



*Tracy L. Rich
Executive Vice President &
General Counsel*

July 21, 2015

Submitted electronically
e-ORI@dol.gov
e-OED@dol.gov

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

Office of Exemption Determinations
Employee Benefits Security Administration
(Attention: D-11712)
U.S. Department of Labor
200 Constitution Avenue NW, Suite 400
Washington, DC 20210

Re: Definition of the Term Fiduciary (RIN 1210-AB32)
Best Interest Contract Exemption (ZRIN 1210-ZA25)
Amendment of PTE 84-24 (ZRIN 1210-ZA25)

Ladies and Gentlemen:

On behalf of The Guardian Life Insurance Company of America (“Guardian”) and its affiliates, we are pleased to submit this comment letter regarding the Department of Labor’s proposed changes to the definition of “fiduciary” under the Employee Retirement Income Security Act, as amended (“ERISA”) and the Internal Revenue Code of 1986, as amended (the “Code”), the proposed introduction of two new exemptions, including the best interest contract exemption, and the proposed changes to class exemptions on which Guardian and other insurance companies rely (the “Proposal”).

We understand the efforts of the Department of Labor (the “Department”) in seeking to protect the interest of retirement savers. Guardian generally supports the concept of a best interest standard for individuals and their affiliated entities who act as investment advice fiduciaries to ERISA plans, plan participants and IRA owners. However, we believe that the Proposal as drafted has numerous unintended consequences that would significantly limit the availability of retirement information and products that provide guaranteed lifetime income options to Americans who are seeking to plan for retirement.

America is in the midst of a retirement crisis. The United States Social Security Administration and the Pew Research Center reported in 2010 and 2011 that until about the year 2030, 10,000 additional people will reach retirement age every day. By 2030, projections are that 80 million people, or roughly 18 percent of the total projected US population, will be living in retirement.¹ While Americans are living longer than ever before, the National Institute on Retirement Security reported in 2013 that “60 percent of working households approaching retirement have less than their annual income saved in retirement accounts.”²

Americans today need more information and opportunities to save for retirement, not less. Public policy makers should be making it easier, not harder, for small businesses to provide retirement options to employees. In this letter, we discuss the changes we believe need to be made in order to appropriately balance the Department’s intent of protecting retirement savers while ensuring that American workers can still choose the retirement products that they want, that are appropriate to their circumstances, and that are from financially strong institutions.

In particular, **Guardian urges the Department to focus on the following areas** when considering comments on how to improve the Proposal:

- Recognize the importance of annuity products, which are only issued by insurance companies, in providing the security of lifetime income for consumers saving for retirement by removing the bias in the Proposal against the sale of these products.
- Protect the ability of middle income and working class consumers saving for retirement to choose among a variety of products and services to help fund their retirement by removing the emphasis on low-cost alternatives in the Proposal that generally do not provide financial guarantees.
- Modify the definition of “investment advice” to exclude, among other things, pure selling activities.
- Expressly exclude the sale of insurance products to health and welfare plans from the Proposal.
- Remove the elements of the Proposal that would jeopardize the sale of proprietary products by proprietary distribution channels.

Without the modifications that are discussed in this letter, the Proposal will result in unnecessary disruption in this marketplace and, more importantly, negative impacts to

¹ *Social Security Annual Performance Plan for FY 2012 and Revised Final Performance Plan for FY 2011; Baby Boomers Approach 65- Glumly*, Pew Research Center, Social and Demographic Trends, December 2010.

² *The Retirement Savings Crisis: Is It Worse Than We Think?*, National Institute on Retirement Security, June 2013.

retirement plans, plan participants, and individual IRA investors. Specifically, without these changes, the Proposal will:

- Make it harder for retirees to obtain guaranteed lifetime income options
- Make it harder for small businesses to offer retirement plans to employees
- Make it harder for workers to obtain information and guidance on retirement products.

Based upon the foregoing, Guardian respectfully submits this comment letter, which is organized as follows. Part I provides a description of Guardian's business with a focus on our customers, and the business lines serving these customers, that will be impacted by the Proposal. Part II summarizes Guardian's primary concerns with the Proposal. Part III provides specific comments related to the concerns raised in Part II. Finally, Part IV discusses additional important issues with the Proposal that we believe should be addressed by the Department in the final regulation.

I. Overview of Guardian's Business

Guardian is a highly rated mutual insurance company that has effectively served the small qualified plan and IRA markets. The Proposal as written negatively impacts the plans and IRA owners served by Guardian.

Guardian is a financially strong, highly rated mutual insurance company that has been in existence for over 150 years. Unlike a stock company, a mutual insurer is owned by its policyholders. This means that Guardian's interests are aligned with the interests of its customers. Guardian's focus is on building and maintaining a strong financial foundation that will serve its customers today and into the future. Guardian is one of the largest mutual life insurers in the United States with \$6.8 billion in capital and \$1.3 billion in operating income in 2014. Guardian has continuously received exemplary ratings from all four of the major credit rating agencies. We are very proud of the financial strength we have maintained throughout our 155-year history.

Guardian and its subsidiaries issue and distribute products that include life insurance, disability income insurance, annuities and investments for individuals and also include workplace benefits, such as group life, dental, vision and disability insurance as well as funding vehicles for employer-sponsored qualified retirement plans. Guardian has approximately 6,000 employees and a network of over 3,000 financial representatives in more than 70 agencies nationwide.

Guardian is a compliance-oriented organization subject to rigorous regulation and enforcement by state insurance regulators. Various entities in the Guardian organization, and products issued by these entities, are also subject to regulation and enforcement by the Securities and Exchange Commission ("SEC"), the Financial Industry Regulatory Authority ("FINRA") and the Internal Revenue Service, as well as the Department.

In most instances, we believe that implementation of the Proposal will dramatically increase the costs and complexity of Guardian's participation in the small qualified plan and individual retirement account ("IRA") markets to the detriment of the very same plans, plan participants and IRA owners the Department is seeking to help with the Proposal, by making retirement product options less affordable to consumers.

As you will see from the descriptions below, Guardian is an established provider of products and services to the ERISA plan and IRA markets. Guardian is commenting on the Proposal because it is concerned that, if the Proposal is adopted as written, a likely result is that its ERISA plan and IRA customers will have diminished access to the broad range of retirement products and services that companies like Guardian provide. We believe that Guardian and its subsidiaries have been able to establish meaningful positions in these markets because of a legacy of solid financial strength ratings that are taken into account by customers interested in purchasing guaranteed lifetime income products from companies that need to be financially sound decades in the future to fulfill their guarantees. At its core, Guardian is a customer-centered organization and strongly wishes to continue to serve the needs of its ERISA plan and IRA customers. We believe, however, that the substantial changes to the Proposal described in this comment letter are necessary in order to make this goal feasible.

Guardian specializes in providing a range of products and services for small businesses and their employees. Guardian's retirement business serves the small qualified retirement plan and IRA markets. This market is currently underserved and many small employers have not established retirement plans for their employees. Those small employers who have established retirement plans frequently do not have access to the same products and services that larger employers do. Since the initiation of Guardian's group variable business in the late 1980's, over 95% of the sales of group variable funding vehicle products issued by Guardian have been made to qualified retirement plans with fewer than 100 participants. Thirty-seven percent of these sales were made to small businesses that previously offered no retirement plan to their employees.

Guardian also issues individual variable and fixed annuities. In 2014, over 70% of individual annuity sales were made to IRA owners, many as rollovers from 401(k) plans. These individual products can provide a guaranteed lifetime income stream to plan participants who rollover some or all of their plan assets into an IRA. In most cases, 401(k) plan participants do not have access to guaranteed lifetime income through their plans. In fact, in a study conducted by LIMRA, less than one percent of defined contribution plans provide for lifetime income through annuitization of benefits within the plan.³ Therefore, to the extent that an annuity option is not available to an investor in his or her 401(k) plan, Guardian's agents will help the investor identify an annuity that meets his or her needs and discuss, if needed, the option to rollover from the 401(k) plan to an IRA through which the annuity can be purchased. Thus, for many investors, the only option for a plan participant to obtain the benefit of guaranteed lifetime income is to enter into a rollover transaction.

³ *Quarterly Retirement Perspectives*, LIMRA Secure Retirement Institute, Fourth Quarter 2013.

As discussed below, we believe that the Proposal will be highly disruptive to the types of discussions that lead to the formation of a 401(k) plan for a small business or effective retirement planning for individuals. We believe that this is an unintended consequence of the Proposal for plan sponsors, plan participants and IRA owners.

Another major business area for Guardian is a retail broker-dealer subsidiary that offers for sale proprietary and non-proprietary mutual funds, annuities and advisory programs. At year-end 2014, this subsidiary had over \$12 billion in IRA assets under management, representing over 60% of the overall business on its books. The account value for 52% of these IRA accounts is \$25,000 or less. Most of this business represents one-time commission sales made by registered representatives acting strictly as product sellers and not as investment advice fiduciaries. The payment of a commission for these types of sales is often more beneficial for an investor than the ongoing payment of an advisory fee. Under the Proposal, the selling agent would be considered an investment advice fiduciary in these situations. An unintended consequence of the Proposal is that the additional operational costs and unquantifiable risks associated with the Proposal will make it challenging and possibly unfeasible for our retail broker-dealer and its registered representatives to continue to effectively serve the small IRA market. We are concerned that Guardian may be forced to choose to discontinue selling products to small IRA accounts due to the new regulatory costs, administrative burdens and legal risks generated by the Proposal.

Guardian agents typically interact with prospective clients through the use of a proprietary data aggregation tool. The tool helps the agent and prospective client gather thorough information about a prospective client's assets and liabilities so that together they can evaluate possible product solutions and financial decisions. Because the information gathered may include information concerning qualified plan and IRA assets, and because certain generic discussions involved in the process may be interpreted as recommendations under the Proposal, the consequence is that all agents using the tool may be considered to be investment advice fiduciaries even before this prospective client becomes a client. An unintended consequence of the Proposal is that individuals will lose access to the use of this beneficial tool.

Guardian also maintains award winning call centers to help its clients.⁴ Our call center representatives provide information to plan participants about their plans, including their distribution options, and provide information about group and individual annuities they have purchased previously. Our call center representatives undergo a great deal of education and training so that they can quickly and accurately answer customer questions. Guardian is particularly proud of its call center representatives and the services they provide. However, we are concerned that, under the Proposal, our representatives will be unable to give participants and contractowners information they need about their plans and contracts without the imposition of fiduciary status and that, as a result, our call center

⁴ In 2015, The Guardian Retirement Solutions™ Group 401(k) and Individual Annuity call centers were recognized for the fifth consecutive year for providing “An Outstanding Customer Service Experience” for the live phone channel. For J.D. Power 2015 Contact Center Certification Program information, visit www.jdpower.com.

servicing will be curtailed significantly and our clients will not receive the information they need to make informed decisions about their retirement.

