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

Re: Definition of the Term "Fiduciary" (RIN 1210-AB32)

Ladies and Gentlemen:

We respectfully submit our comments regarding the Department of Labor's (the "Department" or "DOL") proposed rule (the "Proposed Rule") redefining the term "fiduciary" with respect to the provision of investment advice under Section 3(21)(A)(ii) of ERISA and Section 4975(e)(3)(B) of the Internal Revenue Code (the "Code").

Introduction. Ameritas Life Insurance Corp. ("Ameritas Life" or "Ameritas"), formed in 1887 and domiciled in Nebraska, offers fixed, indexed and variable life insurance and annuities and disability income insurance. Ameritas also offers retirement plan products and services primarily through group annuity contracts to businesses and their tax-qualified pension and profit sharing plans. Our group division offers dental, vision and hearing benefits and products to employer welfare plans and individuals. Through our affiliated broker-dealers, investment advisers and mutual fund complex we offer mutual funds, asset management services, securities brokerage and investment advisory services to individuals, businesses and their tax-qualified plans. The Department's Proposed Rule will significantly impact the products and services our companies offer.

Ameritas consistently has focused on providing protection, asset accumulation and lifetime income solutions. Ameritas supports the Department's goal of increasing consumer protection for tax-qualified retirement plans, their fiduciaries, participants, beneficiaries, and tax-qualified individual retirement account/ annuity owners (collectively "Retirement Account Investors"), but through less disruptive means as suggested in the balance of this letter.

Relevant Background.

ERISA safeguards plans and their participants by imposing trust law standards of care and undivided loyalty on plan fiduciaries, and by holding plan fiduciaries accountable when they breach those obligations. Fiduciaries to plans and IRAs may not engage in "prohibited transactions" which Congress deemed to pose dangers to the security of employee benefit plans (including prohibitions on fiduciaries' conflicts of interest) unless ERISA, the Code, or the DOL provides a prohibited transaction exemption.

In 1975, the Department issued the current definition of a fiduciary regulation establishing a five-part test the DOL must prove before it may consider a person an ERISA fiduciary due to the provision of investment advice for compensation. The Executive Summary in the Proposed Rule's promulgating release notes that the five-part test was created in a very different context, prior to the existence of participant-directed 401(k) plans, widespread investments in IRAs, and the now commonplace rollovers of plan assets from fiduciary-protected ERISA plans to IRAs.

The Proposed Rule re-defines who is a "fiduciary" of an employee benefit plan under ERISA and the Code as a result of giving investment advice to a Retirement Account Investor for compensation. If adopted, the Proposed Rule would significantly broaden the investment advice relationships deemed fiduciary under existing ERISA and Code regulations. The Proposed Rule expands the definition of a fiduciary to include providing "investment advice" to cover almost all sales practices including recommendations concerning taking distributions and rollovers from retirement accounts and sales recommendations for Retirement Account Investors to purchase annuities and other insurance policies for a commission. These changes would have significant consequences to insurance companies' sales practices by changing the long-standing standard for the sale of a product from the state insurance law and federal securities law suitability standard, to a Best Interest fiduciary standard. The suitability recommendation required by state insurance and federal securities laws would become "investment advice" under the Proposed Rule when a commission is received. The sales person making the recommendation will have engaged in a prohibited transaction under ERISA and the Code, if they receive a commission for the product sale, unless the DOL makes a prohibited transaction exemption available for such transaction.

PTE 84-24. Since 1984, the DOL has made prohibited transaction exemption (PTE) 84-24 available for the recommendation and sale of insurance and annuity products to Retirement Account Investors and the receipt of a commission by the selling agent, subject to the conditions of the PTE. The DOL now proposes to revoke the PTE for sales of variable annuities to IRAs and to amend the PTE adding a Best Interest-Impartial Conduct Standard and additional

disclosure of Material Conflicts of Interest. Ameritas opposes the revocation of the PTE for variable annuities and we suggest alternative language for the Best Interest-Impartial Conduct Standard. The standard should be that an Advisor and Financial Institution put the interests of the Retirement Account Investor ***before the financial and other interests of the insurance agent, broker-dealer and insurance company.*** It is impossible and impractical in a sales context, for the insurance agent, its insurance company, or its broker-dealer to act "*without regard to* the financial or other interests of the fiduciary, or any affiliate." Under other statutes and regulations, financial institutions must take into account capital requirements, solvency requirements, and other financial considerations. Our other concerns about this proposed amended PTE are addressed in our separate comment letter concurrently submitted to the Department's Office of Exemption Determinations.

Foundational Comments Regarding Proposed Rule.

