



August 6, 2020

The Office of Exemption Determinations
Employee Benefits Security Administration
Attention: Application No. D-12011
Suite 400
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Submitted Electronically via Federal eRulemaking Portal: www.regulations.gov

Re: Application No. D-12011, ZRIN 1210-ZA29 – Improving Investment Advice for Workers and Retirees

Ladies and Gentlemen:

The Indexed Annuity Leadership Council (“IALC”) appreciates the opportunity to submit comments on the Department of Labor’s (“Department”) notice of proposed class exemption (“Proposed Exemption”) for investment advice fiduciaries, Docket ID# EBSA-2020-0003. The Proposed Exemption would exempt reasonable compensation related to non-discretionary investment advice to Employee Retirement Income Security Act (“ERISA”) retirement plans and participants and Individual Retirement Accounts or Individual Retirement Annuities (“IRA”).

In the preamble to the Proposed Exemption, the Department rescinded Advisory Opinion 2005-23A regarding the ERISA fiduciary status of financial professionals recommending a rollover or distribution from an ERISA plan or IRA. The preamble also announced new interpretive guidance relating to the five-part test for fiduciary investment advice under the 1975 regulation at 29 CFR § 2510.3-21. While this new guidance does not appear to be related to the Proposed Exemption, we wish to take this opportunity to express to the Department our significant concerns regarding the rescission of the advisory opinion and the substance of the new guidance.¹

¹ Though the preamble was officially published in the Federal Register on July 7th, we note the Department’s website indicates that Advisory Opinion 2005-23A was rescinded on June 29th, the day the preamble was unofficially released. We therefore presume that the guidance is also effective June 29th and is not part of the

Who We Are:

The IALC is a consortium of life insurance companies² that offer fixed indexed annuities (“FIA”). IALC was established in 2011 with a mission to educate the public (including regulators) about the benefits of FIAs, which offer principal protection and a predictable, guaranteed retirement income, and can contribute balance to retirement savers’ long-term financial plans. FIAs offered by IALC members are sold by independent insurance agents who work through various organizations, including independent marketing organizations (“IMOs”), broker-dealers, banks, and other financial institutions. IALC members, like other insurance companies, frequently contract with such organizations to distribute their products through independent insurance agents. These organizations and their insurance agents typically sell annuity products offered by more than one insurance company.

IALC member companies believe that it is critically important for retirement savers to have access to a host of financial products so that a financial adviser can recommend a retirement savings strategy that serves each client’s best interest. In certain circumstances, an FIA is the product that best serves a client’s interest and therefore maintaining access to these annuity products promotes the Department’s goal of protecting retirement savers.

Executive Summary:

IALC is very concerned that the new guidance reinterpreting the 1975 regulation’s five-part test inappropriately expands the definition of fiduciary investment advice to include advice in connection with the sale of an insurance product for which a commission is paid as opposed to advice “regularly” furnished as the “primary basis” for the client’s “investment decisions”, the definition embodied in the Department’s five part test. The Department’s test is in turn embodied in traditional fiduciary definition standards as recently articulated in the Fifth Circuit’s 2018 decision rejecting the Department’s 2016 Fiduciary Rule. In addition, the Proposed Exemption is closely modeled on the Security and Exchange Commission’s Regulation Best Interest (“Reg BI”), a securities law standard of care that is not applicable to the offer and sale of state-regulated insurance products. As a result, the Proposed Exemption does not accommodate the regulatory standards and industry sales and marketing standards applicable to insurance products, creating an un-level playing field.

Specifically, our comments address the following issues:

- Recommending an FIA in connection with a rollover or a distribution from an ERISA plan or IRA is the sale of an insurance contract, not fiduciary investment advice. Congress never

proposal on which comments are requested. See, www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2005-23a, last accessed on July 31, 2020.

