



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

August 4, 2017

Filed Electronically

Office of Exemption Determinations
Employee Benefits Security Administration
Attn: D-11933
U.S. Department of Labor
200 Constitution Avenue NW, Suite 400
Washington, DC 20210

Re: Comments in Response to Questions 2-18 of July 6, 2017 Request for Information; RIN 1210-AB82

Ladies & Gentlemen:

Thank you for the opportunity to comment on the Department of Labor's ("Department") request for information issued July 6, 2017 ("RFI") regarding the Fiduciary Rule and related Prohibited Transaction Exemptions ("Rule"). Pacific Life Insurance Company ("Pacific Life") respectfully offers the comments below to assist the Department in determining how to best revise the Rule in order to strengthen retirement security for American investors.

Support for Best Interest Standard

Pacific Life is committed to acting in the best interest of our customers and supports the enactment of a reasonable best interest standard that preserves consumer access to and choice of advice models. However, Pacific Life believes that the Rule does not achieve its stated purpose of strengthening retirement security. To the contrary, it will severely diminish retirement security for many investors by making it harder and more expensive for average Americans to obtain individualized investment advice and access guaranteed lifetime income options with their retirement assets.

For example, specific distribution partners of Pacific Life have already scaled back the retirement products they offer, limiting competition and consumer choice. Advisers plan to be more selective of the new investors they choose to service (i.e., those with higher amounts of assets to invest) which will limit access to retirement information and personalized advice for many. Indeed, distributors continue to identify and eliminate clients with small to modest account balances in anticipation of the added compliance costs and heightened litigation risks generated by compliance with the Rule. Thus, a significant number of existing investors could lose access to an adviser to talk to, answer questions, and who can help encourage them to save more and remain invested over time.

In addition to the comments above, Pacific Life respectfully offers the comments and recommendations below in response to the issues identified in the Department's RFI that pertain to Pacific Life.

The Rule Does Not Appropriately Balance Consumer Interests

Limited Access to Individualized Advice and Education

Pacific Life does not believe that the Rule appropriately balances the interests of consumers in receiving broad-based investment advice while protecting them from conflicts of interest. As stated above, distributors and their advisers are no longer servicing clients with small to modest account balances in anticipation of added compliance costs and heightened litigation risks generated by compliance with the Rule, leaving low- and middle-income consumers deprived of access to the advice they need to help them achieve a financially secure retirement.

In a related matter, investment education will be severely limited due merely to the fact that the many educators do not view themselves, nor want to become, fiduciaries. The Rule does carve out investment education as "non-fiduciary communications," however it does not treat asset allocation models and interactive investment materials with references to specific investment alternatives (e.g., risk tolerance questionnaire for IRAs that will identify a specific investment) as "education" for these purposes. With such a narrow scope to investment education, investors will lose access to many resources and tools that help them make educated decisions about their investments.

Narrowed Range of Products

Nor does the Rule effectively allow advisers to provide a wide range of products that can meet each investor's particular needs. The vast majority of annuities today are sold through a transaction, commission-based compensation structure. Due in part to the increased litigation risk and complexity of disclosure requirements as a result of the Rule, more firms feel the Rule is pushing towards *fee-based* compensation arrangements. The issue this poses is that fee-based compensation arrangements are foreign to many financial firms (e.g., broker dealers and banks), which is resulting in these firms now offering fewer products and, in some instances, eliminating entire categories of products such as annuities from their platforms. This cannot be understated, since annuities are the *only* products available in the marketplace providing guaranteed lifetime income and can help ensure retirees do not outlive their income.

The Contract Requirement in the BIC Exemption and Principal Transactions Exemption Is Not the Appropriate Means for Enforcement

It is suggested in the RFI that the contract requirement in the BIC Exemption and Principal Transactions Exemption was intended to act as an "added motivation" for financial firms and their advisers to adhere to the Rule so as to avoid potential litigation. Pacific Life feels that this is not only an unnecessary "added motivation" but also a severe overstep by the Department.

