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Filed Electronically

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Definition of the Term "Fiduciary"
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Definition of the Term Fiduciary; Conflict of Interest Rule – Retirement Investment Advice
RIN 1210-AB79

Groom Law Group is providing the comments set forth in this letter 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"). These Groom Group comments are responsive to the Department's request for comments for the purpose of examining the "Definition of the Term 'Fiduciary'; Conflict of Interest Rule--Retirement Investment Advice", 81 Fed. Reg. 20946 (April 8, 2016), Prohibited Transaction Exemptions 2016-01 and 2016-02 and the 2016 amendments to Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, 84-24, 86-128, (together, the "Fiduciary Rule") in light of the Presidential Memorandum on Fiduciary Duty Rule for the Secretary of Labor (February 3, 2017), published at 82 Fed. Reg. 9675 (Feb. 7, 2017) (the "Presidential Memorandum").

Significant disruption and dislocation to the financial services industry is already occurring in anticipation of the Fiduciary Rule's applicability. The nature of that disruption, which has been particularly pronounced in regards to commission-based distribution organizations, foreshadows the dire consequences that will likely befall American retirement savers unless the rule is substantially changed. In its current form, the Fiduciary 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 true source of guaranteed protection against unexpected financial emergencies, including the risks of outliving one's retirement savings and the risk of precipitous and prolonged declines in financial markets.

The best interests of retirement savers 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, that ensure the availability of lifetime income and that stand to provide retirees with lasting financial security.[1] The Fiduciary 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. Today, these well-established distribution networks afford retirement investors ready access to a myriad of risk reducing products and expert advice on how those products may be applied to individual circumstances and needs.

The architects of the Fiduciary Rule imagine a utopian future devoid of financial conflicts in which all retail investors will be served by a fee-based financial adviser.[2] Like every other utopian experiment in history, the Fiduciary Rule will founder when confronted with real-world applications. One inconvenient reality is that 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 Fiduciary 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 to clients who can ill afford to withstand financial emergencies on their own.

The Fiduciary Rule's decided tilt in favor of a fee-based advice model is directly at odds with the President's core policy objective of affording retirement savers with the means to withstand *unexpected financial emergencies*. Individuals' access to the guarantees and protections of annuity products will be lost as insurance producers are driven from the market.

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[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).

[2] In theory, the Best Interest Contract or "BIC" Exemption, PTE 2016-01, would cover the receipt of commissions in connection with fiduciary recommendations to retirement investors. Unfortunately, many of the conditions of that exemption tend to defy a number of marketplace realities with respect to financial incentives needed to generate productive, responsible sales activity. The disconnects between BIC Exemption theory and marketplace reality are so severe that a number of major financial services firms have publicly announced a shift from commission-based to fee-based advice models in anticipation of the Fiduciary Rule's applicability. These public announcements, which have been widely reported, are effectively an expression of the industry's lack of confidence that the BIC Exemption is workable when applied to a commission-based model.

In its current form, the rule places enormous costs and burdens on distributors of insurance products by, in the case of fixed indexed annuity products, requiring the presence of deep pocket "Financial Institutions" to oversee distribution networks that may be widely scattered across multiple states.

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

The Fiduciary Rule needs to be modified to narrow the scope of activity defined as "investment advice" and to provide realistic exemptive relief for commission-based providers of fiduciary investment advice. With appropriate modification, the Fiduciary Rule could serve the best interest of retirement investors without depriving them of ready access to information about the insurance and annuity products that can guarantee the security of their retirement years.

As discussed in greater detail below –

The Fiduciary Rule in its current state adversely affects the ability of Americans to gain access to retirement information and financial advice, and fails each of the three specific criteria established by the Presidential Memorandum.

