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VIA EMAIL

Employee Benefits Security Administration
Office of Regulations and Interpretations
Office of Exemption Determinations
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210
e-ORI@DOL.gov (Subject: RIN 1210-AB32)
e-OED@DOL.gov (Subject: ZRIN 1210-ZA25)

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

Proposed Best Interest Contract Exemption (ZRIN 1210-ZA25); and

Proposed Amendment to and Proposed Partial Revocation of Prohibited Transaction Exemption (PTE) 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies and Investment Company Principal Underwriters (ZRIN 1210-ZA25).

Ladies and Gentlemen:

On behalf of Western & Southern Financial Group, Inc. ("WSFG")[1] and its subsidiaries, we appreciate the opportunity to offer comments on the proposed rule and prohibited transaction exemptions under Sections 3(21)(A)(ii) and 2510.3-21 of the Employee Retirement Income Security Act (collectively, the "Proposal"). WSFG is a member of each of, and supports the comment letters regarding the Proposal of, the American Council of Life Insurers ("ACLI"), the Financial Services Roundtable ("FSR"), the Financial Services Institute ("FSI"), and the Insured Retirement Institute ("IRI"). We provide our comments to the Proposal to emphasize issues of particular concern to our businesses. Specifically, WSFG is concerned that, if the Proposal is adopted as currently proposed, it will affect WSFG's ability to provide important products and services, including guaranteed lifetime income products, to our clients.

WSFG is a Fortunc 500, diversified, and customer-oriented family of companies, as well as, a nationally recognized leader in consumer and business financial services. WSFG's heritage dates back to February 23, 1888 with the founding of The Western and Southern Life Insurance Company ("Western and Southern"). WSFG's member

[1] WSFG is wholly owned by Western & Southern Mutual Holding Company, a mutual insurance holding company.

companies provide millions of individuals, businesses and institutions with life and health insurance, annuities, mutual funds, and a variety of investment management products and services. As a mutual company, we do not answer to shareholders, but instead we manage our company in the long-term interests of our policyholders.

Specifically, WSFG has six life insurance subsidiaries — Western & Southern, Western-Southern Life Assurance Company, Columbus Life Insurance Company, Integrity Life Insurance Company, The Lafayette Life Insurance Company, and National Integrity Life Insurance Company. All of our life insurance subsidiaries maintain very strong financial ratings. Our financial strength and 127-year history provide our clients with security for the guaranteed products they purchase from us. Other WSFG subsidiaries include, but are not limited to, Fort Washington Investment Advisors, Inc., a registered investment adviser; W&S Brokerage Services, Inc., a registered broker-dealer and Financial Industry Regulatory Authority ("FINRA") member; and IFS Financial Services, Inc., which consists of Touchstone Investments, a mutual fund company, Touchstone Advisors, a registered investment adviser, and W&S Financial Group Distributors, Inc, a registered broker-dealer and FINRA member.

The Proposal will affect WSFG and its affiliates' clients in numerous ways. Some of our affiliates, such as Western & Southern, distribute insurance and annuity products through career agents who offer a limited range of proprietary products. Certain of these employees may also be registered representatives of our affiliated broker-dealer, through which they offer proprietary mutual funds and variable annuities to our clients. Certain of our other affiliates distribute insurance and annuity products through independent insurance marketing organizations, banks, and broker-dealers, which offer products from multiple carriers. In addition, one of our investment adviser affiliates, Fort Washington Investment Advisors, Inc., advises individual retirement account ("IRA") owners and other qualified plan account holders. Another WSFG subsidiary, The Lafayette Life Insurance Company, has a business line that offers investment products to qualified plans with less than 100 participants. Because of our diverse businesses and distribution models, the Proposal, if adopted as proposed, will have wide-ranging negative consequences for WSFG, its affiliates, and our clients.

