Lincoln Financial Group®

August 3, 2017

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Filed Electronically

The Office of Exemption Determinations
Employee Benefits Security Administration
Attention: D-11933
U.S. Department of Labor
200 Constitution Avenue, N.W., Suite 400
Washington, DC 20210

Re: RIN 1210-AB82

To Whom It May Concern:

Lincoln Financial Group is the marketing name for Lincoln National Corporation and its affiliates (collectively, "Lincoln"). This letter is in response to the Department of Labor's (the "Department's") Request for Information ("RFI") regarding the possible changes to the fiduciary regulation and related new and amended prohibited transaction exemptions (the "fiduciary rule").

While the following comments relate to guaranteed lifetime income products generally, they focus primarily and specifically on variable annuities with lifetime income guarantees. Variable annuities are an important retirement income solution already being used by over 29 million Americans to enhance their retirement security and will be even more important in the years ahead as Americans continue to live longer in retirement. Currently, 60% of individual annuity owners have an annual household income of less than $75,000.[1] Given these facts, regulatory efforts should facilitate, not hamper, consumers' access to these products.

As stated in all prior comment letters on the fiduciary rule,[2] Lincoln has always agreed with the Department's goal of ensuring that retirement savers receive advice that is in their best interest.

[1] 2013 Survey of Owners of Individual Annuity Contracts, conducted by The Gallup Organization and Mathew Greenwald & Associates for the Committee of Annuity Insurers.

[2] Since the rule was proposed in April of 2015, Lincoln has submitted four separate comment letters (submitted on July 21, 2015, September 24, 2015, March 17, 2017 and July 14, 2017) and joined with seven other insurance companies on one group comment letter (submitted on September 24, 2015). (We refer to these prior letters in numerous places in this letter, and have attached them for ease of reference.) We have also participated in numerous meetings with Department officials and staff on this topic to educate the Department about insurance products and their vital importance to consumers' retirement security, and to provide input on needed changes to the rule so that consumers do not lose access to these products.

However, there are aspects of the fiduciary rule that we believe run counter to this goal. In particular, we strongly disagree with the aspects of the rule that favor fee-based compensation over commissions, even though commissions are often more appropriate for a consumer than fees. This type of one-size-fits-all regulatory favoritism does not serve consumers' best interests. Rather, it improperly encourages firms and advisors to favor fee-based advice, not because it is better for their customers, but because it allows them to avoid the extra operational hurdles and legal risk that the rule imposes only on commissions. We are already seeing the impact of this in the retirement market in the form of reduced consumer access to important retirement security products such as guaranteed lifetime income:

- In the fourth quarter of 2016, industrywide sales of variable annuities with guarantees declined 34% from the same quarter in 2015. This was the sixth consecutive quarter of declines.[3]

- As of the end of 2016, industrywide sales of variable annuities with guarantees dropped $26 billion in the previous two years, driving sales of these products to the lowest annual level since LIMRA began tracking this back in 2006.[4]

- For 2017, industrywide sales of variable annuities are expected to further decline 10—15%.[5]

This is happening because over the last year, financial services firms have been moving to eliminate or limit the availability of commissionable products on their retirement platforms in anticipation of the rule going into effect. In our March 17, 2017 comment letter, we provided several data points demonstrating this, pointing in particular to some prominent firms who announced last year that they will no longer offer commission-based retirement accounts.[6] Market data published since then continues to show imminent harm to retirement savers as a result of this flaw in the rule. For example:

- **Advice is becoming unaffordable.** A 2017 report by the National Association of Insurance and Financial Advisors ("NAIFA") found that nearly 90% of financial professionals believe consumers

[3] LIMRA Secure Retirement Institute Variable Annuity Guaranteed Living Benefit Election Tracking Survey, 4th Quarter 2016.

[4] Id.

[5] LIMRA Secure Retirement Institute 2017 Individual Variable Annuity Sales Forecast, April 2017.

[6] See page 2 of the March 17 comment letter.

will pay more for professional advice services.[7] A 2017 report by the American Action Forum estimates that the rule will result in additional charges to retirement investors of $800 per account or over $46 billion in aggregate.[8]

- **Access to advice and products is being reduced.** The 2017 NAIFA report found that 75% of financial professionals have seen or expect to see increases in minimum account balances for the clients they serve, and 91% have already experienced or expect to experience restrictions of product offerings to their clients.[9]

- **Accounts are being "orphaned."** The 2017 American Action Forum report estimates that as many as $28 million Americans could lose access to advice due to increased minimum account requirements imposed by firms in response to the rule.[10] A 2016 study by A.T. Kearney found that by 2020, financial services firms will collectively stop serving the majority of the $400 billion currently held in low-balance accounts.[11] Lincoln is already experiencing this: The number of Lincoln IRA annuity contracts that were orphaned in 2016 was more than double what it was in 2015, and the number of Lincoln IRA annuity contracts that have been orphaned to date in 2017 has already exceeded the 2016 total.

