

July 21, 2015

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

Re: Proposed Rule on the Definition of the Term “Fiduciary” and Prohibited Transaction Exemptions

Submitted Electronically: www.regulations.gov

Dear Sir or Madam:

Delta Dental Plans Association (DDPA) is writing in response to the Proposed Rule and related Prohibited Transaction Exemptions (PTEs) published by the Employee Benefits Security Administration (EBSA) in the *Federal Register* on April 20, 2015. The Proposed Rule and PTEs are intended to address perceived abuses with respect to investment advice given to employee benefit plans, plan fiduciaries, plan participants and beneficiaries, Individual Retirement Accounts (IRAs), and IRA account holders.

DDPA is the nation’s largest, most experienced dental benefits system. Since 1954, DDPA has worked to improve oral health in the U.S. by emphasizing preventive care, and making quality, cost-effective dental benefits affordable to a wide variety of large and small employers and groups, and individuals. DDPA provides a nationwide system of dental health service plans and offers custom programs and reporting systems that provide individuals, employees, and state Medicaid and CHIP participants with quality, cost-effective dental benefit programs and services. Our nationwide network of 39 companies and 151,000 dentists, serves more than 68 million Americans in over 122,000 group plans across the nation.

DDPA member companies do not provide “investment advice” as service providers for employer-provided dental benefit plans. However, we are concerned that the Proposed Rule does not clearly exclude arrangements that are solely employee welfare benefit plans as defined in ERISA section 3(1) and request that any final rule expressly articulate an exclusion for group health and dental benefit plans.

Intent of the Proposed Rule

The Proposed Rule appears to be intended to target investment advice affecting decisions about retirement savings. As stated in the Preamble to the Proposed Rule, EBSA believes new rules are needed to address the expansion of retirement savings options available to employees since the Department of Labor last issued regulations governing investment fiduciaries in 1975:

When the Department promulgated the 1975 rule, 401(k) plans did not exist, IRAs had only just been authorized, and the majority of retirement plan assets were managed by professionals, rather than directed by individual investors. Today, individual retirement investors have much greater

responsibility for directing their own investments, but they seldom have the training or specialized expertise necessary to prudently manage retirement assets on their own. As a result, they often depend on investment advice for guidance on how to manage their savings to achieve a secure retirement. In the current marketplace for retirement investment advice, however, advisers commonly have direct and substantial conflicts of interest, which encourage investment recommendations that generate higher fees for the advisers at the expense of their customers and often result in lower returns for customers even before fees.

80 Fed. Reg. 21930.

Unfortunately, the definition of an “investment fiduciary” in the Proposed Rule is overly broad and could conceivably be construed to apply to a broad range of entities and individuals beyond those intended to be covered by the Proposed Rule. For example, “investment advice” includes recommendations as to:

- The “advisability of acquiring, holding, disposing or exchanging securities or other property”
- The “management of securities or other property”
- Recommendations of a person who is also going to receive a fee or other compensation for providing any [investment] advice”

(29 CFR §2510.3-21 (a)(1)(i), (ii), and (iv)). The person providing the investment advice is someone that either acknowledges they are acting as an ERISA fiduciary or “renders the advice pursuant to a written or verbal agreement, arrangement or understanding that the advice is individualized to, or that such advice is specifically directed to, the advice recipient for consideration” (29 CFR §2510.3-21(2)).

We are concerned that the Proposed Rule does not distinguish clearly between employee welfare plans and employee pension plans. A “plan” is defined as “any employee benefit plan described in section 3(3) of the Act and any plan described in section 4975(e)(1)(A) of the Code” (29 CFR §2510.3-21(f)(2)(i)). In relying upon ERISA section 3(3) the Proposed Rule would unintentionally include an “employee *welfare* benefit plan” in the definition of “plan”. We do not believe this result was intended by the EBSA in promulgating the Proposed Rule.

Differences Between Employee Welfare Plans and Employee Pension Plans

The primary goal of pension plans is to provide participants and beneficiaries with an accumulation of assets to fund their retirement needs. The fees or other compensation paid in connection with pension funding and the investment choices have a major impact on the retirement funds. For example, high 401(k) plan fees and fund investment options can directly reduce the benefits that will be available when an individual retires. As noted in the Preamble to the Proposed Rule, individual investors are taking on a larger responsibility with respect to their investment decisions in connection with IRAs and 401(k) plan options.

In contrast, benefits in connection with a welfare plan are generally available to meet the needs of participants and beneficiaries with respect to a medical event. For example, dental coverage can be used to pay dental claims submitted by a health care provider. The insurance premiums or employee contributions to a self-funded welfare plan are paid on a per member, per month basis and the welfare plan is obligated to fund the benefits pursuant to the ERISA plan document and/or insurance policy.

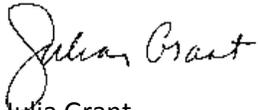
There are differences between the purposes and structures of employee welfare plans and employee pension plans. It is clear that the interactions between insurance companies, agents, brokers, and third-party administrators and welfare plans, plan fiduciaries, and plan participants and beneficiaries do not involve investment advice. As a result, the plan or product choices made by plan participants and beneficiaries should not be subject to the same requirements as the decisions made in choosing pension plan options.

Proposed Amendment

To clarify application of this Proposed Rule as only affecting "investment advice" we suggest that any final regulation include either (1) in proposed subsection (f)(2)---definition of "plan"; or (2) in a new "Applicability" subsection; or both, the following language: "For purposes of this section the term "plan" and the requirements of this section do not include or apply to any plan that is only an "employee welfare benefit plan" as defined under section 3(1) of the Act."

Thank you for the opportunity to comment on this Proposed Rule. Please feel free to contact us if you have any questions.

Sincerely

A handwritten signature in cursive script that reads "Julia Grant".

Julia Grant

Vice President, Government Relations