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Submitted electronically via www.regulations.gov, Docket ID EBSA-2017-0004

Office of Exemption Determinations
EBSA, (Attention: D-11712, 11713, 11850)
U.S. Department of Labor
200 Constitution Avenue NW, Suite 400
Washington, DC 20210

Re: RIN 1210-AB82, Extension of Transition Period and Delay of Applicability Dates

Dear Sir or Madam:

We appreciate the opportunity to provide comments on the Department's proposed "Extension of Transition Period and Delay of Applicability Dates", RIN 1210-AB82, 82 Fed. Reg. 41365 (Aug. 31, 2017) (ZRIN 1210-ZA2). We believe this extension and delay is necessary to allow the Department to resolve uncertainties about whether the Fiduciary Rule and/or the related exemptions apply to individual and group insurance policies offered through employers, including whole or universal life insurance coverage, as well as other uncertainties. Alston & Bird, LLP, a national law firm, represents various insurance carriers that offer individual and group whole and universal life insurance policies through employers. We submit this letter on behalf of a client who is an insurance carrier.

SUMMARY

Many employers allow employees to pay for individual and group insurance policies through payroll deductions. These policies include accident, critical illness, cancer, term life, and whole and universal life. These policies are typically offered as voluntary supplemental insurance coverage. Often, employees select these policies on private exchanges that allow employees to select a wide variety of benefits, some of which are not subject to ERISA under any circumstances (for example, pet insurance) and are clearly outside the scope of the Fiduciary Rule (e.g., accident, critical illness, cancer, and term life policies). Moreover, most of these insurance policies are exempt from ERISA due to the regulatory "safe harbor" exception from the ERISA "plan" definition.¹ The employer's involvement with voluntary supplemental insurance policies is minimal. Typically, the employer only forwards after-tax premiums from the

¹ DOL Reg. § 2510.3-1(j).

employee's paycheck to the insurer, which falls within the safe harbor exception to ERISA. However, in some cases, the policies might become part of an employee welfare benefit plan as defined under ERISA. For example, some employers might overstep the bounds of the voluntary plan safe harbor, such as when they pay a portion of the employee's premium for the policy. The insurer may not have a reasonable way of knowing when or if a policy becomes subject to ERISA because the employer stepped outside the ERISA plan safe harbor. In some cases, the policy may be a group policy.

Questions have arisen as to whether whole and universal life policies that are part of an employee welfare benefit plan under ERISA are within the scope of the Fiduciary Rule. Excluding such policies from the rule is consistent with the stated objectives of the Fiduciary Rule. Moreover, the rule-making record does not reflect discussion of this type of arrangement and so it appears that the Department did not intend to include such policies within the reach of the Rule.

Consequently, we seek confirmation that individual and group whole and universal life voluntary supplemental insurance policies that employers offer through payroll deduction are not considered "plans" for purposes of the Fiduciary Rule, whether or not those policies qualify for the regulatory "safe harbor" exception from the ERISA "plan" definition. To the extent the Department does not already believe that voluntary supplemental policies offered through employers are outside the Fiduciary Rule's reach, then we believe the Department should revise the definition of "plan" to exclude voluntary supplemental life (including whole and universal life) policies offered through an employer. As a result, we also believe the Department should extend the special transition rules and effective date of the exemptions until at least July 1, 2019 "to give the Department of Labor the time necessary to consider possible changes and alternatives to these exemptions."²

DETAILED DISCUSSION

Fiduciary Rule's Definition of "Plan"

The Fiduciary Rule defines a "plan" to mean "any employee benefit plan described in section 3(3) of [ERISA] and any plan described in section 4975(e)(1)(A) of the Code".³ Under ERISA § 3(3), "plan" means an "employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan." As described below, many voluntary supplemental policies offered via employers are not "plans" under ERISA.

² 82 Fed. Reg. 41365 (Aug. 31, 2017).

³ DOL Reg. § 2510.3-21(g)(6)(i).

