MUTUAL OF AMERICA

MUTUAL OF AMERICA
LIFE INSURANCE COMPANY

320 PARK AVENUE
NEW YORK NY 10022-6839
212 224 1566

NICHOLAS S. CURABBA
SENIOR VICE PRESIDENT & ASSOCIATE GENERAL COUNSEL

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Mailed Electronically

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Conflict of Interest Rule, Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Subject: Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice (RIN 1210-AB32)

Mutual of America Life Insurance Company ("Mutual of America") is pleased to provide its comments on the proposed regulation promulgated under Sections 3(21)(A)(ii) the Employee Retirement Income Security Act of 1974, as amended ("ERISA") (collectively, the "Proposed Regulation"). Mutual of America participated in the drafting and fully endorses the comment letter submitted by the American Council of Life Insurers, and this comment letter should not be read to be inconsistent with or contrary to the significant concerns detailed therein. Mutual of America writes separately to register an additional concern which we believe the Department of Labor (the "Department") must address before proceeding to a final regulation.

Mutual of America Life Insurance Company is a mutual life insurance company organized under the New York Insurance Law. The Company is licensed and authorized to transact business in all fifty states and the District of Columbia. As a mutual company, it is organized, maintained and operated for the benefit of its policyowners. It is subject to regulation by the New York State Department of Financial Services as well as the insurance regulatory authorities of the the 49 other states and the District of Columbia.

The majority of Mutual of America's in-force business and new sales consists of annuity contracts, primarily group variable accumulation annuity contracts to fund tax qualified defined contribution retirement savings plans such as 401(k) pension plans and 403(b) thrift pension plans that seek to provide small-to-medium size employers and their employees with standardized features and a high degree of flexibility in managing their retirement savings. In addition, the Company makes available group and individual life insurance and group long-term disability income insurance.

For individuals, the Company also offers individual retirement annuities ("IRA") and nonqualified flexible premium annuities ("FPA"). The IRA is a variable accumulation annuity contract that is made available to individuals where contributions are eligible for tax deductibility, where only earnings are tax deferred and to individuals who are eligible to roll over amounts from their employer's pension plan due to an in service distribution; upon retirement; termination of employment; or as a distribution of an eligible death benefit. The FPA is a nonqualified individual variable accumulation annuity contract for long range savings, generally not associated with any tax-qualified pension plan or other retirement savings arrangement. The FPA contains similar features as the Company's individual IRA annuity contract, except that there is no tax deductibility on amounts contributed to the contract, but there is tax deferral on any appreciation of funds accumulated under the annuity contract until withdrawal.

Importantly, the Company's group and individual variable accumulation annuity contracts, do not have "front-end" charges on premiums, contributions or transfers, or "back-end" charges or surrender penalties on withdrawals, or market value reductions. In addition, the Company's variable accumulation contracts do not have secondary guarantee elements, market value adjustment features, equity index features, bonuses, persistency enhancements, a-typical conversion or renewal options, bailout features, premium refund features, additional insurance options, a-typical liquidity features, products or riders often packaged with a given product, a-typical settlement options, commutation options or optional benefits. During the accumulation phase, the Company's variable accumulation annuity contracts generally permit transfers to and from the fixed interest accumulation of the Company's general account and the investment funds of the separate accounts or among the investment funds of the separate accounts, without charge or restriction, subject to compliance with the Company's and the investment company funds' frequent transfer policies that are consistent with SEC Rule 22c-2. There are no tax consequences for any transfers.

In addition to regulation under state insurance laws, the Company's variable annuity products are subject to registration as securities under federal securities law and, as a result, Mutual of America is registered as a broker/dealer with the Securities and Exchange Commission (SEC) and is a member of FINRA, a securities industry self-regulatory organization, in order to facilitate the distribution of its variable accumulation annuity contracts and individual variable universal life insurance.

Assets contributed to the Company's group and individual variable contracts may be allocated to the Company's General Account or to the one of the Company's three Separate Accounts. Two of Mutual of America's separate accounts, Separate Accounts No. 2 and No. 3, are registered with the SEC as unit investment trusts, because the variable annuity and variable life insurance contracts for these separate accounts are not exempt from registration under the federal securities laws. Separate Account No. 1 is available for group annuity contracts that fund tax-qualified pension plans and is exempt from registration under the securities laws, but is also structured as a unit investment trust. The Separate Accounts invest solely in the shares of funds of ten designated investment companies, including shares of the Mutual of America Investment

Corporation, which are only distributed to the Mutual of America Separate Accounts and the Separate Accounts of a former subsidiary that are administered by Mutual of America. The menu of mutual funds offered under the Mutual of America contracts is the same for all contract holders and plan participants. The Company offers a total of 38 investment alternatives, excluding the General Account, which the Company believes are suitable and appropriate for retirement savings. Twenty-four of the funds, including 10 funds in a target date retirement series, are proprietary funds offered by Mutual of America Investment Company. The 14 other funds offered are from nine other investment companies.