We share the interest of the Department of Labor (the "Department") in seeing that plan sponsors, plan participants, and IRA owners receive advice that is in their best interest and will help them achieve lifetime financial security. We strongly believe, however, if the Proposal is adopted as proposed, it will result in reduced access to much needed investment advice, retirement benefit coverage, guaranteed lifetime income products, and investment education. While, these unintended negative consequences will impact all Americans investing for retirement, we believe the effects will be most acute for investors who tend to have middle to small asset size retirement accounts and plans, a

primary client base of Western & Southern.[2] Accordingly, we strongly urge the Department to amend the Proposal.

At its core, the Department should amend the Proposal to:

- exclude sales activities and other non-fiduciary activities from the definition of the term "fiduciary;"
- provide guidance that a fiduciary and its affiliated companies that develop and adhere to compliance procedures and processes reasonably designed to ensure that the fiduciary and its affiliates mitigate conflicts of interest, act in the best interest of their clients, receive only reasonable compensation, and disclose material conflicts, would not be deemed to have violated their respective fiduciary duties;
- streamline the Best Interest Contract Exemption ("BICE") to provide a workable prohibited transaction exemption;
- remove from the BICE any bias against the offering of proprietary products;
- remove any bias for low-fee investments;[3]
- provide a single prohibited transaction exemption for both fixed and variable annuities; and
- expand the time period for implementation of any final rule.

These core changes are necessary to ensure that plan sponsors, fiduciaries, and participants, as well as IRA account holders retain the flexibility necessary to define the nature and scope of their relationship with financial services providers. Such changes will address the Department's stated goal of increasing retirement consumer protections, while ensuring that a variety of business models can continue to operate and serve all Americans, not just those with the largest retirement accounts.

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[2] For example, in 2014, 69% of Western & Southern's customers had an annual income of $40,000-$140,000.

[3] As discussed in more detail below, such investments may or may not be in a particular client's best interest.

I. The Definition of "Fiduciary" Should Be Revised to Exclude Sales Activities and Other Non-Fiduciary Activities.

The definition of "fiduciary" must explicitly carve-out sales activities and other non-fiduciary activities. The investment industry has operated under the premise that on-going "investment advice" is a product of a relationship of trust between the adviser and an investor, and such advice is customized, deemed suitable for, and based on the needs of the specific investor. The final fiduciary standard should only apply in these circumstances, and fiduciary obligations should not be imposed 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."[4]

Accordingly, fiduciary status should not apply when someone makes a sales recommendation to a qualified plan of any size or an IRA owned by a sophisticated investor. Further, when presenting recommendations, asset allocation information should continue to be permissible as set forth in Interpretive Bulletin 96-1 ("IB 96-1"),[5] as such information has been a useful mainstay to educate consumers about their investment options. Finally, fiduciary status should not apply when marketing materials are provided to a potential investor, or the owner of an IRA discusses that product with a call center specialist. These situations do not come with an expectation of trust and impartiality, and therefore, the fiduciary standard should not apply.

A. Seller/Counterparty's Carve-Out

The Proposal provides carve-outs or exceptions for communications that are "best understood as non-fiduciary in nature" and that "parties would not ordinarily view as communications characterized by a relationship of trust or impartiality."[6] These communications should also include sales to small qualified plans and IRAs owned by sophisticated investors. Accordingly, the seller's or counterparty's carve-out set forth in Section (b)(1) of the Proposal should be expanded. The Department draws an unwarranted distinction between plans with fewer than 100 participants and/or with less than $100,000,000 in plan assets. The Department views these small plans as unsophisticated, but, as with larger plans, small plans must identify a named fiduciary bound by ERISA's fiduciary duty rules. Fiduciaries to smaller plans have the requisite skill and competence to understand when an adviser is acting in a selling capacity, and the Department sets forth no evidence to the contrary. In the absence of a mutual understanding or agreement that products or services are being offered or marketed in a fiduciary capacity, such offerings should be treated as sales activities not included in the "investment advice" definition.