As a foundation to our specific comments regarding the Proposed Rule, we strongly believe the following two concepts should be given significant weight in any final rule:

1) Financial service companies are already subject to a comprehensive regulatory framework that governs conduct in the sale of insurance products and securities. Life insurance companies and their agents currently are subject to a broad array of statutes and regulations administered by state insurance departments, the Securities and Exchange Commission (SEC), the Financial Industry Regulatory Authority (FINRA), and various state securities departments in addition to those of your Department. This body of statutory and regulatory obligations and oversight provide strong consumer protections and enforcement tools.

2) Retirement Account Investors, the general public, the Department, and financial services companies can only benefit from changes to the definition of a fiduciary *if* the proposed changes set forth standards and requirements that are clear, understandable, predictable, certain, and practical. Absent this, the Department's proposed changes will subject Retirement Account Investors and the financial services industry to inefficiency, second-guessing, unnecessarily protracted regulatory examinations, regulatory fines and penalties, and civil litigation with its' substantial burden of defense costs and potentially punishing and unpredictable consequences. This would exhaust finite resources otherwise available for customer services, innovative product design, and continuously improving technology which are in the best interests of all.

Recommended Changes to Proposed Rule.

Regarding the proposed §2510.3-21 Definition of "Fiduciary":

- It should be objectively clear to a Retirement Account Investor when fiduciary status is transaction specific or ongoing. If a person becomes a fiduciary because of a recommendation of a product, fiduciary status should relate only to the

recommendation triggering fiduciary status and not to any other past, present or future communications that do not meet the test for fiduciary status.

- Fiduciary status does not automatically require a duty to monitor the investment advice provided unless the person providing investment advice is formally engaged and agrees in writing to such monitoring.
- Distributions (such as required minimum distributions) and rollovers (required by the terms of a retirement plan or under the Code), should not fall within the Proposed Rule because they are *required.* A recommendation concerning a product using proceeds available as a result of a required distribution or required rollover may constitute "investment advice," but not the required distribution or required rollover alone.
- Recommendations deemed to be investment advice must be acted on within a time frame that is reasonably contemporaneous with the provision of investment advice, in the absence of facts to the contrary.
- The scope of the investment advice should be tied exclusively to the individualized recommendation for the Retirement Account Investor and should not include general or generic marketing or advertising of the type of a product commercially available, but not part of the individualized recommendation.
- Investment advice should also exclude any product marketing or "wholesaling" (compensating a person to engage another intermediary with the direct customer relationships) that is not part of the direct and immediate relationship with the Retirement Account Investor.
- Finally, the definition of an "Investment" should not include: life insurance, disability income insurance, dental, eye care or audiology insurance sold to welfare benefit plans subject to ERISA. The Department has undertaken no special analysis regarding these plans and products and should not casually apply the Proposed Rule to them.

Exhibit A contains our recommendations for revisions to Section (a) of proposed §2510.3-21 Definition of "Fiduciary."

Next, we comment regarding three of the Department's carve-outs to investment advice in section (b) of the Proposed Rule:

(1) Counterparties to the Plan, or the "Seller's Exception" Carve-Out. The Department stated that the purpose of this carve-out is to "avoid imposing ERISA fiduciary obligations on sales pitches that are part of an arm's length transaction where neither side assumes 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."[1] And, that "The seller's

[1] 80 FR 21941.

invitation to buy the product is understood as a sales pitch, not a recommendation." [2] The Department then explains that smaller plans and IRA owners will somehow fail to understand this and thus require additional protections. Ameritas disagrees with the Department's premise and position. Retirement Account Investors should be able to enter into the arrangements most appropriate for their individualized facts and circumstances, subject to market availability. Such investors have the legal capacity to act and make responsible decisions. ERISA itself makes no distinction between fiduciary status and plan size. Federal securities laws and insurance laws have long provided protections for consumers in the sale of individual products appropriate for such non-employer based markets. The DOL should respect and harmonize its regulatory efforts with these other regulatory regimes to provide cost-effective and systemically sensible consumer protection for tax-qualified individual retirement accounts. Ameritas strongly recommends that the Department extend the proposed "Seller's Exception" to all plans and IRAs.

