



**SHARON A. CHEEVER**  
Senior Vice President  
General Counsel  
Law Department  
Telephone (949) 219-3852  
FAX (949) 219-3706  
email: Sharon.Cheever@PacificLife.com

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Office of Exemption Determinations  
Employee Benefits Security Administration  
U.S. Department of Labor  
200 Constitution Avenue, NW, Suite 400  
Washington, DC 20210

**Re: Definition of the Term "Fiduciary"; Conflict of Interest Rule (RIN: 1210-AB32);  
Proposed Best Interest Contract Exemption (ZRIN: 1210-ZA25);  
Proposed Amendment to and Proposed Partial Revocation of Prohibited Transaction  
Exemption (PTE) 84-24 for Certain Transactions Involving Insurance Agents and  
Brokers, Pension Consultants, Insurance Companies and Investment Company  
Principal Underwriters (ZRIN: 1210-ZA25)**

To Whom It May Concern:

Pacific Life Insurance Company is submitting this letter during the 2<sup>nd</sup> comment period, regarding the proposed rule and prohibited transaction exemptions promulgated under Sections 3(21)(A)(ii) and 2510.3-21 of the Employee Retirement Income Security Act ("ERISA") (collectively, the "Proposal"). This letter is not meant to restate all the issues and questions raised in our first comment letter, but rather focuses on one item for the U.S. Department of Labor's ("Department") consideration: that a product manufacturer is not subject to the fiduciary duty absent a recommendation, regardless of state insurance appointment laws.

We anticipate and support letters to you from others, including, the Committee of Annuity Insurers, Insured Retirement Institute ("IRI"), the Chamber of Commerce and the American Council of Life Insurers ("ACLI"), that will address other important issues such as; the sensible recognition that both fixed and variable annuities are insurance products and should be subject to the same exemption (PTE 84-24), the need for a clear grandfathering provision, extension of time for implementation, clarification for the definition of "recommendation" and what is covered by the education carve out, and revisions to the proposed BICE. In addition, Pacific Life also refers you to a letter submitted by Lincoln Financial Group that we signed as part of a group of top insurance carriers to specifically address the treatment of variable annuities in the Department's Proposal.

### **Need for a Manufacturer's Carve-Out**

Pacific Life fully supports the Department's stated goal of a Best Interest Standard. In our prior comment letter, we described how our products are only offered to the end consumer through independent advisers that are not affiliated with Pacific Life. We strongly believe, based on the Department's commentary during the hearings, that the Department would agree that absent a recommendation, advice or a call to action for a fee or other compensation by a manufacturer company or its employees, the mere issuance of its products to Retirement Savers in the ordinary course of business would not alone trigger fiduciary duty. Despite that reasonable conclusion, for the following reasons, we believe such a carve-out is necessary.

In order to avoid confusion between a manufacturer's role and responsibilities under the Department's Proposal and existing state insurance laws, a specific carve-out is crucial. Under state insurance laws, insurance products (annuities) can only be sold by state licensed producers (agents) that are appointed (authorized) by each insurance company whose product the agent sells. The appointment is the mechanism to evidence the agent's authority to sell that company's insurance products under state insurance law. It is unclear in the Proposal whether simply as a result of such state law appointment of an independent agent a product manufacturer/issuer can: 1) become an ERISA fiduciary; 2) be required to enter into a BIC even if the product manufacturer is totally removed from the individualized investment advice being provided to the client as specified in the Proposal; or 3) be subject to the Impartial Conduct Standards due to the wording used in the Proposal to describe individuals and entities providing investment advice (e.g., insurance agent, insurance broker, pension consultant, insurance company or mutual fund principal underwriter) or their Affiliates or controlling entities. An example with a diagram of this fact pattern is attached as Appendix 1.

By way of analogy, this is similar to how, under existing ERISA law, mutual funds' issuers would not be considered fiduciaries simply by being the chosen investments in a wrap account set up and recommended by an ERISA fiduciary investment adviser. Stated another way, we believe that adding potential fiduciary liability for product manufacturers who play no part in making individualized investment recommendations is not a "gap" that the Department is trying to close through this Proposal.

To remove any doubt on this issue and to avoid any future disputes as to the Department's intent (keeping in mind that the Department may not be the arbiter of this distinction if the fiduciary question is in front of a court, for example), we recommend the addition of the following specific "carve-out" from the definition of fiduciary for a manufacturer/issuer that does not directly render personalized investment advice or make individualized recommendations to the public.