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[4] 75 Fed. Reg. 21941 (April 20, 2015).
[5] 29 C.F.R. § 2509.96-1.
[6] 75 Fed. Reg. 21929 (April 20, 2015).

In addition to expanding the seller's exception to small plans, the Department should remove the requirement that the seller prove that a small plan fiduciary has sufficient expertise to evaluate the transaction. If a plan fiduciary is acting in that capacity in connection with a sales or marketing engagement, any seller/counterparty may reasonably assume that the fiduciary understands her duties under ERISA. Further, we agree with the point raised in FSI's comment letter[7] that it is nonsensical to make this exception unavailable if a plan directly pays a fee to the seller. The fiduciary nature (or lack thereof) of the recommendation does not change depending on the source of the compensation, and small employers may need to charge plans with fees to offset initial costs.

The seller's exception should also be expanded to IRAs owned by sophisticated investors. The SEC has already drawn a distinction between sophisticated and unsophisticated investors through its "accredited investor" concept set forth in SEC Rule 501 of Regulation D.[8] Such investors are capable of making sound investment decisions with respect to their IRAs and can distinguish between a sales pitch and unbiased advice. Accordingly, IRAs owned by accredited investors should be included within the seller's exception.

As drafted, the Proposal raises serious concerns about the ability of financial services firms to offer products and provide advice to small retirement plans and IRAs. If implemented in its current form, the Proposal will significantly increase costs and risks attendant to serving the small employer community and those individuals with smaller IRA accounts, and, in our opinion, will decrease many American workers' access to retirement plans and much needed retirement investment advice.

RECOMMENDED CHANGE: Expand the seller's/counterparty's carve-out to include sales to all plans and sales to IRAs owned by "accredited investors." Eliminate the requirements under this carve-out that the seller prove that a plan fiduciary has sufficient expertise to meet her fiduciary obligations and that fees may not be paid by the plan.

B. Investment Education

IB 96-1 has been relied upon by investment advisers for two decades. Unlike the Department's 2010 fiduciary rule proposal, the Department proposes changes to IB 96-1 that would prohibit asset allocation information that refers to specific investment products available under the plan or IRA. These changes are a significant shift from well-established and relied upon guidelines that benefit consumers. We believe these changes will dramatically reduce the value of educational materials to our clients, and result in less-informed consumers, which does not advance the Department's stated goals.

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[7] *See* FSI Comment Letter dated July 21, 2015, Section IV.b.

[8] 17 C.F.R. § 230.500, et seq. An "accredited investor" includes individuals who have income of $200,000 or more (individual) or $300,000 or more (couple) or who have a net worth of more than $1,000,000, excluding the value of a primary residence. 17 C.F.R. § 230.501(a)(5)-(6).

We have found that asset allocation education with specific investment product references have proven to be very useful educational tools for our clients. Accordingly, IB 96-1 should be incorporated into the Proposal in whole and without change.

RECOMMENDED CHANGE: Revise the investment education carve-out to fully incorporate IB 96-1, including its provisions regarding asset allocation.

C. Marketing Materials, Advertising and Call Centers

The Department should narrow the scope of the Proposal to only those relationships that implicate relationships of trust and consumer expectations of impartiality. The Proposal's revised definition of fiduciary would potentially apply to any advice that is "individualized to the advice recipient" or "specifically directed to" a potential customer, including general investment communications delivered via targeted sales calls, individually addressed marketing materials, or brochures selected and distributed in an effort to match informational content with a particular client or potential investor's retirement needs. The Proposal's revised definition would also include responses to requests for proposals from retirement plan sponsors that include sample investment line-ups or proprietary product "wholesaling" activities, including training. This revised definition of fiduciary creates a presumption of fiduciary status in circumstances where no relationship of trust or expectation of impartiality exists or was intended. We support IRI's comment[9] that paragraph (a)(2)(ii) of the Proposal be modified to eliminate the "specifically directed to" language and to read "sufficiently individualized as to form a reasonable basis for reliance by the advice recipient as a source of unbiased and impartial advice."