Voluntary Individual and Group Life Insurance Policies are NOT “Plans” Within the Meaning of the Fiduciary Rule

Voluntary Individual and Group Life Insurance Policies are Not Pension Plans Unless Offered Under a Pension Plan

An “employee pension benefit plan” is a plan that “(i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond.”⁴ A life insurance policy, including a whole or universal life policy, is not an employee pension benefit plan. A life policy is intended to provide death benefits rather than retirement income. Additionally, such policies do not defer income for periods beyond termination of employment, and are not governed by any employment relationship. Thus, life, including whole or universal life policies, offered to an employee are not “employee pension benefit plans” when they are not offered under an arrangement that is itself a pension plan.

Voluntary Individual and Group Life Insurance Policies are Not Plans Under Code Section 4975(e)(1)

Code § 4975(e)(1) also does not apply here as it defines a plan as a retirement plan qualified under Code § 401(a), an individual retirement account or annuity, an Archer MSA, a health savings account, or a Coverdell education savings account. Voluntary individual and group life insurance policies are clearly not within this section of the Code (again, unless purchased through a plan described in that section).

Many Individual and Group Life Policies are not Employee Welfare Benefit Plans and Thus Exempt from the Rule

In relevant part, an “employee welfare benefit plan” is a plan that provides “medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services”.⁵ However, the Department’s regulations provide an exception for certain voluntary plans. Specifically:

“the terms ‘employee welfare benefit plan’ and ‘welfare plan’ shall not include a group or group-type insurance program offered by an insurer to employees or members of an employee organization, under which—

- (1) No contributions are made by an employer or employee organization;
- (2) Participation the program is completely voluntary for employees or members;
- (3) The sole functions of the employer or employee organization with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees

⁴ ERISA § 3(2).

⁵ ERISA § 3(1).

or members, to collect premiums through payroll deductions or dues checkoffs and to remit them to the insurer; and

(4) The employer or employee organization receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deductions or dues checkoffs.”⁶

In many cases, the employer’s only involvement with respect to the purchase of voluntary policies is limited to payroll deduction to pay for the policy, which falls squarely within the safe harbor.

Even if an Individual or Group Supplemental Life Policy Becomes Subject to ERISA, the Fiduciary Rule is Inapplicable

As described above, life insurance policies, including those that offer whole or universal life, are not employee benefit pension plans and not plans under Code section 4975(e)(1)(A). Thus, to the extent they are ERISA “plans” it would be because they are “employee welfare benefit plans” that provide “benefits in the event of sickness, accident, disability, [or] death”.⁷ The rulemaking record does not indicate that the Department determined that extending the Fiduciary Rule to employee welfare benefit plans resolves any regulatory problem or reduces financial losses of employee welfare benefit plan participants. In fact, the term “employee welfare benefit plan” is not mentioned in the proposed or final regulations, or their preambles, and ERISA § 3(1) is not cited at any point.

The Department’s concerns related to universal or whole life policies appear to revolve around use of retirement distributions to pay premiums.⁸ However, the Department did not identify any concerns with employee welfare benefit plans. Thus, it appears that the Department did not intend to include individual and group life policies that are solely employee welfare benefit plans, including whole and universal life, within the reach of the Fiduciary Rule. We therefore request clarification that policies that are employee welfare benefit plans as discussed here are not subject to the Fiduciary Rule.

CONCLUSION

As further discussed above, we believe that the Department should provide clarification establishing a clear exception from the Fiduciary Rule for life insurance policies, including whole and universal life, offered through employers as described here. As a result, we also believe the Department should extend the special transition rules and effective date of the exemptions until at least July 1, 2019 “to give the Department of Labor the time necessary to consider possible changes and alternatives to the

⁶ DOL Reg. § 2510.3-1(j).

⁷ ERISA § 3(1).

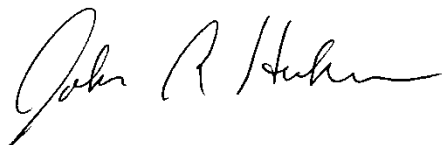
⁸ See, e.g., Conflict of Interest FAQs (PART II - RULE), Q/A-4 (January 2017), available at <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/coi-rules-and-exemptions-part-2.pdf> (as visited September 12, 2017).

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exemptions.”⁹ We would be pleased to meet with the Department and further discuss the issues outlined here.

Sincerely,

A handwritten signature in black ink, appearing to read "John R. Hickman". The signature is written in a cursive style with a large initial "J" and a long horizontal stroke at the end.

John R. Hickman

⁹ 82 Fed. Reg. 41365 (Aug. 31, 2017).