Another important business area for Guardian involves the sale of group dental, vision, disability and life products to ERISA health and welfare plans sponsored by small business clients. In 2014, Guardian sold approximately 240,000 products to over 90,000 welfare plans. The average plan size was 53 employees. Absent clarification or revision, the Proposal would impose investment advice fiduciary status on sellers of products intended to satisfy the employee benefit needs of small businesses. This may, in turn, threaten small businesses' access to products that provide these welfare benefits to their employees. Insurance products purchased to provide welfare benefits are outside the scope of the Proposal and should be specifically excluded.

II. Guardian's Primary Concerns with the Proposal

A. We support the Department's recognition of the need to change the focus of retirement investors from products that emphasize a lump sum accumulation amount to solutions that create a lifetime stream of income during retirement. We believe the Proposal will hinder this change of focus to the detriment of middle and lower income American workers who are saving for their retirement.

The Department has recognized the importance of lifetime income to American workers, particularly as they move from a defined benefit pension system where retirees are offered guaranteed lifetime benefits to a retirement system where they are responsible for managing their own retirement through savings vehicles such as defined contribution plans and IRAs. In fact, a Department news release states "As Americans live longer and pensions increasingly trend away from the traditional defined-benefit structure that provides a stream of guaranteed income for the duration of a retiree's life, improving access to lifetime income options is an important way to help retirees manage their savings."⁵ Similarly, the Department recognized the importance of lifetime income in the preamble to the Proposal, "Based on public input received in connection with its joint examination of lifetime income issues with the Department of the Treasury, the Department is persuaded that additional guidance may help improve retirement security by facilitating the provision of information and education relating to retirement needs that extend beyond a participant's or beneficiary's date of retirement."⁶

Notwithstanding the Department's support of lifetime income solutions, Guardian believes that the Proposal will have a negative impact on the sale of products that can meet the demand for lifetime income by consumers who are worried about outliving their retirement nest eggs. Other than defined benefit plans and Social Security, only one product in the retirement plan market meets the need for lifetime income: an annuity contract. Only insurance companies can issue annuities. Guardian currently issues individual and group variable annuities as well as fixed annuities. In addition to

⁵ News Release, EBSA, US Labor, Treasury Departments act to enhance retirement security for an America built to last (Feb. 2, 2012), available at <http://www.dol.gov/opa/media/press/ebsa/EBSA20111653.htm>.

⁶ 80 FR at 21944.

providing annuitization options under these contracts, a popular feature of many of Guardian's individual variable annuities is a guaranteed lifetime withdrawal benefit. Under this guaranteed benefit, the annuitant will receive a guaranteed withdrawal amount, commencing on a date certain, for his or her lifetime. Guardian's guaranteed lifetime withdrawal benefit also provides a guarantee that the withdrawal balance under the contract will not vary based on market performance. Thus, the investment risk is shifted from the individual retirement investor to Guardian.

Of course, because of the presence of these guarantees, variable annuity contracts are more expensive than a passively managed index mutual fund. Guardian is subject to substantial capital and reserve requirements under the New York Insurance Code and is closely regulated by the New York Department of Financial Services. The issuance and distribution of annuity products is broadly regulated by all fifty states and the District of Columbia as well as the SEC and FINRA. Guardian is also subject to mortality risk and has developed a sophisticated hedging program to deal with the risk it bears for providing guaranteed benefits, despite market volatility and a low interest rate environment. Providing benefits to contract owners despite the risks highlighted above requires Guardian to constantly assess those risks and the other responsibilities it is shouldering so that the company remains financially strong and capable of meeting its obligations to all of its policyholders. Part of assessing these risks is making actuarial calculations on how to price its products fairly and reasonably in light of the risks and obligations inherent in those products.

Unfortunately, Guardian believes that the Proposal will ultimately limit the availability of guaranteed lifetime income to American workers. This is the case because the Proposal makes the sale of products that offer guaranteed lifetime income extremely difficult. In particular, an overly broad definition of "investment advice" and a lack of adequate carve-outs, an overemphasis on cost, an apparent bias against the recommendation of proprietary products, a lack of clarity with respect to the application of the new and revised Prohibited Transaction Exemptions ("PTEs") and overly burdensome disclosure requirements in the Proposal will impede the provision of guaranteed lifetime income products to American workers by Guardian and its industry peers.

B. Without the significant revisions, the increased contractual, legal and disclosure requirements of the Proposal pose a significant challenge to serving working class and middle class retirement investors as well as small businesses.

Almost all sales activity involving an ERISA-governed plan or IRA (including the use of Guardian's data aggregation tool that helps gather information about a prospective client's assets and liabilities) would be considered "investment advice" under the Proposal. This will be the result even in situations where the plan fiduciary understands that the selling agent is merely acting as a product seller and the plan fiduciary has no reasonable basis for believing that the seller is acting pursuant to a fiduciary standard. Further, the "carve-outs," as proposed, fail to capture many of the activities related to the sale of products and services to small participant-directed plans and IRAs even though a plan fiduciary should have no basis for believing that a Guardian

representative is acting pursuant to a fiduciary standard. The proposed PTEs add onerous conditions that we believe do not directly serve the needs of plan sponsors, plan participants and IRA owners while increasing operational costs that will be passed on to customers. The PTEs also introduce ambiguous terms that will create compliance uncertainty and increase litigation risks for entities seeking to offer products to plans, participants and IRA owners. We believe an unintended consequence of the Proposal is that Guardian and its agents will face daunting challenges in their efforts to continue to provide products and services to small participant-directed plans and IRAs, particularly more complicated and higher cost products like some types of annuities. In addition, the carve-outs, as well as the additional compliance and legal burdens associated with the Best Interest Contract (“BIC”) Exemption and the revised PTEs, will result in a competitive disadvantage for financial institutions seeking to serve the small-plan market and low and middle-income individuals.

In the absence of significant changes, the BIC Exemption as written will significantly increase the compliance and litigation costs underlying the delivery of products and services to Retirement Investors.⁷ Guardian believes that the Department can attain its stated goal of protecting Retirement Investors without requiring Guardian and its industry peers to comply with an unnecessarily multi-layered and complex compliance regime.

C. The Proposal creates barriers to Guardian selling its proprietary products. These barriers should be removed from the Proposal so that small qualified plans and IRA owners can continue to benefit from the security provided by Guardian’s retirement products and services.

The proposed Best Interest Standard under the BIC Exemption and the proposed PTE 84-24 will make it difficult for Guardian and its advisers to sell its proprietary products to plans and IRAs.⁸ We believe that Guardian’s small plan and IRA customers have been well-served by Guardian’s proprietary field force. Through a rigorous agent training program, a team of wholesalers who are dedicated primarily to servicing the Guardian field force and access to senior product and operations management, Guardian financial professionals have opportunities to obtain a deep understanding of Guardian’s product offerings, which enables them to better serve their plan and IRA clients. The BIC Exemption can be interpreted to favor fee-based compensation arrangements over transaction-based compensation arrangements. A transaction-based compensation structure is a better fit for accounts held by our middle and lower income customers. The usual asset-based account charge of 1.00% annually does not work efficiently with modest sized accounts because the charges over time will exceed the value of the services provided (typically a one-time sale as opposed to active ongoing trading). Also, the transaction-based compensation structure incentivizes the agent to

⁷ For the purposes of this letter, the term “Retirement Investors” shall have the meaning set out in the BIC Exemption. 80 FR 21988.

⁸ For the purposes of this letter, the term “Best Interest Standard” shall have the meaning corresponding to the definition of “Best Interest” in the BIC Exemption, or, as appropriate, PTE 84- 24. 80 FR 21987, 22020.

sell to holders of modest-sized accounts since the structure properly awards the agent for the time and attention needed to educate and explain complex products like annuities to prospective clients. In addition, the warranty requirement under the BIC Exemption that Guardian cannot employ compensation arrangements that “tend to” incentivize its representatives to not act in the “best interest” of the IRA owner sets a vague standard that will result in compliance challenges and great uncertainty for almost any compensation arrangement that is currently utilized for the sale of proprietary products.

Guardian also believes that PTE 84-24 as currently proposed can be interpreted so that Guardian and its affiliates cannot receive revenue sharing, 12b-1 fees or other third party payments in connection with the recommendation of a product issued by Guardian. If this is the case, Guardian will be unable to offer its products to ERISA-governed plans at competitive prices, as it does today. Rather, in order to offer the superior service and other features of our product offerings to plan participants, Guardian will be required to increase the direct costs to the plans. Furthermore, the definition of “Insurance Commission” in the proposed PTE 84-24 does not appear to include certain “in kind” benefits (including healthcare coverage under Guardian’s benefit plans). Thus, Guardian and its representatives will not be able to be compensated in accordance with the arrangements that have been in existence for decades.

D. *“Best interest” does not necessarily equal “lowest cost” and any bias in the Proposal toward “lowest cost” should be removed.*

The current articulation of the Best Interest Standard, coupled with the Department’s solicitation for comments on a streamlined exemption for “certain high-quality low-fee investments,” overemphasizes the cost of investment products and services as the primary factor in determining whether one product or service should be recommended over another. We believe that this emphasis on costs puts Guardian and its representatives at risk of engaging in a non-exempt prohibited transaction when they recommend a group variable annuity product to a plan fiduciary or an individual variable annuity product to an IRA. The higher cost of annuity products is due, in part, to insurance company guarantees discussed above and embedded within those products. These products are inherently more expensive than simply making available a suite of mutual funds or other investments outside of an annuity. However, it is the guarantees in these products that afford plan participants and their beneficiaries and IRA owners the security of lifetime income. As a result, the Best Interest Standard as it appears in the exemptions as proposed, along with the bias toward a streamlined exemption for low fee investments, may have the impact of limiting individuals’ access to these guaranteed, lifetime income solutions.

E. The Proposal potentially expands the scope of the rule beyond retirement plans and products to health and welfare plans. Health and welfare plans should be excluded from the Proposal.

It appears that the definition of “investment advice” under the Proposal could include a recommendation of a life, health, dental, disability or other insurance policy to a plan fiduciary or plan participant. An insurance policy providing plan benefits might reasonably be characterized as “other property” within the meaning of the advice definition. In addition, a footnote in the BIC Exemption states that such exemption may be used to exempt transactions involving health and welfare plans. Yet, the Department’s entire analysis and the focus of the Proposal are clearly the investment of plan assets and the marketing of investment products and services to retirement plans and IRAs. The Proposal includes no analysis on the effect of applying the fiduciary standard and the onerous conditions of the BIC Exemption to insurance products sold in the health and welfare market. Historically, the Department has assessed retirement plans versus health and welfare plans very differently. Guardian encourages the Department to continue this practice with respect to the Proposal and expressly exempt the application of the Proposal to health and welfare plans. In the event that the Department wishes to propose rules related to the sale of insurance products to health and welfare plans, such rules should only be proposed after a thoughtful assessment of the unique characteristics of these plans and products and the way they are sold and purchased in the employer marketplace. Additionally, Guardian urges the Department to preserve both the current rule and current prohibited transaction exemptions for sales in this market, pending further analysis.

