GROOM LAW GROUP

MEMORANDUM

November 19, 2014

TO: Daniel Hall, VP Retirement Plan Sales
Harley Spring, VP Retirement Plan Services

FROM: David N. Levine
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RE: Standard Retirement Services, Inc. Delegated Administrative Fiduciary Services – Compliance Review

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This memorandum provides a summary of our analysis and findings regarding Standard Retirement Services' ("The Standard") delegated administrative fiduciary services (the "Fiduciary Services"). The Fiduciary Services are described in the Delegated Administrative Fiduciary Services Addendum to its Retirement Plan Administrative Services Agreement that is executed by each client electing to utilize the Fiduciary Services.

Description of the Fiduciary Services

The Standard offers numerous retirement-related services to its clients. One of its core services is retirement plan administrative and recordkeeping services. The Standard offers the Fiduciary Services as optional services that may be utilized in conjunction with The Standard's core administrative and recordkeeping services. The Fiduciary Services can be detailed as follows:

- Annual Compliance Testing;
- Management of the Approval of Loans, Distributions and QDROs;
- Enrollment Notification; and
- Delivery of Required Participant Notices.

Summary of Findings

In the past, many plan sponsors[1] relied on service providers to provide guidance on a number of administrative issues even though providers' own service agreements clearly indicated that the service providers' information was not intended or to be relied on as fiduciary advice. In recent years, plan sponsors have become more aware of their retained responsibilities and liabilities, causing some plan sponsors seeking more comprehensive service relationships. In

[1] For purposes of this memorandum, we generally assume that the plan sponsor / employer is the named fiduciary of each plan utilizing the Fiduciary Services.

response, The Standard has developed the Fiduciary Services to assist plan sponsors and fiduciaries by efficiently assuming a number of significant responsibilities that normally reside with a plan sponsor. The Fiduciary Services are designed and implemented using a system of detailed internal controls designed to help protect a plan sponsor in the event of a DOL or IRS inquiry. We summarize our findings as follows:

- The Fiduciary Services are designed to allow a plan sponsor to transition administrative and fiduciary responsibility for certain key annual compliance testing functions, enrollment notification activities, approval processes for loans, distributions, and QDROs, and legally-required notice delivery to a third party service provider – The Standard.
- The Fiduciary Services would likely be characterized as a combination of both ERISA section 3(16) "administrator" and ERISA section 3(21)(A)(iii) "fiduciary" services and are intended to be more than just ministerial in nature. As such, while The Standard labels the Fiduciary Services as a "3(16)" program for ease of communication, the breath of the Fiduciary Services results in The Standard providing support to its clients beyond a basic "3(16)" program and, instead, shifts a number of core administrative fiduciary responsibilities to The Standard.
- The Fiduciary Services are designed in a manner intended to ensure compliance with applicable Internal Revenue Code and ERISA requirements.

This analysis is based on the description of the Fiduciary Services contained in the Delegated Administrative Fiduciary Services Addendum. Our analysis is not and is not intended to serve as legal advice to any person other than The Standard. Each client or prospective client of The Standard, whether or not a sponsor, employer, fiduciary, or plan itself, should consult with its own legal counsel when considering and evaluating the Fiduciary Services, including whether or not to incorporate them in their own plan. Despite best efforts by The Standard, it is possible that a regulator or court of law could conclude that any component of the Fiduciary Services is non-compliant with any applicable legal requirement.

Discussion of The Standard's Role in Providing the Fiduciary Services

A. Legal Framework

In undertaking the Fiduciary Services, The Standard is actively taking on certain duties that would apply to an administrator under ERISA section 3(16) and/or an administrative fiduciary under ERISA section 3(21)(A)(iii). A key factor in evaluating the Fiduciary Services is to understand the relevance of these roles.

Under ERISA the "fiduciaries" of a plan must:[2]

- Act solely in the interest of plan participants and their beneficiaries and with the exclusive purpose of providing benefits to them;
- Carry out their duties prudently;

[2] http://www.dol.gov/ebsa/publications/fiduciaryresponsibility.html.

- Follow the governing documents of the plan (unless such documents are inconsistent with ERISA);
- Diversify plan investments; and
- Pay only reasonable plan expenses from plan assets.

Typically, a plan service provider will assert that it is not a fiduciary because it is engaging in ministerial, non-fiduciary functions.

ERISA section 3(21)(A) provides that a person is a fiduciary "to the extent" he or she (1) exercises discretionary authority or control over the management or administration of a plan; exercises authority or control with respect to the management or disposition of plan assets, (2) renders investment advice with respect to the moneys or other property of the plan, or (3) has any discretionary authority or responsibility in the administration of a plan. This ERISA section 3(21)(A) definition is the "core" definition of fiduciary.

