GREAT-WEST FINANCIAL

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July 17, 2015

VIA E-MAIL: e-ORI@dol.gov and e-OED@dol.gov

Office of Regulations and Interpretations, Employee Benefits Security Administration
Office of Exemption Determinations, Employee Benefits Security Administration
Attention: Conflict of Interest Rule, and related exemption package
Room N-5655 and Suite 400
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: RIN 1210-AB32, Conflict of Interest Rule
RIN 1210-ZA25, Best Interest Contract Exemption (D-11712)
RIN 1210-ZA25, Prohibited Transaction Exemption 84-24 (D-11850)

Dear Sir or Madam:

Great-West Financial ("Great-West")[1] appreciates the opportunity to share our comments and concerns regarding proposed regulations (herein, the "Proposed Rule") from the Employee Benefits Security Administration ("EBSA") defining when and how investment advice is provided under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), as well as the related exemption proposals.

As background, Great-West provides insurance and investment services to many thousands of benefit plans and IRAs through its relationship with Empower Retirement, our related retirement business. We also provide investment products like variable annuity contracts to IRAs through our distribution partners at other firms. Great-West is a significant presence in the retirement industry, with more than 7.5 million participants in the plans and IRAs we serve, and with more than 440 billion dollars in assets under administration. We have been at the forefront of developing innovative products that help workers and investors accumulate and manage income in retirement.

Great-West's mission is to support the retirement security of American workers and investors, whether those workers and investors are saving for retirement through workplace plans, annuity contracts or IRAs, and whether the investments that drive retirement readiness are funds or insurance contracts. It is our experience that financial advisors, in particular, play a key role in helping America plan for a secure retirement, and we believe the role of an advisor in retirement planning must be encouraged to continue.

[1] Great-West Financial is the brand name of the family of insurance, recordkeeping, trust, investment, and investment advisory companies owned by Great-West Life & Annuity Insurance Company, including Great-West Life & Annuity Insurance Company of New York, Great-West Financial Retirement Plan Services, LLC, Great-West Trust Company, LLC, FASCore, LLC, and Advised Assets Group, LLC.

Against this background, this comment letter addresses several topics in depth:

- The Proposed Rule's impact on the availability of investment advice for retirement assets;
- The Proposed Rule's impact on insurance and retirement income;
- The Best Interest Contract Exemption (the "BIC exemption"); and
- Prohibited Transaction Exemption 84-24.

The last section of this letter contains a list of other topics under the Proposed Rule that we believe EBSA should consider.

A. The Proposed Rule Will Discourage Investment Advice about Retirement

Great-West is deeply committed to supporting the advisor community, since we believe advisors are an integral part of helping workers and investors save and prepare for retirement. In fact, a recent study by Oliver Wyman[2] suggests that individuals with access to professional guidance exhibited behaviors commonly associated with long-term investment success. Specifically, the report found that when compared to individuals without a financial advisor, those with access to an advisor:

- Own more diversified investment portfolios;
- Stay invested in the market by holding less cash and cash equivalents;
- Take fewer premature cash distributions; and
- Re-balance their portfolios with greater frequency to stay in line with their investment objectives and risk tolerances.

Accordingly, we disagree with regulatory efforts that would make it more difficult for advisors to discuss retirement investment and planning.

We believe, however, that the Proposed Rule will do just that - make it more difficult for advisors to speak to workers and investors about retirement assets. This is because the Proposed Rule will require many financial advisors to deal with the red tape of the BIC exemption to discuss retirement assets like IRAs with their clients. For those who choose to deal with the BIC exemption, client interactions will now include even more complex contract terms, and complicated, confusing disclosures. EBSA's regulatory policy will hinder discussions about retirement, at a time when workers and investors are more and more individually responsible for insuring they have adequately saved for retirement.

We believe these unintended effects outweigh EBSA's concerns about potential conflicts of interest. The Proposed Rule upsets longstanding business models that have provided access to professional advice to generations of workers and investors, and EBSA should carefully consider the Proposed Rule's unintended consequences in finalizing the Proposed Rule.

[2] Oliver Wyman, "The role of financial advisors in the US retirement market," July 10, 2015.