² American Equity Investment Life Insurance Company, Midland National Life Insurance Company, Athene Annuity and Life Company, Allianz Life Insurance Company of North America, and North American Company for Life and Health

intended these sales activities to be fiduciary investment advice under ERISA Sec. 3(21)(a)(ii);

- The new guidance is tantamount to a regulation, exceeding the permissible scope of a guidance document under Executive Order 13891;
- The new guidance reinterpreting the five-part test is inconsistent with the law, and with the legal reasoning employed by the Fifth Circuit Court of Appeals in vacating the Department's 2016 fiduciary regulation;
- The new guidance misinterprets the Department's 1975 regulation with respect to "regular basis," "mutual understanding" and "primary basis;" and should be rescinded; the Department should clarify that insurance sales are not ERISA fiduciary investment advice;
- The Proposed Exemption favors investment professionals subject to securities regulation, creating an un-level playing field for insurance professionals subject to state insurance regulation; and
- The Proposed Exemption should be modified to provide an additional, insurance-based exemption modeled on the revised National Association of Insurance Commissioners' "Suitability in Annuity Transactions Model Regulation" Rule #275 ("NAIC Model Rule #275"). This would complement the securities-based exemption modeled on Reg BI.

We would be happy to meet with the Department to discuss these issues. We provide our comments in more detail below.

Selling Insurance is not ERISA Fiduciary Advice:

As the U.S. Court of Appeals for the Fifth Circuit wrote in its ruling vacating the Department's 2016 fiduciary regulation, "When enacting ERISA, Congress was well aware of the distinction, explained further below, between investment advisers, who were considered fiduciaries, and stockbrokers and insurance agents, who generally assumed no such status in selling products to their clients."³ When an insurance agent sells an insurance product, like an FIA, to a customer, including in connection with a rollover or distribution from an ERISA plan, he or she does so as an insurance agent governed by a state law standard of care, not as an ERISA fiduciary. As the court above ruled, Congress did not intend that all transactions involving ERISA plans or participants confer fiduciary status on the person recommending the transaction. Fiduciary status is a special relationship of trust that goes beyond recommending that a person purchase an insurance contract.

The Department recognized this in 1975 when it adopted the regulation establishing the five part test for identifying an ERISA fiduciary advisor who was giving "advice for a fee" under the statute. The Fifth Circuit summarized that test writing "...an investment-advice fiduciary is a person who (1) 'renders advice ... or makes recommendation[s] as to the advisability of investing in, purchasing, or selling securities or other property;' (2) 'on a regular basis;' (3) 'pursuant to a mutual agreement ... between such person and the plan;' and the advice (4) 'serve[s] as a primary basis for investment decisions with respect to plan assets;' and (5) is 'individualized ... based on the particular needs of the plan.' 29 C.F.R. § 2510.3-21(c)(1) (2015)." ⁴

³ *Chamber of Commerce of the United States v. U.S. Department of Labor*, 885 F.3d 360 at 372 (5th Cir. 2018).

⁴ *Chamber*, at 364-365.

The Fifth Circuit went on to explain that this test, “...captured the essence of a fiduciary relationship known to the common law as a special relationship of trust and confidence between the fiduciary and his client.”⁵

The New Guidance Seeks to Amend the Rule Without Amending the Rule:

In the preamble to the Proposed Exemption, the Department explained that it had separately reinstated the words of the 1975 regulation to give effect to the Fifth Circuit’s ruling vacating the 2016 rule. However, the Department apparently believes that while it may have lost in its 2016 bid to extend ERISA’s reach to insurance sales and other transactions that were beyond the scope of fiduciary duty for over 40 years, it can do through guidance what the court says it can’t do through regulation. In the new guidance, the Department does not propose to change the actual words of the 1975 rule, instead it is using interpretive guidance to reverse the long-understood *meaning* of those words.

Accordingly, the Department issued new guidance in the preamble to the Proposed Exemption that almost certainly runs afoul of the President’s Executive Order 13891 intended to stop rulemaking by guidance. The effect of the new guidance is to rescind Advisory Opinion 2005-23A and replace it with new interpretations of elements of the five part test that bear no resemblance to the 1975 regulation reviewed and approved by the Fifth Circuit.

The Guidance is Inconsistent with the Law and the Fifth Circuit’s Legal Reasoning:

The new guidance purports, in 2020, to have discovered that the Department’s previous views since 1975 were wrong. This is somewhat similar to the discovery by the Department in 2016 of a new meaning to the statutory text from 1974. The court noted this in its opinion, writing, “[T]hat it took DOL forty years to ‘discover’ its novel interpretation further highlights the Rule’s unreasonableness.”⁶ The Department is doing the same thing here—reversing 40 years of thinking to discern novel meanings for “regular basis,” “mutual understanding” and “primary basis.”