At a minimum, the Fiduciary Rule should be revised to reflect --

1. **Inclusion of a broad seller's exemption modeled after the Department's 2010 proposal;**
2. **Elimination of class action litigation as the primary enforcement mechanism;**
3. **A realistic "Best Interest" standard that does not seek to disallow the existence of financial interests on the part of advice providers but regulates those interests in an appropriate manner;**
4. **Rationalized exemptive relief for recommendations of all annuity products under PTE 84-24.**

I. The Presidential Memorandum

On February 3, 2017, the President of the United States signed the Presidential Memorandum directing the Secretary of Labor to reevaluate the Fiduciary Rule to ensure consistency with his policy objectives. The Presidential Memorandum requires the Department to update its economic and legal analysis and to reevaluate the legal and economic underpinnings of the Fiduciary Rule. The Presidential Memorandum further directs the Department to consider the effects of the anticipated Applicability Date of the Fiduciary Rule including whether the anticipated Applicability Date has harmed or is likely to harm or adversely affect investors including the ability of Americans to gain access to retirement information and financial advice. More specifically, the Department is instructed to consider –

> (i) Whether the anticipated applicability of the Fiduciary Duty Rule has harmed or is likely to harm investors due to a reduction of Americans' access to certain retirement savings offerings, retirement product structures, retirement savings information, or related financial advice;
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> (ii) Whether the anticipated applicability of the Fiduciary Duty Rule has resulted in dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees; and
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> (iii) Whether the Fiduciary Duty Rule is likely to cause an increase in litigation, and an increase in the prices that investors and retirees must pay to gain access to retirement services.

If the Department makes an affirmative determination as to any of the three above-listed considerations, or if the Department concludes for any other reason following "appropriate review" that the Fiduciary Rule is inconsistent with the President's policy priorities as outlined in the Presidential Memorandum, the Department is instructed to rescind or revise the Fiduciary Rule.[3]

II. The Proposed Extension

As a first step towards complying with the President's instructions, the Department proposed to extend the Applicability Date of the Fiduciary Rule for 60 days and requested comments to help inform the updated legal and economic analysis ordered by the President. "Definition of the Term 'Fiduciary'; Conflict of Interest Rule--Retirement Investment Advice", 82 Fed. Reg. 12319 (March 2, 2017) (the "Proposed Extension"). In announcing the Proposed Extension, the Department outlined the possible results of its updated analysis: "the Department may decide to allow the final rule and PTEs to become applicable, issue a further extension of the applicability date, propose to withdraw the rule, or propose amendments to the Rule and/or the PTEs."[4]

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[3] 82 Fed. Reg. 9675.

[4] 82 Fed. Reg. 12325.

On April 7, 2017, the Department published a final regulation extending the applicability date of the Fiduciary Rule from April 10, 2017 to June 9, 2017 (the "Initial Extension"). Incredibly, the Department also expressed the view that the Initial Extension is to be the *only* extension, even though the updated economic and legal analysis ordered by the President may require the balance of calendar year 2017 to complete. In our view, it is inconsistent with the spirit of the President's order for the Department to proceed in this manner. We urge the Department to reconsider its approach and to extend the applicability of the Fiduciary Rule until the work that the President instructed to be undertaken has been completed.

III. The Fiduciary Rule Should Be Substantially Revised

Retirement savers who work with financial advisers generally achieve a higher level of retirement preparedness than those who do not. A February 2017 survey reported that 79% of Americans have never hired a financial professional.[5] Only 46% of those Americans who never hired a financial professional have a retirement plan or emergency fund and only 19% have a long-term financial plan. Of Americans who have hired a financial professional, 77% have a retirement plan or emergency fund and 50% have a long-term financial plan. Access to financial advice should be an important public policy priority.

Comments submitted to the Department and news coverage since April 2016 indicate that a number of the nation's largest financial services providers have struggled to find a path forward under the Fiduciary Rule. In numerous instances, those providers have determined that doing business under the Fiduciary Rule will require a suspension of advisory services to less affluent investors. A number of Groom Group member companies that engage in the manufacture of annuity products have been notified by certain distribution partners that those distributors will suspend the provision of advice to annuity holders in anticipation of the Fiduciary Rule's applicability. Within the industry, these groups of individual annuity holders are referred to as "orphans." We believe that these developments, which are widespread and well known, raise troubling questions about the harmful effects of the rule. The economic analysis required by the Presidential Memorandum needs to take these developments into account.