B. The Proposed Rule Will Discourage Discussion and Adoption of Insurance and Retirement Income Products

Great-West offers many insurance and investment products to benefit plans and IRAs that will be impacted by the Proposed Rule, including annuity contracts through which defined contribution plans and IRA accountholders make investments.

As EBSA is well aware, American workers are less and less likely to be covered by a defined benefit plan that provides a fixed stream of income at retirement. Instead, most workers must now rely on defined contribution plans and IRAs to supplement any Social Security benefits. We believe that while most workers understand the importance of saving for retirement, many workers have not saved enough to maintain their income in retirement. Others may outlive their savings.

In this environment, insurance features in retirement plans and IRAs are more important than ever. Insurance products can provide guaranteed income to investors, and this guarantee is backed by the financial security of a regulated insurer. Considering these unique benefits, EBSA's regulatory policy should encourage the inclusion of insurance investments in plans and IRAs. Indeed, EBSA recently stated that it has an ongoing initiative to "encourage the prudent consideration, offering, and use of lifetime income alternatives, including annuities, in retirement plans."[3]

To encourage consideration of insurance products, it is clear that advisors and insurance companies need to discuss insurance products with workers, plan sponsors, and IRA accountholders. However, due to the broad definition of advice under the Proposed Rule, there is a significant risk that any conversations about products will be deemed to be fiduciary investment advice. The Proposed Rule would define advice as a "recommendation as to the advisability of acquiring, holding, disposing or exchanging securities or other property." Recommendation is further defined 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." Given the breadth of this definition, taken to its logical extension, and absent an appropriate sales exemption, virtually any discussion with an individual regarding product offerings would result in a fiduciary obligation.

We believe if the Proposed Rule is finalized without change, firms will assess the risk of taking on fiduciary liability in interactions where insurance products are discussed. We believe most firms will instruct advisors and representatives to avoid specific conversations, since that will likely impart fiduciary status. Some insurance products are complicated, and plan sponsors, participants, and IRA accountholders should be able to discuss insurance products without every discussion resulting in a fiduciary conversation. Although EBSA purports to address these concerns through the Proposed Rule's education carve-out, and the exemption package, we believe the Proposed Rule will still make having unguarded discussions with workers and plan sponsor fiduciaries about insurance products less likely, and this will lead to less adoption of these uniquely useful products.

[3] See Field Assistance Bulletin No. 2015-02, released July 13, 2015.

Great-West is committed to acting in the best interests of those we have the privilege of serving. However, we believe the Proposed Rule itself should better accommodate providing insurance and retirement income products to participants, plans and IRAs by:

1. Expanding the seller's carve-out to include small plan fiduciaries. EBSA should include in the seller's carve-out an exception for sales interactions with the fiduciaries of participant-directed defined contribution plans, since the current and proposed exemptions do not sufficiently mitigate the need for such a carve-out. We believe that the fiduciaries of small, participant-directed plans understand a sales pitch when they hear one. ERISA imposes significant responsibility on all fiduciaries, not just large plan fiduciaries, and to treat small plan fiduciaries differently than large plan fiduciaries is inconsistent with the statute's expectations. Any concerns that EBSA may have in this regard can be addressed by a simple "warning" disclosure.

2. Expanding the seller's carve-out to include plan participants and IRA accountholders. EBSA should include in the seller's carve-out an exception for sales interactions with plan participants and IRA accountholders. We believe plan participants and IRA accountholders understand that financial service companies earn compensation from the investment and insurance products they sell, and under an expanded seller's exception, individuals could be provided with a disclosure to this effect. By expanding the seller's exception to include these kinds of participants, EBSA would encourage more detailed dialogue about insurance products in plans and IRAs, short of making discussions potentially subject to the BIC exemption's burdensome requirements.

3. Expanding the carve-out for valuations of separately pooled accounts as applied to single plans. The Proposed Rule contains a carve-out for valuations of investment funds like pooled separate accounts, but this carve-out appears to apply only to products used with "more than one unaffiliated plan." For several plan clients, Great-West maintains a stand-alone, custom stable value fund. Each custom stable value fund is structured as a pooled separate account, and each custom stable value fund can hold the assets of a single plan. We don't believe there is a compelling policy argument about why valuations for a custom stable value fund organized for a single plan should amount to fiduciary activity, and we believe the carve-out should be expanded to apply to single plan investment fund arrangements.

