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Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW, Suite 400
Washington, DC 20210

Re: Definition of the Term "Fiduciary:" Conflict of Interest Rule (RIN 1210–AB32)
Proposed Amendment to Proposed Partial Revocation of Prohibited Transaction Exemption 84-24 (ZRIN 1210-ZA25)
Proposed Best Interest Contract Exemption (ZRIN 1210-ZA25)

To Whom It May Concern:

Lincoln Financial Group is the marketing name for Lincoln National Corporation and its affiliates (collectively, "Lincoln"). Lincoln is pleased to have this opportunity to provide additional comments on the Department of Labor's ("Department's) proposed fiduciary advice regulation and related prohibited transaction exemptions (the "Proposal"). We appreciate the Department's efforts to understand the life insurance industry's questions and concerns about the Proposal and to work with us to address the Proposal's unintended consequences that would limit consumers' access to critical lifetime income guarantees.

In this regard, we appreciate Department Secretary Perez's time in attending the July 30th meeting with Jeffrey Zients, Director of the President's National Economic Council, and several representatives of the U.S. Chamber of Commerce. We also appreciate the Department's follow-up meeting with representatives from Lincoln and several other insurance companies on August 24. These meetings were extremely helpful in giving us greater insight into the Department's goals, and also allowed the Department to gain a better understanding of annuities, including how they differ from other retirement investment products.

This letter will respond to a number of specific requests for additional information by the Department at the August 24 meeting. It also will cover the following topics:

- We continue to emphasize the arguments made in our July comment letter, as well as the letters submitted by industry groups such as the American Council of Life Insurers (ACLI), the Insured Retirement Institute (IRI) and the Committee of Annuity Insurers (CAI), that Prohibited Transaction Exemption (PTE) 84-24 should continue to cover variable IRA annuity sales, along with other insurance products, as it has for the last 30+ years. The Department's stated basis for its proposal to remove variable IRA annuity sales from its scope and to lump them in with mutual funds and other non-guaranteed investment products under the Best Interest Contract (BIC) exemption is that they are registered securities. This justification to move variable annuities out of PTE 84-24 does not make sense because, as we discussed, the SEC and FINRA treat variable annuities differently from mutual funds under the securities laws. See, for example,

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FINRA Rule 2330, FINRA IM-2210-2 and SEC Form N-4, discussed below. There is nothing inherent in tax advantaged accounts that would call for a different perspective. Furthermore, insurance guarantees are a significant feature of variable annuities. Given the significance of this proposed change and the clear disadvantage that it creates for variable annuity sales as compared to other retirement investment products, we think the Department should continue to make PTE 84-24 available for all annuities.

- If the Department nevertheless concludes that the Best Interest Contract (BIC) exemption should become the only exemption available for variable IRA annuity sales, we propose expanding the existing section for annuities that is already in the BIC exemption to include annuity-specific provisions that account for the value of insurance guarantees rather than focusing on just investment performance and fees, allows consumers to properly compare like products on an apples-to-apples basis, and does not invite improper comparisons with mutual funds and other non-guaranteed products.[1]

Supplemental Comments Regarding Proposed Changes To PTE 84-24

We urge the Department to maintain PTE 84-24 as an available exemption for all annuities. As has been pointed out in the many comment letters submitted by the industry on and before July 21, 2015, PTE 84-24 was developed for insurance products. As such, it explicitly permits commissions and recognizes the value of product features like insurance guarantees rather than focusing solely on investment advice services, as the BIC exemption does. The disclosure requirements of PTE 84-24 already work for insurance products and many in the industry have already adjusted to the requirements of this exemption. Having a separate exemption for all annuities illustrates that annuities 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,[2] while allowing consumers to easily compare all annuity products under one set of rules.

Treating all annuity products the same, and within the same exemption, is preferable to bifurcating one class of annuity and requiring it to comply with the BIC exemption. The Department's stated basis for including variable annuities in the BIC exemption—that variable annuities are securities— is misguided. Not all securities are the same products, nor can they be regulated under identical rules. In fact, SEC and FINRA rules and regulations contain unique requirements for annuities, including variable annuities, in recognition of their differences from other securities and mutual funds. For example:

- SEC requirements for prospectus content are very specific for variable annuities (Form N-4), including detailed descriptions of contract expenses in a standard format as well as the contract terms, and specific rules for calculating standard performance of variable annuities.
- FINRA Rule 2330: Members' Responsibilities Regarding Deferred Variable Annuities; with heightened suitability requirements for recommended transactions, expanded principal review and approval requirements as well as firm supervisory and training requirements. In particular, there must be an "annuity-specific" reason why the client is choosing to purchase the annuity. Such reasons might include the need for access to guaranteed lifetime income through the right to annuitize the contract and/or downside risk protection to weather market downturns as an individual nears or is in retirement through living benefit riders.

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[1] We also propose several additional adjustments to the BIC exemption that would greatly simplify its overall requirements, so that it could actually be usable.

[2] For example, it would be inappropriate to compare an insurance guarantee, and the fee charged for that feature, to investment advice, and the fee charged for that service.

- FINRA Advertising Standards for variable annuities are set forth in IM-2210-2; which require identification of the product as insurance, discussion of the long term nature of the product, prohibitions against guaranteeing investment return, requirements for showing performance and rules for product comparisons.

The Department Has Not Provided Adequate Rationale For Removing Variable IRA Annuities From PTE 84-24.

As annuities are treated differently from other investment products, it makes more sense for the Department to have a set of prohibited transaction rules for annuities, including variable annuities, which recognizes the differences between annuities and other investment products, just as the SEC and FINRA do, and as the Department does with PTE 84-24 as currently written. The Department's proposal now to no longer recognize these differences for variable annuities is a serious step back from this sensible approach. It indicates a lack of understanding about the insurance guarantees that variable annuities provide. As noted in our July comment letter, over the last five years, 75% of the income guarantee benefits sold have been through variable annuities.[3] These significant numbers show that variable annuities certainly are not just like mutual funds, stocks and bonds, which have no income guarantees, and should not be treated the same as these other investments. We urge the Department to recognize the significant differences between variable annuities and non-guaranteed investment products by allowing PTE 84-24 to continue to cover variable IRA annuity sales.

If the Department declines to do this, we believe that a rationale based solely on the fact that variable annuities are securities is insufficient and will be evidence of a continued misunderstanding about the nature of these products. We are very concerned that this misunderstanding will result in a rule that will discourage firms and advisors from recommending annuities, when they are in a consumer's best interest, resulting in reduced consumer access to critical guaranteed income products. It will also result in unnecessary consumer confusion caused by differing sets of rules for variable IRA annuities and other annuities. The life insurance industry has raised these concerns in its comment letters and in meetings with Department staff,[4] but to date we have not heard the Department articulate a reasonable basis for removing variable IRA annuities from PTE 84-24. We urge the Department to reconsider its approach, in light of the substantial market disruption and harm to retirement savers that would result.

Further, the continued availability of PTE 84-24 for variable IRA annuities is not the status quo. The proposed changes to PTE 84-24, in particular the "best interest" standard of care contained in the exemption's new "impartial conduct standards" requirement, would provide enhanced consumer protections. As we and our industry trade groups have stated in our earlier comment letters, we support a best interest standard for retirement advice and believe that its addition to PTE 84-24 is workable, provided certain changes are made to the "best interest" definition and other parts of the exemption to make it usable in the retirement market.[5]

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[3] See page 6 of the Lincoln Financial Group comment letter submitted on July 21, 2015.

[4] See pp. 5—11 of the Lincoln Financial Group comment letter submitted on July 21, 2015, for a discussion of the importance of variable annuities in the retirement market, and pp. 11 and 15—16 for a discussion of the ways in which the BIC exemption as proposed would harm variable annuities and the consumers who need them.

[5] Changes are needed to the "best interest" definition in PTE 84-24 to make it consistent with the Department's own public statements about the meaning of this term, and to make the revised exemption usable. In addition, changes to other parts of PTE 84-24 are necessary in order for this exemption to continue to have utility in the retirement market, including changes to the definition of "insurance commission" and other parts of the exemption so that it covers all forms of compensation attendant to the sale of an annuity. For more specifics about these needed changes, please see pp. 11—15 of the Lincoln Financial Group comment letter submitted on July 21, 2015), as well as the comment letters filed on behalf of the industry by the ACLI (pp. 18—22), the IRI (pp. 33-34) and the CAI (pp. 20—23).

Variable Annuities Are Insurance Contracts And Are Legally And Fundamentally Different From Mutual Funds.