III. Specific Comments Related to Highlighted Concerns

As discussed, we believe that several aspects of the Proposal will result in individuals and employers losing access to certain products and services provided by Guardian. Therefore, we recommend several changes to the Proposal as described below.

A. To Preserve the Continued Availability of Lifetime Income Products to Middle and Working Class Consumers, the Definition of Investment Advice Must Be Revised and the Relevant Carve-Outs Should Cover All Plans and IRAs and All Annuity Platforms.

Group variable annuity contracts and individual annuities, particularly variable annuity contracts, include, by design, features that guarantee lifetime income. However, these are complex products. The sale of these products involves a great deal of time and expertise on behalf of a Guardian agent to explain the complexities of the products and the differences among them. Further, the agent provides a great deal of information to the plan fiduciary, plan participant or IRA owner so that he or she can make an informed decision regarding what product and underlying funds he or she should select. Under the Proposal, such activities will result in the agent and Guardian providing “investment advice” and thus becoming subject to a fiduciary standard even in situations where no reasonable plan fiduciary, plan participant or IRA owner would believe that the agent or Guardian is acting in the capacity of a fiduciary. Guardian believes that this result will limit the availability

of products that offer lifetime income guarantees, and consumers' access to them. Therefore, Guardian recommends several changes to the Proposal.

1. Narrow the Definition of Fiduciary

The Department is proposing to eliminate the current five-part test that must be satisfied to be considered a fiduciary and replace it with a two-part test that requires an Adviser and Financial Institution to determine (i) if recommendations of certain types ("Covered Advice") will be made for compensation and (ii) if so, whether the advice is rendered "pursuant to a written or verbal agreement, arrangement or understanding that the advice is individualized to, or that such advice is specifically directed to, the advice recipient for consideration in making investment or management decisions with respect to securities or other property of the plan or IRA."⁹ A "recommendation" is defined in the Proposal as "a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action."¹⁰ In the Preamble, the Department states that the parties must have a "meeting of the minds" (i.e., agreement or understanding) that the advice is individualized or specifically directed to the plan or IRA, but no such "meeting of the minds" is required with regard to "the extent to which the advice recipient will actually rely on the advice."¹¹

The proposed changes to the fiduciary definition are so broad that Advisers, Financial Institutions, Affiliates and Related Entities will almost always be considered fiduciaries for purposes of ERISA and the Code when they engage in routine sales to plans and IRAs.¹² They could even become fiduciaries when they engage in activities incidental to the sales process. For example, mere conversations about available products and services (e.g., sales presentations) could be construed as fiduciary advice. Answering an IRA owner's factual questions about an individual annuity could be fiduciary advice. In addition, the submission of a Request for Proposal ("RFP") response could be considered advice to the extent the RFP includes a sample fund line up that could be made available under a group annuity or discusses certain products and services available to a plan or IRA. As another example, wholesalers who are hired by a product provider to promote the sale of their employer's products, may be deemed to be fiduciaries because they are making recommendations to retail agents who would now be deemed fiduciaries in their discussions with ERISA plan and IRA customers.

The Proposal's underlying premise that virtually every sales interaction involves fiduciary advice is inconsistent with normal business practices in which a buyer of a product or service would not reasonably expect that the seller is acting as a fiduciary during

⁹ 80 FR 21957. For the purposes of this letter, the terms "Adviser" and "Financial Institution" shall have the meanings set out in the BIC Exemption. 80 FR 21987.

¹⁰ 80 FR 21960.

¹¹ 80 FR 21940.

¹² For the purposes of this letter, the terms "Affiliates" and "Related Entities" shall have the meanings set out in the BIC Exemption. 80 FR 21987, 21988.

the sales process.¹³ Unfortunately, while the Proposal includes a few “carve-outs” from the fiduciary definition, the only carve-out that addresses sales activities does not apply to IRAs and small participant-directed defined contribution plans, which make up a substantial majority of the retirement marketplace and Guardian’s primary customers. Further, unlike the current regulation under which all five elements of the five-part test must be met before fiduciary status is imposed, the Proposal essentially shifts the burden to the Adviser and Financial Institution to prove that it should not be treated as a fiduciary by demonstrating compliance with a carve-out.

The breadth of the definition of fiduciary investment advice, the limited nature of the carve-outs and the shift of the burden of proof will effectively require Advisers, Financial Institutions, Affiliates and Related Entities to assume fiduciary status even in situations in which no plan fiduciary or IRA owner could reasonably expect that the Adviser or Financial Institution is acting in a fiduciary capacity. As a result, they will be required to assume the costs associated with complying with (or failing to comply with) the BIC Exemption or other potentially available exemptions, even when there is no expectation on the part of the plan fiduciary, plan participant or IRA owner that the Adviser or Financial Institution is acting other than in its own interest as a product distributor.

- For these reasons, we urge the Department to modify the definition of “investment advice” under the regulation so that Advisers and Financial Institutions can engage in routine sales of products and services without becoming fiduciaries.

a. Delete the “specifically directed” prong: Under the Proposal, fiduciary status arises virtually any time that a communication is made that is in any way suggestive of a plan investment or investment management activity and is either individualized for, or is *specifically directed to*, an advice recipient for consideration. In our view, whether a recommendation is “specifically directed to” the recipient is irrelevant to the question of whether the parties to that communication should be viewed as having a fiduciary relationship. Institutions that offer products and services in the retirement plan marketplace generate targeted communications every day in the course of advertising and marketing to potential clients. Providers and distributors of annuities and other financial products require the freedom to utilize targeted marketing communications to identify consumers with an interest in potentially purchasing those products. Yet, under the Department’s Proposal, even a mass mailing or telephone campaign describing the range of Guardian insurance products and their key features and pricing could be characterized as “specifically directed” to the recipients and thus potentially investment advice. It defies common sense to suggest that these types of generalized, albeit “specifically directed,” marketing communications should result in the establishment of a fiduciary relationship. If Financial Institutions cannot even contact potential clients without assuming fiduciary

¹³ See e.g., *Renfro v. Unisys Corp.*, 671 F.3d 314, 324 (3rd Cir. 2011) (“When a person who has no relationship to an ERISA plan is negotiating a contract with that plan, he has no authority over or responsibility to the plan and presumably is unable to exercise any control over the trustees’ decision whether or not, and on what terms, to enter into an agreement with him. Such a person is not an ERISA fiduciary with respect to the terms of the agreement for his compensation.”), citing *F.H. Krear & Co. v. Nineteen Named Trs.*, 810 F.2d 1250, 1259 (3rd Cir. 2011).

status, retirement investors may never learn about products and services that may fit their needs.

- We propose that the “specifically directed to” prong of the definition be deleted so that Advisers and Financial Institutions can engage in a routine sale process without becoming fiduciaries.

b. Revise the “individualized” prong: Guardian strongly believes that the “individualized to the advice recipient” element of paragraph (a)(2)(ii) should be modified to describe the nature of individualization that is needed to give rise to fiduciary status on the part of the advice provider. In our view, it is only where a communication with a Retirement Investor is sufficiently tailored, within the context of a particular relationship, to provide a basis for the investor’s reliance on an advice recommendation, that a fiduciary relationship should arise.

The objective of a revised fiduciary definition should be to impose fiduciary standards on those who undertake to, or create the expectation that, they will be acting in a position of trust with respect to the advice recipient. The Department has stated throughout the Preamble that it views as “fiduciary” in nature those investment recommendations where there is an expectation that the advice provider will provide unbiased and impartial advice that is in the recipient’s best interest. *See, e.g.*, 80 FR 21938 (the Proposal “avoids burdening activities that do not implicate relationships of trust and expectations of impartiality.”); 80 FR 21941 (“In each instance, the proposed carve-outs are for communications that the Department believes Congress did not intend to cover as fiduciary ‘investment advice’ and that parties would not ordinarily view as communications characterized by a relationship of trust or impartiality.”) However, we do not agree that every communication or suggestion should be held to such a high standard when there is no reasonable expectation by either party that the agent will act in this capacity.

We understand the Department’s reasoning in wishing to eliminate the requirement of a “mutual agreement” regarding how the advice will be utilized by the recipient. Nonetheless, we believe that there should be some arrangement, agreement or understanding that the advice is sufficiently individualized and provided under circumstances in which it is reasonable for the advice recipient to rely on that advice.

- We recommend that the Department consider the following revision -

(2) Such person, either directly or indirectly (*e.g.*, through or together with any affiliate),—

...

(ii) Renders the advice (A) pursuant to a written or verbal agreement, arrangement or mutual understanding that the advice is individualized to ~~or that such advice is specifically directed to~~, the advice recipient for consideration in making investment

or management decisions with respect to securities or other property of the plan or IRA, and (B) under circumstances creating a reasonable expectation on the part of the advice recipient that advice will be provided in the interest of the advice recipient.

c. Clarify the definition of recommendation: Under the Proposal, a recommendation is “a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action.” Though Guardian appreciates that the Department has taken this definition from FINRA guidance in an effort to coordinate its rulemaking with other regulators, we nevertheless believe that the articulated definition is over-inclusive.

FINRA guidance focuses not on the existence of a mere suggestion, but on whether there has been a communication that might reasonably be viewed as a “call to action” that might reasonably influence an investor to trade a particular security or group of securities. See NASD Notice to Members 01-23. Guardian believes that such FINRA guidance may usefully be applied to distinguish a zone of information that may be provided about investment products and services that objectively describes the features of an investment product or service (including performance and benchmarking information) but that falls well short of a “recommendation.” The definition of “recommendation” should allow a provider to market products and communicate with potential investors and purchasers about the provider’s products without becoming a fiduciary.

That being said, it appears that the Department is seeking to cover any conversations or communications where the advice provider is in a position of trust with respect to the advice recipient. Guardian nevertheless believes that not every investment provider that interacts with ERISA plans, ERISA plan participants and beneficiaries and IRA holders undertakes to provide unbiased investment advice solely in the client’s interest. Rather, whether the intervention would give rise to a fiduciary relationship ought to depend on the nature of the relationship being established. Further, Guardian believes that routine sales activities in the investment space, where sellers attempt to sell products in exchange for compensation for their sales activities, are appropriate activities in the ERISA context and should not be eliminated. We believe that the regulatory scheme proposed by the Department threatens to do.

d. Need for a link between recommendation and a contemporaneous transaction: Additionally, the Department should clarify that a recommendation is “investment advice” only when it is linked to a contemporaneous transaction to purchase or sell a security or other property for compensation. A Guardian agent may make recommendations to trade a particular security or group of securities. However, the client may not actually trade for days, weeks or even months later and may make such trade through an entity other than Guardian. Guardian and its agent should not be viewed as making a recommendation in these circumstances.

- Therefore, Guardian recommends that “recommendation” should be clarified so that a “recommendation” will only occur if the investor’s actions with regard to the

transaction are contemporaneous with the communication from the Adviser and if the Adviser or the Financial Institution receives compensation for the transaction.