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[7] U.S. Chamber of Commerce, "The Data Is In: The Fiduciary Rule Will Harm Small Retirement Savers," Spring 2017 at page 5, available at https://www.uschamber.com/sites/default/files/ccmc_fiduciaryrule_harms_smallbusiness.pdf .

[8] Meghan Milloy, "The Consequences of the Fiduciary Rule for Consumers," American Action Forum (April 10, 2017).

[9] U.S. Chamber of Commerce, "The Data Is In" at page 5.

[10] Meghan Milloy, "The Consequences of the Fiduciary Rule for Consumers."

[11] A.T. Kearney, "The $20 billion impact of the new fiduciary rule on the U.S. wealth management industry" (October 2016), at pp. 15—18, available at https://www.atkearney.com/documents/10192/7041991/DOL+Perspective+-+August+2016.pdf/b2a2176b-c821-41d9-b12e-d3d2b0807d69.

These estimated impacts are coming to fruition in the marketplace right now. Significant changes that several large firms have already made in response to the rule include: [12]

- No longer offering certain products in commission-based IRA accounts.
- Offering no commission-based IRA accounts at all.
- Raising minimum account thresholds for services.

To correct the bias against commissions and reverse these alarming trends, the Department must make the following changes:

- Remove the private right of action from the Best Interest Contract Exemption ("BICE").
- Work with the other financial services industry regulators to create a harmonized standard of care, with enforcement by the appropriate regulator for the product or service involved (e.g., the SEC, FINRA, state insurance departments), so that all investments, not just retirement investments, are subject to uniform rules and enforcement mechanisms.
- As part of the best interest standard, require consideration of (1) lifetime income needs and (2) the value—which requires looking through to the associated cost—of insurance guarantees in meeting those needs.
- Treat all insurance products the same under Prohibited Transaction Exemption ("PTE") 84-24 and harmonize its requirements with other exemptions.

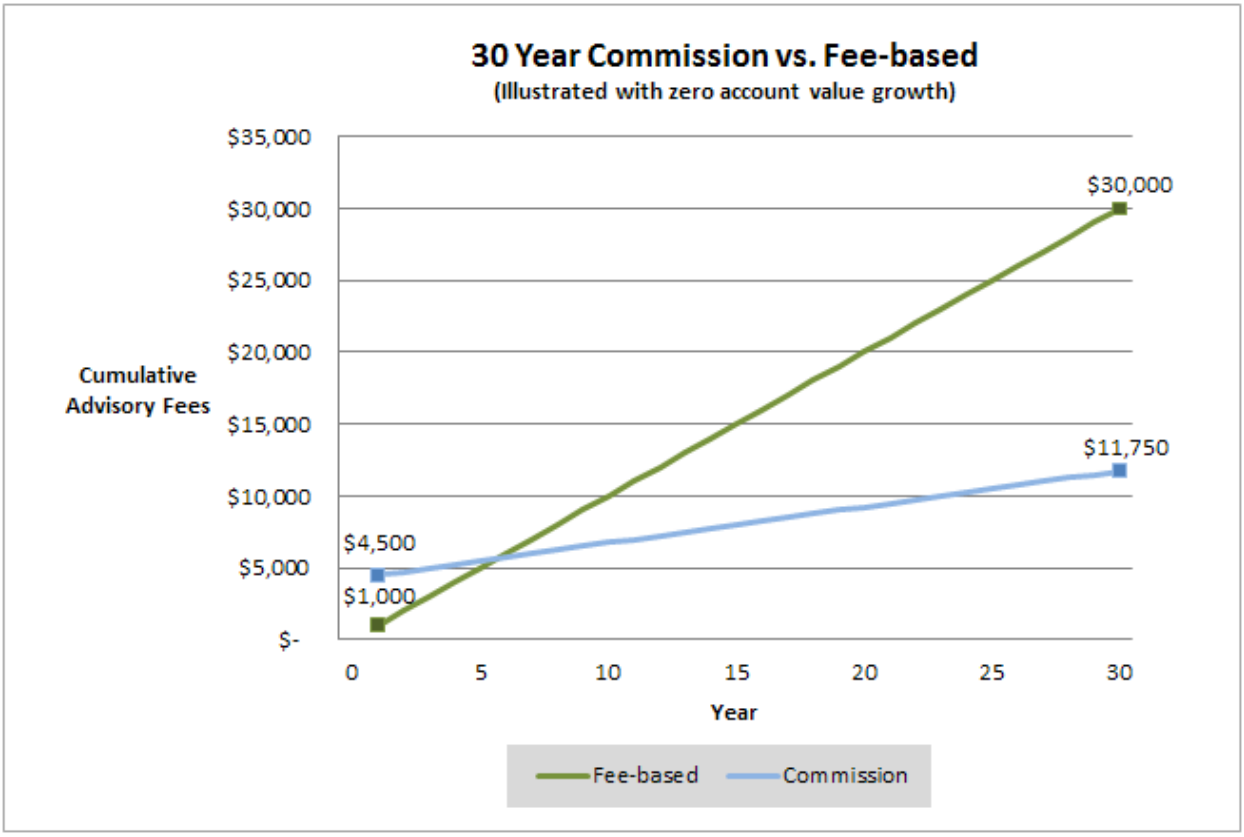
Commissions are in Many Consumers' Best Interest

