



DAVE JONES
Insurance Commissioner

August 7, 2017

The Honorable R. Alexander Acosta
Secretary of Labor
Timothy D. Hauser
Brian Shiker
U.S. Department of Labor
Office of Exemption Determinations
EBSA
(Attention: D-11933)
200 Constitution Avenue NW., Suite 400
Washington, DC 20210
email: EBSA.FiduciaryRuleExamination@dol.gov

SUBJECT: RIN 1210-AB82
Comments Responsive to Question One Regarding Delaying the January 1, 2018, the Applicability Date of the BIC, Principal Transactions Exemption and Amendments to PTE 84-24

Dear Mr. Secretary, Mr. Hauser and Mr. Shiker:

I strongly support the Department of Labor's Fiduciary Rule, and related Exemptions. Consumers save throughout their working lives to ensure that they have sufficient funds to enjoy retirement. Many consumers do so by purchasing annuities as IRAs or through ERISA plans. Existing suitability requirements for selling annuities continue to be insufficient. There is no requirement that the agent act as a fiduciary, nor is there a prohibition on providing conflicted advice. Further, Advisers are not required to make consumers aware that the advice they are providing is conflicted. In our enforcement cases, we have seen that consumers have been led by Advisers to purchase annuity products that ultimately provide them with little return or even caused them to lose money. Once fully implemented, the Department of Labor's fiduciary rule regulatory package will go far toward putting an end to these types of problematic sales.

I am providing responses to five of the questions raised in the Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions (82 FR 31278) issued July 6, 2017. Please view my responses as generally limited to the transaction of annuities, which are insurance products.

Question 3. Do the Rule and PTEs appropriately balance the interest of consumers in receiving broad-based investment advice while protecting them from conflicts of interest? Do they effectively allow Advisers to provide a wide range of products that can meet each investor's particular needs?

300 CAPITOL MALL, SUITE 1700
SACRAMENTO, CALIFORNIA 95814
PHONE (916) 492-3500 • FACSIMILE (916) 445-5280

The Rule and PTEs strike an appropriate balance. Consumers can continue to receive “broad-based investment advice”. Advisers are not precluded from providing a wide range of products. Further, it is appropriate that Advisers be limited to recommending to a range of products that are in the consumers’ best interest.

Financial products are complex. Consumers must rely on Advisers to guide them in purchasing investment products. Currently, there is no fiduciary duty that applies in the context of insurance sales, nor is there a prohibition against conflicted advice. Existing suitability requirements do not provide enough consumer protection. The NAIC *Suitability in Annuity Transactions Model Regulation* (#275) (hereinafter “NAIC Suitability Model”) requires that the consumer benefit from certain features of an annuity and that the annuity be suitable based on enumerated suitability information. This standard has proved to be insufficient. In our enforcement cases, we have seen experienced investors be taken advantage of by unscrupulous agents who are motivated by high commissions to sell unsuitable annuities. The practice of recommending financial products that are primarily in the Adviser’s best interest due to the commission amounts they will receive must cease.

Question 5: Likely impact on Advisers’ and firms’ compliance incentives if the Department eliminated or substantially altered the contract requirement for IRAs.

The enforceable contract requirement provides negative sanctions for Financial Institutions, Advisers and firms that do not comply. An enforcement mechanism is essential for compliance to occur. The contract requirement should remain applicable to sales of IRAs. Many consumers are induced to roll their retirement nest eggs into IRA annuities. Without the contract requirement, Advisers, firms, and Financial Institutions will be less likely to comply with the regulations, resulting in consumers receiving conflicted advice to their detriment.

Further, the contract provision provides consumers with transparency regarding the Adviser’s and Financial Institution’s obligations. The required Disclosure document, which may be a stand-alone document or included as part of the contract, will make the costs of the transaction and whether proprietary products are being sold transparent. It is essential that the retirement saver be informed of this important information. Currently, insurance agents are not required to reveal to the consumer the amount of commission the insurance producer will receive for selling the annuity, nor is the insurance producer required to state whether he or she is selling proprietary products. The DOL’s requirement that this information be disclosed will benefit consumers. The enforceable contract requirement provides important consumer protection to IRA purchasers.