In the August 24 meeting, the Department expressed concern that if variable annuities were excluded from the BIC exemption and covered under PTE 84-24, that mutual funds would be able to structure themselves as variable annuities "in name only" to avoid the BIC exemption requirements. Again, this concern is misplaced and appears to be based on a misunderstanding that variable annuities are the same as mutual funds. Variable annuities are fundamentally different from mutual funds. The Investment Company Act of 1940 (the "1940 Act") defines a "variable annuity contract "as an "accumulation or annuity contract, any portion thereof, or any unit of interest or participation therein pursuant to which the value of the contract, either prior or subsequent to annuitization, or both, varies according to the investment experience of the **separate account** in which the contract participates." The 1940 Act further defines a "separate account" as an account **established and maintained by an insurance company** pursuant to the laws of any state or territory of the United States, or of Canada or any province thereof, under which income, gains and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains or losses of the insurance company.

As this definition makes clear, variable annuities are insurance contracts, which can only be issued by a duly licensed insurance company. Insurance companies are highly regulated by the states, subject to state insurance law and reserving requirements, and subject to supervision and examination by state insurance departments. The contracts they issue are also subject to state review and approval. Because of this, it would be irrational for a mutual fund company to become an insurance company for the sole purpose of availing itself of PTE 84-24 and avoiding the BIC exemption requirements. For greater detail on the specific state insurance law requirements applicable to insurance companies, please see attached Appendix A, as well as the comprehensive appendix attached to the ACLI comment letter.

Proposed Changes To The BIC Exemption

In the alternative, if the Department concludes that the BIC exemption should be the only exemption available for variable IRA annuity sales, we urge the Department to make changes to the BIC exemption that better reflect the differences between annuities and other types of investment products that are covered under the BIC exemption. These revisions are documented in attached Appendix B.

As expressed in the hundreds of pages of comments filed during the public comment period and during the public hearings, the BIC exemption must be simplified so that firms that offer annuities can and will rely on it. We do not believe that converting our businesses to fee-only advice models for all retirement savers is in their best interest. Fee-based models do not fit with the way annuities are used by consumers. We propose that the Department enhance Section VI[6] of the BIC exemption – the "Insurance and Annuity Contract" section that is already part of the BIC exemption. These enhancements would include:

- An annuity-specific definition of "reasonable compensation" that accounts for the value of the insurance guarantees and other benefits inherent in an annuity product, and the extensive up-front consumer education that is required for annuity product sales. This change would make clear that insurance commissions that are higher than mutual fund commissions, or that are initially higher than fee-based compensation, are reasonable provided they are consistent with customary compensation practices in the annuity marketplace. It would also expressly permit insurers to maintain their "statutory employee"

[6] In the attached markup, the annuity section of the BIC exemption is Section V, because we propose removing Section IV of the exemption entirely. See the attached BIC exemption markup at Appendix B for supporting rationale.

programs. The topic of statutory employee programs was something that the Department requested more information on at the August 24 meeting. Please see attached Appendix C for more details about insurance company statutory employees.

- An annuity-specific definition of a "material conflict of interest" that would make clear that an insurance commission that is higher than a mutual fund commission or that is initially higher than a fee-based compensation arrangement is not by itself evidence of a conflict of interest.
- Disclosures that are tailored to annuity products. This disclosure would cover a description of the contract and its benefits, advisor compensation (defined as insurance commissions), other payments to the advisor or the selling firm, compensation to the insurance company (other than "spread", see below), product manufacturer affiliations and contract charges.
- In response to the Department's questions about insurance company "spread" at the August 24 meeting, we propose that insurance company "spread" be expressly excluded from the disclosure requirements and the "reasonable compensation" definition, because it is not something that can be known or quantified over any particular period. For example, in the case of a fixed annuity, or the fixed component of a variable annuity, spread is the difference between the fixed return credited to the contract holder and the insurer's general account investment experience. The spread can be positive or negative and is not known in advance, or at any point in time during the life of the contract. Until the insurer's performance under the contract is complete, it will not know whether it has lost money, covered its costs or perhaps gained a profit on that contract. As noted by the ACLI in its July comment letter (at page 36), spread is earned by financial institutions on a wide range of products (e.g., bank deposits), and is more appropriately thought of as investment earnings as opposed to compensation. As the ACLI points out, the Department has agreed with this in other regulatory contexts and should also do so here.[7]

We also propose several changes to the BIC exemption for all products sold in reliance on it, including annuities. The intent of these proposed changes is to greatly simplify it and remove unnecessary administrative burdens so that firms will be able to use the BIC exemption to cover the sale of all retirement investment products, including annuities. Many of these are changes that were specifically requested by Lincoln and other individual insurance companies, as well as industry groups, during the comment period that ended in July. The attached mark-up in Appendix B provides more detail about these proposed changes and supporting rationale.

Thank you for the opportunity to comment on this important initiative.

Sincerely,

Dennis Glass

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

[7] See Q and A 22 of the 2009 Form 5500 Schedule C Frequently Asked Questions (which has been interpreted to require disclosure on Schedule C of reductions in an insurance contract's crediting rate to cover plan recordkeeping expenses, but to not require disclosure of spread). See also DOL Regulation Section 2550.408b-2(c)(1)(iv)(E) and (F) which require disclosure of operating expenses only for investments that do not have fixed returns, and DOL Regulation Section 2550.404a-5(d)(1)(iv)(B), which requires only disclosure of "shareholder-type fees" such as surrender charges, and liquidity restrictions.

Appendix A – State Insurance Company Requirements

A. Although each state has specific statutes and regulations that apply to companies domiciled in that state, the following outline provides general guidance on requirements to become licensed as an insurance company with a state insurance department.

B. Insurance companies must:
   1) Meet financial requirements for capital and surplus, with additional financial requirements if the company is issuing variable contracts.
   2) Submit and have a plan approved by the insurance department for incorporating, promoting and raising capital.
   3) Submit and have approved by the insurance department, a business plan, which demonstrates that: a) the insurance company can conduct and transact business in a safe and prudent manner, b) the insurance company can maintain the company in a safe and solvent condition, and c) the company has established safe and sound methods for the conduct of such insurance company and its business and prudential affairs.
   4) Submit a plan of operations for variable business, which will not be approved until the insurance commissioner has found that: a) the plan is not unsound b) the general character, reputation and experience of the management and those proposed to supply consulting, investment, administrative or custodial services are would allow the insurance commissioner to reasonably assume competent operation c) the present and foreseeable future financial condition of the insurer and its method of operation in connection with the issuance of such policies is not likely to render its operation hazardous to the public or its policyholders.

C. To do business in states other than the state of domicile, a company needs to follow the requirements of each state in order to be approved to conduct insurance business and to issue variable annuity contracts. States will each have requirements for variable annuity contracts and all contracts must be filed and approved by a state's insurance department before the contracts are available for sale to consumers in that state. Actuarial Memoranda are usually required to support the contract filings and contain: a high level description of the contract, how the contract satisfies non-forfeiture requirements, the reserving basis and in many states, examples of the mechanics of the contract.

D. On an ongoing basis, an insurance company must:
   1) Follow rules set out by the insurance departments for conducting its business
   2) Submit to regular financial examinations by the domiciliary insurance department
   3) Submit to various exams from other state insurance departments where the company is authorized to do business.

E. Additional Requirements:
   1) Insurance companies must file an annual statement on the National Association of Insurance Commissioners (NAIC) Annual Statement Blank. This is unique to insurance companies and provides for consistent reporting across companies.

2) Annual, audited financial statements must be filed in conformity with statutory accounting practices prescribed or otherwise permitted by the department of insurance. Therefore, insurance companies must typically prepare two types of audited financial statements each year—Statutory and GAAP Financials. Insurance companies' outside auditors need to be familiar with both types of accounting practices.
3) Additional insurance department reporting is required if the insurance company is part of a holding company.

Appendix B

Recommended Revisions of the Best Interest Contract Exemption To Address the Unique Issues Presented by Insurance Products

We appreciate the Department's recognition of the important role of guaranteed income through annuities in retirement planning for America's workers. As insurance products, variable annuities provide valuable lifetime guarantees, even though they are also registered securities. Because of this, the features of and compensation related to variable annuities are materially different from mutual funds and other types of securities, for which the Best Interest Contract Exemption appears primarily to have been designed. Accordingly, we would prefer to address the Department's specific concerns about individual variable annuities in the context of revisions to PTE 84-24. However, in the event the Department will not agree to this, we have developed changes to the Best Interest Contract Exemption for the Department's consideration.

The following proposed changes to the exemption text are intended to achieve two primary objectives. First, these changes recognize and address the real differences presented by variable annuities, amending the securities-focused language to address these unique concerns. Without these changes, we believe the exemption as Proposed would severely disadvantage variable annuities in the marketplace, undermining the Department's goal of ensuring retirees have access to and the choice of guaranteed income solutions through variable annuities. Second, we suggest more general changes to the exemption to facilitate its wider use by advisors.

