk of outliving their savings. As workforce trends continue to shift in the coming years, it is important to ensure that American retirement savers have access to the widest possible variety of investment options. Guardian and our financial representatives play a critical role in educating retirement savers and providing them with lifetime income and protection products that will give them financial security for life.

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[7] Morningstar, "Costs of the Fiduciary Rule Underestimated," http://news.morningstar.com/articlenet/article.aspx?id=793268
[8] *Id.*

Thank you for providing us with the opportunity to comment. If I can provide any further assistance, please contact me.

Respectfully submitted,

Tracy Rich
Executive Vice President and General Counsel