The contract requirement is an unnecessary "added motivation" since oversight and enforcement already exists for ERISA and non-ERISA transactions and rests with applicable regulators. For prohibited transactions involving ERISA plan assets, these are subject to civil as well as criminal penalties under ERISA. For prohibited transactions involving non-ERISA plan assets such as IRAs, the Securities and Exchange Commission ("SEC"), Financial Industry Regulatory Authority ("FINRA"), and state insurance departments are all significantly more experienced, and significantly better positioned, than the Department to oversee *and enforce* customer protection standards. All of the aforementioned agencies,

including the Department, have a common goal in protecting investors. However, the one thing that separates the Department from the aforementioned agencies is that the Department does not inherently have a means to *enforce* regulations. This is clearly why the Department incorporated the contract requirement within the Rule.

However, the U.S. Constitution restricts federal agencies such as the Department to create new grounds for individuals to bring a private right of action, which is what the contract requirement establishes. The Department has tried to justify this on the grounds that the contract, not the Rule itself, contains the right to bring a private right of action. But this logic seems to contain a significantly large oversight. If a federal agency is allowed to create a regulation that includes a contract requirement, which inherently creates a private right of action, how is this any different than the federal agency creating a regulation that, in and of itself, creates a private right of action? How can the above-referenced Constitutional restriction be enforced, if all the federal agency needs to do as a “work-around” to create a private right of action is incorporate a “contract requirement” within the regulation?

For these reasons, Pacific Life feels that the contract requirement should be removed from the Rule, and the Department collaborate with the applicable and proper regulators for creation *and enforcement* of a uniform and reasonable best interest standard.

PTE 84-24 Should be Revised to Include the Sale of All Annuities and Expand Relief for Range of Compensation Types

Pacific Life respectfully recommends that the Department revise the amendments to prohibited transaction exemption 84-24 (“Amended PTE 84-24”) to permit advisers to rely on this exemption in connection with sales of *all* annuities, including “fixed-rate annuity contracts” (“FAs”) as well as variable annuity contracts (“VAs”), fixed indexed annuity contracts (“FIAs”), and group annuities (“GAs”). For decades, PTE 84-24 has been the primary pathway for exempting the sale of annuity and insurance products to plans and IRAs, and Pacific Life believes it should continue to be available for all annuity products.

After January 1, 2018, however, Amended PTE 84-24 will only be available for FAs, while VAs, FIAs and variable GAs would no longer be eligible for this exemption. There is no empirical data or evidence of any kind in the record to support such a change to this time-tested exemption. The inclusion of investment or investment-like features in certain types of annuity products alone does not justify this disparate treatment and the intended or unintended market consequences of the Department’s favoring one annuity product over another when the primary attributes of all annuity products are their guaranteed lifetime income features. Therefore, all annuities should fall under Amended PTE 84-24.

In addition, the definition of the group annuity contracts in Amended PTE 84-24 does not apply to the different form of group *payout* annuities. The Amended PTE 84-24 states in part: “A Fixed Rate Annuity Contract is a fixed annuity contract issued by an insurance company that is either an immediate annuity contract or a deferred annuity contract that... in the case of a group fixed annuity, guarantees return of principal net of reasonable compensation and provides a guaranteed declared minimum interest rate in accordance with the rates specified in the standard nonforfeiture laws in that state that are applicable to individual annuities.” Group payout annuities are designed to guarantee the income stream and *not* a specified rate of return, thus would be excluded from this very narrow definition.

Furthermore, the removal of FIAs from Amended PTE 84-24 is particularly problematic for independent insurance agents, many of whom are small businesses or sole proprietorships. These agents will be unable to satisfy the BIC Exemption unless they join a broker dealer or other “Financial Institution” willing to

assume the associated fiduciary liability. This option is not viable for many insurance-only licensed agents who offer FIAs, and, as a result, the ability of these agents to continue serving their clients will be severely limited. Pacific Life believes restoring FIAs to Amended PTE 84-24 is the most appropriate solution to this issue.