4. Drafting the education carve-out to accommodate innovative participant tools. The Proposed Rule contains an education carve-out that specifies four categories of educational materials that will not be considered fiduciary investment advice. We believe providing educational information to plan participants and IRA accountholders is a critical way to encourage the saving and investing behavior needed to achieve retirement readiness. However, we are concerned that the education carve-out as drafted may not accommodate innovative investment tools, and we encourage EBSA to draft the education carve-out in a way that accommodates new educational products and tools. For example, so-called "next step" participant tools may suggest that a 401(k) plan participant take steps to raise 401(k) contributions to maximize the

plan's employer match, or consider a change in asset allocation based on a participant's past investment history. It is not clear that these tools would be covered by the proposed education carve-out, and we believe that these tools are critical in driving participant retirement readiness. To address these concerns, we believe the education carve-out should state that the examples contained in each of the four education categories are not an exclusive list of information that could be provided under each of the four categories. We also believe the Proposed Rule's education carve-out should more clearly support providing interactive tools that model allocations towards investment products or distribution options available under the plan or IRA, even when the modeling is not specifically directed by the participant or accountholder. For example, if a plan or IRA contains a longevity annuity distribution option, an interactive tool that models a distribution stream from the annuity would encourage consideration and adoption by participants or accountholders.

5. Clarifying the platform exception as applied to IRAs. The Proposed Rule contains a "platform" carve-out for providers of investments to "an employee benefit plan." We believe that the platform exception should be expanded to include platforms of investments provided to IRAs, provided the platform is not individualized to the needs of an IRA accountholder. If the platform carve-out is not applied to IRAs, then making investment funds available to an IRA could be deemed an ERISA fiduciary act. This is untenable. Clearly, a provider of IRA investments shouldn't owe an ERISA fiduciary duty to all potential IRA customers simply by making an investment platform available.

6. Clarifying the Proposed Rule to specify that information provided to an independent, third-party advisor cannot be fiduciary advice. The definition of fiduciary in the Proposed Rule is broadly worded such that a recommendation made to "a plan, plan fiduciary, plan participant or beneficiary, IRA, or IRA owner" can constitute ERISA investment advice. We are concerned that this definition is so broadly drafted that information Great-West provides to an independent, third-party plan advisor may be deemed to be fiduciary advice, since the plan advisor may also be an ERISA "plan fiduciary" under the Proposed Rule. This drafting will create great uncertainty over Great-West's fiduciary status in interacting with plan advisors or intermediaries, since the determination of ERISA fiduciary status will often be based on facts and circumstances of the advisor's relationship with a plan. Without an amendment to the Proposed Rule, we anticipate that plan advisors will receive less investment information than they do today, given the risk of Great-West becoming an ERISA fiduciary. We would encourage EBSA to amend the fiduciary definition by removing "plan fiduciary" from the text of proposed 29 C.F.R. Section 2510.3-21(a)(1).

C. Best Interest Contract Exemption

We support EBSA's efforts to develop a principles-based exemption, such as the BIC exemption, to accommodate many industry compensation practices. However, we believe the BIC exemption is

unworkable as proposed, for the reasons below. We urge EBSA to restate the BIC exemption to provide a viable method for ERISA fiduciaries to continue receiving variable compensation.

1. Small 401(k) plan sales activity should not be placed under the BIC exemption. The Proposed Rule does not cleanly address sales activity directed at the fiduciaries of small plans whose investments are selected by plan participants, such as 401(k) plans. EBSA has limited the seller's exception to plans with over 100 participants, and EBSA has proposed the BIC exemption as the method by which an ERISA fiduciary can continue to receive variable compensation with regard to advice generally provided to individuals. We believe it is critical, when EBSA is finalizing the Proposed Rule and the BIC exemption, that sales activity directed at the fiduciaries of participant-directed small plans not be forced into the BIC exemption. Again, ERISA imposes significant responsibility on all fiduciaries, not just large plan fiduciaries, and to treat small plan fiduciaries differently than large plan fiduciaries is inconsistent with the statute's expectations. We believe plan-level fiduciaries, regardless of the size of the plan, are in the best position to evaluate and compare potential plan investments and, when given adequate information, are sophisticated enough to distinguish sales activity from neutral investment advice. ERISA Section 408(b)(2) disclosures, combined with a meaningful seller's carve-out, would provide a more effective and efficient structure for evaluating sales activity within ERISA's fiduciary structure.

