GROOM LAW GROUP

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Filed Electronically

Office of Exemption Determination
Employee Benefits Security Administration
Attn: D-11933
U.S. Department of Labor
200 Constitution Avenue, NW
Suite 400
Washington, DC 20210

Re: Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions RIN 1210-AB82

Ladies and Gentlemen:

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 information regarding the Fiduciary Rule and Prohibited Transaction Exemptions ("RFI"). The RFI relates to 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"). The Fiduciary Rule is also the subject 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 Fiduciary Rule is substantially changed. Moreover, we believe that many retirement savers have and will continue to 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 beyond those suggested in the recent RFI 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]

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 allow for beneficial non-fiduciary communications that occur when there is no mutual intent to provide advice;

2. Expand the available exceptions and recognize the legitimate distinction between advice and sales;

3. Eliminate private litigation as the primary enforcement mechanism;

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

5. Ensure that principles-based prohibited transaction exemptions are widely available.

I. 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 as shown in the comment letters previously received, the Department must conclude that revisions are necessary to achieve the objective of empowering and protecting American retirement consumers.

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 that individual outreach to employees resulted in participation rates 22% higher than the

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

average.[2] 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."[3]

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, potentially 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

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[2] *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).
[3] 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.

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.

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 create a menu of diverse investment options in order 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.[4]

Importantly, 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.[5] This consolidation can be seen in the industry already with smaller advisers joining firms that can provide compliance resources.[6] Larger providers are also segmenting client services resulting in retirement savers with smaller accounts being moved to self-directed status if fee-based servicing is not economically appropriate.[7]

The 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.[8] 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.

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[4] Comment Letter from Raymond James re: Proposed 60-day delay of Fiduciary Rulemaking Applicability Date (March 10, 2017).
[5] *See generally* Comment Letter from Richard Akel (Allstate) re: Proposed 60-day delay of Fiduciary Rulemaking Applicability Date (March 1, 2017).
[6] Lisa Beilfuss, *United Capital Buys Three Advisers With $758 Million Under Management*, WALL ST. J., July 25, 2017.
[7] Michael Wursthorn, *A Complete List of Brokers and Their Approach to 'The Fiduciary Rule'*, WALL ST. J., Feb. 6, 2017.
[8] Report: *Fiduciary Rule to Leave US Mass-Market Investors Stranded, Study Shows*, CoreData Research UK (November 2016).

A report from consultant A.T. Kearney estimated a $20B adverse 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.[9] The report predicts consolidation within the industry as both smaller and independent broker-dealers struggle with Fiduciary Rule compliance.

Earlier in 2017, the Investment Company Institute ("ICI") submitted a comment letter regarding the proposed delay that contains new information about industry dislocation.[10] 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. Regretfully, many times these are precisely the retirement savers that are most in need of advice.

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.[11] 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 for American retirement savers having accounts under $25,000.

As currently structured, 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.

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

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

[11] *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).

The Department has cited the primacy of private litigation as a Fiduciary Rule enforcement mechanism in its Consumer Protections FAQs #10.[12] 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. Because the Department's penalty for non-compliance is class action lawsuits, that formula will surely yield an enormous increase in litigation and a resulting increase in litigation-related cost and expense.

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 also estimated that long-term annual costs to the retirement services industry related to Fiduciary Rule-related class action settlements are likely to range in the tens to hundreds of millions. Initial costs are estimated to likely be higher.[13] These numbers do not take into account the costs of defense, which are also likely to be substantial and often more than the settlement amounts. As explained more fully below, using class action lawsuits as the consequence of non-compliance is short-sighted and will ultimately result in the loss of opportunities for retirement savers.

Our concerns outlined above are not alleviated by the proposed adjustments to the Fiduciary Rule set forth in the RFI and we seek instead meaningful adjustments as described below.