#### *Sec. 2510.3-21 Definition of "Fiduciary."*

- (1) Manufacturer/Issuer of Insurance or Investment Products. (1) An Insurance Company, including its Affiliates, when solely performing the role of manufacturer/issuer or (when applicable) underwriter and distributor of investment products, shall not be deemed to be a Fiduciary within the meaning of section 3(21)(A) of the Act or section 4975(e)(3)(B) of the Code, with respect to an employee benefit plan or IRA solely because such Insurance*

*Company or other manufacturer/issuer of investment products issues annuity or other insurance or investment products to such plan or IRA in the ordinary course of its business if the Insurance Company or other manufacturer/issuer of investment products, or their employees, do not:*

- (a) Render investment advice (as defined in paragraph (a) of this section) for a fee or other compensation related to such advice with respect to such insurance or investment products (as opposed to compensation for the product itself or services related thereto). Represent or acknowledge that it is acting as a fiduciary within the meaning of the Act with respect to the advice described in paragraph (a)(1) of this section.*
  - (b) Render 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 in making investment or management decisions with respect to annuities, insurance or other investment products it manufactures.*
- (2) For purposes of this section, an Insurance Company in its capacity as a product manufacturer/issuer is not considered a Fiduciary, Affiliate or a Financial Institution merely because a state insurance licensed and appointed agent, agency or their representatives, and state and federal securities licensed advisers or firms, who may or may not be a Fiduciary pursuant to this section, are required by state insurance laws to be appointed or otherwise authorized to sell the Insurance Company's products.*

### **Conclusion**

Pacific Life agrees with the Department that Investment Advisers should be required to act in the best interest of their client. Our request for the carve-out is not an attempt to skirt responsibility for our products as state insurance laws cover a myriad of product issues (as do SEC rules for variable products). We are simply not close enough to the individualized advice to be considered a fiduciary under the ERISA standards. As a product manufacturer, we have an enforceable contractual obligation to our annuity contract owners to deliver on our promises and to not misrepresent our products. *Product issues are separate and apart from advice issues.* We are already accountable for compliance with a copious amount of state and, depending on the product, federal laws and regulations that enhance consumer protection<sup>1</sup> and subject us to regulatory scrutiny, and if necessary, litigation.

Pacific Life echoes the request from our trade organizations, colleagues, lawmakers and many others who have submitted comments during this process for 1) a re-proposal and additional opportunity to comment on the expansive and groundbreaking changes the Department is suggesting for the retirement landscape in the United States and 2) an extended time for implementation of the final

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<sup>1</sup> See Appendix 2 attached from Appendix to ACLI July 21, 2015, Submission to the Department of Labor on the Fiduciary Rule (Table of contents enclosed for your reference)

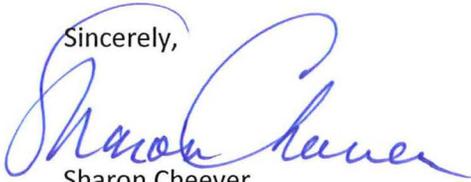
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regulations, particularly with regard to the reporting and technology requirements imposed by the new schematic.

We greatly appreciate the Department's willingness to hear our point of view, and take into consideration the recommendation we have made.

Sincerely,



Sharon Cheever  
Senior Vice President and  
General Counsel

## Appendix 1

### State Appointment Scenario

Financial Institution Z is a large, full service, financial services institution. It has a registered investment adviser affiliated entity ("RIA W"), an affiliated retail broker-dealer ("BD X"), and an affiliated licensed insurance agency ("Insurance Agency Y").

Financial Institution Z wants to make available insurance products (including variable insurance products which are securities) to its customers. So, BD X and Insurance Agency Y enter into Selling Agreements with various insurance companies, including Insurance Company A, to make the products of those insurance companies available to their reps for sale to the customers of BD X and Insurance Agency Y.

John Doe, is licensed as an investment adviser representative ("IAR") of RIA W, a registered representative of BD X, and a licensed insurance agent of Insurance Agency Y and is supervised by those entities.

Under state insurance laws, among other requirements, an agent must be "appointed" as an agent by an insurance company to sell insurance products of that particular insurance company. So, John Doe obtains appointment as an agent to all the insurance companies that the entities with which he is affiliated has selling agreements, including Insurance Company A.

Sally Smith is a customer of John Doe. John Doe acts as Sally Smith's investment adviser representative providing investment advice, as her broker for conducting securities transactions, and as an insurance agent for assisting Sally Smith with her insurance needs.