Finally, Amended PTE 84-24 should not be limited to narrowly defined “Insurance Commissions.” Such a restriction is not necessary in light of the Department’s expectation that the Impartial Conduct Standards will adequately protect consumers from potential harm caused by conflicted advice. Barring certain types of payments under this exemption serves no legitimate regulatory purpose as long as the Impartial Conduct Standards are being satisfied. Therefore, Pacific Life believes Amended PTE 84-24 should provide relief for a range of compensation types.

Independent Fiduciary Exception Should be Revised

Pacific Life has significant concerns regarding the effect of the Rule on the sale of annuities in connection with terminating defined benefit plans (“Terminal Funding Contracts”). The Rule does offer the “Independent Fiduciary Exception” (“IFE”) for larger plans (\$50 million or more in assets), but there is a major concern for effectively offering Terminal Funding Contracts to smaller plans (less than \$50 million in assets) without significant risk of fiduciary status. With the difficulties insurance companies face in offering Terminal Funding Contracts to smaller plans, the small plan market will be encumbered with less competition and higher costs.

An example of how cumbersome this current exception can be is illustrated in the common scenario where an employer transfers only a portion of the pension plan assets into the Terminal Funding Contract. This process may involve multiple transfers over time, thus, even if a plan had sufficient assets initially to meet the \$50 million threshold, it may not meet that requirement with subsequent funding to continue qualifying under the IFE.

In order to alleviate the issues smaller plans will face, Pacific Life recommends revising the IFE by either: 1) Expanding the definition of “Independent Fiduciary” to include *any* ERISA fiduciary while also removing the \$50 million asset threshold requirement from this component of the IFE, or 2) If the Department is unwilling to expand the IFE to all ERISA plan fiduciaries, then reducing or removing the asset threshold for plans/plans sponsors, individually or combined (e.g., those that manage or control \$20 million or more, or have 100 or more covered lives subject to the annuity) as these plans are just as capable of evaluating investment risks independently.

Conclusion

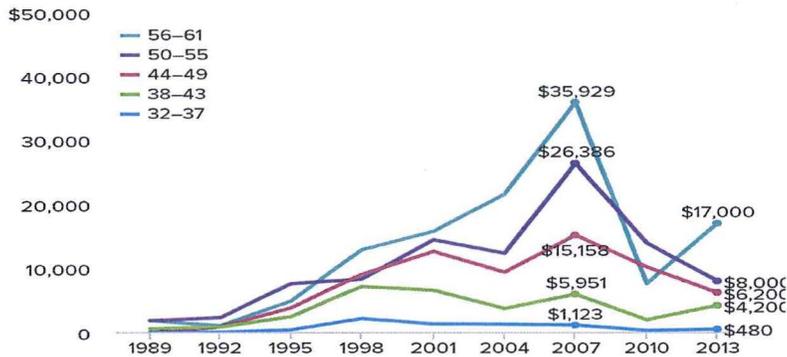
As we have previously mentioned in our prior comment letter, lack of savings is the main challenge for Americans being unprepared for retirement.¹ As illustrated below, most families have little or no retirement savings to speak of.

¹ <http://www.epi.org/publication/retirement-in-america/>

5

Most families—even those approaching retirement—have little or no retirement savings

Median retirement account savings of families by age, 1989–2013 (2013 dollars)



Note: Scale changed for visibility. Retirement account savings include 401(k)s, IRAs, and Keogh plans.

Source: EPI analysis of Survey of Consumer Finance data, 2013.

Economic Policy Institute

Furthermore, with defined benefit pension plans becoming a thing of the past, and Social Security benefits under constant scrutiny for potential reform, today's investors have very limited options that will provide guaranteed lifetime income. If the Rule takes effect as currently written, investors will have even less access to the advice and products they need to help them achieve a financially secure retirement.

Pacific Life appreciates the Department's desire to ensure that American retirement investors are receiving advice in their best interest. For the reasons stated above, Pacific Life joins the American Council of Life Insurers, the Investment Company Institute, the Insured Retirement Institute, the U.S. Chamber of Commerce, and the Committee of Annuity Insurers in supporting a better solution to reach this level of consumer protection.

Sincerely,

Sharon Cheever
Senior Vice President and
General Counsel