III. 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. This leads to the creation of fiduciary relationships where none was ever intended. Under the common law of trusts, a "fiduciary" relationship arises where "special intimacy or . . . trust and confidence" exists between parties.[14] No recommendation should be fiduciary unless there is a mutual understanding between the provider and recipient that advice is being given. This should be accomplished by removing Reg. 2510.3-21(a)(2)(iii) regarding specifically directed statements.

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

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

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

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

Permit Targeted Activities Including Contribution Recommendations Within the Rule

The Groom Group greatly appreciates the clarification provided by Transition Period FAQ Set 2 Questions 2 &3. 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, itself should permit these targeted activities to continue without being characterized as fiduciary advice. The concepts included in the FAQ set should be incorporated directly into the Fiduciary Rule so that there is no confusion. Currently there is some conflict between FAQs 9&10 of FAQ Set II and these new FAQs in Set 2. There is also a little confusion caused by including these FAQs in a document labeled "Transition Period" perhaps implying that the content is only applicable during the Transition Period. This could easily be remedied by incorporating the guidance into the definition of investment advice itself.

For the same reasons, we request that the Fiduciary Rule be explicitly amended to exclude communications encouraging participation or increased contribution rates. This could be done through an amendment of the definition or by providing a broad safe-harbor within the education exception that permits both plan and IRA providers the ability to recommend contributions up to the annual IRS limits. We also ask that this modification clarify that communications encouraging participation made directly to participants are not covered recommendations.

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

Create Safe Harbor for Referrals to Third Party Fiduciaries

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. The recipient of such a list would have no obligation or incentive to choose one of the fiduciaries on the list. Treating this activity as a referral rather than a recommendation would greatly encourage the receipt of professional advice services by consumers. Further, the Department should explicitly state that maintaining connectivity (e.g., offering a single adviser's services for plan sponsors to elect to utilize with their plans) with a third-party adviser who provides participant level or plan level advice on the plan options is not a recommendation under the Fiduciary Rule rather than saying that it will depend upon the facts and circumstances as it did in FAQ 35 relating to the Rule.

Create Safe Harbor for Plan to Plan Rollovers

The prevention of leakage from the retirement savings system is crucial to aiding the protection of retirement savings of Americans. We propose that a safe-harbor be created that permits recordkeepers to solicit account balances in ERISA plans be rolled into another ERISA plan. The safe-harbor would permit a recordkeeper to present the options described in FINRA Notice 13-45 and then to offer to perform a rollover into an ERISA plan recordkept by that entity. The offer may contain statements regarding the benefits of consolidation without the interaction being considered a covered recommendation. This safe-harbor will keep more ERISA assets in ERISA plans and assist in building account balances that exceed the small balance cash out limits.

Expand the Exceptions to Cover IRA Providers

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 Fiduciary Rule is most harmful to consumers when it prevents Americans from accessing investment advice.

Modifications to the Independent Fiduciary Exception Are Necessary

The existing independent fiduciary exception ("IFE") has been burdensome and disruptive. Financial service providers, including recordkeepers, have sent hundreds of thousands of IFE representation letters to their clients in the effort to establish a reasonable basis for belief that retirement plan clients are represented by independent fiduciaries. Despite the efforts by some trade groups to standardize these letters, the letters have taken a wide variety of forms. The vast majority of financial service providers do not have the resources to review, comment and negotiate each of the hundreds if not thousands of letters that each of their lines of businesses have received. Many financial service providers have therefore resorted to sending a second mass mailing of counterproposal IFE representations. The mass mailing of these "dueling notices", mostly between sophisticated financial intermediaries, has been a distracting and wasteful expenditure of limited resources that are available to comply with the Fiduciary Rule.

Communications with an investment professional such as a registered investment adviser, insurance agent, recordkeeper, broker dealer or bank 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. The financial professionals and internal plan fiduciaries listed above are sophisticated enough by reason of their profession to understand the difference between advice and marketing. This approach 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.

The existing exception applies a $50 million threshold to plan fiduciaries that do not hold professional designations. This threshold is not in line with the threshold set for "qualified purchasers" by the Investment Company Act, which instead uses a $5 million in investments threshold. This is a much more reasonable test of sophistication and we encourage the Department to adopt a similar test for fiduciaries of plans holding $5 million or more in plan assets within a controlled group.