2. Expand the Counterparty Carve-out to Cover All Plans and IRAs

The Department states that the “overall purpose” of the seller’s carve-out is “to avoid imposing ERISA fiduciary obligations on sales pitches that are part of arm’s length transactions where neither side assumes that the counterparty to the plan is acting as an impartial trusted adviser, but the seller is making representations about the value and benefits of proposed deals.” 80 FR 21941. The Department makes available a seller’s exception for a plan transaction if the independent fiduciary agrees in writing that it will not rely on the seller to act in the best interests of the plan, to provide impartial investment advice or to give advice in a fiduciary capacity, unless the plan has fewer than 100 participants. IRAs are simply not covered by the seller’s carve-out.

For purposes of assessing fiduciary responsibility, however, ERISA makes no distinctions among plans based on size. ERISA commands all plan fiduciaries, regardless of plan size, to have sufficient knowledge and skill to make prudent decisions on behalf of the plan. See ERISA § 404(a)(1)(B). Where a fiduciary lacks the requisite expertise to make a decision, it is required to hire independent experts to supply it.¹⁴ In excluding small plans from the carve-out, the Department proposes to create two classes of fiduciaries. One unintended consequence of this is that sellers of investment products and services may be inclined to sell only to large plans. This will only reduce the number of providers willing to service the small plans, which is already an underserved market.

Based upon the foregoing, Guardian urges the Department to extend the counterparty carve-out to all plans and IRAs regardless of the number of participants. However, if the Department insists that the counterparty carve-out should not apply to small plans and IRAs, we suggest as an alternative that sales to sophisticated IRA owners or to small plans and IRAs that are represented by an investment adviser who is registered under state or federal securities laws (and thus subject to supervision by a state or federal agency with examination and enforcement authority) should be addressed as follows:

- **Include IRA owners who are sophisticated investors in the carve-out:** We propose that the carve-out be extended to advice provided to sophisticated IRA owners. An IRA owner who is an “accredited investor” under SEC Rule 501 of SEC Regulation D¹⁵ promulgated under section 4(a)(2) of the Securities Act of 1933, as amended (“Securities Act”) can purchase an interest in an investment fund without the fund’s interests becoming subject to registration under the Securities Act. Yet, omission of IRAs from the carve-out suggests that the very same purchaser cannot make sound investment decisions in managing his IRA. To the contrary, we believe that plan fiduciaries or IRA

¹⁴ See, e.g., *Liss v. Smith*, 991 F. Supp. 278, 297 (S.D.N.Y. 1998) (“In such circumstances, where the trustees lack the requisite knowledge, experience and expertise to make the necessary decisions with respect to investments, their fiduciary obligations require them to hire independent professional advisors.”)

¹⁵ 17 C.F.R § 230.500, et. seq.

owners who are sophisticated investors can appreciate the difference between a sales pitch and unbiased advice, and advice to them should be “carved out.”¹⁶

- Include small plans and IRAs represented by an adviser in the carve-out: The Department points to its cross-trading exemption as a basis for the \$100 million dollar threshold. However, much like the 100 participant threshold, we do not see, and the Department does not provide, a connection between that \$100 million amount and the ability of an adviser to adequately act on behalf of a small plan or IRA. For example, under Regulation D, an employee benefit plan within the meaning of ERISA is an accredited investor as long as the decision to invest in the security is made by a plan fiduciary, as defined in section 3(21) of ERISA, which is either a bank, savings and loan association, insurance company or registered investment adviser (or, if the plan has at least \$5 million in assets under management). In addition, if the plan is a participant-directed plan, the plan is an accredited investor if each of the participants is an accredited investor. Also, an “investment manager” as defined under ERISA section 3(38), which includes a registered investment adviser, does not require that the manager have a certain amount of assets under management.

Yet, the Proposal suggests that a party needs at least \$100 million of benefit plan assets under management in order to recognize when an Adviser sells products and services rather than gives advice. We do not believe this to be the case. Rather, we believe that the carve-out should apply in any case in which the sponsor or similar fiduciary receives investment advice from a fiduciary as defined under ERISA section 3(21) who is a bank, savings and loan association, insurance company or registered investment adviser regarding the purchase of an investment product or service, so long as such fiduciary is independent from the seller. In addition, if the sponsor or similar fiduciary does not receive advice from such a fiduciary, the dollar threshold should be \$5 million of assets under management.

3. Confirm That There is No Need for a Platform and Selection and Monitoring Carve-out or Clarify the Application of the Carve-out to Variable Annuity Products

In our view, it is wholly inappropriate to require a carve-out for the provision of an investment platform because the courts and the Department have always taken the position that the creation of a platform is not a fiduciary act. Therefore, the Department should clarify that the provision for making available an investment platform is not included within the definition of “investment advice.” Alternatively, the platform carve-

¹⁶ An “accredited investor” includes individuals who have annual earned income of more than \$200,000 (\$300,000 with a spouse) or who have a net worth of more than \$1,000,000. See 17 C.F.R. § 230.500 et seq. The SEC explains that a “principal purpose of the accredited investor concept is to identify persons who can bear the economic risk of investing in these unregistered securities.” Investor Bulletin: Accredited Investors, S.E.C. Pub. No. 158 (Sept. 2013), available at: http://www.sec.gov/investor/alerts/ib_accreditedinvestors.pdf

out should be modified so that (i) group annuities are “platforms” for purposes of the carve-out and (ii) IRA platforms, including individual variable annuities, qualify for the carve-out.

a. Creation of a platform is not a fiduciary act. The Department has indicated that a service provider to a plan or IRA does not act as a fiduciary by merely providing a platform of investments to such plan or IRA as long as a fiduciary independent of the platform provider approves the platform, such fiduciary receives notice regarding any changes to the platform, and such fiduciary approves by either affirmative or negative consent any changes to the platform that impact the plan.¹⁷ However, the Department also notes that in the event that the service provider or its affiliate provides investment advice for purposes of ERISA with regard to the selection of one or more investments on the platform and such advice results in the payment of additional compensation to the service provider or its affiliate, such service provider or affiliate could be viewed as using its fiduciary authority to increase its own compensation in violation of ERISA section 406(b).¹⁸ As such, the service provider may act as a non-fiduciary with regard to creating the investment platform, but act as a fiduciary with regard to investment of plan or IRA assets in the platform investments. Further, we note that several courts have stated that a service provider does not act as a fiduciary when it makes available a platform of mutual fund investments to ERISA-governed plans.¹⁹

- Based upon the foregoing, the Department should clarify that the creation of a platform, in and of itself, does not involve fiduciary “investment advice,” unless the platform creator acknowledges fiduciary status in creating the platform. We believe that this approach is appropriate because the existence of a platform carve-out implies that the creation of a platform could in fact result in the provision of investment advice under certain circumstances. This will unnecessarily expose platform providers to additional litigation and compliance risk.

b. Variable annuity contracts are “platforms”: If the Department takes the position that platforms should be the subject of a carve-out, the Department should clarify that both group and individual variable annuities constitute “platforms” for purposes of the carve-out. The “variable” or investment portion of the contract provides for a number of mutual funds (or insurance company separate accounts that invest in mutual funds or collective investment trusts) to be offered as investment options under a plan or IRA. Guardian offers a number of investment options under its group and individual variable annuities with the intent of offering a broad range of investment alternatives to cover most asset classes and to allow for adequate diversification. The plan sponsor (or similar fiduciary) or IRA owner selects from the investment options available under the plan or

¹⁷ Adv. Op. 97-16A (May 22, 1997) (making available a menu of funds and the ability to change the funds offered under that menu did not rise to the level of a fiduciary act as long as an independent plan fiduciary approved the initial menu and had the opportunity to approve any changes to the menu with advanced notice of the proposed change).

¹⁸ *Id.*; see also DOL Adv. Op. 2003-09A (June 2, 2003).

¹⁹ See *Hecker v. Deere & Co.*, 556 F.3d 525 (7th Cir. 2009); see also *Leimkuehler v. Am. United Life Ins. Co.*, 713 F.3d 905 (7th Cir. 2013), *Zang v. Paychex*, 728 F.Supp.2d 261 (W.D.N.Y. 2010); *Santomenno v. John Hancock Life Ins. Co.*, No 2:10-cv-01655 (WJM), 2013 WL 3864395 (D.N.J. 2013).

IRA. In the case of a plan, participants are then permitted to direct the investment of their account balances in the investment options made available under the plan by the fiduciary.

As such, group and individual variable annuity contracts are indistinguishable from a platform of investments made available by a broker-dealer, recordkeeper, or other platform provider. While we do not necessarily read the Proposal to preclude group and individual variable annuities from the platform carve-out, we believe that the final regulation should make it clear that such annuities can qualify as a “platform” for purposes of the carve-out and that information about the investments under the annuity may be provided in accordance with the “selection and monitoring” carve-out. Failure to provide such clarity may make issuers unwilling to market annuities.

Guardian is concerned that if the Department does not clarify that the platform carve-out applies to annuities, Guardian’s call center representatives may not be able to provide information to plan participants and contractowners who already have purchased an annuity. Guardian is particularly proud of its award-winning call centers. Our call center representatives should be able to answer questions from plan participants and contractowners about the annuity contracts which they have already purchased from us.

- One way to clarify the carve-out would be to add the underlined language to the first sentence of section 2510.3-21(b)(3) of the proposed regulation as follows “(3) *Platform providers.* The person merely markets and makes available to an employee benefit plan (as described in section 3(3) of the Act), without regard to the individualized needs of the plan, its participants, or beneficiaries, securities or other property through a platform or similar mechanism (including a variable annuity contract) from which a plan fiduciary may select or monitor investment alternatives.”

c. Confirm that the platform and selection and monitoring carve-outs are available to IRA platforms: The Department specifically excludes IRAs from the platform carve-out, and the Department determined to do so because in the case of an IRA “there typically is no separate independent ‘plan fiduciary’ who interacts with the platform provider to protect the interests of the account owners. As a result, it is much more difficult to conclude that the transaction is truly arm’s length or to draw a bright line between fiduciary and non-fiduciary communications on investment options.” The Department requested “specific comment as to the types of platforms and options that may be offered to IRA owners, how they may be similar to or different from platforms offered in connection with participant-directed individual account plans, and whether it would be appropriate for service providers not to be treated as fiduciaries under this carve-out when marketing such platforms to IRA owners.”

As discussed above, the Department’s exclusion of IRAs from the platform carve-out fails to recognize its own prior position and that of the courts that the creation and making available of a platform is not a fiduciary act. Further, by excluding IRAs, the Department appears to assume that IRA owners are incapable of recognizing (i) when they are being offered an investment platform from which they may select one or more investment options and (ii) when advice is provided regarding in which of the investment

platforms they should invest. We do not agree with this position. Guardian believes that the proposed requirements in the platform carve-out are adequate to inform IRA owners that making available a platform of investment options and the provision of information about those options is not a recommendation of any particular investment option on the platform.

