April 17, 2017

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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 recordkeeping services 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. 20,946 (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. 9,675 (February 7, 2017) (the "Presidential Memorandum").

In general, the Groom Group supports the Department of Labor's goal of ensuring that investment recommendations to retirement savers are sound and advance the best interests of clients. However, there are already clear signs that the Fiduciary Rule has caused significant disruption in the retirement system. The nature of that disruption, which has been particularly pronounced in regards to commission-based distribution organizations, foreshadows the further negative consequences that will likely befall American retirement savers unless the rule is substantially changed. Moreover, we fully expect that many retirement savers will lose access to critically important educational opportunities that not only increase savings rates but help people take control of their own financial future.

Thus, the Groom Group believes the Department must conclude that changes are necessary to the Fiduciary Rule in order to achieve the Administration's stated objective of "empower[ing] 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."[1]

[1] *Memorandum for the Secretary of Labor: Fiduciary Duty Rule*, 82 Fed. Reg. 9,675 (Feb. 7, 2017).

With appropriate modification, the Fiduciary Rule could serve the best interest of retirement investors without depriving them of ready access to information about their retirement savings. Specifically, and as discussed below, the Fiduciary Rule should be revised to –

1. Narrow the definition of "investment advice" to both allow for beneficial non-fiduciary communications and recognize the legitimate distinction between advice and sales;

2. Eliminate class action litigation as the primary enforcement mechanism;

3. Include a realistic "Best Interest" standard that seeks to regulate financial interests on the part of advice providers in an appropriate manner; and

4. Ensure that the prohibited transaction exemptions are widely available.

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. 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.[2]

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[2] 82 Fed. Reg. 9,675.

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. 12,319 (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."[3]

On April 7, 2017, the Department issued a final regulation extending the applicability date of the Fiduciary Rule from April 10, 2017 to June 9, 2017 (the "Initial Extension").[4] 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

The Groom Group believes that, as a result of the updated economic analysis ordered by the President and examination of the unintended consequences of the Fiduciary Rule, the Department must conclude that revisions are necessary to achieve the objective of empowering and protecting American retirement consumers. 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?*

The anticipated applicability date of the Fiduciary Rule has already harmed, and is likely to continue harming, investors by reducing their access to retirement savings information.

Traditionally, recordkeepers have not been investment advice fiduciaries. Instead, they offer educational services and tools that help retirement savers better understand how to prepare for retirement. Recordkeepers have developed effective, targeted educational programs to materially increase both plan participation and contribution rates. For example, recordkeepers hold group and one-on-one meetings to discuss enrollment, savings goals, and retirement income targets. These efforts materially increase savings rates. One member of the Groom Group found that group meetings resulted in participation rates 11.5% higher than the national average and

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[3] 82 Fed. Reg. at 12,325.
[4] 82 Fed. Reg. 16,902 (April 7, 2017).

that individual outreach to employees resulted in participation rates 22% higher than the average.[5] Such efforts also lead to higher than average deferral rates and better asset allocation diversification.

Similarly, recordkeepers are at the forefront of developing participation improvement strategies using newer, digital outreach methods. For example, many recordkeepers now offer personalized retirement savings calculators that attempt to estimate the contribution levels necessary to ensure a financially secure retirement. Those calculators may suggest that retirement savers increase their contribution rates to achieve their personal savings goals.

All the available research clearly indicates that direct outreach to participants is an important strategy to help people achieve their savings goals. In fact, a 2013 report by the Advisory Council on Employee Welfare and Pension Benefit Plans found that the types of programs offered by recordkeepers can be very effective and that "[c]ommunications tailored to a particular employee group had better results than the 'one size fits all' philosophy."[6]

Despite all of the obvious benefits of recordkeepers' education programs, the Fiduciary Rule is so broad and ambiguous that many educational programs that drive plan participation could be "investment advice." Therefore, non-fiduciary recordkeepers are already eliminating or scaling back many of the most effective educational tools and programs, leaving participants without the help they need. The practical result is that many retirement savers will not have access to the type of information necessary to ensure that they are prepared for retirement.

The loss of investment education will be particularly devastating in times of market volatility. Recordkeepers experienced a significant increase in call center volume during the Great Recession when many participants considered moving their investments to cash to protect themselves from further losses. At that critical time, recordkeepers played an important role in educating retirement savers about the benefits of taking a long-term view. Individuals that received such education were significantly more likely to stay in the market and, importantly, to capture the gains from the market rebound. However, individuals who took a short-term view and moved to cash locked in their losses, thereby materially reducing their retirement savings. In the next market downturn, retirement savers will again be tempted to make reactive investment decisions. However, next time, as a result of the Fiduciary Rule, recordkeepers will not be able to provide the vital education and other information that could protect retirement savers from making decisions that would lead to irreparable losses.