RECOMMENDED CHANGE: Revise Proposal paragraph (a)(2)(ii) to eliminate the "specifically directed to" language and to read "sufficiently individualized as to form a reasonable basis for reliance by the advice recipient as a source of unbiased and impartial advice."

II. BICE Should Be Amended to Provide that a Fiduciary and its Affiliates Can Adhere to Compliance Procedures to Satisfy Fiduciary Duties, Streamline its Requirements, and Reduce Unnecessary Costs to Comply.

After greatly expanding the activities that will be subject to fiduciary obligations, the Proposal offers BICE to permit otherwise prohibited transactions. The Department describes BICE as "flexible,"[10] but we believe the opposite is the case. Furthermore, BICE appears to be biased against proprietary products sold by a career sales force and in favor of low-cost investments such as indexed mutual funds. BICE is also unnecessarily complicated with a contract timing requirement that will be impracticable to employ and a disclosure regime that only compounds a meshwork of current regulation.

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[9] *See* IRI Comment Letter dated July 21, 2015, Section I.A.2.
[10] 75 Fed. Reg. 21947 (April 20, 2015).

A. Adherence to Compliance Procedures and Processes to Comply with Fiduciary Duties

We believe that, as proposed, BICE is unworkably ambiguous. BICE should be overhauled to include specific guidance for compliance and provide a "safe harbor" that will permit a fiduciary and its affiliates to develop and adhere to reasonably designed compliance procedures and processes to meet their respective fiduciary duties to act in the best interest of the client, receive only reasonable compensation, and disclose material conflicts. Absent such guidance and safe harbor, the parameters of "best interest," "reasonable compensation," and "material" conflicts will be determined by judges across the country. The costs of this litigation will likely be passed on to consumers in the form of higher fees and less access to investment advice for many consumers with small to mid-size plans or IRA account balances. In lieu of such unnecessary and costly litigation, we request that the Proposal be revised to provide additional guidance and safe harbors in lieu of the extensive warranties.

For example, BICE requires an affirmative warranty that the financial institution does not use "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."[11] This language is broad, vague and subjective and, we believe, will likely result in expensive class action and other litigation. In lieu of such ambiguity, the Department could provide safe harbors, such as a provision that deems a commission and any other compensation on annuities, mutual funds, other securities and insurance products reasonable, provided such compensation is permissible under FINRA, SEC, and/or state department of insurance regulations and guidance.

If a financial institution adopts and adheres to reasonable procedures and processes to mitigate and disclose conflicts of interest, otherwise act in a client's best interest, and charge reasonable fees, inadvertent failures should not result in excise taxes or liability. A fiduciary is generally expected to have a reasonable process for determination of the reasonability of compensation for engaging a third party to provide a product or service to a plan, such as requiring multiple bids. BICE should be revised to permit similar reliance on processes related to meeting the best interest standard, reasonable compensation, and disclosure of material conflicts. A provision requiring adoption and adherence to such reasonable procedures and processes should be included in any final rule in lieu of the warranties required by BICE as set forth in the Proposal.

We recognize and appreciate that the Department sought to draft BICE in a flexible manner to accommodate the many business models that offer investment advice to consumers. Nonetheless, we are concerned that absent the revisions discussed above BICE will create an untenable level of uncertainty and litigation risk. More specifically, we are concerned that the potential revenue from a small to mid-size plan and IRA

[11] 80 Fed. Reg. 21971 (April 20, 2015) (emphasis added).

accounts will not justify the potential risk and uncertainty to the fiduciary and its affiliates. Accordingly, BICE should be reformulated to provide the above-referenced compliance-related certainty, so that WSFG, its affiliates, and other similarly situated financial institutions can continue to serve small- to mid-size plans and IRAs, representing those U.S. consumers who, in many ways, most need investment advice to secure retirement security.

