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February 7, 2011

Submitted Electronically – **Re: Hearing on Definition of "Fiduciary"**

Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210
e-ORI@dol.gov

Ladies and Gentlemen:

Please accept our request to testify at your hearing, scheduled to begin March 1, regarding the Department's proposed rule (the Proposal)[1] redefining the term "fiduciary" with respect to the provision of investment advice under ERISA §3(21)(A)(ii).

As background, Great-West Retirement Services® ("Great-West"), a business unit of Great-West Life & Annuity Insurance Company, is the fourth-largest retirement plan record-keeper in the United States.[2] We provide 401(k), 401(a), 403(b) and 457 retirement plan services to 24,000 plans representing 4.4 million participant accounts and $138 billion in assets at September 30, 2010. We offer several different investment "platforms" that include both proprietary and unaffiliated investment products. In addition, we offer tools to our platform customers to assist their decision-making, including Fund Performance Reviews that provide information about the performance of platform investment options against selected criteria. Our services and products are marketed both by employees of Great-West and also by independent broker-dealers, Registered Investment Advisors, insurance agents and other financial advisers.

Our extensive experience in assisting retirement plan fiduciaries and participants informs our analysis of the Proposal, allowing us to provide the Department with a valuable, real life perspective on what plan fiduciaries and participants want and expect from service providers, and how potential changes in the fiduciary status of these relationships would impact plans and participants. Therefore, per your request, we've specified the four issues we propose to address, provided an outline of their main points and indicated the time allocated to each issue.

We recognize that the available time for testimony at this hearing will be quite limited, and we are happy to work with you to accommodate our testimony on any one or all of these issues, including participating in a panel.

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[1] 75 Fed. Reg. 65263 (Oct. 22, 2010)

[2] Based on total participant accounts at year-end 2009, as ranked by *Plan Sponsor* magazine in June 2010.

I Clarification of Platform Exception (3 minutes).

Our testimony would discuss our support for the Department's decision to include a exception for information provided in the context of investment platform operation, and explain the need for clarification of the following issues:

- *Elimination or Clarification of "Individualized Needs" Exclusion* – The exception as proposed is available only for making available investment platforms "without regard to the individualized needs" of the plan. Our testimony would explain why we believe this language does not achieve the Department's goals and should be eliminated or modified. We do not believe that a service-provider can offer a platform that does not take into account the individualized needs of the plan in some manner, from responding to the plan's specific questions about design, operation and investments to discussing which platform best suits the plan's needs. Some of Great-West's platforms offer extensive customization options for plans, and other platforms offer fewer options, all of which are intended to provide to plan fiduciaries the level of services and features they deem most appropriate for their individual plans. Offering products, services and information that take into account the plans' needs should not subject record-keepers and other platform operators to fiduciary liability for providing investment advice.

- *Diagnostic Tools and "General Financial Information"* – Our testimony would explain why the Department should clarify that diagnostic tools providing comparisons between options based on objective data is not advice. Providing plan fiduciaries with objective information regarding common fund metrics, such as comparative past performance or fee data, should not be fiduciary advice. Unless it is clear that such tools are a form of "general financial information," platform providers likely will reduce or eliminate the tools they offer to the detriment of plans and participants.

- *Mapping and Conversion Assistance is not Investment Advice* – Plans often ask questions and request assistance from platform operators when changing platforms using mapping or conversion. Our testimony would address why offering assistance and insight to plan clients who retain the sole authority to make all fiduciary decisions associated with mapping and conversion should not make the platform operator a fiduciary investment advisor, and describe the additional cost and difficulty plans will face without such assistance.

- *Investment Option Removal and Replacement is not Investment Advice* – Platform operators must be able to remove and replace investment options without becoming fiduciary investment advisors. Our testimony would explain why the Department should clarify that removing and replacing funds using a process consistent with the Aetna Advisory Opinion 97-16A should not be fiduciary advice.

II Expansion and Clarification of Valuation Exception (3 minutes)

Our testimony would discuss our support for the Department's decision to include a exception for certain types of valuations, and explain the need for expanding the exception as follows:

- *General Exception for Fair Value Pricing* – Our testimony would explain why the Department should clarify that the definition of fiduciary valuation services does not reach to fair value pricing effected in connection with an underlying open-end registered investment company

(mutual funds) or collective investment trust funds, which are designed to prevent market timing activities in the funds.

- *General Exception for Annuities and Other Insurance Products* – Our testimony would explain why valuations connected with Great-West's group annuity insurance products and other insurance investment contracts should not be fiduciary investment advice. We do not believe the Department intended to cause insurance companies and their employees to become fiduciaries merely because, for example, they mechanically calculate the value of an insurance contract for the purpose of a participants' minimum distribution requirement.

- *General Exception for "Passing-Through" Valuations* – Our testimony would address needed clarification that record-keepers and other service providers are not fiduciary investment advisers for reporting or otherwise providing to plans valuations that are merely "passed-through," and not actually performed by the service provider.

III Fiduciary Concerns of Affiliates in Bundled Service Arrangements (2 minutes)

Our testimony would explain the need to change language in the Proposal making a fiduciary investment adviser a person whose affiliate is a fiduciary to the plan for another purpose. We urge the Department to clarify that a record-keeper in a bundled service arrangement is not potentially a fiduciary investment adviser because an affiliate is, for example, an ERISA §3(38) investment manager with respect to the plan. We believe this is consistent with the Department's position in the Aetna Opinion 97-16A.

IV Clarification of the Sales Exception (2 minutes)

Our testimony would discuss our support for the Department's decision to include a exception for information provided in the context of sales, and explain the need for clarification of the following issues:

- *Exception Applies to Sales Discussions Throughout the Service Provider Relationship* – Our testimony would explain that the rule should clearly state that sales activity is excepted regardless of when during the service provider relationship it occurs. Information related to sales is exchanged on an ongoing basis with the plan throughout the course of the service provider relationship, as the plan makes changes to its investments months or even years after the relationship starts.

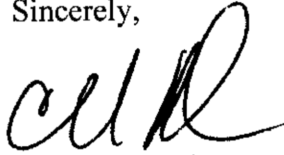
- *Exception Should Not Use Term "Adverse"* – Our testimony would address why the sales exception must be redrafted because the term "adverse" cannot properly be used to describe the plan and service provider relationship. Financial service providers must take into account the needs of their clients, consistent with their legal obligations under the prevailing duty of care, such as the securities law standards of suitability or fiduciary obligation. As a result of these legal duties, a service provider cannot properly be considered "adverse" to his or her client. Having a "financial interest" would be language more consistent with the legal duties of advisers.

As noted earlier, our broad expertise enables us to provide a unique "voice" that distinguishes Great-West Retirement Services from other industry organizations. We have extensive experience with a broad range of plans and products, including 401(k), 401(a), 403(b), 457, and all plan sizes. We are familiar with the legal issues, plan sponsor concerns and participant communication

challenges of each of these different markets, uniquely positioning us to assist the Department in better understanding how the Proposal would impact plans, participants and service providers across the board.

We appreciate your consideration of our request and look forward to offering our insight. If you have any questions or need additional details, please contact me at 303-737-3068 (office) 303-570-3042 (cell) or via e-mail at charlie.nelson@gwls.com.

Sincerely,



Charles P. Nelson,
President, Great-West Retirement Services