If recordkeepers stop providing robust educational services, there is no reason to believe that employers will step in to fill the gap. Most employers simply do not have the resources to perform effective participant education. That is particularly true for small business owners, who lack large and sophisticated human resource departments. The reality is that employers generally want their employees to be on the path to financially secure retirements, but they almost universally rely on their recordkeepers to provide the necessary participant education.

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[5] *Employment-Based Retirement Plan Participation: Geographic Differences and Trends, 2013*, Employee Benefit Research Institute (October 2014) (finding that only 54.5% of workers with access to a retirement plan participate).
[6] Report to Secretary Thomas E. Perez: *Successful Plan Communications for Various Population Segments*, Advisory Council on Employee Welfare and Pension Benefit Plans, pg. 6 (November 2013), *available at* https://www.dol.gov/sites/default/files/ebsa/about-ebsa/about-us/erisa-advisory-council/2013ACreport1.pdf.

The Fiduciary Rule has also made it difficult, and in many cases impossible, for non-fiduciary recordkeepers to help plan sponsors and retirement savers identify third-party advisers who are willing to provide fiduciary advice. Merely recommending a list of potential fiduciary advisers may become "investment advice" under the Fiduciary Rule, and many recordkeepers are simply not able to accept the resulting fiduciary liability. As a result, many plan sponsors may not obtain the type of professional advice they need to ensure that their plans are effective savings programs. That is simply not in the best interest of retirement savers.

We note that 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. 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 dislocation and disruptions within the retirement services industry that is already adversely 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 94% of advisers 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.

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 both smaller and independent broker-dealers struggle with Fiduciary Rule compliance.

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[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 (Allstate) re: Proposed 60-day delay of Fiduciary Rulemaking Applicability Date (March 1, 2017).
[9] Michael Wursthorn, *A Complete List of Brokers and Their Approach to 'The Fiduciary Rule'*, WALL ST. J., Feb. 6, 2017.
[10] Report: *Fiduciary Rule to Leave US Mass-Market Investors Stranded, Study Shows*, CoreData Research UK (November 2016).
[11] Study: *The $20 billion Impact of the New Fiduciary Rule on the U.S. Wealth Management Industry*, A.T.Kearney (October 2016).

Recently, the Investment Company Institute ("ICI") 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. More importantly, consumers deserve to be able to choose to work with a human adviser if that is their personal preference. Additionally, the exemptive relief currently available for robo-advice is not well suited for the provision of advice regarding a recordkeeper platform. The exemptions available to robo-advisers, such as the ERISA section 408(b)(14)/408(g) statutory exemption, do not cover advice given to a plan sponsor and therefore cannot cover advice regarding the selection of designated investment alternatives for a plan line-up. This leaves small plans seeking plan level advice without a robo pathway at a time where robo-advice is practically the only available option for this segment of the market.

Overall, we believe that the Fiduciary Rule has, as shown by the evidence above, caused dislocations in the retirement industry that have the adverse effect of limiting access to advice, particularly in accounts under $25,000.

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?

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 services, making it tougher for Americans to afford retirement plans or to save for retirement. This is especially important for recordkeeper call centers that may wish to provide point in time advice to plan participants.

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.

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[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); Report: *Fiduciary Rule to Leave US Mass-Market Investors Stranded, Study Shows,* CoreData Research UK (November 2016).

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

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, mainly to less affluent retirement savers. Without access to fiduciary advice and investment education, consumers will not be in as good a position to achieve lifetime financial goals such as home buying and retirement.

Changes to the definition of investment advice, the Best Interest Contract exemption, and the best interest standard generally are required to align the Fiduciary Rule with the Presidential Memorandum priorities and, through the reduction of unnecessary provisions, also respect the core principles of the E.O. 13772.

IV. The Fiduciary Rule Definition of Advice Should be Amended

1. Narrow the Definition of "Recommendation"

The definition of "recommendation" is too vague, especially in connection with the "specifically directed to" element. If a recommendation is specifically directed to a covered person, it should also be required to be individualized to the facts and circumstances of that person.

2. Recognize the Legitimate Distinction Between Fiduciary Advice and Non-Fiduciary Activities such as Education and Sales

Participant education is one of the most valuable services recordkeepers can provide to a participant. As discussed above, education targeted to participants (*e.g.*, diversification, alerts regarding employer stock, communications encouraging contributions) is critically important to driving positive outcomes. The Fiduciary Rule should permit these targeted activities to continue without being characterized as fiduciary advice. Therefore, we request that the Fiduciary Rule be amended to exclude communications encouraging participation or increased contribution rates. Further, the definition of investment advice should not include communications from a recordkeeper or any other service provider, undertaken with approval from the plan sponsor's fiduciary agent, to improve diversification or to alert individuals of improper allocations (*e.g.,* being invested in multiple target date funds simultaneously).

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

Additionally, the education exception should cover the provision of investment allocation examples in a similar manner to Interpretive Bulletin 96-1.

