

**July 21, 2015**

Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Attn: Conflict of Interest Rule, Room N-5655  
U.S. Department of Labor  
200 Constitution Avenue, N.W.  
Washington, DC 20210

*Via Federal eRulemaking Portal: <http://www.regulations.gov>.*

Re: Proposed Rule: Definition of the Term “Fiduciary”; Conflict of Interest Rule – Retirement Investment Advice (RIN 1210-AB32)  
Proposed Best Interest Contract Exemption (ZRIN 1210-ZA25)

Dear Sir or Madam:

The American Bankers Insurance Association (“ABIA”), a subsidiary of the American Bankers Association, provides the following comments in connection with two proposals from the Department of Labor (the “Department”) regarding the duties of fiduciaries to retirement investors. The proposals would broaden the applicability of, and revise, the conflict of interest rules established by the Employee Retirement Income Security Act of 1974 (“ERISA”) that govern fiduciary investment advisers who provide retirement investment advice to sponsors, participants, and beneficiaries of employee benefit plans, investment retirement accounts, and certain medical and education savings accounts (collectively “IRAs”). Together, the proposals would affect some of the members of ABIA, namely, banks and affiliated insurance agencies that are actively engaged in the business of insurance, principally as agents and brokers.

The first proposal would broaden the definition of “fiduciary.” It also would partially revoke the exemption from ERISA’s prohibited transaction rules for insurance agents and brokers who receive commissions for variable annuities and other annuities that are regulated as securities – Prohibited Transaction Exemption (“PTE”) 84-24.<sup>1</sup> Some insurance agents and brokers that are currently not covered would be treated as a fiduciary under the proposed rule. The second proposal would add to PTE 84-24 a requirement that insurance agents and brokers who are fiduciaries comply with the requirements of a new Best Interest Contract Exemption when they provide investment advice to retail investors such as plan participants and beneficiaries, individual retirement account owners, and small plans.<sup>2</sup>

The ABIA is concerned that the proposals would add a new layer of regulatory burden to insurance agents and brokers who offer variable products – individuals who are already heavily

---

<sup>1</sup> 80 Fed. Reg. 21928 (April 20, 2015).

<sup>2</sup> 80 Fed. Reg. 21960 (April 20, 2015).

regulated at the state and federal levels – which likely would reduce the availability of these products. Accordingly, the ABIA recommends the following:

- Sales of certain annuities and other insurance products that require a FINRA license should not be considered to be an activity that makes a person a fiduciary; there are sufficient consumer controls in place for those activities (insurance and securities licensing and regulation).
- If the activities are included within the definition of “fiduciary,” the Department should retain PTE 84-24 as is, to avoid increasing the regulatory burden on insurance agents and brokers who recommend variable insurance products.

### **Current regulation of agents and brokers that offer variable products is adequate.**

The Department’s proposed definition of “fiduciary” would define “investment advice” to include a “recommendation as to the advisability of acquiring, holding, disposing or exchanging securities or other property.”<sup>3</sup> That would include the activities of insurance agents and brokers who recommend the purchase of variable products, such as variable annuities. The proposed definitional change would add another layer of regulatory burden to insurance agents and brokers who offer variable products – individuals who are already subject to significant state and federal regulation when offering variable products, including suitability requirements.

The Gramm-Leach-Bliley Act<sup>4</sup> provides for the “functional regulation” of insurance and securities activities by the regulators that are best situated to regulate the activities. Consequently, insurance agents and brokers who offer variable products are subject to both insurance and securities licensing and regulation. As a registered representative of a broker-dealer, an insurance agent or broker who recommends variable products must adhere to the broker-dealer’s directives designed to ensure compliance with FINRA’s suitability rules, including requirements related to recommendations. For example, FINRA Rule 2111 generally requires that a broker-dealer and a financial adviser “have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer.”

Additionally insurance agents and brokers who offer variable products are subject to state regulation. They are required to be licensed as an “insurance producer” in the state where the products are marketed. Many states have adopted several model laws and regulations issued by the National Association of Insurance Commissioners (“NAIC”) that relate to variable products. Among them are the Suitability In Annuity Transactions Model Regulation (NAIC Model No. 275-1), which requires an insurance producer, when recommending the purchase or exchange of an annuity, including a variable-rate annuity, to have “reasonable grounds” to believe that a recommendation is suitable for the customer based on certain information the producer is required to make a reasonable effort to obtain. (Compliance with FINRA’s Rule 2111

---

<sup>3</sup> 80 Fed. Reg. at 21957.

<sup>4</sup> Pub. L. 106-102.

constitutes compliance with the NAIC’s model suitability regulation.) And, NAIC Model No. 245-1 (Annuity Disclosure Model Regulation) requires producers to disclose certain information about annuity contracts to protect consumers.

Both of these extensive licensing and regulatory regimes have proven effective in protecting consumers, and there is no evidence that insurance agents and brokers are taking advantage of, or abusing, retail retirement investors. Because insurance agents and brokers are subject to these requirements, they should not be considered to be a “fiduciary” and have to comply with a third regulatory regime overseen by the Department – one based on a raised compliance standard that likely would reduce the availability of variable products to retail retirement investors.

### **The Prohibited Transaction Exemption Should Not be Modified.**

If the Department elects to adopt the proposed definition of “fiduciary” to include insurance agents and brokers who offer variable products, we urge it to keep the existing prohibited transaction exemption without modification. The Department is proposing to amend PTE 84–24 to require all fiduciaries relying on the exemption to adhere to the same impartial conduct standards required in the Best Interest Contract Exemption. The Department states it is proposing that change so investment advice fiduciaries to IRA owners would not be able to rely on the exemption with respect to transactions involving variable annuity contracts and other annuity contracts that constitute securities under federal securities laws.

The Best Interest Contract Exemption would add a significant burden to insurance agents and brokers that is not warranted, given the current regulatory regimes to which they are subject. The exemption “requires the [broker-dealer] and the [investment advice fiduciary] to contractually acknowledge fiduciary status, commit to adhere to basic standards of impartial conduct, warrant that they will comply with applicable federal and state laws governing advice and that they have adopted policies and procedures reasonably designed to mitigate any harmful impact of conflicts of interest, and disclose basic information on their conflicts of interest and on the cost of their advice,”<sup>5</sup> including “maintain[ing] certain data and mak[ing] it available to the Department upon request, to help evaluate the effectiveness of the exemption in safeguarding the interests of plan and IRA investors.”

We fail to see the need to apply those requirements to insurance agents and brokers. These requirements will ultimately result in needless lawsuits without any measurable benefits.

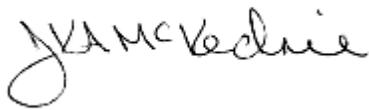
---

<sup>5</sup> 80 Fed. Reg. at 21948.

## **Conclusion**

The ABIA is concerned that the two proposals would add a new, third layer of regulation to insurance agents and brokers who offer variable products, which could diminish the products' availability. These activities are already functionally regulated from both the insurance and securities perspectives. We urge the Department not to modify the definition of "fiduciary" to include insurance agents and brokers. But if it does, we urge the Department to retain PTE 84-24 as is.

Sincerely,

A handwritten signature in cursive script, appearing to read "J. A. McVednie".

SVP & Director, ABA Office of Insurance Advocacy