Below, we separately examine each of the questions posed in the Presidential Memorandum --

> *Has the anticipated applicability of the Fiduciary Rule harmed or is it likely to harm investors due to a reduction of Americans' access to certain retirement savings offerings, retirement product structures, retirement savings information, or related financial advice?*

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[5] *Consumers with Advisors*, Conducted February 6-8, 2017 (MDRT/Harris Poll), press release available at https://www.mdrt.org/consumers-with-advisors.

The anticipated applicability date of the Fiduciary Rule has clearly injured retirement investors. These injuries will only compound as the market place continues to shift away from providing advice to the non-affluent and toward a fee-based advice model that is financially incented to disregard the benefits of insurance and annuity products. As already noted, numerous household name providers of financial advice have scaled back on the clientele they will be able to serve. Sales of certain categories of lifetime income products, particularly variable annuity products, have declined sharply. These drop offs have been widely attributed to the anticipated applicability of the Fiduciary Rule. The economic upheaval that began in 2008 underscored the financial security that variable annuity products can afford retirement savers. We believe that the recent declines in guaranteed lifetime income take-up rates are but a harbinger of the dire consequences yet to befall retirement investors if the Fiduciary Rule is not appropriately changed.

Comments and petitions submitted in response to the Department's March 2, 2017 request for comments broadly warn that the Fiduciary Rule will increase the cost of advice. This concern was also evident in a report by CoreData Research UK that 57% of advisers said they will limit offering variable annuities as a result of the Fiduciary Rule.[6] Other petitions emphasize that retirement education will be hindered and less-affluent savers will not have access to professional investment advice.[7] Numerous comment letters submitted by advisers report that they will need to move away from the provision of advice to small investors or sell their businesses to larger shops if they are to comply with the rule.[8] Larger providers are also segmenting client services resulting in smaller accounts being moved to self-directed status if fee-based servicing is not economically appropriate.[9]

> *Has the anticipated applicability date of the Fiduciary Rule resulted in dislocations or disruptions within the retirement services industry that adversely affect investors or retirees?*

The anticipated applicability date of the Fiduciary Rule has resulted in enormous dislocations and disruptions within the retirement services industry that are already adversely

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[6] Report: *Fiduciary Rule to Leave US Mass-Market Investors Stranded, Study Shows*, CoreData Research UK (November 2016), press release available at http://www.valuewalk.com/wp-content/uploads/2016/11/Fiduciary-rule-Press-Release-%E2%80%93-CoreData-Research.pdf ("CoreData").

[7] Comment Letter from Raymond James re: Proposed 60-day delay of Fiduciary Rulemaking Applicability Date (March 10, 2017).

[8] *See generally* Comment Letter from Richard Akel re: Proposed 60-day delay of Fiduciary Rulemaking Applicability Date (Allstate) (March 1, 2017).

[9] Michael Wursthorn, *A Complete List of Brokers and Their Approach to 'The Fiduciary Rule'*, WALL ST. J., Feb. 6, 2017.

affecting investors and retirees. A research report by CoreData Research UK released in late 2016 reported on this disturbing trend. Of 552 financial advisers surveyed in the U.S., 71% plan to disengage in whole or in part from the provision of services to mass-market investors because of the Fiduciary Rule.[10] CoreData reports that the bottom 25% of mass-market clients (measured by account size) are unlikely to continue to be serviced. The report also made it clear that most advisers, 94%, believed that only robo-advisers will be available to serve these orphaned accounts. The same report stated that 58% of advisers who currently work on commission say that they will move away from it by 2020. For the insurance and annuity industry, which relies on a commission-based distribution model, these numbers portend enormous future challenges in reaching retirement investors who would benefit from guaranteed lifetime income products.