RECOMMENDED CHANGE: Delete Section II(d) of BICE and replace it with a requirement that financial institutions adopt procedures and processes reasonably designed ensure that it and its advisers mitigate conflicts of interest, act in the best interest of the client, receive only reasonable compensation, and disclose material conflicts. Add a provision that eliminates excise tax and contractual liability if a financial institution develops and adheres to such procedures and processes in a good faith manner.

B. Offering of Proprietary Products and Limited Product Offerings

We believe that the BICE requirements are unnecessarily biased against the offering and distribution of proprietary products, as well as other limited product offerings. Section IV(b) of BICE provides that if a financial institution and adviser do not offer a broad range of assets, then a financial institution must make "a specific written finding that the limitations it has placed on the Assets made available to an Adviser for purchase, sale or holding by Plans, participant and beneficiary accounts and IRAs do not prevent the Adviser from providing advice that is in the Best Interest of the Retirement Investor… or otherwise adhering to the Impartial Conduct Standards…."[12] Further, any compensation from such limited offerings must be "reasonable in relation to the value of the specific services provided to the Retirement Investor in exchange for the payments and not in excess of the services' fair market value."[13]

These provisions assume that investors need greater protections when investing in or purchasing proprietary or other limited sets of products. We strongly disagree. No firm offers all investment products; accordingly, all financial institutions and advisers are presenting a limited range of investment options. We strongly believe that these provisions do not adequately recognize the benefits of proprietary products sold by a career sales force. WSFG products are distributed, in part, by Western & Southern agents through our career agency system of financial professionals. Unlike independent insurance agents, these career agents agree to primarily represent Western and Southern and principally sell Western and Southern insurance, annuity, and mutual fund products. In accordance with industry requirements, Western and Southern provides its career agents with substantial training, support and supervision. Additionally, career agents receive health insurance, retirement benefits, and other non-cash compensation.

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[12] 80 Fed. Reg. 21985-86 (April 20, 2015).
[13] 80 Fed. Reg. 21986 (April 20, 2015).

The career agency model of distribution provides a benefit to consumers as it fosters a lifetime relationship between the consumer and financial institution, developed and managed by the career agent. In addition, the career agent has a depth of knowledge about the products he offers, which is very important, especially for products such as variable annuities that can provide retirees with the guaranteed lifetime income solutions that they need. As a mutual company, WSFG and its affiliates, including Western & Southern, deliver long-term value to our clients who, by purchasing certain proprietary products, become owners. The provision of WSFG proprietary products by Western & Southern career agents is comprehensively regulated by applicable state and federal agencies, and in some instances, a self-regulatory organization.[14] This comprehensive regulatory regime helps ensure that these career agents accurately represent and appropriately offer proprietary products and disclose their affiliation with WSFG. Further, WSFG and its affiliates design and implement supervisory and compliance oversight programs and controls to oversee the activities of career agents. Those programs and controls help ensure that career agents comply with all applicable law, regulations, and internal policies and procedures.

The Department should not apply more onerous standards to WSFG products sold by Western & Southern career agents. The Department should instead look to Congressional guidance provided as part of the Dodd-Frank Act. Under Section 913, Congress authorized a uniform standard of care for broker-dealers and registered investment advisers. Congress specifically provided that "[t]he sale of only proprietary or other limited range of products by a broker or dealer shall not, in and of itself, be considered a violation" of such a standard.[15] The Proposal's more onerous standard for compensation related to proprietary products or other limited range of investments should be eliminated. That standard provides no additional protection to consumers beyond the general BICE requirement that compensation received be reasonable; it potentially implicates antitrust issues; and it adds another layer of compliance complication without any apparent benefit to consumers.

Moreover, the Department must recognize that compensation provided to career agents, including health and retirement benefits, is permissible, provided that the receipt of such non-wage compensation is not tied to sales production. Such benefits do not incentivize career agents to act in a manner inconsistent with a client's best interest. The Proposal needs to specifically state that the long-standing and comprehensively regulated forms of compensation paid to career agents are acceptable and do not, in and of themselves, violate any final best interest standard. These changes to BICE are necessary to ensure that U.S. consumers across the economic spectrum continue to have access to well-trained financial professionals and quality life insurance and annuity products.

