GROOM
LAW GROUP
www.groom.com

Stephen M. Saxon
(202) 861-6609
sms@groom.com

Roberta J. Ufford
(202) 861-6643
rju@groom.com

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Submitted Electronically
Jonathan G. Katz
Secretary, Securities and Exchange Commission
450 5th Street, N.W.
Washington, D.C. 20549

Re: Point of Sale Disclosure Requirements and Confirmation Requirements (Release Nos. 33-8544; 34-51274; IC-26778; File No. S7-06-04)

Dear Mr. Katz:

The Groom Law Group, Chartered, appreciates this opportunity to respond to the supplemental request for comments issued by the Securities and Exchange Commission ("Commission") on its rule proposals relating to point of sale and confirmation disclosure requirements for mutual funds and certain other securities (the "Proposed Rules").[1] Our firm represents financial institutions and other service providers to employee benefit plans. As you know, employee benefit plans, especially "401(k)" and similar participant-directed employee benefit plans, invest in mutual funds in addition to other investment products — the fiduciaries of plans responsible for selecting plan investment options would be included among the "investors" targeted to receive point of sale and confirmation disclosures under the Proposed Rules.

We applaud the Commission's effort to improve the disclosure that broker-dealers provide to their customers about the costs and conflicts of interest associated with purchases of

[1] Point of Sale Disclosure Requirements and Confirmation Requirements for Transactions in Mutual Funds, College Savings Plans, and Certain Other Securities, and Amendments to the Registration Form for Mutual Funds; Release Nos. 33-8544; 34-51274; IC-26778 (Feb. 28, 2005), 70 Fed. Reg. 10521 (March 4, 2005) (reopening of comment period and supplemental request for comment) ("Proposing Release").

mutual funds and other securities. However, standardized disclosure formats targeted to individual retail investors will not assist employee benefit plan fiduciaries in making plan investment decisions, and instead will result in plan fiduciaries receiving disjointed and confusing information. We urge the Commission to recognize the special circumstances and requirements of employee benefit plans in its further consideration of the Proposed Rules, and respectfully request that the Commission consider —

- exempting sales to employee benefit plans from point of sale disclosure requirements as currently proposed, and
- involving the U.S. Department of Labor ("Labor Department") and the employee benefit plan industry in discussions to develop specialized disclosure forms that would be appropriate and helpful to plan fiduciaries.

We discuss below some reasons for concern about the Proposed Rules as applied to employee benefit plan investors. We also request that the Commission extend the comment period on the Proposed Rules for an additional sixty (60) days, because our clients have told us that the thirty day comment period provided by the Commission has not allowed them sufficient time to consider the potential impact of the Proposed Rules on plan fiduciaries.

As you know, employee benefit plans are a unique group of investors. The Employee Retirement Income Security of 1974, as amended ("ERISA"), which governs most plans, establishes a regulatory scheme under which certain "fiduciaries" (including the plan "administrator," trustee and other "named fiduciaries" of a plan) have overall responsibility for plan administration and operation and the investment of plan assets. *See* ERISA § 402; 29 C.F.R. § 2509.75-8, FR-12. ERISA imposes specific duties upon fiduciaries and imposes liability for plan losses upon those fiduciaries who do not satisfy their fiduciary obligations. ERISA §§ 404, 406, 409.

It has become common (especially with respect to 401(k) and other participant-directed retirement plans) that "fee-sharing" arrangements between mutual fund complexes and employee benefit plan service providers (including broker-dealers, banks and third party administration firms) are employed to pay some or all of the cost of administrative services provided to plans. In this regard, the Labor Department has specified that ERISA plan fiduciaries are required to obtain information about the fees paid by the plan and received directly and indirectly by all of

the plan's service providers.[2] The Labor Department has issued detailed guidance intended to assist fiduciaries in carrying out this responsibility[3] and continues to review and examine whether plan fiduciaries are receiving information necessary to make informed decisions on behalf of plans, including information about commissions and other amounts that plans may pay indirectly to plan service providers.[4]

The Proposed Rules recognize that disclosure formats should be targeted to investor circumstances and that a "one size fits all" approach is not helpful to investors. Accordingly, the Commission is proposing different model forms for different classes of mutual fund shares and for different investment products, including section 529 plans and variable annuities. Disclosure