We believe that consumers' interests are best served through clear disclosure of costs and by allowing clients to choose how their financial advisor is compensated. We also support the concept of similar compensation for products that require similar education, time and effort and provide similar consumer benefits. In the context of long term "buy and hold" purchases, like the purchase of guaranteed lifetime income, commissions are the way in which most advisors are paid because a commission will usually be less costly over the life of the annuity contract. Commissions are also generally a better match with the services provided with these products, since they include very extensive and personalized up-front education and guidance, and relatively less extensive ongoing service.[13] Commissions are similarly front-loaded, paying the advisor more up front and paying less on an ongoing basis. By contrast, fee compensation structures typically pay the advisor the same annual

[12] "A Complete List of Brokers and Their Approach to 'The Fiduciary Rule'," Wall Street Journal (February 6, 2017) available at https://www.wsj.com/articles/a-complete-list-of-brokers-and-their-approach-to-the-fiduciary-rule-1486413491.

[13] Please see page 4 of our July 21, 2015 comment letter on the proposed fiduciary rule for a more detailed explanation of the typical advice cycle for guaranteed lifetime income products.

percentage indefinitely. This can result in the fee compensation model paying much more to an advisor than a commission would over the long term, as shown in this example:[14]



We are not suggesting that fee-based arrangements are always problematic or that commissions are always better. Rather, this example is simply intended to illustrate why the manner in which consumers pay for advice should be a matter of individual choice, without a blanket regulatory preference for one model over another. Consumers do not appreciate the government taking this choice away from them: According to a February 2017 survey of more than 1,000 investors conducted by J.D. Power, 59% who pay commissions say they either probably will not (40%) or definitely will not (19%) be willing to stay with their current firm if it means being forced into a fee-based account.[15]

[14] We previously provided the Department with this illustration in our July 21, 2015 comment letter. This shows an example of a $100,000 annuity purchase of a typical B-share class variable annuity providing an upfront 4.5% advisor commission and a 25 basis point ongoing advisor commission for service, compared to typical fee-based advisor compensation of 1%. For simplicity, we show a zero rate of return. The commission-based model pays higher compensation in year one, but the fee-based model pays much higher compensation over the long-term.

[15] J.D. Power, "Wealth Management Fiduciary Roulette" (February 2017).

These statistics should come as no surprise. Different types of financial products and compensation models provide different benefits, have different consumer impacts, and meet different consumer needs. To assume that these needs are all alike and develop rules that favor a single preferred model fails to recognize this reality and ultimately harms consumers by limiting their access to important financial products and potentially more cost-effective services.

The Department's blanket preference for fee-based compensation is also inconsistent with the approach of other regulators. The SEC and FINRA understand that fee-based compensation can be inappropriate, particularly in accounts with little to no trading activity, and have focused on it in regulatory exams in recent years.[16] The Department itself, in the preamble to the fiduciary rule and in subsequent guidance, has acknowledged that both commission-based and fee-based compensation structures can be in a consumer's best interest depending on the circumstances, and that fees can be inappropriate for investors in accounts with low or no trading activity. Such "low-or-no-trade" accounts would certainly include guaranteed lifetime income contracts.

