

August 4, 2017

VIA ELECTRONIC MAIL
EBSA.FiduciaryRuleExamination@dol.gov

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

Re: Comment regarding the Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions; RIN 1210-AB82; Docket ID: EBSA 2017-0004; 82 Fed. Reg. 31278 (July 6, 2017).

Dear Deputy Assistant Secretary Hauser:

On behalf of certain insurance providers, this comment asks the Employee Benefits Security Administration of the Department of Labor (the "**Department**") to clarify a narrow application of the final regulation defining who is a "fiduciary" under section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974, as amended, and section 4975(e)(3)(B) of the Internal Revenue Code of 1986, as amended (the "**Code**"), as a result of providing investment advice to a retirement investor for a fee or other compensation (the "**Regulation**") and of two accompanying exemptions, Prohibited Transaction Exemption 2016-01, as amended (the "**BICE**"), or Prohibited Transaction Exemption 84-24, as amended ("**84-24**"). This comment is specifically responding to Question #17 in the Comment regarding the Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions.

By way of background, this comment wants to express to the Department that there exist multiple distribution pathways to recommend insurance products. The Department has made reference to its understanding of product providers working through intermediaries to ultimately distribute products to independent agents. However, another such distribution pathway exists where providers work directly with independent personal producing general agents ("**PPGAs**") in lieu of an intermediary. Such independent PPGAs may have multiple such relationships with providers and in turn, work directly with the retirement investor, adding efficiency to the process and eliminating the need to work through an intermediary. The Department has recognized the intermediary channel through its proposal of a new BIC Exemption for Insurance Intermediaries, but very little guidance has been provided regarding the distributor-PPGA channel, of which multiple distributors use today. Our hope is that the Department remedies this lack of guidance in the final amendments to the BICE and 84-24.

We respectfully request that the Department amend the BICE and 84-24 to state clearly and unambiguously that an insurance provider with only a contractual relationship with an independent PPGA has no direct liability and is not responsible (i) to control or supervise that independent PPGA with respect to market conduct, investment advice, compensation, or any other matter relating to products offered by a different provider and (ii) to know about other providers' products available to such an independent PPGA. In this comment, being "responsible" means being subject to a duty under the BICE or 84-24 or to any liability in any form for a failure to perform that duty. This letter will combine its discussion of a duty to know about other providers' products with a duty to monitor or supervise an independent PPGA's use of those products, and call these combined duties the "duty to supervise."

The Supervisor's Dilemma.

The Department recognized some of the needs of independent PPGAs and their providers when it issued FAQ-22 in its "Conflict of Interest FAQs (Part I - Exemptions)," dated October 27, 2016 (the "FAQ"), and again when it did not limit the exception for insurance intermediaries to exclusive agency arrangements with single intermediaries. 82 Fed. Reg. 7336 (January 19, 2017). We appreciate those explanations. Still, two unanswered questions remain:

- Does a provider have any duty to know about the products from other providers on an independent PPGA's shelf of products?
- Does a provider have a duty to supervise the independent PPGA with respect to *other* providers' products that could have been available on the independent PPGA's shelf when the independent PPGA recommends the provider's product?

Unfortunately, the Regulation, the FAQ, the BICE, and 84-24 do not offer clear answers to these questions. The Department must provide that clarity in the text of an amended BICE and an amended 84-24.

A consequence of the fiduciary rule for some independent PPGAs has been a push in the market towards more exclusive relationships with single intermediaries in lieu of direct relationships with providers. Part of this push has been a result of the BICE's required "Financial Institution" oversight and warranties and the Department's lack of clear guidance for providers. Despite the Department's efforts to clarify that exclusivity is not required, confusion around providers' and PPGAs' responsibilities continues to fuel this dramatic change in the insurance industry's model for distributing retirement products. So far, the compliance realities of the rule have started a swelling preference for exclusivity over independent relationships and independent choice, which in turn limit independent PPGA product shelves and reduce the amount of products available to investors. The trend is not, however, irreversible. Answering these two remaining questions - the most meaningful ones - could correct this tendency.

Relationships. The relationship between a provider and an independent PPGA authorized to sell its products is unique in the industry. It is contractual only and is designed to avoid infringing on that independence. The contract constrains the scope of their interactions. There are no ownership interests of one in the other, no employee or management roles, and no management control by one over the other. The customers originate with the independent PPGA; this is not a situation where the provider found the investor and then sought the independent PPGA. Independent PPGAs have historically chosen not to participate in exclusive relationships with intermediaries or providers. These independent PPGAs already manage across the products and insurers for whom they have decided to act as agents.

Discussion. Given the value that independent PPGAs bring to retirement investors -- through additional product offerings, greater efficiency, independence, and often reduced overall commissions -- it is important for the providers to understand how to operate in this channel within the BICE and 84-24. They deserve certainty that their business model will not inadvertently subject them to liability and the grave risk of class action litigation. For example, if the provider did not become an investment advice fiduciary along with the independent PPGA because it directly participated in a recommendation to a retirement investor, neither the Code's categories of disqualified persons nor ERISA's parties in interest definition would create prohibited transaction exposure for the provider. How then does the insurance provider, which is not a fiduciary, a disqualified person or a party in interest, have a duty to supervise an independent PPGA who is?

This duty could arise if the provider were to be indirectly involved in a recommendation. The Regulation suggests that a way to participate indirectly would be to make the recommendation "through or together with an affiliate." The nature of the relationships between independent PPGAs and their unrelated providers is such that they will not be affiliates. There is not enough control exercised by either on the other for one to be the affiliate of the other. Neither would be an employee, employer, officer, director or partner of the other. The definition of affiliate will not encompass this relationship.