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[14] Specifically, FINRA, which regulates the sale of proprietary variable annuities and mutual funds, among other securities.

[15] 15 U.S.C. § 780(k)(2).

RECOMMENDED CHANGE: Remove Section IV of BICE. Add an explicit statement that the sale of only proprietary or other limited range of products shall not, in and of itself, be considered a violation of the best interest standard. Add an explicit statement that health benefits, retirement benefits, and other non-cash compensation provided to life insurance agents are acceptable forms of compensation that are reasonable and do not create material conflicts of interest with consumers.

C. Differential Compensation

In addition to an apparent bias *against* sales of proprietary products, we believe BICE includes a bias *in favor* of low-cost product options such as indexed mutual funds. This apparent bias is evidenced by the conditions of BICE and the Department's request for comments on a potential streamlined prohibited transaction exemption for low-cost investment options. This bias undervalues the financial strength, expertise, and experience of the issuing company; the product flexibility in the event of life changes; and the benefits of guaranteed lifetime income. Quite simply and intuitively, different products offer different benefits and value propositions to clients, which necessitate commensurate differences in cost structures and compensation models for the product's manufacturer and distributor. American retirement savers benefit from this wide array of products that serve their varying needs.

The Department seems to suggest that passive investment vehicles (e.g. indexed mutual funds) are preferable to actively managed funds or other products. Indexed mutual funds, of course, are not always the most appropriate investment for, or in the best interest of, a specific investor. Many investors prefer actively managed mutual funds. Further, the apparent bias toward indexed mutual funds contradicts recent findings of the Administration's Council of Economic Advisors that guaranteed lifetime income products, such as fixed and variable annuities, "help mitigate some of the risk faced by retirees. In particular, annuities protect retirees against the risk of outliving assets."[16] Finally, the Department should not favor any type of asset class, cost structure, compensation model, or financial services provider.

RECOMMENDED CHANGE: Add an explicit statement that the Proposal is not intended to and does not favor any particular type of asset class, cost structure, compensation model, or financial services provider. Accordingly, any final rule should not include a streamlined exemption for low-cost products.

[16] Executive Office of the President, Council of Economic Advisers, "Supporting Retirement for American Families," Feb. 2, 2012, at 5.

D. Contracting Process

The contracting process dictated by BICE should be simplified. The Proposal currently requires that the mandatory BICE contract be entered into before a recommendation is made and be signed by the financial professional. These timing requirements are onerous, impracticable and unnecessary to achieve the Department's stated goals. The BICE contract timing requirement does not recognize that recommendations are often made as part of a consumer's process of selecting a financial professional. Otherwise, the consumer would have very little information on which to compare financial professionals and the products they offer. Further, requiring that the consumer enter into a contract prior to the financial professional making any recommendation is impracticable in many instances. Instead, we request that BICE be revised to require the execution of the contract before a transaction is executed. This timing would not undermine the Department's goal of an enforceable contract that includes the applicable standard of care. Further, BICE should permit negative consent for existing clients. Obtaining contract signatures from a vast base of existing clients will be particularly onerous considering the implementation timeframe contemplated by the Proposal. Negative consent is permissible and utilized under existing securities law.[17] Permitting such consent for existing clients would not undermine the Department's goal of an enforceable best interest standard.

In addition, while the financial institution should, the individual financial professional should not, be required to execute the BICE contract. When a financial professional leaves the employment or engagement of a financial institution, the financial institution continues to service the product purchased by the consumer. Requiring the financial professional to sign each BICE contract will be unmanageable on an on-going basis, with no apparent benefit to consumers.

RECOMMENDED CHANGE: Require the execution of a contract before a transaction is executed instead of prior to the recommendation of a product. Permit negative consent for existing clients. Eliminate the requirement that the financial professional be a party to the contract.