A report from consultant A.T. Kearney estimated a $20B revenue impact on the retirement industry through 2020, which is only two years after the anticipated implementation of the full conditions of the Fiduciary Rule.[11] The report predicts consolidation within the industry as smaller broker-dealers and independent broker-dealers struggle with Fiduciary Rule compliance.

Recently, the Investment Company Institute submitted a comment letter regarding the proposed delay that contains new information about industry dislocation.[12] The ICI letter describes how intermediary distributor resignations have increased in the wake of the Fiduciary Rule. These resignations occur when distributors, such as brokers, resign from an account leaving the account without a third party adviser. Typically the account would then deal directly with the product manufacturer, who may not regularly offer advice. These resignations have mostly occurred for accounts under $17,000 in the experience of ICI's member product providers.

Robo-advice is the option that will most likely be available to less affluent investors, although even these offerings can have minimum account size requirements.[13] Some question whether robo-advice is appropriate. Some products, like lifetime income products, are particularly poorly suited for robo-advice. Lifetime income products typically have a number of features that only an agent can help explain and that may or may not be suitable for an individual based not only on his or her risk tolerance, but also on his or her need for peace of mind.

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[10] CoreData, *supra* note 6.

[11] Study: *The $20 billion Impact of the New Fiduciary Rule on the U.S. Wealth Management Industry*, A.T.Kearney (October 2016).

[12] Comment Letter from Investment Company Institute re: Proposed 60-day delay of Fiduciary Rulemaking Applicability Date (March 17, 2017).

[13] *See generally* Michael Wursthorn, *Wells Fargo's Robo Adviser to Cost More Than Rivals' Options*, WALL ST. J., Mar. 27, 2017; Study: *The $20 billion Impact of the New Fiduciary Rule on the U.S. Wealth Management Industry*, A.T.Kearney (October 2016); CoreData, *supra* note 6.

Is the Fiduciary Rule likely to cause an increase in litigation, and an increase in the prices that investors and retirees must pay to gain access to retirement services?

Yes, the Fiduciary Rule will obviously cause an increase in litigation, and an increase in the prices that investors and retirees must pay to gain access to retirement service, making it tougher for Americans to afford retirement plans or to save for retirement.

The Department has cited the primacy of private litigation as a Fiduciary Rule enforcement mechanism in its Consumer Protections FAQs #10.[14] We believe that the Fiduciary Rule unnecessarily increases litigation risk because it couples an aggressively expansive definition of "investment advice" with exemptive relief conditions that defy compliance in numerous instances. That formula will surely yield an enormous increase in litigation and a resulting increase in litigation-related cost and expense.

Initial comments filed in response to the Department's March 2, 2017 request indicate the magnitude of concern over Fiduciary Rule-related litigation risk. Some commenters report that the litigation risk associated with servicing small accounts under the Fiduciary Rule far outweighs the potential economic benefits to the firm. Morningstar recently estimated that long-term annual costs to the retirement services industry related to Fiduciary Rule-related class action settlements are likely to range between $70 million and $150 million. Initial costs are estimated to likely be higher.[15]

Is the Fiduciary Rule consistent 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, such as buying a home and paying for college, and to withstand unexpected financial emergencies?

The Fiduciary Rule is not consistent with the President's priorities due to the fact that it decreases the services and information available to retirement investors, particularly the less affluent. Since access to information and advice about guaranteed lifetime income products is likely to sharply diminish, Americans will clearly be less able to withstand unexpected financial emergencies after the Fiduciary Rule becomes applicable than before.

For the reasons set forth in our March 17, 2017 comment letter, we continue to urge the Department to extend the applicability date of the Fiduciary Rule until at least 60 days after the Department completes the work required by the Presidential memorandum and the Fiduciary Rule has been revised or rescinded.

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[14] Consumer Protections for Retirement Investors—FAQs on Your Rights and Financial Advisers, Employee Benefits Security Administration (January 2017).

[15] Michael Wong, *Costs of Fiduciary Rule Underestimated*, Morningstar, Feb. 9, 2017.