ERISA provides that an ERISA section 3(16) "administrator" has only a limited number of duties that are generally reporting and disclosure-oriented, such as preparing and distributing most disclosure documents including summary plan descriptions, quarterly benefit statements, participant notices and fee disclosures, and Form 5500 filings. A plan's "administrator," because of its very nature, involves the performance of fiduciary duties. *See* 29 C.F.R. 2509.75-5 Q-D-3

There are also other fiduciary roles, such as a "named fiduciary" under ERISA section 402(a) (which may be an employer sponsoring a plan, a committee, or some other structure) or ERISA section 3(38) investment manager, which, if optional services are elected, could be an affiliate of The Standard.

B. Explaining The Standard's Role

1. Evolution of the Retirement Services Marketplace

Historically, many plan sponsors have relied on their recordkeeping and administrative service providers to prepare their plan documents, provide all relevant disclosures, and distribute all required notices and many providers did so. However, regardless of these services, the service agreements, contracts, and administrative practices of providers have specifically placed the responsibility for the final decision on fiduciary actions with a plan sponsor and not the provider.

In recent years, some providers have agreed to take on fiduciary responsibility under different names and labels. However, the extent to which any service is truly fiduciary in nature can vary. We understand that The Standard recognized a desire by a number of its clients to have The Standard take on additional responsibilities. Accordingly The Standard has developed the Fiduciary Services.

2. The Responsibilities The Standard Assumes

If a client adopts the Fiduciary Services, The Standard adopts a number of key roles:

- *Compliance Testing*. When acting in a non-fiduciary capacity, The Standard will complete Internal Revenue Code section 410(b) coverage and Code section 401(k) and 401(m) ADP/ACP testing for its clients. When utilizing the Fiduciary Services, The Standard is granted discretion in a number of areas, including how to (1) implement testing on a timely basis, (2) perform corrections, (3) choose testing methodology when a plan document provides for discretion, (4) complete IRS and DOL filings for testing corrections, and (5) perform excess distributions as necessary.[3] The responsibility for timely completing these duties (subject to the general oversight of the plan sponsor and subject to the provision of necessary and accurate information, guidance, and data) is placed on The Standard, not the plan sponsor.
- *Enrollment Alert Notification*. When acting in a non-fiduciary capacity, The Standard will provide notices about enrollment eligibility as directed by a client. When utilizing the Fiduciary Services, The Standard takes on the responsibility for ensuring that, with certain specified exceptions, employees who are eligible to participate in a plan are properly notified. In audits, the IRS has focused on ensuring that eligible employees are actually advised of their right to participate in a plan rather than made eligible in name only.
- *Approval of Loans, Distributions, and Qualified Domestic Relations Orders*. The Standard regularly processes distributions on a ministerial basis for its clients. However, when utilizing the Fiduciary Services, The Standard assumes discretion for reviewing distribution requests generally, hardships (which, notably, are not based on an IRS safe harbor standard, thus requiring discretionary review), loan applications, and QDROs. Notably, QDRO reviews are conducted under procedures established and maintained by The Standard. Except in certain circumstances specifically excluded from the Fiduciary Services, the client does not retain responsibility to make these decisions when the Fiduciary Services are elected.
- *Delivery of Required Annual Notices*. While The Standard will normally assist a client in preparing sample notices, a client is vested with final discretion and responsibility for ensuring timely delivery of these notices. When utilizing this Fiduciary Service, The Standard will assume responsibility for distribution of required annual notices in a manner consistent with ERISA section 3(16). The Standard is responsible for a failure to properly deliver notices within the scope of the Fiduciary Service.

3. The Responsibilities Remaining With The Plan Sponsor

Although The Standard assumes a number of responsibilities as part of the Fiduciary Services, it does exclude certain activities. Each client and its advisors should review and evaluate the extent to which it wishes to shift responsibilities to The Standard as well as the extent to which it will retain certain obligations as set forth in the Delegated Administrative Fiduciary Services Addendum, including its named fiduciary role of providing general fiduciary

[3] The “named fiduciary” or “plan sponsor” may implement other available correction methods.

oversight of plan activities as a whole. We specifically note that a client retains a number of duties, including, but not limited to, the filing:

- *Data Elements*. To fulfill its duties to provide the Fiduciary Services, The Standard needs to receive timely and accurate data. It does not take responsibility, and will not indemnify the plan for actions taken or omitted, if it does not have timely or accurate data.
- *Rehired, Missing Participants, Beneficiaries.* In certain cases involving rehired participants, missing participants, and beneficiaries of participants, the plan sponsor retains responsibility for certain compliance activities.
- *Forwarding of Information*. A plan sponsor must forward any loan, distribution, or domestic relations order material it receives to The Standard on a timely basis.
- *Actions to Override The Standard*. If a plan sponsor directs or overrides an activity taken or to be taken by The Standard, for example with testing corrections, the plan sponsor reassumes the fiduciary role, if any, with respect to that activity.
- *Selecting and Monitoring*. The named fiduciary retains responsibility to effectively select and monitor plan service providers such as The Standard.