E. Disclosures

The expansive disclosure requirements contained within BICE potentially conflict with comprehensive existing disclosure requirements promulgated by various state, federal, and industry regulators; do not appropriately recognize and account for distinctions among different product types; would require development of comprehensive new information technology systems; and would take significant amounts of time and money to implement (significantly more than is estimated by the Department) all without any commensurate benefit to consumers. With our diverse businesses and distribution

[17] *See, e.g.*, Regulation of Investment Advisers § 2:7 (2014) (permitting negative consent from clients in connection with a change of control of the investment adviser).

models, the disclosure requirements will be extremely onerous and, as similarly noted immediately above, without any commensurate benefit to our clients.

Significant and comprehensive disclosure regimes already exist, including the disclosure requirements of ERISA Section 408(b)(2). We request that in lieu of creating an entirely new and in many ways duplicative disclosure regime, the Department should instead leverage existing disclosure regimes. If the Department believes that the disclosures currently mandated by ERISA, the SEC, FINRA, and state insurance regulators overlook any key disclosure requirement, we believe the Department should provide limited additional disclosures that address only such identified disclosure gaps. Overlaying an additional and, in some cases, duplicative disclosure regime will not serve consumers' best interests. Rather, such additional disclosures will, at great cost provide little to no benefit to consumers.

RECOMMENDED CHANGE: Delete Section III of BICE.

F. Eliminate the Data Request Authority

Under the stated purpose of determining the overall effectiveness of BICE, the Proposal grants the Department with unprecedented authority to request data from financial institutions, including performance returns and costs to the client. The Department should not be provided have this authority. First, the connection between such data and the effectiveness of the Proposal is tenuous at best. Second, we believe such data requests further indicate a bias towards low-cost product providers that undervalues products with a higher cost structure that may, in fact, be in the client's best interest for a variety of reasons, including tax effects, guaranteed income benefits, and the financial strength of the product provider. Third, the Department already has statutory powers of investigation that could be used to request information when and only if necessary.

RECOMMENDED CHANGE: Delete Section V(b) of BICE.

III. Prohibited Transaction Exemption 84-24 ("PTE 84-24") Should Be Revised to Retain Application to Variable Annuities and to Permit Customary Forms of Compensation.

The amended PTE 84-24 should be revised to apply to variable annuities sold to IRAs and to permit forms of compensation that have been permissible and unproblematic for decades.

A. Variable Annuities

The Proposal amends PTE 84-24 to remove coverage for variable annuities sold to IRA owners. Such recommendations would instead fall under BICE, while PTE 84-24 continues to apply to fixed annuities. The Department should reverse course on this unnecessary proposed distinction between fixed and variable annuities.

First, these products share features that argue in favor of one prohibited transaction exemption for both products. For example, variable annuities and fixed annuities may both include fixed options with interest guarantees, mortality-based investment guarantees, and retirement income guarantees. Second, we believe that the Department's justification for removing variable annuities from PTE 84-24 is unfounded. The Department indicates its view that variable annuities are more like mutual funds than fixed annuities. We respectfully, but strongly disagree with this premise. The common annuity product features discussed above are not offered through mutual funds or other securities. Variable and fixed annuities provide access to lifetime income guarantees. Mutual funds and other securities do not.

Third, the insurance features of a variable annuity (and a fixed annuity) are incompatible with the BICE disclosure regime. For example, WSFG could not project the future costs associated with a variable annuity, as the owner of such product may or may not elect an annuity payout benefit. Fourth, this dual prohibited transaction exemption structure creates an unnecessary level of complication for advisers who offer both fixed annuities and variable annuities and is unduly complicated for consumers. Consider the average Western & Southern insurance agent faced with documenting compliance with PTE 84-24 for fixed annuities and separately and differently documenting compliance with BICE for variable annuities. Additionally, consider the resulting confusion faced by a consumer considering the both products at one time. As noted above, the product features common to fixed and variable annuities warrant the same consumer protections. Fifth and finally, investors purchasing variable annuities will still be protected as a result of the incorporation of BICE's impartial conduct standard into PTE 84-24. Accordingly, we urge the Department to include variable annuities under PTE 84-24.