Question 6: Likely impact on Advisers’ and firms’ compliance incentives if the Department eliminated or substantially altered the warranty requirement.

The BIC Exemption applies to fixed indexed and variable annuities. The BIC warranty requires that Financial Institutions affirmatively warrant and in fact comply with specified requirements. These requirements include that the Financial Institution “adopted and will comply with written policies and procedures reasonably and prudently designed to ensure that its Advisers adhere to the Impartial Conduct Standards”. Additionally, the Financial Institution must designate a person(s) “for addressing Material Conflicts of Interest and monitoring their Advisers’ adherence to the Impartial Conduct

Standards.” These are important mechanisms for ensuring Adviser compliance. They should remain in the regulation. In the insurance context, the insurance agent is appointed by the insurer to act as its agent. The insurer is responsible for the acts of its agent. The NAIC Suitability Model Similar includes similar monitoring requirements which insurers must comply with. It should not be unduly burdensome for the Financial Institution to comply with these requirements.

The warranty requirement also includes a prohibition on incentives like bonuses, trips to Hawaii and other prizes, special awards, and/or differential compensation based on amount of financial products sold, etc. This is a crucial component of the BIC. Financial institutions’ practice of providing these extra incentives to motivate Advisers to sell more and higher cost financial products is contrary to the notion of creating a situation in which Advisers will act in the best interest of their clients. Including language specifically prohibiting these incentives creates a bright line and makes clear that the only reasonable compensation is permitted for these sales.

The BIC’s warranty requirements provide transparency and assure the retirement saver that the Adviser has the saver’s best interests in mind. These requirements and the contract requirement are necessary to ensure that Advisers actually do put their clients’ best interests first and adhere to the Impartial Conduct Standards. Absent these requirements, it is probable that Financial Institutions will be lax in monitoring Advisers’ transactions, and Advisers will continue to provide consumers with conflicted advice to the consumers’ detriment. The warranty requirements should not be eliminated or substantially altered.

Question 7. Fee Based Annuities as an Alternative Streamlined Exemption

It appears from the questions posed that the Department of Labor views fee-based annuities as “marketplace innovations” which may mitigate or eliminate conflicted advice. An insurer that pays a reasonable fee to the life agent as compensation for selling a fee based annuity is in virtually the same situation as an insurer that pays the agent a reasonable commission. What is important is that the compensation be reasonable and clearly and prominently disclosed. However, if the fee based annuity requires that the life agent set his or her own fees for selling annuities to consumers, with a maximum fee amount stated in the contract schedule, premium tax issues may arise. Additionally, there could be disparities in fees/rates charged which may, depending on how these fees are set, violate state law. I am aware of one fee based fixed indexed annuity that was filed for use in California. Once we see how more of these products are structured, we may find that additional state legislation is necessary.

Question 11. Other Regulators’ Standards of Conduct

The Department of Labor raises the possibility of providing a streamlined exemption that would apply to Advisers who comply with other regulators’ “updated standards of conduct applicable to the provision of investment advice to retail investors”. In the insurance realm, the NAIC Suitability Model as currently written does not provide enough consumer protection and would need to be strengthened. There is no fiduciary duty standard, nor is there a prohibition against conflicted advice, nor is there a requirement that compensation be disclosed. Perks and prizes continue to serve as incentives to agents to put their own interests first and sell more annuities. Such an exemption might

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be appropriate for sales of annuity products if the states adopt new laws or regulations which impose a fiduciary duty on producers and include requirements similar to those set forth in the BIC and prohibited transaction exemptions. Minor amendments to the NAIC Model would be insufficient to ensure that consumers receive advice that is in their best interest, as opposed to that of the Adviser.

Please feel free to contact me if you wish to discuss any of these matters.

Sincerely,



Dave Jones
Insurance Commissioner