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Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Fiduciary Definition Hearing, Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Examination of Fiduciary Rule

To whom it may concern:

Support for Best Interest Standard

Pacific Life Insurance Company (“Pacific Life”) supports a uniform Best Interest Standard of Care applicable to all investors. In the development of such a standard, Pacific Life supports the Department of Labor (“the Department”) in conducting a full, substantive review of the Fiduciary Rule¹ in its entirety. A true review can only conclude that **this Fiduciary Rule reduces widespread availability of retirement advice that encourages financial independence and security**. By making it harder and more expensive for average Americans to access guaranteed income options with their retirement funds, the Fiduciary Rule is a hurdle to closing the retirement savings crisis facing the United States. Without access to such options, savers looking for more certainty regarding income in retirement and the ability to hedge longevity risk are severely limited.

In the text and commentary to the Final Rule Delay of Applicability Date, published in the Federal Register on April 7, 2017, and in the Final Rule and Exemptions published in April 2016, the Department repeatedly points to the volumes of comments received during the notice and comment period. While it is clear the Department processed and read the comments in their entirety, the dismissal of Department errors as mere “disagreement” and the failure of the

¹ For purposes of this letter, the term “Fiduciary Rule” refers to 29 C.F.R. § 2510.3-21 as currently set to become applicable on June 9, 2017, and the new and amended class exemptions released by the Department on April 8, 2016, as corrected by 81 Fed. Reg. 44,773 (July 11, 2016), and as set to become applicable pursuant to the extension published in the Federal Register at 82 Fed. Reg. 16,902 (Apr. 7, 2017).

Department to make meaningful, substantive changes to the Rule addressing the negative consequences to small business owners and the American retirement investors they serve is evidence of a lack of substantive and meaningful analysis and review.

The Department seems to be missing the mark. Lack of savings is the main challenge for Americans being unprepared for retirement;² not conflicted advice. The Rule as applicable on June 9, 2017, and January 1, 2018, erects greater barriers to the individualized encouragement and advice to save in the first place.

Need for Full and Comprehensive Review

A full and comprehensive review is both necessary and appropriate under the Presidential Memorandums dated February 3, 2017³, and March 13, 2017⁴. A hindsight review that occurs only after the amendments to the Definition of Fiduciary become applicable on June 9, 2017, is not compliant with the letter or the spirit of the Presidential Memorandums.

The Department's changes to the Fiduciary Rule are onerous, duplicative, and do not encourage saving or financial independence for Americans. Instead, it encourages costly litigation and its objectives can be better and more effectively achieved through existing regulators at the SEC and by States. It is the quintessential example of the type of regulation that the *Presidential Executive Order on a Comprehensive Plan for Reorganizing the Executive Branch* is directed toward.

Pacific Life is a manufacturer of retirement products, life insurance and investments designed to enable and protect American's financial security and well-being. These products are distributed through independent registered representatives of FINRA broker-dealers and insurance producers. Pacific Life and our distribution partners are regulated by the SEC, FINRA, State Insurance and Securities Departments. These entities regulate sales practices, product design and investments directly, each providing robust licensing, oversight and enforcement mechanisms. The retirement investors and their assets that the Department is purporting to protect, are already 100% covered by regulations promulgated by one or more of these specific regulators.

The Department is not the right regulator to best promulgate, monitor AND enforce a Best Interest Standard of Care in the sale of investment and insurance products.

² <http://www.latimes.com/business/la-fi-retirement-savings-bankrate-20140818-story.html>;

<https://www.usatoday.com/story/money/personalfinance/2016/10/29/nearly-half-young-adults-lack-retirement-savings-pension/92361590/>;

<https://www.shrm.org/ResourcesAndTools/hr-topics/benefits/Pages/50Somethings.aspx>

³ See White House Memorandum for the Secretary of Labor. <https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-memorandum-fiduciary-duty-rule>

⁴ See Presidential Executive Order on a Comprehensive Plan for Reorganizing the Executive Branch.