Despite this, the structure of the fiduciary rule continues to favor fee-based compensation in all situations, even those in which commissions may be more appropriate. While we believe this is an unintended consequence, the effect is that the rule requires a lower standard of care and a less rigorous process for demonstrating that the standard is met for fees than for commissions. Unfortunately, the Department proposes to perpetuate and expand this problem with preferential "streamlined" exemptions for fee-oriented products and compensation structures, such as "T-shares", "clean shares" and fee-based annuities.[17] We strongly disagree with this approach because, for the reasons just outlined, there can be no one-size-fits-all preferred compensation structure that is in every consumer's best interest. We urge the Department to reverse course and hold fee-based compensation and commissions to the same standards, so that commissionable products such as guaranteed lifetime income products can be made available to consumers on a level playing field with other retirement products and services.

Eliminate the Private Right of Action

As we have stated in our previous comment letters, the primary way in which the fiduciary rule discriminates against commissions is through the contract requirement in the BICE, which creates a private right of action and open-ended exposure to lawsuits, including class action lawsuits, for firms and advisors who are compensated for their services on a commission basis. This contract requirement and resulting litigation exposure does not apply to fee-based compensation arrangements. This risk is estimated to be significant and is the primary driver of firms' decisions to limit or eliminate their commissionable retirement offerings and move to more fee-based offerings. According to one report,

[16] "2013 Report on Conflicts of Interest", the Financial Industry Regulatory Authority (October 6, 2013) at p. 29.

[17] See questions 7—9 of the RFI.

the cost to settle class action lawsuits in connection with the BICE private right of action will range from $70 to $150 million per year.[18] This same report notes that in the near term, costs could be even higher, as firms figure out how to manage this cost and risk. In addition, this report notes that "in a bearish scenario, the cost of class-action settlements alone could decrease the operating margin on the advised, commission-based IRA assets of affected firms by 24%–36%."[19]

As the market data cited at the beginning of this letter demonstrates, by imposing the private right of action risk only on commissions, the rule discourages advisors and firms from offering and recommending commissionable guaranteed lifetime income products, even in situations where customers need retirement income and the solutions are in their best interest. We again urge the Department to remove this regulatory market interference and allow guaranteed lifetime income products to be sold on a level playing field with other retirement products.

We also believe that a best interest standard is best handled through existing regulatory enforcement mechanisms (such as those overseen by the SEC, FINRA and state regulators) rather than private litigation, which can produce unpredictable and inconsistent results and benefits trial lawyers more than it does consumers. Data prepared for the U.S. Chamber Institute for Legal Reform by Mayer Brown LLP supports this. That report found that class action lawsuits resulting from the BICE private right of action would provide almost no benefit to class members, but rather just benefit the lawyers.[20]

Harmonize the Standard of Care and Related Compliance Requirements

We were very encouraged to hear Secretary Alexander Acosta and SEC Chairman Jay Clayton publicly commit their agencies to work together on standards of conduct applicable to financial services professionals. We are also aware that the National Association of Insurance Commissioners ("NAIC") has formed a working group dedicated to developing a model standard of care regulation for states to adopt, that would apply to the sale of insurance products that are not regulated by the SEC. These are very good developments and we strongly encourage the Department to engage with these other regulators, as it works to revise the fiduciary rule. The end result must be that the standard of care for investment advice is the same for all products, regardless of whether the account involved is a retirement account. Indeed, if the Department is truly committed to ensuring that consumers can trust their advisors to act in their best interest with respect to their retirement savings, correcting the

[18] Michael Wong, "Costs of Fiduciary Rule Underestimated," Morningstar (February 9, 2017).

[19] Id.

[20] Mayer Brown LLP, "Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions." Available at http://www.instituteforlegalreform.com/uploads/sites/1/Class-Action-Study.pdf (December 2013). While Lincoln understands that the Department is no longer defending the provision in the BICE that prohibits class action waivers in arbitration agreements, Lincoln does not believe that this sufficiently addresses the concerns about litigation risk, including class action risk. In particular, this change in position does not help financial institutions regulated by FINRA since FINRA has its own prohibition on class action waivers.

confusing disarray of differing standards of care and enforcement mechanisms for retirement and non-retirement accounts should be its number one goal.