To assert that the independent PPGA's relationships with its providers would not create an affiliate relationship, but would still be enough to be considered indirect involvement, would mean that every insurer that provided one or more products to an independent PPGA would be an indirect participant in every recommendation of every competitor's products made by every PPGA. Plainly, the reach of this argument is too broad and not what the Department has stated is its intention. The impossibility of that burden on any single provider is obvious. In essence, it would require every provider to be responsible for every other provider and for the independent PPGA.

The Department cannot intend to eviscerate the independent PPGA form of product delivery through this indirect condition. The Department recognized as much in the 84-24 Preamble, saying similar aspirations arising from the rule were "unattainable." 84-24 Preamble, page 21163 (not required by Best Interest to consider the entire marketplace). No provider can be continuously aware of the changing number and nature of products available to an independent PPGA each moment a recommendation is made. Further, the independent PPGA will never assume the task to keep every single provider constantly updated about changes in the details of its available products. Any provider's duty to supervise the independent PPGA must be limited in scope to only encompass that provider's products and must also expressly state that the provider need not know or consider other providers' products available on the independent PPGA's shelf.

Another route to a duty to supervise (perceived or otherwise) an independent PPGA's product shelf might be by using the principal and agent relationship created by the common law (and some state laws). Superficially, this argument might be enhanced by some state insurance laws' requirements that an insurer temporarily "appoint" independent agents that are selling one or more of its products. But that relationship is also not enough under ERISA and the Code because that relationship is created and exists *independently* of the requirements of ERISA and the Code. In addition, the law does not allow the principal to interfere with its agent's obligations to its other principals. It does not impose on the principal the fiction that the principal is acting alongside its agent whenever the agent acts for another of its principals. Further, it does not impose on one principal a duty to know about each of its agents' relationships with other principals. Each principal-agent relationship operates independently.

Finally, the Department has suggested a duty to supervise is inherent in the Best Interest Standard in the BICE (and presumably in 84-24). The BICE says in Section II(d)(1) that the best interest contract must include a warranty that the Financial Institution “will comply with written policies and procedures reasonably and prudently designed to ensure its Advisers adhere to the Impartial Conduct Standards.” Yet, the BICE does not expressly impose a duty to supervise. Based on an extensive discussion in the BICE’s Preamble regarding the duties of a Financial Institution stemming from this warranty, it appears that the Department has implied a duty to supervise in the BICE’s Best Interest Standard, although it may be a duty that is not co-extensive with ERISA’s duty of prudence and duty to monitor. The Preamble says that the implied duty to supervise comes from the BICE’s alleged reference to “standards of reasonableness and prudence set forth in the policies and procedures...” BICE Preamble, page 21038. Unfortunately, this language does not illuminate the difficult question of the scope of the required oversight, especially with respect to other providers’ products. And this language is absent from the guidance about the scope of new 84-24 and its Best Interest Standard, as is the warranty requirement. In fact, 84-24 suggests a very different obligation in its Preamble where it says “the text [of 84-24] does not impose a monitoring requirement.” 84-24 Preamble, page 21163.

On the other hand, the FAQ offers support, albeit limited, for constraints on this duty to supervise. Analyzing only the impact of the BICE, it expresses the Department’s thought that a provider to an independent PPGA need not “exercise supervisory responsibility” on the “practices” of other providers, but it provides little context and begs for elaboration. The FAQ goes on to add that a provider to an independent PPGA must “oversee the recommendation and sale of its products, not recommendations and transactions involving other insurers” without insight into the depth of the required oversight. In the FAQ, therefore, the Department has concluded that a provider does not need to supervise sales of other providers’ products and does not need to be aware in such circumstances of the practices of other providers. But, what does the provider need to know, much less be responsible to supervise, about those other providers’ products that are available when the independent PPGA recommends or sells the provider’s products? And, how does 84-24 fit into this mix?

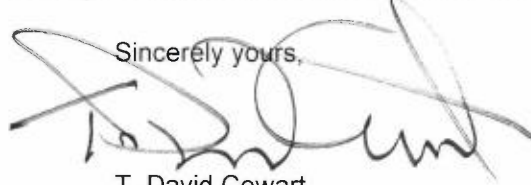
The FAQ is also flawed as guidance. It is not the Department’s opinion. It is not authority, even within the Department. Because it has not been through a notice and comment process, we expect little deference to it in court. If the Department wants the FAQ to influence the court proceedings it expects, this is the opportunity to express the FAQ’s conclusions in a binding way and in so doing, expand them to address this comment’s questions.

None of these arguments sufficiently support the conclusion that a provider must know about other providers’ products available to the independent PPGA at the time of recommendation or supervise an independent PPGA’s activities with other providers’ products. The FAQ and other guidance to date do not provide the clarity and certainty that providers and their distribution systems need to avoid finding themselves inadvertently out of compliance with the BICE or 84-24, and potentially subject to massive remedies resulting from class action litigation. We ask the Department to remedy that omission.

We ask that the Department clarify, in a revised BICE or in a revised 84-24 (or both), that an independent PPGA can operate in a compliant manner within the bounds of the BICE or 84-24 under the direction of more than one provider/Financial Institution, each of which is supervising and aware of only its own product sales by the independent PPGA and the investment advice associated with those sales.

Thank you for considering this request. If it would be helpful, we are available to provide the Department with additional information or meet with the Department to discuss these issues further.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'T. David Cowart', written over the typed name below.

T. David Cowart