<https://www.whitehouse.gov/the-press-office/2017/03/13/presidential-executive-order-comprehensive-plan-reorganizing-executive>

Pacific Life joins the American Council of Life Insurers, the Investment Company Institute, the Insured Retirement Institute and the Committee of Annuity Insurers in supporting a full and comprehensive review of the Rule and related exemptions in their entirety.

Responses to the Department's Questions

In addition to the comments above as to the Presidential directives, the comments below are responses to several of the Department's specific questions in the Notice of Proposed Rulemaking⁵ that pertain to Pacific Life.

Are firms making changes to their line-ups of investment products, and/or to product pricing? What are those changes, what is the motivation behind them, and will the changes advance or undermine firms' abilities to serve their customers' needs?

Yes. Pacific Life has made multiple changes to our product line up including adding more fee based annuity options to support advisory business models and creating a T-Share mutual fund structure to support brokerage models. We have been asked by many of our top distribution partners to change the commissions we pay them. While specific requests have differed in the mix of upfront vs. on-going trail commissions, on average, Pacific Life has been asked to **increase** the total aggregate commission paid for the sale of our products. These requests have an immediate impact on the interest crediting rates offered to consumers on fixed products and fixed guarantees. In addition, Pacific Life is undertaking a long-term analysis to consider removing certain products from the market and/or amending fees and charges to cover the increased costs of compensation, reducing investor choice and possibly increasing their overall costs.

Has implementation or anticipation of the Rule led to increases or reductions in commissions, loads, or other fees? Have firms changed their minimum balance requirements for either commission-based or asset-based fee compensation arrangements?

Refer to above answer. Pacific Life will likely require a minimum balance for annuity contracts purchased by IRA investors or qualified plans.

What innovations or changes in the delivery of financial advice have occurred that can be at least partially attributable to the Rule? Will those innovations or changes make retirement investors better or worse off?

As the Fiduciary Rule was only made final one year ago, it is too early to know what material innovations to the delivery of financial advice will take hold. As evidenced by the significant decrease in Variable Annuity sales,⁶ there has been substantial negative impact to retirement

⁵ <https://www.federalregister.gov/documents/2017/03/02/2017-04096/definition-of-the-term-fiduciary-conflict-of-interest-rule-retirement-investment-advice-best>

⁶ http://www.limra.com/Posts/PR/Data_Bank/_PDF/2016-4Q-Annuity-Estimates.aspx

investors from the chilling effect of advisor uncertainty regarding how to comply with the new Rule. Less advice to retirement investors on the benefits of guaranteed lifetime income bears a direct correlation to a fewer number of investors pursuing those options.

Robo advisors' preferred status under the Rule has, not surprisingly, led multiple industry leaders to announce the adoption of robo options. This shift to the availability of a do-it-yourself model may appear to be a positive accommodation, particularly for low balance accounts, but is a wolf in sheep's clothing. Robo advice is an egregious misnomer as it is not advice at all, it is rather the application of a non-individualized algorithm that is incapable of taking a specific retirement investor's circumstance, concerns and needs into consideration. There is no empirical evidence that supports the motivation created by human interaction to start or increase savings, but we intuitively know it happens.

In addition, being overly optimistic and dependent on the future of robo advice as THE solution for individuals with smaller balances is risky. The marketplace lacks product diversity. Most solutions are based solely on model investment portfolios that lack the lifetime income options that only an annuity can provide should the client need greater certainty and the peace of mind that come from guaranteed income.