Redline of the Best Interest Contract Exemption Proposed Text with Endnote Explanations

Section I--Best Interest Contract Exemption

(a) In general. ERISA and the Internal Revenue Code prohibit fiduciary advisers to employee benefit plans (Plans) and individual retirement plans (IRAs) from receiving compensation that varies based on their investment recommendations. Similarly, fiduciary advisers are prohibited from receiving compensation from third parties in connection with their advice. This exemption permits certain persons who provide investment advice to Retirement Investors, and their associated financial institutions, affiliates and other related entities, to receive such otherwise prohibited compensation as described below.

(b) Covered transactions. This exemption permits Advisers, Financial Institutions, and their Affiliates and Related Entities to receive compensation for services provided in connection with a purchase, sale or holding of an Asset by a Plan, participant or beneficiary account, or IRA, as a result of the Adviser's and Financial Institution's advice to any of the following ``Retirement Investors:''

(1) A participant or beneficiary of a Plan subject to Title I of ERISA with authority to direct the investment of assets in his or her Plan account or to take a distribution;

(2) The beneficial owner of an IRA acting on behalf of the IRA; or

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(3) A plan sponsor as described in ERISA section 3(16)(B) (or any employee, officer or director thereof) of a ~~non-participant-directed~~ Plan subject to Title I of ERISA ~~with fewer than 100 participants~~, to the extent it acts as a fiduciary who has authority to make investment decisions for the Plan.[I]

As detailed below, parties seeking to rely on the exemption must contractually agree to adhere to Impartial Conduct Standards in rendering advice regarding Assets and to contractually agree to adopt[II] ~~; warrant that they have adopted~~ policies and procedures designed to mitigate the dangers posed by Material Conflicts of Interest; disclose important information relating to fees, compensation, and Material Conflicts of Interest; and retain documents and data relating to investment recommendations regarding Assets. The exemption provides relief from the restrictions of ERISA section 406(a)(1)(D) and 406(b) and the sanctions imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(D), (E) and (F). The Adviser and Financial Institution must comply with the conditions of Sections II-V (as applicable) to rely on this exemption.

(c) Exclusions. This exemption does not apply if:

(1) The Plan is covered by Title I of ERISA, and (i) the Adviser, Financial Institution or any Affiliate is the employer of employees covered by the Plan, or (ii) the Adviser or Financial Institution is a named fiduciary or plan administrator (as defined in ERISA section 3(16)(A)) with respect to the Plan, or an affiliate thereof, that was selected to provide advice to the Plan by a fiduciary who is not Independent;

(2) The compensation is received as a result of a transaction in which the Adviser is acting on behalf of its own account or the account of the Financial Institution, or the account of a person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the Financial Institution (i.e., a principal transaction);

(3) The compensation is received as a result of investment advice to a Retirement Investor generated solely by an interactive Web site in which computer software-based models or applications provide investment advice based on personal information each investor supplies through the Web site without any personal interaction or advice from an individual Adviser (i.e., ``robo advice''); or

(4) The Adviser (i) exercises any discretionary authority or discretionary control respecting management of the Plan or IRA assets involved in the transaction or exercises any authority or control respecting management or disposition of the assets, or (ii) has any discretionary authority or discretionary responsibility in the administration of the Plan or IRA.

Section II--Contract, Impartial Conduct, and Other Requirements

(a) Contract. Prior to or reasonably contemporaneous with executing any covered transaction resulting from a recommendation that ~~recommending that~~ the Plan, participant or beneficiary account, or IRA purchase, sell or

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hold an~~the~~ Asset;~~,~~ or rollover or otherwise distribute Assets from a Plan or IRA; the Adviser or ~~and~~ Financial Institution will enter into a written contract with the Retirement Investor, or will provide a written unilateral contract to the Retirement Investor, that incorporates the terms required by Section II(b-d). The terms of s~~S~~uch contract ~~is required before executing any covered transaction, and its terms~~ will apply to any advice or other services provided prior to the execution of the transaction, to the extent that the transaction is directly related to or the result of such advice or other services.[III]

(b) Fiduciary. The written contract affirmatively states that the Adviser and Financial Institution are fiduciaries under ERISA or the Code, or both, with respect to any investment recommendations for which compensation is received by the Adviser and Financial Institution, to the Retirement Investor.

(c) Impartial Conduct Standards. The Adviser and the Financial Institution affirmatively agree to~~, and comply with,~~ the following:

(1) When providing investment advice to the Retirement Investor regarding the Asset, the Adviser and Financial Institution will provide investment advice that is in the Best Interest of the Retirement Investor (i.e., advice that reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, and that places the interests of the plan or IRA ahead of the financial or other interests of the fiduciary and its affiliates.[IV] ~~without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party)~~;

(2) When providing investment advice to the Retirement Investor regarding the Asset, the Adviser and Financial Institution will not recommend an Asset if:

(A) In the case of an Asset that is not an annuity contract, the total amount of compensation anticipated to be received by the Adviser, Financial Institution, Affiliates and Related Entities in connection with the purchase, sale or holding of the Asset by the Plan, participant or beneficiary account, or IRA will exceed reasonable compensation in relation to the total services they provide to the Retirement Investor; or

(B) In the case of an Asset that is an annuity contract, the compensation does not meet the requirements of Section V(c).

(3) The receipt of commission-based compensation and other standard and customary compensation practices shall not be considered a violation of II(c) where such compensation is otherwise reasonable.[V]

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(~~3~~4) The Adviser's and Financial Institution's statements about the Asset, fees, Material Conflicts of Interest, and any other matters relevant to a Retirement Investor's investment decisions, will not be misleading.

(d) ~~Warranties~~Policies and Procedures; Conflict Mitigation. The Adviser and the Financial Institution will adhere to the following: ~~affirmatively warrant the following~~:

~~(1) The Adviser, Financial Institution, and Affiliates will comply with all applicable federal and state laws regarding the rendering of the investment advice, the purchase, sale and holding of the Asset, and the payment of compensation related to the purchase, sale and holding of the Asset;~~ [VI]

(~~2~~1) The Financial Institution has adopted written policies and procedures reasonably designed to mitigate the impact of Material Conflicts of Interest and ensure that its individual Advisers adhere to the Impartial Conduct Standards set forth in Section II(c);

(~~3~~2) In formulating its policies and procedures, the Financial Institution has specifically identified Material Conflicts of Interest and adopted measures to prevent the Material Conflicts of Interest from causing violations of the Impartial Conduct Standards set forth in Section II(c); and

(~~4~~3) Subject to the provisions of paragraph (1) above, n~~N~~either the Financial Institution nor (to the best of its knowledge) any Affiliate or Related Entity will use ~~uses~~ quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, ~~differential compensation~~ or other actions or incentives ~~to the extent theywould tend to~~ which the Financial Institution reasonably believes will encourage individual Advisers to make recommendations that are not in the Best Interest of the Retirement Investor as defined in II(c). Notwithstanding the foregoing, ~~the contractual warranty set forth in this Section II(d)(4) does not prevent~~ the Financial Institution or its Affiliates and Related Entities may ~~from~~ provide~~ing~~ Advisers with differential compensation (whether in type or amount; and, including, but not limited to, commissions and/or ongoing asset-based compensation), based on investments by Plans, participant or beneficiary accounts, or IRAs, provided that the Financial Institution maintains policies and procedures calculated, based upon the Financial Institution's reasonable belief and in consideration of other applicable laws governing any recommendations, to avoid encouraging~~to the extent such compensation would not encourage~~ advice that runs counter to the Best Interest of the Retirement Investor as defined in II(c). For example, ~~(e.g.,~~ differential compensation would be permissible if based on customary commission practices.[VII] ~~would be permissible)~~;

(e) Disclosures. The Retirement Investor must be provided, prior to or concurrent with the execution of any covered transaction resulting from a recommendation described in I(a), a document that ~~written contract~~ must specifically:

(1) Identify and disclose any Material Conflicts of Interest;

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(2) Inform the Retirement Investor that the Retirement Investor has the right to obtain complete information about all the fees currently associated with the Assets in which it is invested, including all of the direct and indirect fees paid payable to the Adviser, Financial Institution, and any Affiliates; and

(3) Disclose to the Retirement Investor whether the Financial Institution offers Proprietary Products or receives Third Party Payments with respect to the purchase, sale or holding of any Asset, and, if applicable, of the address of the Web site required by Section III(~~e~~a) that discloses the compensation arrangements entered into by Advisers and the Financial Institution.