- We ask that the Department modify the introductory clause in section 2510.3-21(b)(3) as follows “(3) *Platform providers*. The person merely markets and makes available to an employee benefit plan (as described in section 3(3) of the Act) or a plan (as defined in section 4975(e)(1) of the Code) .”

d. Confirm that providing access to investment services does not create fiduciary status.

Similar to other product providers in the group plan market, Guardian’s group variable products provide access to investment advice and investment management services of independent third parties.

These services are in addition to the investment options available under the group variable products. As a platform provider, Guardian merely provides information about the nature of these services and does not make any statements that should be considered individualized or specifically directed to plan sponsors or plan participants who may choose to enter into agreements with these independent third parties to subscribe to these services.

- We believe that the Department should clarify that providing information about the availability of such services is within the scope of the platform carve-out and that platform providers should not be considered fiduciaries as a result of providing this information.

B. PTE 84-24 Should Apply to All Sales and Advice Pertaining to Annuities to Avoid Investor Confusion

In the Proposal, purchase and sale transactions in connection with annuity contracts that are securities for purposes of the securities laws, which typically are individual variable annuity contracts, are subject to the BIC Exemption, while such transactions involving annuity contracts that are not securities, which are typically fixed annuities and some group variable annuities that are exempt from the securities laws, are subject to PTE 84-24. The basis for the Department’s subjecting some annuities to the BIC Exemption is “that investment advice transactions involving annuity contracts that are treated as securities and transactions involving the purchase of mutual fund shares should occur under the conditions of the Best Interest Contract Exemption due to the similarity of these investments, including their distribution channels and disclosure obligations, to other investments covered in the Best Interest Contract Exemption.”²⁰

Guardian disagrees with the Department’s assumption and believes that the coverage of some annuities under the BIC Exemption and others under PTE 84-24 is

²⁰ 80 FR 21965.

unnecessary and will be disruptive to the sales and purchase of, and provision of advice related to, individual annuities and group annuity products. While annuities that are treated as securities for securities law purposes include underlying mutual fund or similar investment options, Guardian believes those products should be treated as insurance products under the Proposal. Guardian offers individual variable annuity contracts that include features such as guaranteed death benefits and guaranteed minimum withdrawal benefits. Like fixed annuities, which the Department intends to address under PTE 84-24, variable annuities are subject to state insurance regulation. In addition, the Department has proposed to require the application of the Impartial Conduct Standard to PTE 84-24, which should provide variable annuity contract owners with protection against any concerns of the Department.

- Therefore, we ask that the Department provide that all annuity sales be covered by PTE 84-24. We believe doing so will adequately protect investors, while preserving what we understand to be the intent of the Department, which is to cause minimal disruption to industry distribution and compensation practices while protecting investors. Reliance on PTE 84-24 for all annuity sales has been the practice since its issuance decades ago. Guardian believes PTE 84-24 has always offered adequate protections and the addition of the Impartial Conduct Standards will reinforce that.

C. The Proposal Should Clarify that Guardian and Affiliates May Receive Revenue Sharing and Other Third Party Payments for Proprietary Sales So That Current Product Pricing That is Beneficial to Small Plans and Individual IRA Owners Can be Preserved

We believe that the new definitions of “Insurance Commission” and “Mutual Fund Commission” under PTE 84-24 may be interpreted to prohibit Guardian and its affiliates from receiving revenue sharing and other third party payments from the mutual funds offered under its group annuities and individual annuities. Furthermore, in the case of a proprietary annuity, Guardian may not be able to receive fees paid in connection with the cost of the guarantee and the administration of the contract. In Guardian’s case, no revenue sharing or third party payments are paid to the agent. Rather, those payments and the fees paid to Guardian in its capacity as an issuer are paid to Guardian and its Affiliates. Those amounts are used to, among other things, help the plan and IRA pay for services necessary to operate the plan, such as recordkeeping, trustee and custodial services. Guardian also makes available to ERISA-governed plans investment advice services provided by an independent ERISA section 3(21) fiduciary and an independent ERISA section 3(38) fiduciary. If these payments cannot be retained, Guardian (and other insurers) will not be able to offer the group annuities and individual annuities at the competitive prices that they do today or will not be able to make certain services available without charging additional amounts to Retirement Investors.

Currently, fiduciary recommendations of annuities and proprietary and non-proprietary mutual funds to the plan fiduciaries and IRAs, regardless of the size of the investor, may be exempt under PTE 84-24. However, the Department has proposed to amend this exemption in a way that would make it impossible for Guardian and its affiliates

to receive 12b-1 fees, shareholder servicing fees, sub-transfer agent fees, revenue sharing and other third party payments in connection with the purchase of Guardian's or another issuer's annuities or affiliated and unaffiliated mutual funds or separate accounts made available under the annuity. Additionally, Guardian could not receive other fees paid to it as an issuer of the annuity.

The proposed PTE 84-24 defines "Insurance Commission" as "a sales commission paid by the insurance company or an Affiliate to the insurance agent or broker or pension consultant for the service of effecting the purchase or sale of an insurance or annuity contract, including renewal fees and trailers..." However, the definition specifically excludes "revenue sharing payments, administrative fees or marketing payments, or payments from parties other than the insurance company or its Affiliates." Similarly, the definition of "Mutual Fund Commission" includes a "commission or sales load paid either by the plan or the investment company for the service of effecting or executing the purchase or sale of investment company shares," but specifically excludes "a 12b-1 fee, revenue sharing payment, administrative fee or marketing fee."

We note that the current version of PTE 84-24, Part III(c) exempts "the effecting by an insurance agent or broker, pension consultant or investment company principal underwriter of a transaction for the purchase, with plan assets, of an insurance or annuity contract or securities issued by an investment company." We and others have understood this provision to provide relief for any conflict of interest that we and our agents may have in recommending Guardian and non-Guardian annuities or funds, which includes the receipt of mutual fund advisory fees, 12b-1 fees, revenue sharing payments, administrative fees, marketing fees and similar amounts. Significantly, the revised PTE 84-24 contains an identical description of the covered transaction – "the effecting of" a purchase of an annuity contract or investment company shares. See PTE 84-24, Part I(a)(3). However, the proposed changes to the definitions of "Insurance Commission" and "Mutual Fund Commission" previously discussed call into question whether the Department views such payments to the insurer or other payments to the insurer in its capacity as issuer of the annuity as permissible under PTE 84-24.

- We ask that the Department confirm that an insurance company, mutual fund underwriter or their affiliates may continue to receive payments in connection with the sale of their annuities and mutual funds under Part I(a)(3), notwithstanding the revised definition of "Insurance Commission" and "Mutual Fund Commission."

D. The Proposal Should be Revised to Remove Bias Against Proprietary Products and Overemphasis on Cost So That Plans and IRA Owners Continue to Have the Right to Choose Among a Wide Variety of Products and Compensation Models

The Department's attempt to articulate the meaning of ERISA's duty of loyalty through its Best Interest Standard is unnecessary and only exposes Guardian and its agents to compliance and litigation risk that currently is not present under PTE 84-24 if a Guardian agent sells a proprietary group annuity or individual annuity over a non-proprietary group annuity or individual annuity. Such exposure could make guaranteed lifetime income unaffordable for many consumers. In addition, this articulation of the Best Interest

Standard combined with the introduction of the possibility of a streamlined exemption overemphasizes the importance of cost as a determinative factor in recommending an investment product. Given the fact that products that include guarantees are more expensive than those that do not, the Department may inadvertently reduce the availability of products that guarantee lifetime income because Advisers and Financial Institutions may be more inclined to recommend cheaper products (i.e., those without guarantees) in order to avoid liability.

1. The Definition of “Best Interest” Should Mirror Language in ERISA Section 404(a)

As a condition of receiving section 406(b) relief under both PTE 84-24 and the BIC Exemption, the fiduciary adviser must 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, without regard to the financial or other interests of the Adviser, Financial Institution, any Affiliate or other party...” Prop. PTE 84-24 §VI(b); Prop. BIC Exemption § VIII(d).

According to the Department, “[t]he best interest standard is defined to effectively mirror the ERISA section 404 duties of prudence and loyalty, as applied in the context of fiduciary investment advice.” 80 FR 21970. Apparently, the Department added this condition to extend ERISA-type duties to IRA advisers, who are not subject to section 404, rather than to create new duties for plan fiduciaries. *Id.*; 80 FR 21970.

However, the Proposal’s language “without regard to the financial or other interests of the Adviser, Financial Institution, any Affiliate, Related Entity, or other party” appears to be contrary to long-standing principles found under ERISA. Under ERISA’s duty of loyalty, a fiduciary may realize incidental benefits as a result of performing its fiduciary duties without breaching his or her duty of loyalty. In fact, the U.S. Supreme Court has held that a fiduciary does not violate ERISA simply by taking action otherwise consistent with ERISA’s duty of loyalty if such action incidentally benefits the fiduciary.²¹

Yet, the “without regard to” language raises the possibility that absolutely no incidental benefits are permitted. Without clarification of ambiguous terms in the Proposal or revision of the Proposal, we believe that this standard will present daunting challenges and is arguably unachievable in respect to the sale of proprietary products like group or individual annuities. In addition, even if this is not the Department’s intent, Guardian will face uncertainty for years to come as the federal courts in the case of ERISA plans and state courts in the case of IRAs parse out the meaning of the “without regard to” language.

Accordingly, rather than create yet another fiduciary standard, we urge the Department to provide much needed certainty to advisers and their clients by expressly incorporating into the Best Interest Standard the duty of loyalty language found under section 404 of ERISA. This would ensure that, as intended by the Department, this

²¹ See *Hughes Aircraft v. Jacobson*, 525 U.S. 432 (1999); *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996).

condition would in fact be “interpreted in light of forty years of judicial experience with ERISA’s fiduciary standards and hundreds more with the duties imposed on trustees under the common law of trusts.” 80 FR 21970.

- Therefore, we urge the Department to modify the Best Interest Standard in PTE 84-24 to require the fiduciary adviser to act:

... (i) 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 plan or IRA, ~~without regard to the financial or other interests of the fiduciary, any affiliate or other party~~ and (ii) solely in the interest of the Retirement Investor, in each case as such standards have been interpreted under Section 404 of ERISA.

- Further, we urge the Department to modify the Best Interest Standard in the BIC Exemption to require the fiduciary adviser to act:

... (i) 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 (ii) solely in the interest of the Retirement Investor, in each case as such standards have been interpreted under Section 404 of ERISA ~~without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party.~~

2. Clarify that Lowest Cost is Not Required

- We also ask the Department to acknowledge that an adviser need not recommend non-proprietary products or the “lowest cost” product in order to comply with the Best Interest and Impartial Conduct Standards.²²

The Department’s current guidance, including PTE 77-4 and PTE 84-24, contemplates that a fiduciary can provide advice to invest in a proprietary product and still meet ERISA’s duty of loyalty requirements. Further, the Department and the courts have long recognized that cost is simply one factor among several, including quality of the product or service, that is to be considered when making any fiduciary decision.