Investors who are already self-motivated to save for their retirement and comfortable doing so on their own, may be attracted to a "do it yourself" approach either investing directly or utilizing a robo-allocator. Most fee based investment advisors (who curiously are not subject to the contractual provisions of the Rule) have minimum account requirements of at least \$100,000. Who will provide advice to those retirement savers with balances under \$100,000?^{7 8}

Pacific Life has over 600,000 retail annuity contract owners with an average purchase payment of \$93,400 when funded with retirement assets. That means, on average, there are tens of thousands of retirement investors who did not undertake a "do it yourself" path, but were likely prodded and cajoled by an advisor to commit to saving for their long-term retirement security. A

⁷ The EBRI 2015 Retirement Confidence Survey (https://www.ebri.org/pdf/briefspdf/ebri_ib_413_apr15_rcs-2015.pdf)

- Of those *workers* polled for 2015, 76% say they have a total value of their household's savings and investments at less than \$100,000
- Of those *retirees* polled for 2015, 71% say they have a total value of their household's savings and investments at less than \$100,000

⁸ <http://www.cnbc.com/2016/09/12/heres-how-much-the-average-american-family-has-saved-for-retirement.html> *Many Americans are not prepared for retirement. In fact, "nearly half of families have no retirement account savings at all," the Economic Policy Institute (EPI) reported. Just how much has the average American family saved up? According to the EPI, the mean retirement savings of all families is \$95,776.*

fee based advisor with significant minimum account requirements will not seek out these clients, but a commission based advisor may provide that introductory service.

The consequence of the Rule pushing more advisors to a fee based model, combined with the chilling effect on many distributors from the added compliance costs and legal liability exposure on smaller accounts, sets up a perfect storm for these lower and mid-level retirement investors. We can only speculate on the numbers of how many under \$100,000 accounts or early savers would have set this money aside for their retirement under a “do-it-yourself” model. Nonetheless, in light of the growing retirement savings crisis, ANY increase in the number of American’s saving is a vital improvement.

Equally important, the advisor’s role at the time of retirement, or separation of service cannot be underestimated. The critical points in time when retirees have important decisions to make about what to do next with their retirement funds are when many will benefit most from professional guidance. The retiree who does not have access to professional guidance and is forced into a “do-it-yourself” situation is less likely to make good decisions that will allow them to spread their retirement savings out in a way that will afford them security throughout their lifetime. A recent study found that, “1 in 5 individuals who took a lump sum either from a DB plan or DC plan depleted their lump sum, on average, in 5 ½ years.”⁹

In addition, as previewed above, Pacific Life has been notified by several of our largest distribution partners of their intent to “abandon” or “orphan” accounts that fall below a minimum balance set by them (ranging anywhere from \$2,000 to \$25,000). This leaves existing Pacific Life customers without an advisor to provide ongoing advice and assistance on important decisions on investment selections, lifetime income options and tax and savings impact of distributions or additional contributions.

What changes have been made to investor education both in terms of access and content in response to the Rule and PTEs, and to what extent have any changes helped or harmed investors?

We have found that educational materials are becoming overly generic or over-simplified to avoid the appearance of a recommendation that would trigger fiduciary obligations. This could be a barrier for many Americans who need greater access to more detailed educational information that increases their financial literacy and strengthens their ability to make informed investment decisions.¹⁰

For example, a broad safe harbor is available for plans that wish to show specific investment alternatives in their educational and interactive materials for asset allocation models. These valuable tools that connect the hypothetical value of an asset allocation model to actual

⁹ <https://www.metlife.com/assets/cao/institutional-retirement/MetLife-Paycheck-or-Pot-of-Gold-Study-Final4-11-17.pdf>

¹⁰ <http://www.cnbc.com/2015/04/02/financial-literacy-not-just-a-problem-for-students.html>

investment options is now, under the Rule, not available to IRA owners absent a fiduciary relationship.¹¹

The Department's examination of the final Rule and exemptions pursuant to the Presidential Memorandum, together with possible resultant actions to rescind or amend the Rule, could require more time than this proposed 60-day extension would provide. What costs and benefit considerations should the Department consider if the applicability date is further delayed, for 6 months, a year, or more?