(f) Prohibited Contractual Provisions. The written contract shall not contain the following:

(1) Exculpatory provisions disclaiming or otherwise limiting liability of the Adviser or Financial Institution for a violation of the contract's terms, except that the contract may require the exhaustion of mediation or arbitration prior to filing any claim in a court of law; and

(2) A provision under which the Plan, IRA or Retirement Investor waives or qualifies its right to bring or participate in a class action or other representative action in court in a dispute with the Adviser or Financial Institution except as provided in paragraph (f)(1) above.VIII

Section III--Disclosure Requirements

(a) Transaction Disclosure. ~~(1) Disclosure.~~ Prior to the execution of the transaction involving ~~purchase of~~ an~~the~~ Asset by a Retirement Investor, and periodically thereafter (as applicable under the option selected) for as long as the exemption applies, ~~the Plan, participant or beneficiary account, or IRA,~~ the Adviser furnishes: ~~to the Retirement Investor a chart that provides, with respect to each Asset recommended, the Total Cost to the Plan, participant or beneficiary account, or IRA, of investing in the Asset for 1-, 5- and 10-year periods expressed as a dollar amount, assuming an investment of the dollar amount recommended by the Adviser and reasonable assumptions about investment performance that are disclosed.~~IX

(1) Plan Disclosures. To Retirement Investors who are participants or beneficiaries of a Plan, disclosures required by 29 CFR 2550.404a-5(d); or ~~The disclosure chart required by this section need not be provided with respect to a subsequent recommendation to purchase the same investment product if the chart was previously provided to the Retirement Investor within the past twelve months and the Total Cost has not materially changed.~~

(2) IRA Disclosures. To Retirement Investors who are IRA owners:

(A) For Assets that are registered as securities under the Securities Act of 1933, as amended, fee information and comparative chart(s) required for purposes of Securities and Exchange Commission Form N-1A (open-end management investment companies) or Form N-3 or N-

4 (separate accounts offering variable annuity contracts, combined with a website as described in 29 CFR 2550.404a-5(d);

(B) For Assets that are annuities not subject to subparagraph (A~~i~~) above, a disclosure document that meets the requirements of the National Association of Insurance Commissioners (NAIC) Annuity Disclosure Model Regulation, combined with a website as described in 29 CFR 2550.404a-5(d); and

(C) For Assets not subject to subparagraph (A) or (B) above, disclosures required by 29 CFR 2550.404a-5(d) with respect to the investments actually selected or recommended by the Adviser.

~~(2) Total Cost. The ``Total Cost'' of investing in an Asset means the sum of the following, as applicable:~~

~~(A) Acquisition costs. Any costs of acquiring the Asset that are paid by direct charge to the Plan, participant or beneficiary account, or IRA, or that reduce the amount invested in the Asset (e.g., any loads, commissions, or mark-ups on Assets bought from dealers, and account opening fees, if applicable).~~

~~(B) Ongoing costs. Any ongoing (e.g., annual) costs attributable to fees and expenses charged for the operation of an Asset that is a pooled investment fund (e.g., mutual fund, bank collective investment fund, insurance company pooled separate account) that reduces the Asset's rate of return (e.g., amounts attributable to a mutual fund expense ratio and account fees). This includes amounts paid by the pooled investment fund to intermediaries, such as sub-TA fees, sub-accounting fees, etc.~~

~~(C) Disposition costs. Any costs of disposing of or redeeming an interest in the Asset that are paid by direct charge to the Plan, participant or beneficiary account, or IRA, or that reduce the amounts received by the Plan, participant or beneficiary account, or IRA (e.g., surrender fees, back-end loads, etc., that are always applicable (i.e., do not sunset), mark-downs on assets sold to dealers, and account closing fees, if applicable).~~

~~(D) Others. Any costs not described in (A)-(C) that reduce the Asset's rate of return, are paid by direct charge to the Plan, participant or beneficiary account, or IRA, or reduce the amounts received by the Plan, participant or beneficiary account, or IRA (e.g., contingent fees, such as back-end loads that phase out over time (with such terms explained beneath the table)).~~

~~(3) Model Chart. Appendix II to this exemption contains a model chart that may be used to provide the information required under this Section III(a). Use of the model chart is not mandatory. However, use of an appropriately completed model chart will be deemed to satisfy the requirements of this Section III(a).~~

~~(b) Annual Disclosure. The Adviser or Financial Institution provides the following written information to the Retirement Investor, annually, within 45 days of the end of the applicable year, in a succinct single disclosure:~~

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~~(1) A list identifying each Asset purchased or sold during the applicable period and the price at which the Asset was purchased or sold;~~

~~(2) A statement of the total dollar amount of all fees and expenses paid by the Plan, participant or beneficiary account, or IRA (directly and indirectly) with respect to each Asset purchased, held or sold during the applicable period; and~~

~~(3) A statement of the total dollar amount of all compensation received by the Adviser and Financial Institution, directly or indirectly, from any party, as a result of each Asset sold, purchased or held by the Plan, participant or beneficiary account, or IRA during the applicable period.~~

~~(c) Web page.~~

~~(1) The Financial Institution maintains a Web page, freely accessible to the public, which shows the following information:~~

~~(A) The direct and indirect material compensation payable to the Adviser, Financial Institution and any Affiliate for services provided in connection with each Asset (or, if uniform across a class of Assets, the class of Assets) that a Plan, participant or beneficiary account, or an IRA is able to purchase, hold, or sell through the Adviser or Financial Institution, and that a Plan, participant or beneficiary account, or an IRA has purchased, held, or sold within the last 365 days. The compensation may be expressed as a monetary amount, formula or percentage of the assets involved in the purchase, sale or holding; and~~

~~(B) The source of the compensation, and how the compensation varies within and among Assets.~~

~~(2) The Financial Institution's Web page provides access to the information in (1)(A) and (B) in a machine readable format.~~

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~~Section IV--Range of Investment Options~~

~~(a) General. The Financial Institution offers for purchase, sale or holding, and the Adviser makes available to the Plan, participant or beneficiary account, or IRA for purchase, sale or holding, a range of Assets that is broad enough to enable the Adviser to make recommendations with respect to all of the asset classes reasonably necessary to serve the Best Interests of the Retirement Investor in light of its investment objectives, risk tolerance, and specific financial circumstances.~~

~~(b) Limited Range of Investment Options. Section (a) notwithstanding, a Financial Institution may limit the Assets available for purchase, sale or holding based on whether the Assets are Proprietary Products, generate Third Party Payments, or for other reasons, and still rely on the exemption, provided that:~~

~~(1) The Financial Institution makes a specific written finding that the limitations it has placed on the Assets made available to an Adviser for purchase, sale or holding by Plans, participant and beneficiary accounts, and IRAs do not prevent the Adviser from providing advice~~

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~~that is in the Best Interest of the Retirement Investor (i.e., advice that reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party) or otherwise adhering to the Impartial Conduct Standards;~~

~~(2) Any compensation received in connection with a purchase, sale or holding of the Asset by a Plan, participant or beneficiary account, or an IRA, is reasonable in relation to the value of the specific services provided to the Retirement Investor in exchange for the payments and not in excess of the services' fair market value;~~

~~(3) Before giving investment recommendations to Retirement Investors, the Adviser or Financial Institution gives the Retirement Investor clear written notice of the limitations placed on the Assets that the Adviser may offer for purchase, sale or holding by a Plan, participant or beneficiary account, or an IRA. Notice is insufficient if it merely states that the Financial Institution or Adviser ``may'' limit investment recommendations based on whether the Assets are Proprietary Products or generate Third Party Payments, or for other reasons, without specific disclosure of the extent to which recommendations are, in fact, limited on that basis; and~~

~~(4) The Adviser notifies the Retirement Investor if the Adviser does not recommend a sufficiently broad range of Assets to meet the Retirement Investor's needs.~~

~~(c) ERISA plan participants and beneficiaries. Some Advisers and Financial Institutions provide advice to participants in ERISA-covered participant directed individual account Plans in which the menu of investment options is selected by an Independent Plan fiduciary. In such cases, provided the Adviser and Financial Institution did not provide investment advice to the Plan fiduciary regarding the composition of the menu, the Adviser and Financial Institution do not have to comply with Section IV(a)-(c) in connection with their advice to individual participants and beneficiaries on the selection of Assets from the menu provided. This exception is not available for advice with respect to investments within open brokerage windows or otherwise outside the Plan's designated investment options.~~

Section IV--Disclosure to the Department and Recordkeeping

(a) EBSA Disclosure. Before receiving compensation in reliance on the exemption in Section I, the Financial Institution notifies the Department of Labor of the intention to rely on this class exemption. The notice will remain in effect until revoked in writing by the Financial Institution. The notice need not identify any Plan or IRA.