Mutual of America distributes its group and individual products nationally directly through salaried sales representatives employed by the Company and located in 34 Regional Offices. The sales representatives are not permitted to sell any products offered by other insurers. The Company does not distribute products through independent brokers, agents, financial planners or registered investment advisers and does not pay commissions. All sales representatives are paid an annual salary based upon their assigned responsibilities and experience and, like all Company employees, are eligible for an annual incentive compensation award, which will vary based upon certain performance factors, including new sales and asset retention. In addition, as employees of Mutual of America, our registered representatives can sell only Mutual of America products and do not offer any other securities or non-securities products. The recommendations our employees make to customers are, therefore, purely incidental to the sale of the product and are representations of the benefits and value of the product. Mutual of America's sales representatives do not make recommendations to its customers regarding allocation of their assets amongthe Separate Account investment funds or the General Account.

In the preamble to the Proposed Regulation, the Department recognizes the importance of preserving the non-fiduciary treatment of sales activity that are part of arm's length transactions where neither side can reasonably assume the seller is acting as an impartial trusted adviser. We are concerned that, despite the intentions expressed by the Department in the preamble to the Proposed Regulation, the operative language of the "counter-party carve-out" is not sufficiently broad enough to encompass all sales activity in situations where no reasonable person would expect that the salesperson is providing impartial advice.

In particular, in situations where the individual salesperson is a salaried employee of a financial institution and is authorized to sell only the products of such institution, sales activity of such employee should not be considered fiduciary investment advice when there is no individual financial incentive to the salesperson. Such sales activity routinely involves representations and education regarding the value and benefits of the offered products. Such representations are not, however, offered as impartial investment advice. As with the transactions contemplated by the counterparty carve-out, the retirement investor in such situations understands that he or she is purchasing an investment product, not advice regarding how the product compares to the universe of available non-proprietary investments. The advice received is, in fact, incidental advice due to the person's status as an employee or agent of the manufacturer of the available investments, rather than fiduciary investment advice. Moreover, salaried employees who are

authorized to sell only proprietary products are already in a representational relationship with their employer. Imposing on these employees the requirement to engage in a type of dual representation would be inconsistent with the obligations and duties they have as employees.

Accordingly, we respectfully request the Department to recognize that salaried, non-commissioned salespeople cannot be presumed to be providing impartial investment advice, and cannot be deemed to be investment advice fiduciaries under the proposed rule.

Further, we also request that the Department provide further clarification with respect to the Proposed Regulation's fiduciary investment advice platform provider carve-out.[1] As noted in the Preamble to the Proposed Regulation, the Department recognizes the utility of the carve-out for platform providers for the "effective and efficient operation of plans." It is our understanding that a "platform or similar mechanism" under this carve-out includes a group variable annuity insurance contract. Otherwise, insurance companies such as Mutual of America would be severely disadvantaged as compared to other plan service providers. Further, we also believe the carve-out covers plan service providers that merely market and make available a platform of predefined investment options as selected by the plan sponsor on a take-it or leave-it basis, provided that the arrangement permits the plan sponsor to terminate such contract on short notice without penalty. Similar arrangements have previously been reviewed by the Department and have not resulted in the service provider being deemed a fiduciary under ERISA.[2] In addition to the foregoing clarification, we believe the Department should preserve the platform provider carve-out for all plan sizes in the final regulation, regardless of asset size, as contemplated in the Proposed Regulation, and should extend the carve-out to sales of IRAs. Adequate protection is provided to small plans and IRAs due to the disclosures that are required of providers relying on this exception, and excluding small plans and IRAs from the platform provider carve-out is likely to disadvantage smaller employers and small investors who may find it difficult to obtain the products and service they require if providers are subject to a fiduciary standard.

Thank you for the opportunity to comment on the Proposed Regulation.

Sincerely,

Nicholas S. Curabba

[1] DOL Proposed Regulation § 2510.3–21(b)(3) (2015).
[2] See, *e.g.*, 29 C.F.R. 2550.408b-2(c); DOL Advisory Opinion 2003-09A; DOL Advisory Opinion 1997-16A.