A Broad Seller's Exception is Needed

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. In fact, SEC Commissioner Piwowar submitted an RFI response calling out this very issue stating that "the DOL Fiduciary Rule fails sufficiently to distinguish 'selling' activities from 'advice' activities, undermining the Commission's longstanding approach to regulation of broker-dealers and investment advisers."[15] 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 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.

IV. Private Litigation Should Not be the Primary Enforcement Mechanism

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

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[15] Commissioner Piwowar's Comment Letter in Response to the Department of Labor's "Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions" submitted July 25, 2017.

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 will be in the tens or hundreds of millions of dollars. These numbers do not take into account the costs of defense, which are also likely to be substantial and often more than the settlement amounts. In a rule that uses litigation as its enforcement mechanism these costs will ultimately be borne by retirement investors.

The Department itself has ceased to defend the provision of the BIC that prohibits the inclusion of mandatory arbitration of class claims in *Chamber of Commerce v. U.S. Dep't of Labor*, No. 17-10238 (5th Cir. July 3, 2017) and *Thrivent Financial for Lutherans v. R. Alexander Acosta, Secretary of Labor and U.S. Department of Labor*, Court File No. 0:16–cv–03289–SRN–DTS. As a result, the Department must, at a minimum, remove the prohibition on class arbitration found in section II(f)(2) of both PTE 2016-01 and 2016-02.

However, we strongly believe that a written contract should not be required at all. 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.

V. A Workable "Best Interest" Standard and Exemption

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. Therefore, the Department should remove the reference to "without regard," which creates an unworkable standard that is inconsistent with ERISA.

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. We believe that none of the additional disclosure requirements under the Best Interest Contract Exemption (or Principal Transaction Exemption) should ever become effective. However, any disclosures required under the Best Interest Contract Exemption should be permitted to be incorporated into the existing systems, which to do not function in a manner that allows the disclosures contemplated by Section III. The content of any required 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.[16] Even by the Department's own admissions, the current interpretation presents a major undertaking with uncertain consumer protection value.[17] These disclosures are extremely expensive to create and distribute. Therefore, we believe the outcome that best balances the benefits to consumers against the cost to providers is to rescind all of the disclosure requirements, including Section V(a) disclosure to EBSA. Short of full rescission, Sections III(a) and (b) must be dramatically streamlined. The transactional disclosures do not provide useful information to consumers, even the on-demand ones, because they only provide information about that particular product giving little insight into the scope or magnitude of any perceived conflict. An annual statement with the information in Section III(a)(1) should be sufficiently protective of consumer rights. The website disclosures are costly and unlikely to be utilized by average American retirement savers. Building these disclosures for third party intermediaries shifts the economic burden on to service providers, many of whom are small businesses, for need that has already been filled by the likes of Morningstar.

VI. 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. Finally, in-house plans and participants in those plans should be afforded relief under the BIC. Allowing more providers to use an exemption for more investors furthers the goal of making professional investment advice more widely available.

VII. Special Product Specific Exemptions Should Not Be Promulgated In Lieu of Making a Workable Principles-Based Exemption Widely Available

As was stated many times in reaction to the 2015 proposal, the Department should not be favoring specific investment products, like clean shares or fee based annuities, through streamlined exemptions or asset lists. Rather, the Department should craft an exemption that is applicable to any investment option a fiduciary, in his or her professional discretion, can prudently recommend. The changes we describe above, including the elimination the contract

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

and warranties and relying upon conditions instead, should make this goal of a principles-based exemption a reality.

VIII. Conclusion

For the reasons described above, the Groom Group believes that the Department must revise the Fiduciary Rule beyond those revisions contemplated in the RFI. 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 respond to the Department's RFI and would be pleased to respond to any questions the Department may have.

Sincerely,

Stephen M. Saxon