(b) ~~Data Request. The Financial Institution maintains the data that is subject to request pursuant to Section IX in a manner that is accessible for examination by the Department for six (6) years from the date of the transaction subject to relief hereunder. No party, other than the Financial Institution responsible for complying with this paragraph (b), will be subject to the taxes imposed by Code section 4975(a) and (b), if~~

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~~applicable, if the data is not maintained or not available for examination as required by paragraph (b).~~

(b~~e~~) Recordkeeping. The Financial Institution maintains for a period of six (6) years, in a manner that is accessible for examination, the records necessary to enable the persons described in paragraph (c~~d~~) of this Section to determine whether the conditions of this exemption have been met, except that:

(1) If such records are lost or destroyed, due to circumstances beyond the control of the Financial Institution, then no prohibited transaction will be considered to have occurred solely on the basis of the unavailability of those records; and

(2) No party, other than the Financial Institution responsible for complying with this paragraph (c), will be subject to the civil penalty that may be assessed under ERISA section 502(i) or the taxes imposed by Code section 4975(a) and (b), if applicable, if the records are not maintained or are not available for examination as required by paragraph (d), below.

(c~~d~~) (1) Except as provided in paragraph (~~d~~c)(2) of this Section, and notwithstanding any provisions of ERISA section 504(a)(2) and (b), the records referred to in paragraph (b~~e~~) of this Section are unconditionally available at their customary location for examination during normal business hours by:

(A) Any authorized employee or representative of the Department or the Internal Revenue Service;

(B) Any fiduciary of a Plan that engaged in a purchase, sale or holding of an Asset described in this exemption, or any authorized employee or representative of such fiduciary;

(C) Any contributing employer and any employee organization whose members are covered by a Plan described in paragraph (c~~d~~)(1)(B), or any authorized employee or representative of these entities; or

(D) Any participant or beneficiary of a Plan described in paragraph (B), IRA owner, or the authorized representative of such participant, beneficiary or owner; and

(2) None of the persons described in paragraph (c~~d~~)(1)(B)-(D) of this Section are authorized to examine privileged trade secrets or privileged commercial or financial information, of the Financial Institution, or information identifying other individuals.

(3) Should the Financial Institution refuse to disclose information on the basis that the information is exempt from disclosure, the Financial Institution must, by the close of the thirtieth (30th) day following the request, provide a written notice advising the requestor of the reasons for the refusal and that the Department may request such information.

Section V~~I~~--Insurance and Annuity Contract Exemption

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(a) In general. Insurance contracts and annuities are specialized investments with unique features, such as guaranteed income, and compensation structures that differ from many other securities. This exemption therefore provides specific conditions related to these products.

(b) Fees and Compensation. For the purposes of this exemption, the definition of compensation related to insurance contracts and annuities for financial institutions and advisors shall be limited to those commissions, fees, charges and other forms of compensation required to be disclosed under 29 CFR 2550.408b-2, 29 CFR 2550.404a-5, and PTE 84-24. The receipt of commission-based compensation and other standard and customary compensation practices (e.g., standard forms of revenue-sharing based on either sales or assets under management; deferred compensation or subsidized health or pension benefit arrangements for career agents or other similarly situated individuals; reimbursement for reasonable and necessary marketing, education and professional development expenses) shall not be considered a violation of II(c) where such compensation is otherwise reasonable.[XI]

(c) Reasonable Compensation for Insurance Contracts and Annuities. In providing investment advice regarding an insurance or annuity contract, the combined total of all fees, Insurance Commissions (as defined in PTE 84-24), Mutual Fund Commissions (as defined in PTE 84-24) and other consideration received by the insurance agent or broker, pension consultant, insurance company, or investment company Principal Underwriter (as defined in PTE 84-24) will not exceed reasonable compensation in relation to:

(1) the value of the services provided to the Plan, participant or beneficiary account, or IRA, and

(2) the value of the insurance guarantees or other benefits provided by the Asset.

(d) Policies and Procedures; Conflict Mitigation. Commissions and compensation related to the sale of an insurance or annuity contract shall be provided pursuant to a policy and procedure designed to ensure such commissions and compensation are:

(1) paid in a manner that is reasonable and customary for such insurance and annuity contracts taking into account the total compensation anticipated over the expected duration of the contract; and

(2) no more than reasonable compensation as described in II(c)(2).

(3) Notwithstanding the foregoing:

(A) reasonable and customary deferred compensation or subsidized health or pension benefit arrangements provided to the Adviser, such as typically provided to an "employee" as defined in Code Section 3121(d)(3) (a "statutory employee") shall be considered reasonable and customary under this section; and[XII]

(B) Provided the other requirements of this exemption are met, the fact that an Insurance Commission may be higher than the compensation payable with respect to another investment product or service shall not be evidence of a conflict of interest.

(e) Disclosures. In addition to the disclosures required in Section III, prior to the execution of a transaction involving an insurance or annuity contract, the Adviser furnishes to Retirement Investors who are IRA owners, the following information in writing and in a form calculated to be understood by a plan fiduciary who has no special expertise in insurance or investment matters:

(1) If the agent, broker, or consultant is an Affiliate of the insurance company whose contract is being recommended, or if the ability of the agent, broker or consultant to recommend insurance or annuity contracts is limited by any agreement with the insurance company, the nature of the affiliation, limitation, or relationship;

(2) The Insurance Commission, expressed as a percentage of gross annual premium payments for the first year and for each of the succeeding renewal years, that will be paid by the insurance company to the agent, broker or consultant in connection with the purchase of the recommended contract;

(3) A description of any charges, fees, discounts, penalties or adjustments which may be imposed under the recommended contract in connection with the purchase, holding, exchange, termination or sale of the contract; and

(4) A website as described in 29 CFR 2550.404a-5(d).

(f) Broad Service Provider Relationships. In addition to prohibiting fiduciaries from receiving compensation from third parties and compensation that varies on the basis of the fiduciaries' investment advice, ERISA and the Internal Revenue Code prohibit the purchase by a Plan, participant or beneficiary account, or IRA of an insurance or annuity product from an insurance company that is a service provider to the Plan or IRA. This exemption permits a Plan, participant or beneficiary account, or IRA to purchase an Asset that is an insurance or annuity contract in accordance with an Adviser's advice, from a Financial Institution that is an insurance company and that is a service provider to the Plan or IRA. This exemption is provided because purchases of insurance and annuity products are often prohibited purchases and sales involving insurance companies that have a pre-existing party in interest relationship to the Plan or IRA.

(g~~b~~) Covered transaction. The restrictions of ERISA section 406(a)(1)(A) and (D), and the sanctions imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(A) and (D), shall not apply to a fiduciary's causing the purchase of an Asset that is an insurance or annuity contract by a ~~non-participant-directed~~ Plan subject to Title I of ERISA ~~that has fewer than 100 participants~~, participant or beneficiary account, or IRA, from a Financial Institution that is an insurance company and that is a party in interest or disqualified person, if:

(1) The transaction is effected by the insurance company in the ordinary course of its business as an insurance company;

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(2) The combined total of all fees, ~~and compensation received by the insurance company and any Affiliate is not in excess of reasonable compensation under the circumstances~~Insurance Commissions (as defined in PTE 84-24), Mutual Fund Commissions (as defined in PTE 84-24) and other consideration received by the insurance agent or broker, pension consultant, insurance company, or investment company Principal Underwriter (as defined in PTE 84-24):

(A) for the provision of services to the plan or IRA; and

(B) in connection with the purchase of insurance or annuity contracts or securities issued by an investment company

is not in excess of "reasonable compensation" as described in Section II(c) of this Exemption

(3) The purchase is for cash only; and

(4) The terms of the purchase are at least as favorable to the Plan, participant or beneficiary account, or IRA as the terms generally available in an arm's length transaction with an unrelated party.

(he) Exclusion: The exemption in this Section V~~I~~ does not apply if the Plan is covered by Title I of ERISA, and (i) the Adviser, Financial Institution or any Affiliate is the employer of employees covered by the Plan, or (ii) the Adviser and Financial Institution is a named fiduciary or plan administrator (as defined in ERISA section 3(16)(A)) with respect to the Plan, or an affiliate thereof, that was selected to provide advice to the plan by a fiduciary who is not Independent.

Section VI~~I~~--Exemption for Pre-Existing Transactions

(a) In general. ERISA and the Internal Revenue Code prohibit Advisers, Financial Institutions and their Affiliates and Related Entities from receiving variable or third-party compensation as a result of the Adviser's and Financial Institution's advice to a Plan, participant or beneficiary, or IRA owner. Some Advisers and Financial Institutions did not consider themselves fiduciaries within the meaning of 29 CFR 2510-3.21 before the applicability date of the amendment to 29 CFR 2510-3.21 (the Applicability Date). Other Advisers and Financial Institutions entered into transactions involving Plans, participant or beneficiary accounts, or IRAs before the Applicability Date, in accordance with the terms of a prohibited transaction exemption that has since been amended. This exemption permits Advisers, Financial Institutions, and their Affiliates and Related Entities, to receive compensation, such as 12b-1 fees, in connection with the purchase, sale or holding of an Asset by a Plan, participant or beneficiary account, or an IRA, as a result of the Adviser's and Financial Institution's advice, that occurred prior to the Applicability Date, as described and limited below.

