GROOM LAW GROUP

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July 23, 2013

U.S. Department of Labor
Office of Exemption Determinations
Employee Benefits Security Administration
Room N-5700
200 Constitution Avenue, NW
Washington, DC 20210

Attn: PTE 80-26 Amendment

Re: Exemption Application D-11716

Dear Sir or Madam:

On May 24, 2013, the Department issued a notice of pendancy of a proposed amendment to class prohibited transaction exemption ("PTE") 80-26, which would provide retroactive and temporary exemptive relief for certain guarantees of the payment of "debits" to plan investment accounts (including IRAs) by parties in interest to such plans, as well as loans and loan repayments made pursuant to such guarantees.

On March 30, 2012, on behalf of certain broker-dealer members of our informal IRA Group, Groom Law Group filed comments with respect to the SIFMA application for the proposed amendment. Although the comments were submitted at the request of the Department, they were neither referenced nor addressed in the notice of pendancy. We understand that, instead, the comments were forwarded to the Office of Regulations and Interpretations to consider issuing further guidance as to the circumstances under which contractual provisions involving indemnities, guarantees, security interests, liens, cross-collateralization terms and the like (collectively, "guarantees") may (or may not) involve prohibited extensions of credit or other prohibited transactions. In the meantime, the proposed amendment is intended to provide relief for what the Department views as a narrow set of past transactions that in fact involved prohibited transactions – as well as a temporary six (6) month window period for amending otherwise offending contract terms.

We respectfully submit that unless and until the Department addresses the underlying issues addressed in our 2012 comments, the issuance of the proposed amendment would create serious and needless uncertainty for millions of plans and IRA accountholders, even beyond the uncertainty triggered by the earlier advisory opinions. In order to avoid any risk of challenge, our clients anticipate that they probably will need to remove ***all*** guarantees from brokerage agreements. In so doing, they are likely to impose trading restrictions designed to protect

themselves from losses, may impose liquidity requirements that could reduce investment returns, and/or simply close smaller or less profitable accounts.

Department staff informally have suggested that these concerns may be overblown, given that only *some* guarantees involve extensions of credit and/or that extensions of credit by service providers generally should be covered by Section IV of the PTE relating to ordinary operating expenses. However, we reiterate that Advisory Opinions 2009-03A and 2011-09A call both of these conclusions into question. Thus, until the Department provides guidance as to *which* guarantees by an IRA accountholder involve an extension of credit, *all* guarantees come into question. For instance, as noted in our prior letter, the IRS permits certain types of service provider fees (*e.g.* custodial fees or investment advisory fees) to be paid from assets outside of an IRA or qualified plan. If an IRA owner agrees to pay these types of fees outside of the IRA, is the mere promise to pay an impermissible extension of credit under the Department's interpretation? [1] Moreover, Section IV of the PTE only addresses extensions of credit ***by*** a service provider to a plan, and affords no protection to guarantees ***to*** service providers by plan sponsors or IRA accountholders. We also reiterate that Advisory Opinion 2011-09A involves a false premise – that the IRA accountholder was somehow guaranteeing the "investment performance" of the account rather than indemnifying the broker from operating losses/expenses incurred in providing services to the account. Clarifying this point arguably might make the need for any exemptive relief moot.

Accordingly, we request that the Department reconsider making the requested relief permanent rather than temporary. In the alternative, the temporary exemption should be extended to at least six (6) months beyond the issuance by ORI of final regulations or other clear guidance as to the circumstances under which guarantees (including but not limited to "outside-the-plan" contractual promises to pay fees and expenses) by plan sponsors, IRA accountholders or other service providers to a broker or other plan service provider constitute prohibited extensions of credit.

In addition to the foregoing, we note the following comments on the proposed amendment terms and conditions:

- In the case of a "Plan Account," the term "Related Account" should include any other account established by the same plan with the same or affiliated financial institution. For example, an IRA may maintain both a brokerage account and a bank account with different subsidiaries of the same financial institution. As written, the exemption condition could even be interpreted to preclude the use of assets of a plan in a regular

[1] At minimum, the Department should clarify that an agreement to pay a future IRA or plan-related expense is merely an executory promise and not an extension of credit – in this respect, it should be no different than a promise to make a future plan contribution.

brokerage account to guarantee losses of the *same* plan in a margin account within the *same* institution.

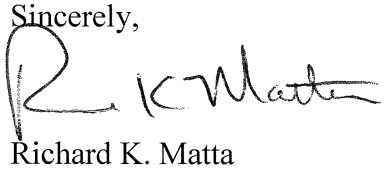
- A "Covered Extension of Credit" should include any guarantee by a plan sponsor or IRA accountholder to a financial institution in connection with an Account Opening Agreement between the plan/IRA and the financial institution, even if the guarantee is not from a Related Account.

- To the extent that Advisory Opinion 2011-09A stands for the notion that a service-provider expenses resulting from an "investment loss" is not an ordinary operating expense of a plan within the meaning of Section IV of the PTE, the relief afforded by Section V should extend to any guarantee by a service provider to a financial institution in connection with an Account Opening Agreement between a plan and such financial institution (*e.g.*, where an introducing broker with a relationship to the plan provides a separate guarantee to a clearing broker as an inducement to opening the account).

- Guarantees of fees and expenses by plan sponsors and IRA accountholders arise in connection with the performance of services beyond brokerage, futures and other investment agreements, and should be covered by the exemption. (As noted, we believe that such guarantees of future performance are not extensions of credit at all, but the Advisory Opinions have created uncertainty.)

Thank you for your consideration of these issues. For convenience, we attach a copy of our March 30, 2012 comments and request that they be reconsidered as directly relevant to the need for, and scope of, the proposed amendment to PTE 80-26.

Sincerely,



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