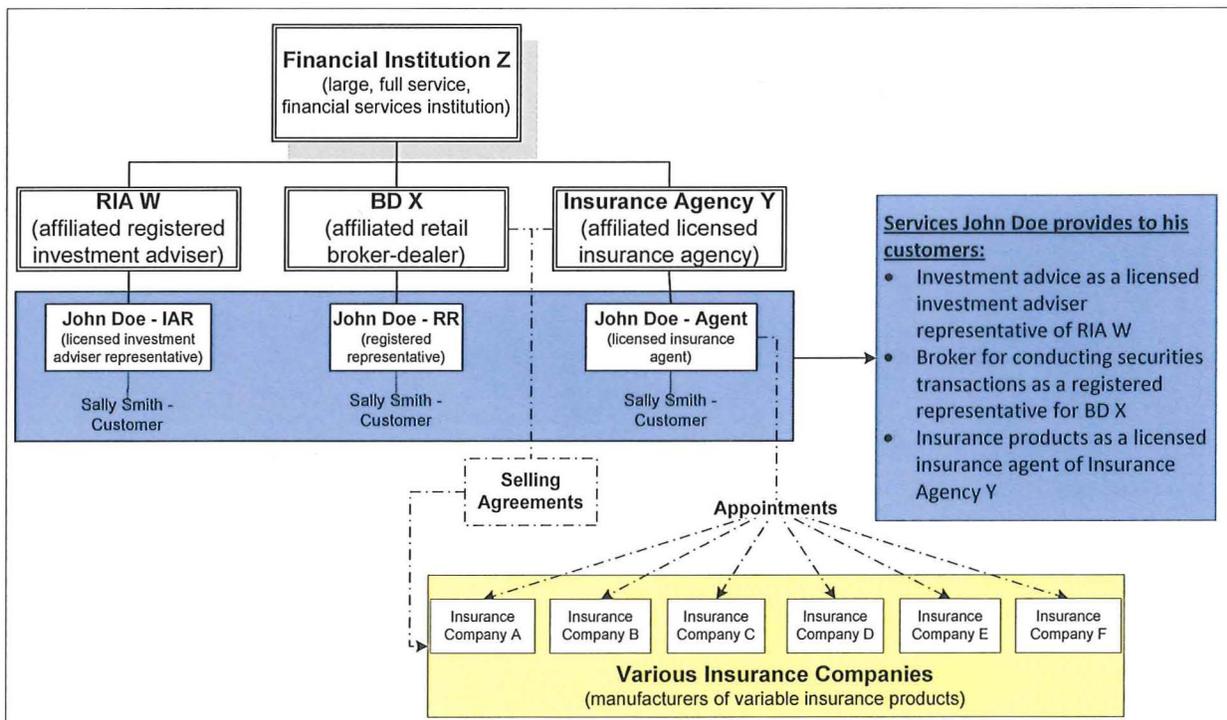
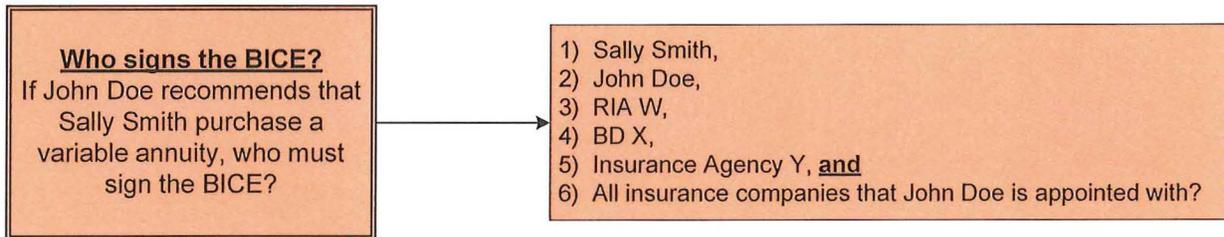
John Doe meets with Sally Smith and, based on financial and other information provided by Sally Smith, recommends in his investment adviser capacity to Sally Smith that she purchase a variable annuity from Insurance Company A in her IRA account to help her meet the retirement savings short fall she currently appears to have and to provide protection against the risks indicated by Sally Smith. John Doe provides that advice in his investment adviser capacity for RIA W, executes the security sale in his registered representative capacity for BD X, and executes the insurance sale as an agent of Insurance Agency Y. The product is manufactured by Insurance Company A.

Under the current construct of the DOL Proposal, the recommendation to purchase the variable annuity by John Doe would arguably create a fiduciary relationship by John Doe; by affiliated entities Financial Institution Z, RIA W, BD X, Insurance Agency Y; and arguably Insurance Company A.

We don't believe the Department intended that the product manufacturer, in this case Insurance Company A, was to be a fiduciary under the proposal merely because state law requires that the persons that sell its products are required to be appointed with the insurance company. Clearly, no recommendation has been provided by Insurance Company A in the above scenario and Insurance Company A should be excluded from the definition of a fiduciary under the proposal.

In fact, under the scenario provided above and in accordance with the current Proposal, in order to comply with the BIC requirements, a BIC contract would have to be executed by Sally Smith, John Doe, and at a minimum, RIA W, BD X and Insurance Agency Y to receive the protections afforded by the

exemption. That would be a five party agreement (not to mention the need for a 6th party if the insurance company manufacturer is not excluded from the definition as requested). In fact, if John Doe is appointed with six insurance companies and he is uncertain as to the product to be recommended at the time the BIC agreement is executed, all six insurance companies would be required to sign a BIC with Sally Smith. And, now that they are contractually bound to Sally Smith to be a fiduciary, should the five companies whose product was not recommended or sold still have exposure to Sally pursuant to the BIC agreement for the recommendation of the competitor's product by John Doe? The obvious answer would appear to be no.



Appendix 2

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