Once the Department and other regulators agree on a standard of care, associated rulemaking and enforcement should be done by the appropriate regulator for the product or service involved—SEC/FINRA for retail securities, state regulators for non-securities like fixed annuities, and the Department for employer sponsored retirement plans that are covered by ERISA. For retirement products and services sold outside of employer sponsored plans, this can be accomplished by treating compliance with the appropriate regulator's rules as also meeting the requirements of the fiduciary rule.

Require Consideration of Lifetime Income Needs in Retirement

Because its focus is skewed to fees and compensation, and their potential negative impact on investment returns, the fiduciary rule currently encourages advisors to overlook the benefits of guaranteed lifetime income. As we have pointed out numerous times in previous comment letters, guaranteed lifetime income is a critical and valuable benefit since it can ensure an income stream that continues for an individual's lifetime regardless of how long that is and regardless of market conditions. In the age of disappearing defined benefit plans, uncertainty about Social Security, and Americans' increasing reliance on personal savings to fund retirement, guaranteed lifetime income products are the only way for the vast majority of consumers to obtain retirement income that they cannot outlive. As we noted in our July 21, 2015 comment letter, less than 5% of retirement savers who are covered by a defined contribution plan have access to guaranteed lifetime income through that plan. For the remaining 95%, and for the many retirement savers with no access to an employer-sponsored plan, the only way to get these protections is through an individual fixed or variable annuity. To ensure that consumers do not continue to lose access to these vital products, the rule must be revised to expressly require consideration of guaranteed lifetime income needs as part of the best interest analysis for all retirement savers.

As part of this, the best interest standard must also require separate consideration of guarantees and their associated costs when evaluating the reasonableness of fees and comparing product solutions, so that these costs are not improperly lumped in with or compared to fees for investment advice or management. As we noted in our March 2017 comment letter, the rule's almost exclusive focus on fees for advice and investment performance has caused advisors to limit their service models to charging a fee for advice as the best or only solution for both retirement and non-retirement accounts. This is causing firms and advisors to incorrectly evaluate guaranteed lifetime income products as expensive when compared to fee-based advisory services, without separately evaluating the added benefits of lifetime income guarantees.

Treat All Insurance Products the Same under PTE 84-24

While we believe the best long term approach is for the Department to create a rule that is coordinated with the requirements of other industry regulators, we recognize that this will take some

time. In the meantime, in order to reverse the harmful decline in consumer access to insurance products that we have seen over the last year, it is imperative that the fiduciary rule allow insurance products with guarantees to be sold on a level playing field with other investments. The Department took a step in the right direction in April of this year when it allowed variable and fixed indexed annuities to continue to be sold under PTE 84-24 until January 1, 2018. We urge the Department to make this change permanent, so that PTE 84-24 can remain an available exemption for all insurance products, not just fixed rate annuities.

As has been pointed out in the many comment letters submitted by Lincoln and others in the industry, PTE 84-24 was developed for insurance products. As such, it explicitly permits commissions and recognizes the unique value of product features like insurance guarantees rather than focusing almost exclusively on investment advice services, as the BICE does. Having a separate exemption for all insurance products appropriately recognizes that they are different from other investments. It also advances the goal of treating similar products alike—something the Department has publicly affirmed. Finally, it minimizes inappropriate comparisons of fundamentally different products and services, while allowing consumers to easily compare all insurance products under one set of rules. When the Department initially proposed to move variable annuities to the BICE, Lincoln and others in the industry were concerned that without a separate set of rules for insurance products, firms and advisors would improperly evaluate them on the same basis as the mutual funds and other non-guaranteed investments and services that are covered by the BICE. For example, it would be inappropriate to evaluate the costs and benefits of an insurance guarantee on the same basis as one would evaluate a fee-based service model. Unfortunately, as noted above, we are seeing firms and advisors do just that, and incorrectly evaluate the insurance product as too expensive relative to the advice service.

The Department has never articulated a good reason for removing variable and fixed indexed annuities from PTE 84-24 and placing them in the BICE. Its initial rationale for moving variable annuities to the BICE was that these products are securities and therefore should be subject to the same rules as mutual funds and other securities. This rationale ignored the fact that the vast majority of variable annuities in retirement accounts have insurance guarantees and therefore are more like fixed annuities than mutual funds.[21] This raised industry concerns that the Department did not understand that insurance guarantees, and the lifetime income and death benefit protections that they provide, are a significant feature of variable annuities. In response, the industry took steps to educate the Department on this point, in comment letters and in meetings among industry representatives and Department personnel.[22]

[21] For example, we noted in our September 24, 2015 comment letter that in 2014, over 70% of industry variable annuity sales were in products offering these guarantees, and that over the five year period ending with the first quarter of 2015, 75% of the income guarantee benefits sold had been through variable annuities.