We recommend redrafting 2510.3-21(b)(1) Counterparties to the Plan (or the "Seller's Exception") Carve Out in its entirety as follows:

> *"Counterparties to the Investor -- In such person's capacity as a counterparty to an investor, the person provides a recommendation incident to the sale of an investment to an investor who is independent of such person and who exercises authority or control with respect to the management or disposition of investments held by a plan or individual retirement account in an arm's length transaction, if, prior to providing such recommendation, the person has not acknowledged in writing that such person is acting as a fiduciary (within the meaning of this subsection) with respect to the recommended sale of an investment and the person will receive a commission upon the sale of the recommended investment to the investor and no other separate advisory fee."*

(2) Platform Providers Carve-Out. We support the platform provider carve-out and suggest changes to ensure that the carve-out can be used by a group variable annuity contract and accommodates a recordkeeper's customary practices such as the use of disclosure, updates, advance notice and negative consents following the Department's Rules 408b-2 (plan fiduciary fee disclosure), 404a-5 (plan participant fee disclosure), 404c-1 (disclosures for participant directed plan safe harbor) and 404c-5 (fiduciary relief for qualified default investment alternatives), and the Department's advisory opinion 97-16A (Aetna Life opinion agreeing that use of negative consents is not acting as a fiduciary). Additionally, we believe the carve-out should be available to all Retirement Accounts Investors, including IRAs, particularly through the use of an individual variable annuity.

We recommend redrafting 2510.3-21(b)(3) Platform Providers Carve-Out in its entirety as follows:

> *"Platform providers. The person markets and makes available to an investor investments through a platform or similar mechanism from which an Investor may select and monitor*

[2] Id.

such investment alternatives (which may be, or include, one or more annuity contracts) offered without regard to the individualized needs of the investor, subject to any default provisions selected by the plan fiduciary or negative consent procedures, if the person discloses in writing to the investor that the person is not undertaking to provide investment advice in selecting or monitoring investment alternatives available through the platform."

(3) Selection and Monitoring Assistance Carve-Out. As the platform provider carve-out is expanded to IRAs, the introductory language of this carve-out would be changed to conform.

We recommend revising the introductory clause of 2510.3-21(b)(4) to strike the following language:

"with respect to an employee benefit plan as described in section 3(3) of the Act)."

Conclusion. Thank you for the opportunity to comment on the Department's proposed amendment to the Fiduciary Rule. We look forward to working with you to improve the consumer protections available to Retirement Account Investors while ensuring access to lifetime income solutions. We would be happy to answer any questions you may have. Please feel free to contact Robert-John H. Sands at 301-280-1035.

Very truly,

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Exhibit A

Set forth below are recommended changes to Section (a) of proposed §2510.3-21 Definition of "Fiduciary."

§ 2510.3-21 Definition of "Fiduciary."

(a) Investment advice. For purposes of section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974 (Act) and section 4975(e)(3)(B) of the Internal Revenue Code (Code), except as provided in paragraph (b) of this section, a person renders investment advice with respect to moneys or other property of a plan or IRA described in paragraph (f)(2) of this section if—

(1) Such person provides, directly to an investor ~~a plan, plan fiduciary, plan participant or beneficiary, IRA, or IRA owner~~ the following types of investment advice, whether one time or ongoing, in exchange for a fee or other compensation, whether direct or indirect:

(i) A recommendation as to the advisability of acquiring, holding, disposing or exchanging investments ~~securities or other property~~, including a recommendation to take a distribution of benefits ~~or~~ that includes a recommendation as to the investment of assets ~~securities or other property~~ to be rolled over or otherwise distributed from the plan or IRA;

(ii) A recommendation as to the discretionary management of investments by a party other than the party making the recommendation ~~securities or other property~~, including recommendations as to the management of money ~~securities~~ or other property to be rolled over or otherwise distributed from the plan or IRA;

(iii) An appraisal, fairness opinion, or similar ~~statement~~ professional opinion ~~whether verbal or written~~ concerning the value of investments ~~securities or other property if~~ provided with regard to ~~in connection with~~ a specific transaction or transactions involving the acquisition, disposition, or exchange, of investments ~~securities or other property~~ by the plan or IRA;

~~(iv) A recommendation of a person who is also going to receive a fee or other compensation for providing any of the types of advice described in paragraphs (i) through (iii);~~ and

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

(i) Represents or acknowledges, either directly or indirectly (e.g., through or together with any affiliate) that it is acting as a fiduciary within the meaning of the Act with respect to the investment advice described in paragraph (a)(1) of this section; or

(ii) Renders the investment advice pursuant to a written or verbal agreement~~,~~ or arrangement, or mutual understanding that the advice is individualized ~~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~~. to meet the specific investment goals of the investor, and is provided at the request of the investor pursuant to such agreement, arrangement, or mutual understanding.

(f) Definitions. For purposes of this section –

(2)(i) "Plan" means any ~~employee benefit~~ plan described in section 3(~~3~~2) of the Act ....

(9) "Investor" means a plan, plan fiduciary (with discretionary authority over plan assets), plan participant or beneficiary, IRA, or IRA owner.

(10) "Investments" means securities, insurance and annuity contracts, property or other financial instruments held by a plan or IRA. The term "investments" does not include a contract issued by an insurance company for the provision of benefits under the plan described in section 3(1) of the Act.