2. Contract should be allowed after initial investment advice. The BIC exemption requires entering into a contract before any ERISA fiduciary investment advice is provided. This would be a considerable administrative challenge, and would be a confusing and disjointed experience for an advice recipient. For example, we anticipate that our call center representatives, when discussing investments over the phone with a plan participant or IRA accountholder, could have to stop and enter into a contractual negotiation before the representative could provide additional information.

   To the extent a contractual requirement is retained as part of the BIC exemption - and we share the concern expressed in other comment letters that the contract construct is not workable - the contract should be required when an actual business relationship exists, like at point of sale, or at some later time before compensation is received in connection with the transaction. In the event EBSA is concerned about a gap between contract execution and the initial investment advice, the contract could be made effective as of the date of the initial investment advice.

3. Don't limit asset types covered by the BIC exemption. The scope of the BIC exemption is limited to the purchase, sale or holding of specified types of assets. As currently proposed, the definition of asset includes several types of insurance products, including "insurance company separate accounts," "insurance and annuity contracts" and "guaranteed investment contracts." We would comment that EBSA should be careful not to limit the categories and descriptions of covered assets such that innovative insurance products developed in the future cannot be sold through the BIC exemption.

4. Impartial Conduct Standards should reflect ERISA. The requirements of the Impartial Conduct Standards included in the BIC exemption are similar, but not identical, to the standard of care already imposed on fiduciaries under ERISA Section 404(a). This fosters uncertainty in the obligations owed under the BIC exemption, and will encourage litigation around a perceived new standard of care other than the well-understood standard of care described in ERISA. There should be no difference between the Impartial Conduct Standards in the BIC exemption and the standard of care under ERISA. We find especially troubling the language in the Impartial Conduct Standards that would require acting "without regard" to the financial interest of the fiduciary, particularly because ERISA itself does not contain the "without regard" requirement. We question whether a regulation can add a substantive requirement to the standard of care not otherwise enumerated in the statute. To avoid this problem, the Impartial Conduct Standards should simply reference ERISA Section 404(a).

5. Contract should not be at the advisor level. The BIC exemption requires a contractual connection between an advice recipient, and both the "Adviser" and the "Financial Institution" involved in the transaction. We believe that requiring the advisor (who is an individual representative of a larger financial institution) to sign a contract with an advice recipient imposes far too much potential liability on a single individual. We anticipate that many of the representatives swept into the ERISA fiduciary web by the Proposed Rule will be inadvertent fiduciaries, such as call center staff who interact directly with participants or IRA accountholders. This is simply too much liability exposure for an individual to bear, especially given how easy it would be to become an ERISA investment advice fiduciary under the Proposed Rule. Any contract required by the BIC exemption should be at the financial institution level, recognizing that the institution has liability for the actions of its representatives.

6. BIC exemption disclosure requirements are not workable. As proposed, the BIC exemption's disclosure requirements are overbroad and impose an onerous burden. The BIC exemption contemplates four categories of disclosures: a public website, an "Individual Transaction Disclosure" chart, an "Individual Annual Disclosure," and a disclosure about "Non-Security Insurance and Annuity Contracts." Although EBSA requests detailed comments on many aspects of each category of disclosure, we would raise the following points:

    - Each proposed BIC exemption disclosure would require incredibly complex and time-consuming system builds to automate. In the preamble to the BIC exemption (80 F.R. 21982) EBSA appears to assume, for cost estimate purposes, that a financial institution will spend 100 hours of IT time during the first year the institution uses the BIC exemption to "create the required disclosures, insert the contract provisions into existing contracts, maintain the required records, and publish information on the Web." We believe the 100 hour estimate dramatically underestimates the amount of time an institution would need to spend in information technology build hours to comply with the BIC exemption's new disclosure regime alone, much less setting up a structure to contract with all potential advice recipients. Although the build effort can't be properly

scoped until release of a final rule, we anticipate the initial implementation of the BIC exemption would take about 5,400 information technology hours. EBSA should know that compliance with the contracting and disclosure regime proposed under the BIC exemption will require major resources from Great-West. These increased costs may be priced into Great-West's products and services, thereby raising costs for plans, participants, and IRA accountholders.