[22] For example, Lincoln participated in a meeting with Department personnel and several other insurance companies on August 24, 2015, to educate the Department about how annuities work and their

In the final rule issued in April of 2016, the Department changed its rationale somewhat so that it could justify moving fixed indexed annuities into the BICE along with variable annuities. The new rationale was that these products require consumers to shoulder significant investment risk, are complex, are subject to conflicts of interest at point of sale and are susceptible to abusive sales practices.[23] This rationale again seems to ignore or at least significantly discount the prevalence of insurance guarantees in these products. In fact, in explaining its decision to exclude these products from PTE 84-24, the Department stated that "conflicts of interest in the market for retail investments result in billions of dollars in underperformance to investors," indicating that the Department continued to erroneously believe that the only reason someone would purchase a variable annuity is for the investment returns.[24] The other factors cited to justify this decision—point-of-sale conflicts and susceptibility to abusive sales practices—are not convincing reasons for treating variable annuities differently from fixed annuities because these factors are also considerations in the sale of fixed annuities. The Department specifically cited "enhanced" conflicts of interest in connection with the sale of variable annuities and fixed indexed annuities, as compared to fixed annuities, but never said what those extra conflicts are.[25] Its rationale overall seems to be based on an unsubstantiated notion that there are unique conflicts and sales practice concerns with these products that are not present with other insurance products. We do not believe this is a sufficient basis for treating these products so differently from other insurance products, particularly given the demonstrably harmful impact this differential treatment has had on consumer access to guaranteed lifetime income products. It also bears noting again that point-of-sale conflicts and abusive sales practices are concerns when it comes to the sale of all investment products and services, including fee-based advice, as discussed earlier in this letter.

As the data cited at the beginning of this letter show, the Department's ill-considered and never adequately explained decision to limit consumer access to guaranteed lifetime income products by moving them out of PTE 84-24 and into the BICE has already caused significant harm. We applaud the Department for delaying the effectiveness of this change and urge the Department to make this delay

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unique value in helping consumers achieve retirement security. On February 22, 2016 we participated in a similar meeting with the Obama Administration's Office of Management and Budget.

[23] 81 Fed. Reg. 21152, 21153 (April 8, 2016).

[24] We still have concerns that the Department does not understand these products. In its July 3, 2017 brief in *Chamber of Commerce v. Acosta*, Case No. 17-10238 (5th Cir.), responding to the industry's recent appeal of the district court's decision upholding the rule, the Department describes variable annuities as products that "do not guarantee any future income to investors," whose "structure allocates all risk to investors." There is no mention anywhere of the guaranteed lifetime income features that are so important to the consumers who purchase these products inside retirement accounts.

[25] 81 Fed. Reg. 21158 (April 8, 2016).

permanent so that consumers do not continue to lose access to these important retirement security products.

Finally, PTE 84-24 should be revised to (1) harmonize its disclosure requirements with other exemptions and (2) cover all forms of compensation attendant to the sale of an annuity, not just insurance commissions. There is no good reason for the disclosure requirements in PTE 84-24 to be different from, for example, the BICE. All that does is create unnecessary complexity and cost, particularly for insurance companies who need to provide fiduciary intermediaries with the information necessary to comply with both exemptions. The limitation of PTE 84-24 to only allow the payment of insurance commissions and not allow other common forms of compensation such as revenue sharing payments, administrative fees and marketing fees, makes the exemption unusable for many intermediaries. The only reason the Department articulated in the final rule for limiting the exemption to insurance commissions was that if fiduciary intermediaries want to receive these other forms of compensation, they can use the BICE.[26] This rationale does not make sense if PTE 84-24 is to continue to be used for the sale of all insurance products, as is currently the case and as we advocate here. And as we explained in our July 21, 2015 comment letter,[27] provided the compensation is disclosed and reasonable in amount, there is no good reason to limit the types of compensation covered, especially given the presence of the impartial conduct standards in the current version of the exemption. If the sale is in the best interest of the consumer, the forms of compensation paid should be irrelevant.

Thank you for the opportunity to comment.

Sincerely,

Dennis R. Glass
President and Chief Executive Officer
Lincoln Financial Group

[26] 81 Fed. Reg. 21166 (April 8, 2016).

[27] See pp. 13—14 of our July 21, 2015 comment letter.