3. The Department Should Not Proceed with its Consideration of a Potential Streamlined High Quality/Low Cost Exemption

Guardian does not support the concept of a special, streamlined exemption for “certain high-quality low-fee investments” designed as an alternative to the BIC Exemption or other exemptions with significant conditions. We expect that an exemption of this type would favor passive investment vehicles (e.g., index funds), which are not necessarily the

²² For the purposes of this letter, the term “Impartial Conduct Standards” shall have the meaning set out in the BIC Exemption, or PTE 84-24, as appropriate. 80 FR 21984, 22018.

most appropriate investments for all investors. While some investors may not wish to pay for active management, many others still believe that active management can add value. In addition, products with guaranteed lifetime income in most cases will be more expensive as there is a cost associated with providing such guarantees. Additionally, it would be difficult to avoid the perception that, whatever the designated investment type, it would have received the tacit approval by the Department. The plan fiduciaries and IRA owners with the help of their advisers (not the Department) should make determinations as to what investments are prudent and appropriate. More importantly, there is no reason to believe that the potential for self-interested recommendations is lower when someone is selling “high quality low-fee investments.”

Finally, even the suggestion of a “separate streamlined exemption” for advice related to “certain high-quality low-fee investments” is contrary to prior positions by the Department and the courts that ERISA does not require (or even permit) a fiduciary to recommend or select investments based solely on cost; instead, ERISA requires a review of quality of services and other factors. Cost is only one such factor.

- As a result, Guardian believes that the Department should not proceed with consideration of the streamlined high quality/low cost exemption.

E. Disincentives to Sell Annuity Products Found in the BIC Exemption and PTE 84-24 Should be Removed so that Guaranteed Lifetime Income Solutions are Readily Available

Guardian is concerned that the BIC Exemption may be interpreted by a court to require that an Adviser and Financial Institution adopt “fee for service” or other arrangements rather than transaction-based fee arrangements. A “fee for service” structure is not in line with traditional compensation models currently present in the group annuity and individual annuity markets. Typically, the Adviser is compensated on a commission basis, the Financial Institution and its Affiliates receive 12b-1 fees, revenue sharing and other third party payments for, among other things, the provision of plan-related services (e.g., recordkeeping) and the issuing insurance company may receive fees in connection with the cost of the guarantees and the administration of the contract, a portion of which may be used to pay plan-related services. In our view, it would generally not be feasible to offer a group annuity or individual annuity on a “fee for service” or level-fee basis. Additionally, Guardian’s agents (and agents of other insurers) receive “in kind” benefits, such as health care coverage under Guardian’s health benefit plans for selling certain products. The receipt of these kinds of benefits may be construed as not in conformance with the BIC Exemption and PTE 84-24 if they are credited for the benefits with regard to the sale of certain products, but not others. The inability to receive these traditional forms of compensation while still complying with the BIC Exemption and PTE 84-24 may result in the limited availability of and consumer access to products such as group annuities and individual annuities because agents and insurance companies will be dissuaded (or prevented by their broker-dealers) from selling them.

1. Clarify the Proposal so that it is Clear that Transaction-Based Compensation (Including the Receipt of Revenue Sharing) is Permitted Under the BIC Exemption

The BIC Exemption requires that the Adviser and Financial Institution warrant in a written contract with the Retirement Investor that the Adviser and Financial Institution will conform to an Impartial Conduct Standard. Among other things, the standard requires that the Adviser act in the “Best Interest” of the Retail Investor. The Adviser and Financial Institution act in the “Best Interest” if they provide “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.” We discussed above the need to revise the language in the BIC Exemption to conform with the language in ERISA section 404(a).

Additionally, apart from the Impartial Conduct Standard, the Adviser and Financial Institution must warrant to a number of things including that “Neither the Financial Institution nor (to the best of its knowledge) any Affiliate or Related Entity uses quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation or other 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” (emphasis added).²³ The Proposal goes on to provide that the aforementioned warranty provision “does not prevent the Financial Institution or its Affiliates and Related Entities from providing Advisers with differential compensation based on investments by Plans, participant or beneficiary accounts, or IRAs, to the extent such compensation would not encourage advice that runs counter to the Best Interest of the Retirement Investor (e.g., differential compensation based on such neutral factors as the difference in time and analysis necessary to provide prudent advice with respect to different types of investments would be permissible).”

The Department has stated that the BIC Exemption is designed to preserve “common fee practices” (subject to compliance with “basic standards”) as the definition of fiduciary advice is expanded. Although the Department asserts that the exemption’s Material Conflicts rule “does not mandate fee leveling” (80 FR 21971),²⁴ which is, as explained, not common in the group annuity and individual annuity marketplace. However, the Proposal appears to effectively do just that. For example, in explaining how a Financial Institution might structure a compensation arrangement so that it does not “*tend*

²³ The Proposal would also require the Adviser to warrant that it has policies and procedures “designed to mitigate the impact of Material Conflicts of Interest and ensure that its individual Advisers adhere to the Impartial Conduct Standards” and has “adopted measures to prevent the Material Conflicts of Interest from causing violations of the Impartial Conduct Standards.” Prop. Reg. II(d)(2),(3).

²⁴ “The exemption permits fiduciaries to continue to receive a wide variety of types of compensation that would otherwise be prohibited. It seeks to preserve beneficial business models by taking a standards-based approach that will broadly permit firms to continue to rely on common fee practices, as long as they are willing to adhere to basic standards aimed at ensuring that their advice is in the best interest of their customers.” 80 FR 21966. The BIC Exemption defines a “Material Conflict of Interest” at 80 FR 21988.

to encourage individual Advisers to make recommendations that are not in the Best Interest of the Retirement Investor,” it specifies five examples of compensation structures that could satisfy the contractual warranty including (i) independently certified computer models, (ii) asset-based compensation, (iii) fee offset, (iii) differential payments based on neutral factors and (iv) alignment of interests. None of these conform to the above-described transaction-based fee model that is most commonly found in the group annuity or individual annuity marketplace. In fact, we would argue that these transaction-based fee arrangements do not raise a conflict under 406(b) or similar provisions under the Code such that an exemption would not be necessary. We believe that the marketplace has adopted various compensation structures for sales made by insurance and broker-dealer agents in a way that competitively reflects the differences in products and services and the effort required to sell these products and services. Also, as described above, the payment of third party payments like revenue sharing may not be permitted to be received in light of the language in the BIC Exemption.

At the least, the Material Conflicts rule introduces a broad, vague and subjective standard that will drive financial professionals to level fees or, more likely, invite a slew of plaintiffs’ class action lawsuits challenging current fee practices as being violative of the “tend to encourage” language in the Material Conflicts standard. Even worse, we can envision Advisers not wanting to sell products that afford the benefit of guaranteed lifetime income.

- We encourage the Department to consider a simpler approach to conflict mitigation, substituting the following for section II(d) of the proposed BIC Exemption:

(d) *Warranties.* The Adviser and Financial Institution affirmatively warrant the following:

...

(2) 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), which policies and procedures shall be deemed sufficient if compliant with Section 15(b)(4)(E) of the Securities Exchange Act, and Section 203(e)(6) of the Investment Advisers Act, as applicable;

...

(4) The use, by ~~Neither~~ the Financial Institution, or, ~~nor~~ (to the best of its knowledge) any Affiliate or Related Entity of uses quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation or other actions or incentives ~~to the extent they would tend to encourage~~ has not caused, or will not cause, the individual Advisers²⁵ to make recommendations that

²⁵ It appears to us that these conflict mitigation rules are intentionally focused on ensuring that the compensation and other inducements provided to the individual Adviser do not affect his or her fiduciary

~~are not in the Best Interest of the Retirement Investor. 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 from providing Advisers with differential compensation based on investments by Plans, participant or beneficiary accounts, or IRAs, to the extent such compensation would not encourage advice that runs counter to the Best Interest of the Retirement Investor (e.g., differential compensation based on such neutral factors as the difference in time and analysis necessary to provide prudent advice with respect to different types of investments would be permissible).~~

Even though relief under the BIC Exemption “is not conditioned on compliance with the warranty,” the inclusion of such warranties in an agreement with clients exposes Guardian, along with other Financial Institutions, to the potential of multitudinous lawsuits for inadvertent breaches of such warranties. Therefore, Guardian urges the Department to acknowledge that Financial Institutions will be deemed to have compliant policies and procedures if those policies and procedures satisfy similar requirements under U.S. securities laws such as Section 15(b)(4)(E) of the Securities Exchange Act and Section 203(e)(6) of the Investment Advisers Act, both of which address the steps necessary to mitigate conflicts of interest. Importantly, market participants already use and comply with the process reflected in these securities laws.

2. Clarify PTE 84-24 so that Certain “In Kind” Compensation Including Ordinary Employee Benefits is an “Insurance Commission”

If the requirements of the exemption are met, PTE 84-24, as proposed, permits the payment of an “Insurance Commission” to the Adviser. An Insurance Commission is defined as “a sales commission paid by the insurance company or an Affiliate to the insurance agent or broker or pension consultant for the service of effecting the purchase or sale of an insurance or annuity contract, including renewal fees and trailers.” The definition then goes on to exclude payments from other parties.

Guardian is concerned that under PTE 84-24, the only compensation that an Adviser may receive for the sale of group annuities to plans and for the sale of other insurance and annuities to both plans and IRAs is an “Insurance Commission.” However, the definition of “Insurance Commission” does not appear broad enough to include compensation in the form of health care coverage or similar benefits under Guardian’s benefit plans. Guardian believes that the definition of “Insurance Commission” should include such benefits as they are an important part of a Guardian agent’s compensation and a failure to exempt that compensation may result in agents not selling variable annuity and other products that offer guaranteed lifetime income. In addition, Guardian is not aware of any evidence that would suggest the payment of such compensation raises a conflict of interest that would prohibit the Adviser from acting in accordance with the Best Interest Standard. FINRA Rule 2320 prohibits, with some exceptions, the payment of “non-cash

recommendations. We ask that the Department expressly confirm that the “conflict mitigation” described in the Proposal under the Impartial Conduct Standards is focused on Adviser conflicts and that any “interests” that the Financial Institution may have in the recommendation is not imputed to the Adviser for these purposes.

compensation” in connection with the sale and distribution of variable contracts of an insurance company, but the rule defines “cash compensation” to include the payment of an “employee benefit.” When it promulgated the rule, the NASD clarified that it did not intend to include “payments of ordinary employee benefits” within the prohibitions of non-cash compensation. NASD, Notice to Members 98-75, 578 (Sep. 1998), *available at* <http://www.finra.org/sites/default/files/NoticeDocument/p004887.pdf>.