The existing independent fiduciary exception is also more burdensome than necessary. Investment professionals should have the requisite knowledge to make independent investment decisions. Communications with an investment professional such as a registered investment adviser, insurance agent, registered representative or ERISA named fiduciary for a plan of any size should be presumptively non-fiduciary unless a written mutual agreement has been entered into by the communicator and the recipient that such communications are intended to be fiduciary investment advice. This will eliminate the compliance costs associated with obtaining the existing representations without diminishing the protections afforded consumers by the Fiduciary Rule and be a step toward streamlining the regulatory burdens imposed by the Fiduciary Rule.

Of critical importance in the recordkeeping space is facilitating the encouragement of fiduciary guidance by permitting recordkeepers to provide a list identifying at least three fiduciary advisers without the recordkeeper itself being considered a fiduciary. Permitting this would greatly encourage the receipt of professional advice services by consumers. Further, the Department should explicitly state that maintaining connectivity with a third-party adviser who provides participant level advice on the plan options is not a recommendation under the Fiduciary Rule.

All exceptions to the definition that are available to ERISA plan providers should be equally available to IRA providers. This includes the platform exception, monitoring exception, and all aspects of the education 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 also empower retirement savers to make their own decisions about which informational channels are right for them.

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. 65,263 (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 for the Department to 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

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

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.

V. Litigation Should Not be the Primary Enforcement Mechanism

A fiduciary rule that relies on litigation as its primary enforcement mechanism cannot pass the tests outlined in the Presidential Memorandum. 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, which will ultimately be borne by and harm retirement investors.

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. A rule that uses litigation as its enforcement mechanism cannot meet the test outlined in the Presidential Memorandum, since these costs will ultimately be borne by retirement investors.

A written contract should not be required. Rather than requiring a written contract or disclosure, we suggest that the better approach is making the standard of care a condition of the exemption, as done in PTE 84-24. In other words, the basis for enforcement should be the loss of exemptive relief; as this would cause a non-exempt prohibited transaction thereby resulting in potentially substantial excise tax liabilities, this would be an effective enforcement mechanism.

VI. A Workable "Best Interest" Standard

A far more workable and sensible "best interest" standard would be one where an adviser is 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.

Further, the best interest standard should not be tethered to impractical warranties that do not account for the realities of how investment products are priced. The warranties should be eliminated in their entirety as they do not provide any practical, real-world investor protections, and are only fodder for class action liability.

Finally, the disclosure requirements currently imposed by the Best Interest Contract Exemption are unduly burdensome as they require service providers to create entirely new systems to satisfy their compliance burden. Reliance upon existing disclosure systems, such as post-trade confirmations or 408(b)(2) disclosures, would significantly reduce the cost of compliance. Any disclosures required under the Best Interest Contract Exemption should be permitted to be incorporated into these existing systems. The content of these disclosures should be streamlined and realistic. The current interpretation, as articulated by FAQ 27 of the Department's first set of FAQ guidance, requires the capture of data regarding third-party payments, compensation, and fees as of the date of the recommendation, and also requires holding this data for up to six years on the off chance that an investor requests that data.[17] Even by the Department's own admissions, the current interpretation presents a major undertaking with uncertain consumer protection value.[18]

VII. All Retirement Accounts Should have Access to the Best Interest Contract Exemption

A reproposed exemption should be expanded to cover all plans and IRAs without a ceiling on the amount of assets. It has proven to be an extremely complicated task to draft a contract that addresses the plans straddling the $50M in assets threshold. The results so far have not been consumer friendly and are full of "if/then" statements meant to accommodate whether or not an exemption is available. If an adviser would like to provide fiduciary advice to a plan under the exemption, it should be able to do so. Additionally, the exclusion of robo-advisers from all but the Level Fee portion of the current PTE 2016-01 and concurrent exclusion of advice to sponsors under ERISA section 408(b)(14) has made a workable robo-advice solution in the plan sponsor space difficult. This robo-adviser exclusion should not be in any reproposed exemption. Allowing more providers to use an exemption for more investors furthers the goal of making professional investment advice more widely available.

VIII. Conclusion

For the reasons described above, the Groom Group believes that the Department must conclude that revisions to the Fiduciary Rule are necessary to make the Fiduciary Rule consistent with the priorities outlined in the Presidential Memorandum. Specifically, revisions are needed to allow American retirement savers to receive important non-fiduciary services, permit broad access to fiduciary investment advice from an investment professional subject to a best interest standard, and address the other issues described in this letter. Importantly, the revisions to the Fiduciary Rule can be made while still maintaining strong retirement consumer protections so that a viable and practical pathway for providers to service those same clients is available.

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We appreciate this opportunity to comment on the Department's response to the Presidential Memorandum.

Sincerely,

/s/ Stephen M. Saxon

[17] Conflict of Interest FAQs (Part I - Exemptions), U.S. Department of Labor (Oct. 27, 2016).
[18] 81 Fed. Reg. 21002, 21062.