

April 17, 2017

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

RIN 1210-AB79

Dear Sir or Madam:

The American Bankers Association appreciates the opportunity to comment on the impact of the fiduciary rule in response to the President's Memorandum directing the Department to update its economic and legal analysis of the final rule.¹ This comment is directed at the ability of insurance agents to provide information and advice related to insurance products.

We appreciate that the final rule and the Prohibited Transaction Exemption (PTE) 84-24 include provisions designed to accommodate insurance sales activities. The final rule includes a new paragraph (g)(4) that expressly defines "investment property" to exclude health or disability insurance policies, term life insurance policies, or other assets to the extent that they do not include an investment component.² This change makes it clear that the final rule does not treat advice related to the purchase of health, disability, and term life insurance policies as fiduciary investment advice, as long as the policies do not have an investment component. Similarly, the revised Prohibited Transaction Exemption (PTC) 84-24 allows insurance agents that act as investment advice fiduciaries to continue to receive a variety of forms of compensation that would otherwise violate prohibited transaction rules and trigger excise taxes.³ This exemption allows fiduciaries to receive compensation when plans and IRAs purchase insurance contracts or fixed rate annuity contracts.⁴

We are concerned, however, about the impact of the following conflict of interest FAQ issued by the Department earlier this year:

Q4. An investment adviser who is also a licensed insurance agent approaches a client who will soon begin receiving minimum required distributions from the client's 401(k) plan accounts and IRAs. The adviser recommends that once the client receives these required minimum distributions they should be used to fund a permanent life insurance product. The investment adviser in his or her capacity as insurance agent will receive a commission on the sale of the permanent life insurance product. Is the recommendation of the permanent life insurance product investment advice covered by the Rule?

¹ Presidential Memorandum dated Feb. 3, 2017 and published in the Federal Register on Feb. 7, 2017 at 82 Fed. Reg. 9675.

² 81 Fed. Reg. 20946 (April 8, 2016).

³ 81 Fed. Reg. 21147 (April 8, 2016).

⁴ This includes immediate annuities, traditional annuities, declared rate annuities or fixed rate annuities (including deferred income annuities), but does not include variable annuities or indexed annuities.

Yes. Because the minimum required distributions are compelled by the Code, the adviser has not recommended a distribution from a plan or IRA simply by explaining the tax requirements and telling the plan participant that the law requires those distributions. However, the adviser has made a recommendation as to how securities or other investment property of a plan or IRA should be invested after the funds are distributed from the plan or IRA within the meaning of paragraph (a)(1)(i) of the Rule.⁵

While permanent life insurance has a saving component, it is primarily an insurance product, and is regulated as an insurance product by state insurance regulator. Therefore, we recommend that the Department revise the definition of “investment property” to exclude any product regulated as insurance by state insurance authorities. This proposed modification would ensure that consumers can have access to different forms of insurance. Without such a modification, the rule would have the negative impact of reducing consumers’ access to retirement product structures.

Additionally, we recommend that the Department clarify that the rule does not apply to minimum distributions once the funds have been distributed and are no longer in a retirement plan. In the FAQ cited above, the advice was provided before the minimum distribution. After a minimum distribution, however, it is impossible for an insurance agent to determine if insurance premiums are paid with the proceeds from the distribution or from funds that were already in an account. Clarifying this matter would avoid dislocations or disruptions for insurance agents and insurance agencies that would adversely affect consumers.

Finally, we recommend that the Department clarify that periodic distributions from retirement plans into insurance policies that were entered into prior to the applicability date of the rule should be deemed exempt from the rule. The ongoing premiums paid to agents in such cases do not constitute a new recommendation, but are based upon a transaction that occurred prior to the applicability of the rule. Without this clarification, insurance agencies may be forced to resign as servicing agents on these policies and the policyholders would lose the benefit of the agent’s expertise to address questions that may arise regarding the policies. Thus, clarifying this matter would avoid dislocations or disruptions for insurance agents and insurance agencies that would adversely affect consumers.

Thank you for your consideration of these views. For further information please contact Sarah Ferman at 202-663-5510.

Sincerely,

Sarah Ferman

Sarah Ferman
Senior Government Relations Representative
American Bankers Association

⁵ <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/coi-rules-and-exemptions-part-2.pdf>.