The final Rule (delay), published April 7, 2017, creates a new set of Rules for the industry to comply with between June 9, 2017, and January 1, 2018. This partial implementation (i.e., requiring only the Impartial Conduct Standards to be applicable) and creation of essentially a new rule, with no notice or comment period, is an egregious abuse by the Department. Consumers and the industry now will essentially have to deal with one set of rules for the remainder of 2017 and be prepared to potentially deal with another set of rules starting 2018 and beyond.

Have market developments and preparation efforts since the final Rule and PTEs were published in April 2016 illuminated particular provisions that could be amended to reduce compliance burdens and minimize undue disruptions while still accomplishing the regulatory objective of establishing an enforceable best interest conduct standard for retirement investment advice and empowering Americans to make their own financial decisions, save for retirement and build individual wealth?

Pacific Life supports efforts to adopt a uniform and enforceable best interest standard of care for all investors. Consistent with legislative intent in the crafting and adoption of Dodd-Frank, the SEC is the regulator with the requisite experience, understanding and enforcement capabilities to meet the above stated regulatory objective. The Department of Labor's reach is limited in scope, duplicative in application and powerless in enforcement. For these reasons, the Department was never the correct body to regulate in this capacity and this regulatory change in particular does not meet the standards set forth in the March 13, 2017, Presidential Executive Order on a Comprehensive Plan for Reorganizing the Executive Branch.

Nevertheless, the following provisions are the items we have consistently heard from our distribution partners that the Department must amend to reduce compliance burdens and minimize disruptions. These suggestions accommodate the Department's regulatory objectives of establishing an enforceable best interest conduct standard for retirement investment advice

¹¹ 81 FR P. 20948

Additionally, in response to comments on the proposal, the final Rule allows educational asset allocation models and interactive investment materials provided to participants and beneficiaries in plans to reference specific investment alternatives under conditions designed to ensure the communications are presented as hypothetical examples that help participants and beneficiaries understand the educational information and not as investment recommendations. The Rule does not, however, create such a broad safe harbor from fiduciary status for such "hypothetical" examples in the IRA context for reasons described below.

and empowering Americans to make their own financial decisions, save for retirement and build individual wealth.

1) Remove the contractual mandate as a condition of the BIC Exemption

There are grave concerns that by simply maintaining a commission based compensation model, financial institutions will be faced with the uncertain costs and resource challenges from possibly frivolous class action lawsuits. To mitigate such outcome, many financial institutions and their advisors will avoid offering certain products like variable and indexed annuities, even if those products are in the clients' best interest.

2) Amend grandfathering provisions for uniform application and time frames

Application of any new rules and exemptions related to advisors and currently invested retirement savings must be on a prospective basis. Any different construction (i.e., by certain dates, certain transactions and certain recommendations) causes harm to savers as they must re-negotiate arrangements with their advisors and may not receive the benefit of services previously agreed to and paid for. In addition, advisors are making plans to abandon clients with whom they had previous relationships because the Rule is too uncertain and fraught with risk. Certain distribution firms are planning to abandon clients that do not fit into their grandfathering solutions.

3) PTE 84-24 should cover all annuities

Pacific Life applauds the Department's first step to return all annuities to PTE 84-24 and continues to urge the Department to adopt uniform treatment of all annuity products. The unique value of all annuities is the ability create lifetime income. As previously stated, advisors must be properly licensed and trained under both securities and state insurance laws and are subject to significant review and enforcement mechanisms by those bodies. It is unnecessary, duplicative and counter to Presidential priorities to create distinctions between these products due to required compliance with differing exemptions.

To what extent have the rule's and exemptions' costs already been incurred and thus cannot, at this point in time, be lessened by regulatory revisions or delays? Can the portion of costs that are still avoidable be quantified or otherwise characterized? Are the Rule's intended effects entirely contingent upon the costs that have not yet been incurred, or will some portion be achieved as a result of compliance actions already taken? How will they be achieved and will they be sustained?