- Therefore, we suggest that the definition of “Insurance Commission” be modified as follows:

“Insurance Commission” mean a sales commission paid by the insurance company or an Affiliate to the insurance agent or broker or pension consultant for the service of effecting the purchase or sale of an insurance or annuity contract, including, but not limited to, benefits under one or more employee benefit plans as defined under ERISA section 3(3), renewal fees and trailers, but not revenue sharing payments, administrative fees or marketing payments, or payments from parties other than the insurance company or its Affiliates.

F. Specific Elements of the BIC Exemption Must Be Revised and Simplified so that it Can Meet its Goal of Benefitting Plans and Plan Participants and IRA Owners

1. Increased Compliance Costs and Litigation Costs

If the Department’s regulation is adopted as proposed, we believe that most sales presentations to plan fiduciaries and IRA holders will be considered fiduciary advice or, at the least, there will be a meaningful risk that such advice will be found to have been provided, whether a fiduciary relationship is intended by the parties or not. In that case, the BIC Exemption will become an essential part of Guardian’s compliance strategy in its dealings with ERISA plans, participants and IRA owners.

However, in addition to the issues we have already described, there are a number of requirements in the BIC Exemption that will expose Guardian to extensive compliance and litigation risks in complying with (or inadvertently failing to comply with) the requirements of the BIC Exemption. We believe the BIC Exemption can be modified in several ways so that Retirement Investors will continue to be protected while not unduly increasing the compliance and litigation costs associated with BIC Exemption compliance.

a. Modify the Written Agreement Requirements with respect to timing, Adviser as a party and affirmative consent by the Retirement Investor. The BIC Exemption requires that the Retirement Investor enter into a tri-party agreement with the Financial Institution and the Adviser before any investment advice is provided to the Retirement Investor. We have three concerns with this requirement.

First, requiring a contract this early in the process is simply untenable in the normal course of business dealings between a prospective client and the Adviser and Financial Institution. It will be impractical, and we believe unacceptable to Guardian’s prospective

clients, to require them to enter into a written agreement before they can receive any meaningful information about what services and products Guardian may be able to offer. In addition, this requirement will lead to awkward and uncomfortable business dealings with prospective clients. For example, conversations between a Retirement Investor may start out as education and thus subject to a carve-out, but suddenly turn to “investment advice” as soon as the investor asks a question about Guardian’s specific products. At that point, the Adviser must stop the conversation and ask the investor to sign a contract, which is simply not practicable.

Second, it is unnecessary to require individual Advisers to sign the written agreement. The provisions required to be included in the written agreement largely address the Financial Institution’s oversight of the Adviser. It adds no protection for the Retirement Investor to require the Adviser to individually be a party to this type of agreement and simply adds to the administrative burden of the written agreement condition.

Third, if the purpose of the written agreement is to ensure that the Financial Institution provides the required disclosures and is contractually bound by the Impartial Conduct Standards and Warranties described in Part II(A), an affirmative consent (signature) by the Retirement Investor is not necessary. In fact, the ability to obtain a signature may not be possible if the advice is provided over the phone or over the internet through video conferencing. We request that the Department confirm that the contract requirement would be satisfied if the Retirement Investor’s agreement is obtained by negative consent.

- To address each of these three points, we propose that Section II(a) of the BIC Exemption be amended as follows:

Contract. ~~Prior to recommending that the Plan, participant or beneficiary account, or IRA purchase, sell or hold the Asset~~ Prior to the execution of the recommended purchase or sale subject to relief under Section I, the Adviser and Financial Institution enters into a written contract with the Retirement Investor that incorporates the terms required by Section II(b) – (e). An agreement shall not fail to satisfy this provision solely because the agreement of the Retirement Investor was obtained by negative consent.

b. Eliminate the disclosure requirements. Guardian urges the Department to remove the various disclosure requirements from the BIC Exemption (e.g., Compensation Disclosure – Point of Sale and Annual, Website Disclosure, etc.). Guardian and other companies already provide numerous other disclosures including fact sheets, buyer’s guides, prospectuses, and benefit illustrations. In addition, Guardian already provides a large amount of disclosure in connection with PTE 84-24, section 408(b)(2) of ERISA, and section 404(a)(5) of ERISA. Many elements of the proposed additional required disclosures would need to be obtained from third parties such as mutual fund families. Guardian would have no means of verifying the accuracy of the information. Costly new systems would be required to facilitate the calculation and distribution of this information. We do not believe an additional layer of disclosures will be at all helpful to participants

and IRA owners. The additional disclosure will only confuse participants and IRA owners and increase costs that customers may pay.

Guardian believes that section 408(b)(2) already provides for the appropriate disclosures. Financial Institutions have devoted significant financial and compliance resources to complying with the Department's 408(b)(2) disclosure regulation. However, the Department appears to believe that different, additional disclosures are necessary. The Department should not require the point of sale, annual, and website disclosures, as proposed. Rather, the Department should require disclosures based upon its own section 408(b)(2) regulation.

c. Expand grandfathering: Guardian urges the Department to carefully consider the administrative burdens imposed by the proposed BIC Exemption when it considers a final rule.

- We propose that all arrangements or agreements between an Adviser and a Retirement Investor entered into before the effective date of the exemption be excepted from the requirements of the BIC Exemption, provided that when entered into they were in compliance with then current law.

This would extend so that all existing sales and new transactions under those agreements (e.g., additional deposits or premium payments, re-allocations, follow-up communications, etc.) are covered by prior law. In addition, amendments to those agreements should not cause the loss of the grandfathering. Complete grandfathering of all arrangements or agreements entered into prior to the effective date of the BIC Exemption is necessary because the price of products sold in the past could not have taken into account the additional costs and administrative burdens imposed by the BIC Exemption.

2. Clarification Regarding the Application of the BIC Exemption to Rollovers

The BIC 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” Retirement Investors. The BIC Exemption defines the term “Asset” at 80 FR 21987. We note that the definition of this term does not include an IRA. While we believe that the Department intended to cover “investment advice” provided in the context of a rollover recommendation, we are concerned that the exemption could be interpreted otherwise.

In our view, the typical rollover advice transaction will consist of four separate recommendations: (i) a recommendation to take a distribution “from” the plan; (ii) a recommendation to hire the Adviser; (iii) the recommendation to rollover to an IRA; and (iv) the recommendation regarding how to invest the assets of the IRA once rolled over. Pursuant to the proposed definition of “investment advice,” the Adviser acts as a fiduciary with respect to each of the recommendations.

- We ask that the Department confirm that the BIC Exemption will apply to all four of these recommendations. This issue could be addressed by simply adding a statement to the preamble of the final exemption such as, “The Department intends that the best interest contract exemption apply to all transactions connected to the Adviser’s and Financial Institution’s providing advice regarding a rollover distribution including (i) a recommendation to hire the Adviser; (ii) a recommendation to take a distribution from a Plan or IRA; (iii) a recommendation to roll over the distribution to an IRA; and (iv) a recommendation regarding the purchase of an Asset by the IRA with the proceeds of the amount rolled over.”

3. Elimination of the Warranty Requirement from the BIC Exemption

The provisions of the BIC Exemption require that the “Adviser and Financial Institution affirmatively warrant” that (i) the Adviser, Financial Institution, and Affiliates will comply with all applicable federal and state laws, (ii) the Financial Institution has written policies and procedures designed to mitigate the impact of conflicts of interest, (iii) the Financial Institution has identified conflicts and mitigated them, and (iv) the Financial institution does not use compensation and other arrangements that “tend to cause” Advisers to not act in accordance with the Best Interest Standard. The Department states in the Preamble that the warranty provision is not a condition of the exemption, thus presumably Guardian or its agent would not be subject to an excise tax in the event the warranty provision is violated.

A “warranty” implies a guarantee of compliance, which to our knowledge is not found in any class exemption ever issued by the Department and unfairly establishes a precedent that perfection is required to establish compliance. In addition, the fact that the Department states that Guardian will not lose the benefits of the exemption offers little consolation. The warranty will only make it easier for plaintiff’s class action lawyers to identify technical compliance “foot faults” as a basis for bringing class action lawsuits. We believe that the BIC Exemption, even modified as we recommend, provides adequate protection to investors and the addition of the warranty requirement only unnecessarily creates litigation risk. Therefore, the Adviser and Financial Institution should not be required to “warrant” compliance under the BIC Exemption.

G. Clarify That the Proposal Does Not Apply to Products Sold to Health and Welfare Plans so that Participants in these Plans Can Have Continued Access to Employee Benefit Products Until the Consequences are Adequately Evaluated

It appears that “investment advice” could include a recommendation of a life, health, disability or other insurance policy to a plan fiduciary or participant. An insurance policy providing plan benefits might reasonably be characterized as “other property” within the meaning of the advice definition. In addition, a footnote to the proposed BIC Exemption

states that such exemption may be used to exempt transactions involving health and welfare plans.²⁶

Yet, the Department's entire analysis and the focus of the proposed regulation and the exemptions is clearly the investment of plan assets and the marketing of investment products and services to retirement plans and IRAs. The Proposal fails to recognize that the distribution of insured health and welfare benefits is completely different than the distribution of insured products in the retirement market. A Guardian agent receives compensation in the form of a commission that is in no way connected to the claims paid out under the contract. The contracts are typically subject to annual renewal. In addition, an agent will often be involved in employee meetings where he or she explains the benefit of the coverage offered under a policy to employees after the employer selects the group contract and type of coverages to be offered. The Proposal is not at all clear regarding whether one or more of these activities are considered "investment advice" and, if so, how the BIC Exemption or PTE 84-24 as revised would apply to these activities. Furthermore, these products are in the nature of pure indemnity insurance.

Before those persons marketing insurance policies to welfare plans are subjected to fiduciary standards and specifically the onerous conditions of the BIC Exemption, Guardian maintains that there is not sufficient evidence to support the extension of fiduciary standards to the sale of insurance products to welfare plans and participants. We note that the Department took the same position when it promulgated its final regulation under ERISA section 408(b)(2). In deciding to not immediately address the applicability of section 408(b)(2) to health and welfare plans, the Department stated "there are significant differences between service and compensation arrangements of welfare plans and those involving pension plans and that the Department should develop separate, more specifically tailored, disclosure requirements under ERISA section 408(b)(2) for welfare benefit plans." Therefore, pending further analysis, we recommend that the Department exclude health and welfare benefit plans from the Proposal, preserving both the current rule and current prohibited transaction exemptions for sales in this market.

IV. Other Necessary Changes to the Proposal

Set forth below are other critical areas which must be addressed by the Department in order to make the Proposal workable.

A. Extend Effective Date to Take into Account Reasonable Implementation Requirements

The requirements of the Proposal, even if modified as we suggest, will require a significant amount of time for Guardian to determine which of its activities will be "investment advice" and to write and implement compliance and operational procedures. In addition, we believe that the changes to our systems needed to meet the disclosure requirements of the BIC Exemption will take well more than one year to implement. Therefore, we do not believe that an effective date of 8 months after the final regulation is

²⁶ BIC Exemption, 80 Fed. Reg. 21960, 21966 n. 18 (Apr. 20, 2015).

published will be sufficient time for Guardian or any other large financial institution to complete the necessary tasks. In order to accommodate the immense burden of operational compliance, we request an extension of the effective date to no sooner than 36–48 months after the date the final regulation is published in the Federal Register. In addition, given the complexity of the Proposal, we believe the Department should specifically acknowledge that good faith efforts with reasonable diligence to comply with the terms and conditions of the final rule are sufficient to demonstrate compliance.