IV. The Fiduciary Rule should be Amended to Include a Broad Seller's Exception Patterned After the Seller's Exception in the Department's 2010 Proposal

The Fiduciary Rule should include a broad seller's exception modeled after the seller's exception contained in the proposed regulation "Definition of the Term 'Fiduciary'", 75 Fed. Reg. 65263 (Oct. 22, 2010) (the "2010 Proposal"). The Fiduciary Rule's chief flaw is its determined non-recognition of the fundamental tenet that selling activity is a non-fiduciary function. A "fiduciary" relationship arises where "special intimacy or . . . trust and confidence" exists between parties.[16] The Fiduciary Rule improperly redefines the term "fiduciary" to include that which is clearly a non-fiduciary function. The incorporation of a clear seller's exception could remedy this flaw.

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 Fiduciary Rule to include a similar exception.

The inclusion of a broad seller's exception would increase retirement saver access to products and product-related information. A seller's exception would allow retirement savers to know with specificity those who are impartial providers of investment advice and those who are not and would empower retirement savers to make their own decisions about which informational channels are right for them.

V. Litigation Should be Removed as a Primary Enforcement Mechanism

A fiduciary rule that relies on litigation as its primary enforcement mechanism cannot pass the tests outlined in the Presidential Memorandum. 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 or quasi-contract based litigation in order to obtain exemptive relief. The Fiduciary Rule as drafted will undoubtedly lead to increases in litigation and litigation-related costs.[17]

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[16] Bogert's The Law Of Trusts And Trustees § 481 (Breach of fiduciary obligation), Westlaw (database updated September 2016).

[17] Moreover, ERISA's remedial scheme is largely equitable in nature. The BIC Exemption in its current form would introduce new private rights of action at law that could dramatically expand the scope of remedies sought by plaintiffs; a result seemingly inconsistent with a comprehensive and reticulated statutory approach.

As noted above, Morningstar predicts that, in the long run, the Fiduciary Rule will result in annual litigation related settlement costs ranging between $70 million and $150 million. These numbers do not take into account the costs of defense, which are also likely to be substantial. These costs will ultimately be borne by retirement investors.

The loss of exemptive relief itself should be the basis for enforcement since a non-exempt prohibited transaction would result in excise tax liabilities, which could be substantial. Neither consumers nor financial institutions benefit from an increase in class action litigation; the only group whose retirement security will be improved would be members of the class action bar.

VI. A Workable "Best Interest" Standard

The Fiduciary Rule's exemptive relief 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 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.

VII. Exemptive Relief for Recommendations of Insurance and Annuity Products Should be Rationalized under PTE 84-24

Annuities have historically been distributed in reliance on the exemptive relief provided by PTE 84-24. These products should properly play a distinctive role since they are the only source of lifetime income guarantees and accompanying peace of mind to retirement savers. The Fiduciary Rule has dislocated the annuity market. In the past year, there has been a sharp decrease in the sale of variable annuity products with sellers seeing reductions of between 26 and 45 percent.[18] The current decline will be compounded if the Fiduciary Rule were to become applicable. Additionally, prices for all annuity products are likely to increase as insurers and annuity providers seek to comply with the conditions of the BIC Exemption, which are ill-suited to the annuity and insurance provider marketplace. To avoid this scenario and to promote access to guaranteed lifetime income products, the Department should allow all insurance and annuity products to be covered by PTE 84-24 regardless of their features.

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[18] *See* Greg Iacurci, *Department of Labor's fiduciary rule blamed for insurers' massive hit on variable annuity sales*, InvestmentNews, March 28, 2017.

VIII. Conclusion

The Groom Group urges the Department to pause the Fiduciary Rule's applicability for a sufficient period to complete the important analysis and considerations that the President has instructed to be undertaken. We also urge the Department to revise the Fiduciary 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 on the Department's response to the Presidential Memorandum.

Sincerely,

Thomas Roberts

Thomas Roberts