Substantial costs have been incurred in preparation of the April 10, 2017, applicability date. For Pacific Life, as a product manufacturer in a supporting role, this or any additional delay does not materially add to our tangible costs. Nevertheless, additional revisions that make the Rule and exemptions more stringent could add additional costs to develop and re-tool our preparation work to meet the initial applicability date. Many of the infrastructure developments can be repurposed to support a uniform best interest standard that may develop through the SEC and NAIC.

The real cost to Pacific Life and American investors is consistent with the industry statistics revealing a greater than 25% reduction in variable annuity sales attributable to the Department's actions.¹² The legal cost to Pacific Life and our distribution partners is not easily quantifiable. The risk of class action litigation, including the cost of defending against unsuccessful actions is not readily available but recent studies have pointed to an increase in risk of litigation.¹³

The Department's unprecedented targeting of a particular product or investment, and those that distribute it, is fundamentally unfair and beyond the scope of the Department's authority to become a market maker or destroyer via regulation. These actions by the Department are squarely in conflict with the priorities of "empower[ing] Americans to make their own financial decisions, to facilitate their ability to save for retirement and build the individual wealth necessary to afford typical lifetime expenses..."¹⁴

The Department should regulate ERISA fiduciary behavior, not specific insurance or investment products that are already heavily regulated.

In response to the approaching applicability date of the Rule, or other factors, has the affected industry already responded in such a way that if the Rule were rescinded, the regulated community, or a subset of it, would continue to abide by the Rule's standards? If this is the case, would the Rule's predicated benefits to consumers, or a portion thereof, be retained, regardless of whether the Rule were rescinded? What could ensure compliance with the standards if they were no longer enforceable legal obligations?

As we have stated in all our prior comment letters to the Department, we believe our industry has always acted in the best interest of our customers, and it will remain a central tenet throughout the promotion of our products. In support of a uniform standard, industry leaders have been working with Congress and the SEC to propose an appropriate standard and enforcement mechanism across securities investments. At the same time, the insurance industry is working closely with the NAIC to provide uniformity in the form of a best interest standard of care applicable to non-securities based insurance products, as well as addressing conflicts of interest and compensation.

The SEC and NAIC/State Insurance Departments each have substantial enforcement arms to ensure compliance. These professional regulatory entities can provide uniform guidance and application of the requirements far better than a patchwork of state court actions and their varying remedies that would result from class action litigation under the Rule.

¹² Greg Iacurci, *Department of Labor's fiduciary rule blamed for insurers' massive hit on variable annuity sales*, INVESTMENT NEWS (Mar. 28, 2017), http://www.investmentnews.com/article/20170328/FREE/170329922/departement-of-labors-fiduciary-rule-blamed-for-insurers-massive-hit?utm_source=Morning-20170329&utm_campaign=investmentnews&utm_medium=email&utm_visit=24334.

¹³ A.T. Kearney Study: *The \$20 billion impact of the new fiduciary rule on the U.S. wealth management industry* (October 2016), <https://www.atkearney.com/documents/10192/7041991/DOL+Perspective++August+2016.pdf/b2a2176b-c821-41d9-b12e-d3d2b0807d69>.

¹⁴ Presidential Memorandum on Fiduciary Duty Rule, February 3, 2017

Conclusion

Pacific Life appreciates the Department's desire to ensure that American retirement investors are receiving advice in their best interest. For the reasons stated above, Pacific Life supports a better solution to reach this level of consumer protection. Leveraging existing regulators with professional enforcement experience provides broader consumer protection across all investments in ways better suited to keep advice and options accessible to all investors based on their varying needs.

A complete delay in applicability of the Rule and all exemption requirements that is long enough to allow a full and substantive review of the Rule and exemptions in their entirety is necessary to achieve the right approach for American investors.

Sincerely,

A handwritten signature in black ink, appearing to read "Sharon A. Cheever". The signature is written in a cursive, flowing style.

Sharon Cheever
Senior Vice President and
General Counsel