Guardian would like to emphasize that this is an extremely comprehensive and complicated rulemaking that will require a significant investment of financial and human capital over a period of years. We are concerned that the Department will rush to complete its rulemaking process. Guardian believes that this would be a mistake. Failure to make the requested changes to the Proposal and to provide Financial Institutions with adequate time to properly implement the final rule and regulations will likely lead to unbalanced results across industry segments and consumer confusion and require revisiting the rule and exemptions in the future, which will only further increase the costs involved. Therefore, we ask that the Department, after reviewing the written comments of Guardian and others and listening to the testimony at its hearings, repropose the rule and the exemptions to allow more time for the Department and industry participants to work together to create a rulemaking that protects the interests of investors, but in a measured way that will not cause significant upheaval in the retirement industry.

B. Use Interpretive Bulletin 96-1 as the Basis for the Investment Education Carve-out to Preserve Existing Education Programs That Have Served Plans, Plan Participants and IRA Owners Well

Guardian supports the Department’s proposal to recognize that investment education is not, and should not, be treated as investment advice under ERISA, based on principles articulated in Interpretive Bulletin 96-1, 29 C.F.R. § 25.09.96-1 (“IB 96-1”). While not perfect, we believe that the framework reflected in IB 96-1 has led to greater access to educational information for countless individuals over the past two decades, thereby improving their chances of a financially secure retirement.

However, the Proposal eliminates paragraphs (d)(3)(iii) and (4)(iv) of IB 96–1, which currently permit the use of asset allocation models that refer to specific investment products available under the plan or IRA as long as certain disclosure requirements are met. The Department, based upon its own experience and public comments, believes that asset allocation models populated with actual investment alternatives available under the plan or IRA “function as tailored, individualized investment recommendations, and can effectively steer recipients to particular investments, but without adequate protections against potential abuse.” 80 FR 21945.

We agree with the Department that this “represents a significant change”²⁷ and, in response to the Department’s query, we do not believe that the change is “appropriate.” We believe it would have the effect of dramatically reducing the value of participant

²⁷ 80 FR 21945.

education initiatives by making it exceedingly difficult, if not impossible, to impart the information needed by retirement plan participants to implement their investment decisions.

There are two less drastic ways of addressing the potential for abusive “steering” identified by the Department:

- The perception of steering could be limited if the Department requires that if “a model asset allocation identifies or matches any specific investment alternative available under the plan with a generic asset class, then all investment alternatives under the plan with similar risk and return characteristics must be similarly identified or matched.” 61 FR 29586, 29587 (exposure draft). If this approach is adopted, the Department should be practical. For example, where the number of available investment alternatives within an asset class is so large that describing them all is likely to confuse, rather than enlighten, the education recipient, the Final Rule should permit asset allocation models to identify a representative subset of alternatives, as long as the subset is selected based on neutral factors and does not disproportionately identify alternatives which result in the most compensation being paid to the adviser or financial institution.
- Any potential for abuse on the part of the model provider would be eliminated if the IRA owner, plan sponsor or independent plan fiduciary were permitted to select the specific investment options included for each asset class in the portfolio.

In addition, Guardian is concerned that the education carve-out is not clear regarding what information may be provided with regard to distributions and rollovers from a plan or IRA. There is also some language in the Proposal that we find problematic. The Proposal states “when providing general information, it cannot discuss distribution options under the plan or specific alternatives or services offered outside the plan,” but in that very same subsection, at paragraph (H), it can discuss “General methods and strategies for managing assets in retirement (e.g., systematic withdrawal payments, annuitization, guaranteed minimum withdrawal benefits), including those offered outside the plan or IRA.” We are unclear as to how the opening language to subsection (ii) relates to paragraph (H) thereunder. Similarly, subsection (iv) seems to allow a discussion of distribution options: “questionnaires, worksheets, software and similar materials which allow a plan fiduciary, participant or beneficiary, or IRA owners to evaluate distribution options”; however, paragraph (E) thereunder provides that the interactive material identify any distribution option.

Our call center representatives are responsible for explaining all of the options available to a participant with regard to staying in the plan or taking a distribution, including a rollover distribution. Unfortunately, due to the inconsistencies in the carve-out language, it is not entirely clear if our representatives can do this without losing the benefit of the carve-out. However, we think it is critical to be able to discuss all options without triggering fiduciary status. Without clarification, Guardian may be faced with providing

less information to contractowners in order to avoid the risk that it inadvertently lose the carve-out. It would be extremely challenging to apply the BIC Exemption in the context of a call center.

- Therefore, the Proposal should be clarified to provide additional guidance as to when our call centers are providing distribution and rollover education rather than advice.

C. Clarify that Marketing of Services is Not Fiduciary

In addition to annuities, Guardian provides investment management and advisory services. It would appear that, under the Proposal, the marketing of these services could involve “investment advice” for a fee even though the Adviser receives no compensation for marketing the service but simply receives an “assets under management” fee if it is engaged. The Department should clarify that the marketing of “fee only” investment advice or management services will not be considered fiduciary advice so long as no compensation is received by any firm or individual in connection with the marketing or sale of the services. Thus, while the adviser or manager would receive fees for the provision of advisory or management services, it would not be considered a fiduciary adviser when marketing those services.

D. Exempt Certain Valuation of Securities and Other Property from the Fiduciary Definition to Allow for Valuation Required by Law or Regulation

Pursuant to the Proposal, Covered Advice also would include appraisals or similar statements, “whether verbal or written, concerning the value of securities or other property if provided in connection with a specific transaction or transactions involving the acquisition or disposition, or exchange, of such securities or other property by a plan or IRA.” This language is extremely broad and threatens to capture communications that reflect market values from market sources, even in the absence of a recommendation. For example, Guardian uses values from such market sources to calculate required minimum distributions and for similar purposes.

- Therefore, the Department should clarify that the above-described uses of values of securities and other property are not covered by the definition.

E. Clarify the Broad Range of Investment Options Requirement so that Guardian and Its Agents Can Operate with Certainty

A condition of the BIC Exemption is that Guardian “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.” Alternatively, Guardian can certify that although it does not meet the “broad range of investment options”

requirement, the investments and products that it makes available for its agents to sell to plans and IRAs allows the agents to act in accordance with the Impartial Conduct Standards.

Guardian is concerned about these requirements. The provision's broad range requirement is unclear. It will be very difficult for Guardian and others to make a determination that its product offering is "broad *enough*" (emphasis added). As discussed, Guardian offers investments under its platforms that are intended to cover a broad number of asset classes to allow for diversification. However, we believe it unreasonable and unprecedented to make Guardian determine whether that is "enough."

- Guardian believes the "broad range" standard creates a vague and unprecedented standard that presents too much compliance uncertainty and litigation risk. Additionally, the standard is unnecessary due to the requirement that the Adviser and Financial Institution act in the best interest of the Retirement Investor. Therefore, this requirement of the BIC Exemption should be eliminated.

F. Coordinate with the SEC to Clarify that Registration of Registered Representatives as Investment Adviser Representatives is not Required for all Fiduciaries

Before the Proposal becomes effective, we request that the Department ask the SEC to confirm that registered representatives of Guardian's broker-dealers who are deemed to be giving fiduciary advice under the Department's expanded definition, and must acknowledge fiduciary status in the client contract required by the BIC Exemption, are not required to also register as investment adviser representatives under the Investment Advisers Act of 1940 ("Advisers Act"). Many registered representatives and their firms do not register as investment advisers under the Advisers Act because they do not provide investment advice as defined under the Advisers Act or are otherwise exempt from registration under the Advisers Act. We urge the Department to coordinate with the SEC to clarify that investment adviser representative registration will not be required solely due to the provisions of the Proposal. Without such clarification, the Proposal will ultimately result in additional costs for retirement consumers.

G. Delete the Data Retention Requirement to Protect Consumer Data Security

Lastly, Guardian urges the Department to remove the data retention provisions in Sections V(b) and (c) and Section IX of the BIC Exemption. The Department states that "the Department and certain other entities" need this information "to determine whether the conditions of this exemption have been satisfied." The data required by this provision is broad, encompassing six years of "Inflows," "Outflows," "Holdings," and "Returns" by plans, participant and beneficiary accounts, and IRAs. This data would be calculated on a

quarterly basis and by asset. To our knowledge, this type of data is not currently maintained by or not readily accessible to Financial Institutions. It would take a tremendous expenditure of time and resources to put the systems in place to track and maintain this data. Further, the Department and “other entities” have much of the information they need to determine whether the requirements of the exemption are met by reviewing the disclosures provided under ERISA section 408(b)(2) and other applicable exemptions. Finally, Guardian believes that much of the information required to be maintained pursuant to this requirement constitute trade secrets or proprietary business information, and most importantly, would put consumer data security at risk.

The changes in the retirement landscape have been quite dramatic over the past 40 years. The shift away from defined benefit plans to participant-directed plans and IRAs has put the risk of investing squarely on the shoulders of individual investors who may or may not have the skills to undertake this responsibility. As a result, there is no doubt that the security of a comfortable retirement is jeopardized for millions of Americans.

We believe our company is uniquely positioned, along with other insurance companies, to provide lifetime income products to retirement investors who might otherwise be in danger of outliving their retirement income. Guardian, as a mutual company with a sales force of financial professionals who are well-trained and well-supervised, is committed to continuing to provide products and services that are critical for small plans, participants and IRA owners now and in the future. We also operate our company in an effort to price our products appropriately and control our risks so that we can meet our future obligations to policyholders and contractowners regardless of market volatility, economic downturn or the interest rate environment.

As we have stated in this letter, Guardian generally supports the concept of a best interest standard for financial professionals who provide investment advice to retirement investors. Unfortunately, for the reasons cited above, we believe that the Proposal as drafted has many fundamental problems that do not support this goal of a best interest standard and would result in the unintended consequence of significantly limiting the products and services available to American workers, especially those in the working and middle classes, as well as small businesses. We urge the Department to proceed with caution before finalizing the Proposal to ensure that the unintended effect of this Proposal

will not be the disruption of the current framework that provides the lifetime guarantees that so many Americans rely on, and will need to continue to rely on, in the future. In short, we are concerned that the Proposal, without substantial changes, will make retirement less secure for these Americans by increasing costs, making it more challenging for providers and financial professionals to serve the retirement marketplace and reducing retirement savings.

Thank you for providing us with the opportunity to comment on the Department's Proposal. If we can provide you with any further assistance in your consideration of these issues, please contact us.

Sincerely,

A handwritten signature in cursive script that reads "Tracy Rich".

Tracy L. Rich