- EBSA seeks to layer the proposed BIC exemption disclosure regime on top of the participant-level "404a-5" disclosure regime that was separately finalized by EBSA a few years ago. We are concerned that any additional disclosure to participants would be counterproductive, overwhelming participants with so much information that they will not carefully read any of the disclosures. Perhaps a workable disclosure alternative under the BIC exemption is that any disclosures to participants or IRA accountholders should piggyback on the form of disclosure required under EBSA's existing participant-level 404a-5 disclosure rules. This would provide a framework on which to build any additional BIC exemption disclosures.

7. A short BIC exemption effective period is not possible. We are seriously concerned that if compliance with the BIC exemption is mandated eight months after the publication of a final rule, there will simply not be sufficient time to build an IT and compliance structure that can address the BIC exemption's requirements. This is because implementation cannot even be scoped, much less be executed, before the release of a final rule. Additionally, system builds for ERISA compliance purposes will compete with the critical business-as-usual IT work needed to service our customers' plans and IRAs. We would propose that the BIC exemption provisions have a significantly longer implementation period, such as an additional two years. As stated above, we question the underlying assumptions that EBSA appears to have made regarding the cost and effort needed to comply with the BIC exemption.

D. Prohibited Transaction Exemption 84-24

Great-West believes the changes proposed to PTE 84-24 are problematic in several significant ways, as described below. Great-West believes the changes to the exemption as drafted will be very time consuming to implement, and Great-West is concerned that the proposed changes may not justify the potential protective value they may impart.

1. Significant new compliance expenses. Several provisions of the proposed PTE 84-24 will raise compliance costs. As described below, these additional compliance costs will likely be priced into insurance and investment products, ultimately raising prices for participants, beneficiaries, and IRA accountholders.

    - Under the Impartial Conduct Standard section of proposed PTE 84-24, there is a new disclosure obligation regarding material conflicts of interest. This is yet another new

disclosure requirement. We understood that the disclosures finalized in 2012 under ERISA Section 408(b)(2) were designed to address these issues, and we believe the new supplemental disclosures under proposed PTE 84-24 are duplicative. The proposal should be revised in this regard to simply require provision of the ERISA Section 408(b)(2) disclosure as a condition.

- The expanded recordkeeping and document retention rules listed in Section V of the proposed PTE 84-24 are extensive. In addition to raising compliance costs, we believe this requirement will encourage costly fishing expeditions. Lastly, we question whether EBSA should be requiring document retention for the Internal Revenue Service, as described in Section V(b)(1)(A).

- The changes to PTE 84-24 mean that brokers and insurance agents will likely have to deal with multiple exemptions to receive commissions in their everyday business - both PTE 84-24 and the BIC exemption. This is because sales to IRAs of registered products will be structured under the BIC exemption, while sales to IRAs of fixed products can continue under PTE 84-24. Compliance costs will rise, and will be factored in the pricing of investment products, which will raise costs. We don't believe there are compelling policy reasons to treat an IRA's purchase of fixed products and registered products differently.

2. Impartial Conduct Standards should reflect ERISA. For the reasons discussed above with respect to the BIC exemption, the Impartial Conduct Standards in PTE 84-24 should be replaced with a reference to ERISA Section 404(a).

3. Ambiguous drafting as applied to IRAs. We believe a section of proposed PTE 84-24 may be more broadly drafted than EBSA intended, which would lead to unintended consequences. The section in question is section I(b) of proposed PTE 84-24. As we read EBSA's comments in the BIC exemption preamble (80 F.R. 21965), we believe EBSA's motivation in drafting section I(b) of proposed PTE 84-24 was to move the exemption for receipt of commissions by a fiduciary, in connection with the sale of a registered product to an IRA, away from PTE 84-24, and into the BIC exemption.