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[2] In Advisory Opinion 97-16A (May 22, 1997), which was issued to ALIAC, an insurance company offering a combination of investment and administrative services to defined contribution retirement plans *i.e.,* 401(k) plans, the Labor Department explained that: "it should be noted that ERISA's general standards of fiduciary conduct also would apply to the proposed arrangement. Under section 404(a)(1) of ERISA, the responsible Plan fiduciaries must act prudently and solely in the interest of the Plan participants and beneficiaries both in deciding whether to enter into, or continue, the above-described arrangement with ALIAC, and in determining which investment options to utilize or make available to Plan participants and beneficiaries. In this regard, the responsible Plan fiduciaries must assure that the compensation paid directly or indirectly by the Plan to ALIAC is reasonable, taking into account the services provided to the Plan as well as any other fees or compensation received by ALIAC in connection with the investment of Plan assets. The responsible Plan fiduciaries therefore must obtain sufficient information regarding any fees or other compensation that ALIAC receives with respect to the Plan's investments in each Unrelated Fund to make an informed decision whether ALIAC's compensation for services is no more than reasonable."

[3] *See, e.g.,* "Understanding Retirement Plan Fees And Expenses" (May 2004), available at www.dol.gov/ebsa.

[4] Advisory Council on Employee Welfare and Pension Benefit Plans, Report of the Working Group on Fee And Related Disclosures To Participants, November 10, 2004 (study of fee and related disclosures to participants in defined contribution plans that relate to investment decisions and retirement savings); Advisory Council on Employee Welfare and Pension Benefit Plans, Report of The Working Group on Plan Fees and Reporting on Form 5500, November 10, 2004 (studying retirement plan investment management fees and expenses as they are currently reported; this working group was charged with studying whether plan sponsors adequately understand the total fees and expenses they are paying and whether those fees are reported on the Form 5500).

to employee benefit plans similarly involves special issues, not addressed by forms developed for individual retail investors.

In this regard, plan fiduciaries often can select plan investments from a range of different mutual funds and other investments (including insurance products and bank collective trust funds). Plan fiduciaries also have a wide range of choices in contracting for recordkeeping and other administrative services, including "bundled" arrangements under which plan administrative services are provided "for no additional charge" and alliances of unrelated service providers. Plan fiduciaries therefore require disclosure forms that assist them in comparing all of the fees the plan will pay, directly or indirectly, for investment products and administrative services.[5] Forms prepared for individual retail investors would not meet this need since they would only provide piecemeal information about individual investment products, providing an incomplete and potentially misleading picture of the plan's investments rather than disclosure that assists the plan fiduciary in understanding the plan's total cost for investment and administrative services. This may contribute to plan fiduciary confusion and "information overload." At best, rules requiring delivery of inappropriate disclosure forms would add unnecessary cost without any benefit to fiduciaries making decisions about plan investments.

Therefore, we urge the Commission to provide an exception from the point of sale disclosure requirements, as these requirements are currently proposed, so that forms developed for individual retail investors need not be delivered to fiduciaries of employee benefit plans.[6] In

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[5] One effort to develop a format for this disclosure is the "401(k) Plan Fee Disclosure Form," available at www.dol.gov/ebsa, which provides a form for collecting information about service fees and investments so that employers can compare the investment and administrative costs of competing providers.

[6] The Commission has suggested that certain plans with more than 100 participants might be excepted from the point of sale disclosure. Proposing Release, 70 Fed. Reg. at 10532 n. 45. However, disclosure forms prepared for individual retail investors can be incomplete and potentially confusing to fiduciaries of plans with under 100 participants for the same reasons that the forms will not be helpful to fiduciaries of larger plans.

addition, we urge the Commission to work with the Labor Department and the retirement services industry to develop disclosure forms helpful to plan fiduciaries.

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Thank you for your consideration. We are available to discuss our comments and any other questions as you continue to consider these issues.

Sincerely,

/s/
Stephen M. Saxon

/s/
Roberta J. Ufford

cc: William H. Donaldson, Chairman
Paul Atkins, Commissioner
Cynthia A. Glassman, Commissioner
Harvey Goldschmid, Commissioner
Roel Campos, Commissioner
Annette L. Nazareth, Director, Division of Market Regulation
Catherine McGuire, Associate Director, Division of Market Regulation
Ann L. Combs, Assistant Secretary of Labor