RECOMMENDED CHANGE: Revise PTE 84-24 so that it applies to variable annuities purchased in IRAs.

B. Compensation

Variable annuities have been covered under PTE 84-24 for decades. In addition, for that same time period, compensation relating to variable annuity sales has included commissions, revenue sharing, administrative and marketing fees, and other payments from third parties. Without any apparent justification or reference to problematic compensation practices, the Proposal provides a new definition of "insurance

commissions" that does not include these common and currently permissible sources of compensation. This new definition should either be eliminated or revised to include these historically acceptable, non-problematic, sources of compensation. If the Department is concerned that consumers are unaware of these sources of compensation under current disclosure requirements, we believe the Department should promulgate a rule specifying supplemental disclosures.

RECOMMENDED CHANGE: Eliminate Section VI(f) of PTE 84-24 or replace it with a definition of "insurance commissions" that includes standard and permissible compensation provided in connection with sales of annuities, including revenue sharing and administrative and marketing fees.

IV. Advisers Should Be Permitted to Define the Time Period for Reliance on Advice.

The Proposal's definition of investment advice is unclear as to how long a fiduciary's duties continue or how long her advice may be relied upon. The Proposal should expressly state that the provision of advice in one instance does not establish a continuing fiduciary obligation on the part of the fiduciary or its affiliates. Further, the Department should permit the parties to define a time period during which the customer can reasonably rely on the advice. Congressional intent, as shown in the Dodd-Frank Act, would suggest that fiduciaries should not be required to have a continuing duty of care or loyalty after providing a recommendation.[18]

RECOMMENDED CHANGE: Add an explicit statement that the fiduciary obligations imposed by the Proposal may be limited in time.

V. The Proposal Should Not Apply to Welfare Benefit Plans.

WSFG fully supports the arguments set forth in Section I of ACLI's comment letter regarding welfare benefit plans. The Proposal is unclear as to whether such plans are within its scope. We request that any final rule definitively state that a recommendation to purchase a disability policy or other welfare benefit product is not "investment advice" to address any ambiguity. Further, we believe that welfare benefit plans should be carved-out from the Proposal for several reasons. First, these products are not savings vehicles, but rather are built to provide specific, non-monetary benefits. Including such products within the scope of the Proposal does not serve the Department's goal of increasing Americans' retirement savings. Second, we do not believe that the Department has clear statutory authority to include welfare benefit plans in the scope of the Proposal.

RECOMMENDED CHANGE: Add a carve-out for welfare benefit products, including disability policies.

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[18] 15 U.S.C. § 780(k)(1).

VI. The Department Should Extend the Time Period for Implementation.

The Proposal provides that it will become effective eight months after publication of the final regulation. Eight months to comply with this costly and sweeping regulation, even if modified as requested, is impracticable. At a minimum, we anticipate that WSFG and its affiliates will need to train thousands of employees and agents, build comprehensive new information technology infrastructure, create new documentation, and develop and modify new and existing compliance programs and supervisory systems. WSFG's diverse business lines, like those of many other financial service institutions, will only further complicate necessary changes, as different business units will be impacted in different ways and are currently subject to, in many case, differing existing regulatory regimes. We believe that three years from the date of publication of the final rule is a practicable implementation time period.

RECOMMENDED CHANGE: Revise the implementation period to three years.

Once again, we appreciate the opportunity to comment on the Proposal and its potential impacts to consumers. If you have any questions regarding our comments or if we can be of any assistance in your consideration of the issues discussed above, please contact Sarah Sparks Herron at 513-357-4055 or sarah.herron@westernsouthernlife.com or me.

Sincerely,

Jonathan D. Niemeyer
Senior Vice President and General Counsel