(b) Covered transaction. Subject to the applicable conditions described below, the restrictions of ERISA section 406(a)(1)(D) and 406(b) and the sanctions imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(D), (E) and (F), shall not apply to the receipt of compensation by an Adviser, Financial Institution, and any Affiliate and

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Related Entity, for services provided in connection with the purchase, holding or sale of any securities or other property ~~Asset~~, as a result of the Adviser's and Financial Institution's advice, that was purchased, sold, or held by a Plan, participant or beneficiary account, or an IRA before the Applicability Date if:

(1) The compensation is not excluded pursuant to Section I(c) of the Best Interest Contract Exemption;

(2) The compensation is received pursuant to an agreement, arrangement or understanding that was entered into prior to the Applicability Date, and that has not expired or come up for renewal after the Applicability Date; and

~~(3) The Adviser and Financial Institution do not provide additional advice to the Plan regarding the purchase, sale or holding of the Asset after the Applicability Date; and~~ XIII

(4) The transaction ~~purchase or sale of the Asset~~ was not a non-exempt prohibited transaction pursuant to ERISA section 406 and Code section 4975 on the date it occurred.

Section VII~~I~~--Definitions

For purposes of these exemptions:

(a) ``Adviser'' means an individual who:

(1) Is a fiduciary of a Plan or IRA solely by reason of the provision of investment advice described in ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B), or both, and the applicable regulations, with respect to the Assets involved in the transaction;

(2) Is an employee, independent contractor, agent, or registered representative of a Financial Institution; and

(3) Satisfies the applicable federal and state regulatory and licensing requirements of insurance, banking, and securities laws with respect to the covered transaction.

(b) ``Affiliate'' of an Adviser or Financial Institution means—

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the Adviser or Financial Institution. For this purpose, ``control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual;

(2) Any officer, director, employee, agent, registered representative, relative (as defined in ERISA section 3(15)), member of family (as defined in Code section 4975(e)(6)) of, or partner in, the Adviser or Financial Institution; and

(3) Any corporation or partnership of which the Adviser or Financial Institution is an officer, director or employee or in which the Adviser or Financial Institution is a partner.

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(c) An ``Asset,'' for purposes of this exemption, includes cash, securities, and other property.[XIV] ~~only the following investment products: Bank deposits, certificates of deposit (CDs), shares or interests in registered investment companies, bank collective funds, insurance company separate accounts, exchange-traded REITs, exchange-traded funds, corporate bonds offered pursuant to a registration statement under the Securities Act of 1933, agency debt securities as defined in FINRA Rule 6710(l) or its successor, U.S. Treasury securities as defined in FINRA Rule 6710(p) or its successor, insurance and annuity contracts, guaranteed investment contracts, and equity securities within the meaning of 17 CFR 230.405 that are exchange-traded securities within the meaning of 17 CFR 242.600. Excluded from this definition is any equity security that is a security future or a put, call, straddle, or other option or privilege of buying an equity security from or selling an equity security to another without being bound to do so.~~

(d) Investment advice is in the ``Best Interest'' of the Retirement Investor when the Adviser and Financial Institution providing the advice act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, and that places the interests of the plan or IRA ahead of the financial or other interests of the fiduciary and its affiliates.~~without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party~~.

(e) ``Financial Institution'' means an~~the~~ entity that is an "affiliate" (as defined in ERISA regulation section 2510.3-21(f)(7) of the Adviser who, together with the Adviser, functions as a fiduciary under ERISA for purposes of the covered transaction.[XV] ~~employs the Adviser or otherwise retains such individual as an independent contractor, agent or registered representative and that is:~~

~~(1) Registered as an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b-1 et seq.) or under the laws of the state in which the adviser maintains its principal office and place of business;~~

~~(2) A bank or similar financial institution supervised by the United States or state, or a savings association (as defined in section 3(b)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1)), but only if the advice resulting in the compensation is provided through a trust department of the bank or similar financial institution or savings association which is subject to periodic examination and review by federal or state banking authorities;~~

~~(3) An insurance company qualified to do business under the laws of a state, provided that such insurance company:~~

~~(A) Has obtained a Certificate of Authority from the insurance commissioner of its domiciliary state which has neither been revoked nor suspended,~~

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~~(B) Has undergone and shall continue to undergo an examination by an Independent certified public accountant for its last completed taxable year or has undergone a financial examination (within the meaning of the law of its domiciliary state) by the state's insurance commissioner within the preceding 5 years, and~~

~~(C) Is domiciled in a state whose law requires that actuarial review of reserves be conducted annually by an Independent firm of actuaries and reported to the appropriate regulatory authority; or~~

~~(4) A broker or dealer registered under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.).~~

(f) ``Independent'' means a person that:

(1) Is not the Adviser, the Financial Institution or any Affiliate relying on the exemption,

(2) Does not receive compensation or other consideration for his or her own account from the Adviser, the Financial Institution or Affiliate; and

(3) Does not have a relationship to or an interest in the Adviser, the Financial Institution or Affiliate that might affect the exercise of the person's best judgment in connection with transactions described in this exemption.

(g) ``Individual Retirement Account'' or ``IRA'' means any trust, account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code.

(h) A ``Material Conflict of Interest'' exists when an Adviser or Financial Institution has a material financial interest that could affect the exercise of its best judgment as a fiduciary in rendering advice to a Retirement Investor regarding an Asset.

(i) ``Plan'' means any employee benefit plan described in section 3(3) of the Act and any plan described in section 4975(e)(1)(A) of the Code.

(j) ``Proprietary Product'' means a product that is managed by the Financial Institution or any of its Affiliates.

(k) ``Related Entity'' means any entity other than an Affiliate in which the Adviser or Financial Institution has an interest which may affect the exercise of its best judgment as a fiduciary.

(l) ``Retirement Investor'' means—

(1) A participant or beneficiary of a Plan subject to Title I of ERISA with authority to direct the investment of assets in his or her Plan account or to take a distribution,

(2) The beneficial owner of an IRA acting on behalf of the IRA, or

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(3) A plan sponsor as described in ERISA section 3(16)(B) (or any employee, officer or director thereof), of a ~~non-participant-directed~~ Plan subject to Title I of ERISA ~~that has fewer than 100 participants~~, to the extent it acts as a fiduciary with authority to make investment decisions for the Plan.

(m) ``Third-Party Payments'' mean sales charges when not paid directly by the Plan, participant or beneficiary account, or IRA, 12b-1 fees and other payments paid to the Financial Institution or an Affiliate or Related Entity by a third party as a result of the purchase, sale or holding of an Asset by a Plan, participant or beneficiary account, or IRA.

~~Section IX--Data Request~~ XVI

~~Upon request by the Department, a Financial Institution that relies on the exemption in Section I shall provide, within a reasonable time, but in no event longer than six (6) months, after receipt of the request, the following information for the preceding six (6) year period:~~

~~(a) Inflows. At the Financial Institution level, for each Asset purchased, for each quarter:~~

~~(1) The aggregate number and identity of shares/units bought;~~

~~(2) The aggregate dollar amount invested and the cost to the Plan, participant or beneficiary account, or IRA associated with the purchase;~~

~~(3) The revenue received by the Financial Institution and any Affiliate in connection with the purchase of each Asset disaggregated by source; and~~

~~(4) The identity of each revenue source (e.g., mutual fund, mutual fund adviser) and the reason the compensation was paid.~~

~~(b) Outflows. At the Financial Institution level for each Asset sold, for each quarter:~~

~~(1) The aggregate number of and identity of shares/units sold;~~

~~(2) The aggregate dollar amount received and the cost to the Plan, participant or beneficiary account, or IRA, associated with the sale;~~

~~(3) The revenue received by the Financial Institution and any Affiliate in connection with the sale of each Asset disaggregated by source; and~~

~~(4) The identity of each revenue source (e.g., mutual fund, mutual fund adviser) and the reason the compensation was paid.~~

~~(c) Holdings. At the Financial Institution level for each Asset held at any time during each quarter:~~

~~(1) The aggregate number and identity of shares/units held at the end of such quarter;~~

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~~(2) The aggregate cost incurred by the Plan, participant or beneficiary account, or IRA, during such quarter in connection with the holdings;~~

~~(3) The revenue received by the Financial Institution and any Affiliate in connection with the holding of each Asset during such quarter for each Asset disaggregated by source; and~~