   However, as section I(b) is drafted, there is an argument that section I(b)'s scope applies more broadly than to receipt of commissions by fiduciaries. This could have the consequence of requiring relief for other prohibited transactions involving the sale of registered products to an IRA to be run through the BIC exemption, even if the prohibited transaction does not involve an investment advice fiduciary. For example, it may not be clear that a non-fiduciary "disqualified person" (like Great-West) who provides a mutual fund investment to an IRA accountholder could continue to receive revenue sharing payments from the mutual fund, even though this relief would appear to be available absent the changes to section I(b). EBSA should clarify this ambiguous drafting in proposed PTE 84-24.

4. Ambiguous scope of commission definition. We interpret the new commission definition in proposed PTE 84-24 to restrict only the types of commission payments that may be made to third parties regarding the sale of an insurance contract or securities. However, as drafted, there may ambiguity about whether the narrowing of the commission definition could be more broadly applied, for example, to the receipt of revenue sharing payments by the insurer who is effecting the investment in the insurance contract. Given this ambiguity, we believe it is appropriate for EBSA to clarify that the narrowing of the commission definition applies only in connection with the payment of a commission to a third party agent, as described under Section I(a)(1) and I(a)(2) of proposed PTE 84-24.

E. Other Comments

EBSA has imbedded requests for comments throughout the Proposed Rule. The earlier sections of this letter focus on the major points that are of particular concern to Great-West. For the reasons elaborated by other commentators, Great-West also supports the following refinements to the Proposed Rule and the proposed exemptions:

1. EBSA should re-propose the Proposed Rule and exemptions before releasing a final rule. There are simply too many complexities in the Proposed Rule and exemptions for EBSA to finalize the guidance without affected parties being able to comment on the next iteration of the guidance.

2. The carve-out for pre-existing transactions should be revised to create an effective grandfather rule that will not require entering into a new contract or arrangement for relationships that pre-date the Proposed Rule.

3. The valuation carve-out should remove the word "solely" from the carve-out section regarding statements under applicable reporting and disclosure requirements, and a specific carve-out should be included for actuarial valuations under annuity contracts.

4. There should be a mechanism under the BIC exemption whereby someone who becomes an inadvertent investment advice fiduciary under ERISA can retroactively enter into a Best Interest Contract and retain variable compensation received during the retroactive period.

5. The BIC exemption should be made more specific as to which parties are expected to enter into a contract when multiple parties (e.g., product manufacturer, broker-dealer, agent) are associated with an investment.

6. The BIC exemption's contract requirement should be modified to be of practical use in telephonic and electronic transactions.

7. The BIC exemption's public website disclosure requirement should be eliminated as being overly burdensome and costly, as well as potentially violating securities and insurance laws.

8. The BIC exemption's additional requirements with regard to situations where an advisor's range of investments is limited is unworkable in practice and should be replaced with a simple disclosure requirement.

9. PTE 84-24 should be clarified to specifically provide relief for non-proprietary mutual fund transactions on an agency basis, for which there is no product-specific exemption under the proposed complex of exemptions. It is our understanding that the relief for compensation associated with non-proprietary mutual funds was historically thought to be provided under PTE 75-1, but with the changes to PTE 75-1 made through the Proposed Rule, additional clarification should be provided under PTE 84-24.

10. Because a streamlined exemption for low cost investments could have unintended consequences, particularly with regard to EBSA and Treasury's stated policies to encourage the use of lifetime income options, it should be the subject of a separate study. Insufficient time has been given to analyze and comment on a theoretical exemption as part of the already voluminous Proposed Rule.

11. In general, the burden of information collection requests for all proposed exemptions has been underestimated and additionally, is generally unnecessary in light of existing requirements under applicable laws.

We appreciate EBSA's consideration in this important proposal. We would also call EBSA's attention to the comment letters submitted by our affiliated companies, Empower Retirement and Putnam Investments, as complementing the issues discussed herein. If we can expand on any of the points above or provide additional information, please contact the undersigned.

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