~~(4) The identity of each revenue source (e.g., mutual fund, mutual fund adviser) and the reason the compensation was paid.~~

~~(d) Returns. At the Retirement Investor level:~~

~~(1) The identity of the Adviser;~~

~~(2) The beginning-of-quarter value of the Retirement Investor's Portfolio;~~

~~(3) The end-of-quarter value of the Retirement Investor's Portfolio; and~~

~~(4) Each external cash flow to or from the Retirement Investor's Portfolio during the quarter and the date on which it occurred.~~

~~For purposes of this subparagraph (d), ``Portfolio'' means the Retirement Investor's combined holding of assets held in a Plan account or IRA advised by the Adviser.~~

~~(e) Public Disclosure. The Department reserves the right to publicly disclose information provided by the Financial Institution pursuant to subparagraph (d). If publicly disclosed, such information would be aggregated at the Adviser level, and the Department would not disclose any individually identifiable financial information regarding Retirement Investor accounts.~~

Endnote Comments Regarding Edits

I We ask that the Department make the Best Interest Contract Exemption available for all plans, not just small, non-participant-directed plans. The fiduciaries of all plans would benefit from the option to use this exemption in connection with advice they receive. We note that further revisions are necessary to this definition so as to not inadvertently exclude plan sponsors and plan participants of "Keogh" plans which are not subject to Title I of ERISA but are "Plans" subject to the prohibited transaction rules of Code Section 4975.

II We ask that the Department replace the warranties in the contract with contract terms. We do not generally object to the substance of these provisions except for the revisions as noted below, but we do object to their characterization as warranties. A contract provision binding advisors and financial institutions equally serves the Department's purpose in providing a framework to hold advisors accountable. While state law governing contract provisions is reasonably uniform, allowing financial institutions and advisors some certainty in assessing the potential legal liability presented by the exemption, some states treat a breach of warranty as a tort rather than a contract dispute. This can result in significantly different litigation risks and

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standards from state to state. This additional uncertainty does not provide additional protection to participants and IRA owners, but it does increase the costs they ultimately bear, and reduces the likelihood that the exemption will be used as the Department intends.

[III] We ask that the Department clarify that the contract may be provided prior to execution of a transaction and apply retroactively to preceding discussions, rather than being required before any substantive discussions have taken place. We believe this change will be important in making the exemption useful for participants and IRA owners, who otherwise will be unlikely to sign a contract their advisor requires, especially as the participant or IRA owners may not yet even have decided to engage the advisor. We also ask that the proposed language be modified to permit a unilateral contract presented by and binding on the advisor or financial institution. We believe this alternative is necessary to better serve the needs of participants and IRA owners. A unilateral contract is equally enforceable and it must contain all of the same provisions, but it does not require obtaining a physical or electronic signature from the advice recipient, something that can pose a logistical challenge and become an unnecessary barrier in practical operations.

[IV] We ask that the Department modify the language describing the Best Interest standard as we have indicated. The "without regard" language is simply too restrictive to permit proprietary funds or common compensation arrangements, such as commissions related to insurance contracts and annuities, that the Department intends the Best Interest Contract Exemption to permit within the framework of the exemption. The suggested language captures the Department's purpose in proposing the exemption, and requires that the client's interests be put before the advisor's interests.

[V] We ask that the Department modify the exemption language to expressly permit the reasonable and customary use of commissions to compensate advisors recommending annuity contracts. The traditional insurance commission is actually less costly over the term of the contract than a typical investment advice fee would be—the fact that a larger portion of that commission is paid at the time of the sale should not be the basis for a bias against insurance and annuity products in the exemption.

[VI] We ask that the Department remove this condition because it does not provide any additional safeguards for participants and IRA owners as advisors and financial institutions must already comply with applicable laws. Our concerns is that these laws include a great many details that are completely unrelated to the Department's concerns regarding conflicts and acting in the best interest of the advice recipient. Given the sheer scope of such laws, it is very likely that minor compliance issues unrelated to any conflict, and that can cause no harm to the advice recipient, will periodically be the subject of enforcement actions by the wide array of Federal and State regulators. For example, a securities, insurance or bank examination is likely to result in minor corrections of various kinds in the normal course of operations for nearly every financial institution. Causing all of those technical "foot faults" routinely addressed in ordinary oversight interactions with various regulators to be a potential breach of contract, despite no effect or harm on the advice recipient, results in significant legal risk related to the contract. Such issues should not be a basis for liability under the contract, especially given that compliance with all such laws is already required of every financial institution.

[VII] We ask that the Department modify the language to reflect the traditional forms of commission-based compensation paid by insurance and annuity contracts, and our suggested language ensures that such commissions are consistent with acting in the best interest of the advice recipient. The timing of the payments related to insurance products should not put them at a disadvantage relative to compensation methods for fee-based advice. As discussed above, the traditional insurance commission results in lower costs for the advice recipient over the life of the contract than would a typical fee-based advice arrangement. Our language permits these traditional compensation methods but ensures that the best interest of the advice recipient is put first.

[VIII] We ask the Department to permit the contract to require the exhaustion of arbitration or mediation prior to pursuing a claim in court. This is consistent with ERISA benefit claims, and serves to protect participants and IRA owners from the extensive costs, delays, and risks of litigation by providing a fair opportunity for concerns to be resolved.

[IX] The disclosures in the proposed exemption would be extremely costly to participants and IRA owners, requiring recoupment of millions of dollars in IT costs incurred to revise information collection and present it in the very specific forms the Department proposed. Further, some of the provisions appear to conflict with securities law and regulation. We ask the Department to consider our suggestion for a set of disclosures that are modeled on existing securities and ERISA disclosures, combining the information in a way that will ensure advice recipients receive the information they need to make informed decisions.

[X] We ask the Department to remove the Section regarding the limited range of investment products. While we appreciate that it could address issues presented by some proprietary products, our recommended language elsewhere in this draft better addresses these concerns. The limited range idea is conceptually troubling. It seems to suggest that product providers must cover the waterfront of investment alternatives for their agents to sell products to Retirement Investors, effectively precluding offering only specialized products, like annuities and insurance contracts. In effect, the limited range concept serves to preclude certain providers from participating in the market regardless of the quality of the products.

[XI] We ask that the Department adopt language clarifying that the type of fee and compensation information to be disclosed regarding insurance and annuity contracts is consistent with the Department's other disclosure regulations and exemptions. Our request is that the

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Department clearly state that there is no change in how such fees, compensation, investment returns and so forth are calculated. Without this clarification, we are concerned that courts and others will apply different definitions, such as treating spread as a form of disclosable compensation, substituting their judgment for the Department's considered determinations regarding insurance products reflecting decades of careful study. See Q and A 22 of the 2009 Form 5500 Schedule C Frequently Asked Questions (which has been interpreted to require disclosure on Schedule C of reductions in an insurance contract's crediting rate to cover plan recordkeeping expenses, but to not require disclosure of spread). See also DOL Regulation Section 2550.408b-2(c)(1)(iv)(E) and (F) which require disclosure of operating expenses only for investments that do not have fixed returns, and DOL Regulation Section 2550.404a-5(d)(1)(iv)(B), which requires only disclosure of "shareholder-type fees" such as surrender charges, and liquidity restrictions.

[XII] We ask that the Department modify the language to reflect the traditional forms of commission-based compensation paid by insurance and annuity contracts, and our suggested language ensures that such commissions are consistent with acting in the best interest of the advice recipient. The timing of the payments related to insurance products should not put them at a disadvantage relative to compensation methods for fee-based advice. As discussed above, the traditional insurance commission results in lower costs for the advice recipient over the life of the contract than would a typical fee-based advice arrangement. Our language permits these traditional compensation methods but ensures that the best interest of the advice recipient is put first. We also suggest language addressing the need for statutory employees to receive employee benefits. These traditional employment arrangements are common in the insurance industry, and are expressly addressed in the Tax Code. The proposed exemption could have made the employee benefits received by these employees a form of prohibited compensation—this suggestion ensures these employee benefits can be provided. As these benefits are not linked to any particular contract or investment, there is no reason for the Department to perceive these employee benefits as presenting a conflict of interest.

[XIII] We ask that the Department provide a transition rule in the exemption that protects the expectations of participants, IRA owners, advisors and financial institutions, all of whom made valid contracts under current law. Those reasonable expectations are thwarted if the Department mandates reformation of all existing contracts. While we appreciate the idea of the "grandfather" clause in the exemption, it must be modified to in several respects. First, rather than permitting arrangements to continue only until they result in new advice, the exemption should permit all existing arrangements prior to the applicability date to continue until their expiration or renewal. This will provide an orderly transition, as all new contracts must abide by the new rules, and all renewed arrangements must abide by the new rules. This both preserves the expectations of participants and IRA owners and ensures rapid adoption of the new rule.

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[XIV] We ask the Department to remove the list of assets eligible for the exemption. This list does not provide any additional protection from conflict, and it requires all new products to seek an individual exemption to be eligible for the Best Interest Contract Exemption. Given the pace of innovation in annuity and insurance products as the industry tries to develop new and better retirement income solutions that better serve the needs of participants and IRA owners, we are concerned that some new products might be precluded from being utilized under the exemption. As the individual exemption process is quite lengthy, this could significantly delay introduction of new retirement income solutions to the marketplace.

[XV] We ask that the Department modify the definition of financial institution so that only those entities that are fiduciaries under the definition of fiduciary would be fiduciaries for purposes of the exemption. Entities that, under the statutory definition of a fiduciary, would not be treated as a fiduciary under the definition of fiduciary should not be required to accept such status under the exemption.

[XVI] The collection of investor-level information will be enormously expensive for service providers, a cost that ultimately will be borne by the IRA owners. Advisor performance data is not a proxy for the prudence of advice, and such performance data will be meaningless when aggregated across different investors with different needs utilizing different investment options. For example, providing advisor performance data does not make sense for annuity products with guaranteed returns—the primary purpose of the product is providing guaranteed retirement income, not generating "better" investment returns for IRA owners.

Appendix C – Statutory Employee Information

Background on Statutory Employees

Generally, workers are classified for tax purposes as either employees or independent contractors. A statutory employee is an independent contractor who is treated as an employee for certain tax purposes. The following provides an overview of the differences between employees and independent contractors as well as the requirements to be a statutory employee.

Employee vs. Independent Contractor

Whether an individual is an employee or an independent contractor for tax purposes depends on the level of direction and control retained by the service recipient. Specifically, in an employment relationship, the employer directs and controls the work performed as well as the methods employed to perform required tasks. In an independent contractor relationship, the worker is self-employed and controls the manner and means by which contracted services, products or results are achieved.

The determination of whether a worker is an employee or an independent contractor has significant tax consequences for both the worker and the service recipient as shown in the following table:

Tax Feature	Employment Relationship	Independent Contractor Relationship
Federal Insurance Contributions Act ("FICA") Tax / Self-Employment Contributions Act ("SECA") Tax	Employee and Employer split the FICA tax. Each pay 7.65% of wages up to the Social Security Wage Base ($118,500 for 2015), 1.45% of wages thereafter.	Independent Contractor pays entire SECA tax of 15.3% of wages up to the Social Security Wage Base, 2.9% thereafter. Receives income tax deduction equal to half the tax paid.
Federal Income Tax Withholding	Applies to all wages	N/A
Federal Unemployment Tax	Employer pays 6% tax on first $7,000 of wages paid	N/A
Tax Qualified Health, Life Insurance, Pension, 401(k) and Cafeteria Plans	Employees are eligible to participate	**Independent Contractors are NOT eligible to participate unless they qualify as "Full-Time Life Insurance Salesmen" - a type of statutory employee as described below**

In the employment context, the additional tax and withholding obligations placed on a service recipient, and the additional benefits provided to the worker, reflect that employers and employees generally have an ongoing close relationship whereas service recipients and independent contractors typically work together on a more transactional basis.

Statutory Employees in General

In 1950, the definition of the term "employee" for purposes of the Social Security Program and its related FICA tax was expanded to include independent contractors in certain occupational categories who, although they are not employees under the direction and control analysis described above, generally maintain a closer relationship with their service recipients than other types of independent contractors.[1] Based on this distinction, these "statutory employees" must be treated as if they were employees for purposes of the FICA tax. Thus, the statutory employee's service recipient is required to withhold FICA

[1] Tax Code Section 3121(d)

tax from the statutory employee's compensation and pay the corresponding employer tax. The statutory employee is not required to pay SECA tax on that compensation.

Background on "Full-Time Life Insurance Salesman"

Definition

A "full-time life insurance salesman" ("FTLIS") is one of the occupational categories of statutory employees. A FTLIS is defined by Treasury Regulations as "An individual whose entire or principal business activity is devoted to the solicitation of life insurance or annuity contracts, or both, primarily for one life insurance company." [2] Internal Revenue Service guidance provides that an insurance agent will be deemed to be a FTLIS agent when, "pursuant to the terms and conditions of his arrangement with the life insurance company or its general agent, it is mutually agreed or clearly contemplated by the parties that the salesman's entire or principal business activity is the solicitation of application for life insurance or annuity contracts...for the life insurance company."[3] Insurance companies making a determination as to whether an agent meets the FTLIS requirements will look to the terms of his or her agreement and may use production tests based on sales of the company's proprietary products as a factor to confirm that an agent is, in fact, acting in accordance with his or her agreement.

The FTLIS definition is geared towards "career agents" of insurance companies who sell the proprietary products of their career company. As described in MassMutual's comment letter regarding the proposed fiduciary rules submitted July 21, 2015, "career agents agree to primarily represent one insurance company and principally sell and service that company's insurance and annuity products...career agents also receive substantial training and education support from the insurance company they represent. The career agent model seeks to foster a long-term relationship between the insurance company and its customers – a relationship that is maintained by a highly-trained, well supervised agent and that is beneficial to both the customer and the company."

Receipt of Benefits by FTLIS Agents

Tax Code Section 7701(a)(20) recognizes the unique relationship between FTLIS agents and their associated insurance companies and furthers a strong public policy in favor of providing health and welfare benefits to the working American public by providing that FTLIS agents are treated as if they were employees of their associated insurance company for purposes of certain tax-qualified benefit plans including group-term life insurance plans, accident and health plans, pension and 401(k) plans and cafeteria plans. Accordingly, FTLIS agents are eligible for these benefits despite the fact that they are independent contractors and would not otherwise be permitted to participate in these plans.

Life insurance companies with FTLIS agents rely on this provision of the Tax Code to provide their FTLIS agents with qualified health, welfare and retirement benefits. For example, a company may allow FTLIS agents to participate in their qualified health, welfare and retirement plans and may provide 401(k) employer contributions or life insurance and disability insurance coverage based on the amount of the agent's proprietary commissions. A company may also use FTLIS status as a basis for eligibility in nonqualified plans such as nonqualified deferred compensation plans or equity programs.

Concern Related to the Best Interest Contract Exemption ("BIC Exemption")[4]

Concern

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[2] Treasury Regulation Section 31.3121(d)-1

[3] IRS Revenue Ruling 54-312

[4] Note that the concerns and proposed solutions discussed herein relate solely to the conflict between the proposed BIC Exemption and the Tax Code provisions related to Full-Time Life Insurance Salesmen. Other concerns and proposed solutions related to the exemption have been addressed in separate comment letters submitted by members of this group.

Appendix C – Statutory Employee Information

We are concerned that the BIC Exemption could be construed to preclude life insurance companies with career agents who sell to retirement investors from providing important health, welfare and retirement benefits to the agents and their families, effectively nullifying the FTLIS provisions of the Tax Code for those agents. As further described below, this concern derives from the exemption's formulation of "Best Interest," and the warranty and range of investment options requirements. We believe these requirements could be construed to fundamentally conflict with FTLIS status for agents selling to retirement investors in various ways.

First, the BIC Exemption requires that the adviser affirmatively agree to provide investment advice that is in the "Best Interest of the Retirement Investor ..... without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party." The phrase "without regard to" could be construed in litigation or arbitration to prohibit the sale of proprietary products to retirement investors entirely.

Second, the BIC Exemption requires that the BIC include a warranty stating that the financial institution does not use "quotas...differential compensation or actions or incentives to the extent they would tend to encourage individual Advisers to make recommendations that are not in the Best Interest of the Retirement Investor." This warranty could be construed to prohibit insurance companies from looking at production tests based on proprietary sales (including such sales to retirement investors) as a factor in determining FTLIS status because a company doing so could be accused of implementing a quota that tended to encourage an adviser to recommend a proprietary product. The warranty could similarly be construed to prohibit insurance companies from providing benefit plan coverage based on proprietary sales (including such sales to retirement investors) in accordance with the Tax Code.

Third, the BIC Exemption provides that an adviser must make available "a range of assets that is broad enough to enable the Adviser to make recommendations with respect to all of the asset classes reasonably necessary to serve the Best Interests of the Retirement Investor." This requirement could be construed to prohibit insurance agents selling to retirement investors from agreeing with an insurance company that their entire or principal business activity will be devoted to the solicitation of proprietary life insurance and annuity products, the very definition of a FTLIS agent.

Proposed Solution

We have provided proposed solutions to these issues in our proposed markup to the BIC Exemption in Appendix B attached to this comment letter.