- Regular Basis

The new meaning of “regular basis” in the guidance seems designed to expressly undermine the legal principle that sales recommendations are not fiduciary advice. The guidance tries to turn a series of non-fiduciary sales conversations into an “ongoing relationship” that meets the “regular basis” requirement.

The Department’s new guidance suggests it is not necessary to give ERISA-related advice more than once to meet the regular basis test. For example, “...in circumstances in which the advice provider has been giving financial advice to the individual about investing in, purchasing, or

⁵ Id. at 365.

⁶ Id. at 380.

selling securities or other financial instruments, the advice to roll assets out of a Plan is part of an ongoing advice relationship that satisfies the ‘regular basis’ requirement.”⁷ In other words, a series of insurance sales to an individual that are unrelated to any plan or distribution (advice to purchase an insurance contract) will be enough to create an ongoing relationship such that a single rollover recommendation is deemed to have been ERISA fiduciary advice provided on a “regular basis.”

Even more concerning, the Department finds that “regular basis” can be met after only one meeting if both parties anticipate that there will be more meetings. The Department wrote, “the rollover recommendation may be seen as the first step in an ongoing advice relationship that could satisfy the regular basis prong of the five-part test depending on the facts and circumstances.” [emphasis added]⁸ Such analysis is grossly inconsistent with traditional fiduciary standards, not to mention the Fifth Circuit’s opinion which emphasized the importance of “control and authority” for a fiduciary standard, which “necessarily implies a special relationship beyond that of an ordinary buyer and seller” in its rejection of the 2016 Fiduciary Rule.

Not only are these illogical readings of the words, but both of these would seek to bring non-fiduciary sales conduct into the realm of fiduciary investment advice. The failure to establish a bright line test creates uncertainty, and for something as important as whether ERISA’s fiduciary obligations apply—“the highest duty known to the law”⁹—it is vital that insurance professionals know where the line is drawn.

- Mutual Understanding

A fiduciary relationship must necessarily be understood as such by both parties—they have to have a *mutual* understanding under the 1975 rule. The new guidance explains that this will be discerned by the “reasonable understanding of each of the parties.” However, the guidance then notes that a contract term describing that mutual understanding is not “determinative” of whether mutual understanding actually exists...but the Department will “appropriately consider” it. A contract is an agreement in which two parties state their mutual understanding of the terms and agree to be bound by them. It’s hard to see how a contract can be less than “determinative” with respect to the intent of the parties. If both parties agree that the recommendation given is part of a sales contract and is not fiduciary advice, how can there be any other conclusion? The guidance is clearly attempting to suggest that the Department can pick and choose which elements of a mutual understanding it decides to believe.

- Primary Basis

In a remarkable bit of legal jiu jitsu, the new guidance provides that where a financial service professional is making a recommendation pursuant to a best interest standard, the financial

⁷ 85 Fed. Reg. 40,839 (July 7, 2020).

⁸ 85 Fed. Reg. 40,840.

⁹ See, e.g., *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d. Cir. 1982), and *Tibble v. Edison Int’l*, 843 F.3d 1187, 1197 (9th Cir. 2016).

professional has automatically met the primary basis test. This presumption in the guidance appears to apply to any best interest standard, from Reg BI to the revised NAIC annuity model rule. Given that these best interest standards are expressly not fiduciary standards—they were adopted as part of a rejection of a fiduciary standard of care—finding them to be evidence of fiduciary status is a novel interpretation.

- The Department Should Clarify that Insurance Sales are Not Fiduciary Advice

While the Department does acknowledge that “a one-time sales transaction, such as the one-time sale of an insurance product, does not by itself confer fiduciary status under ERISA or the Code, even if accompanied by a recommendation that the product is well-suited to the investor and would be a valuable purchase,”¹⁰ the guidance immediately undermines this statement with a footnote, warning, “Like other Investment Professionals, however, insurance agents may have or contemplate an ongoing advice relationship with a customer. For example, agents who receive trailing commissions on annuity transactions may continue to provide ongoing recommendations or service with respect to the annuity.”¹¹

This footnote again misrepresents the nature of fiduciary obligation, as trailing compensation is irrelevant to whether a fiduciary relationship exists, and providing future services has nothing to do with whether fiduciary advice is provided.

It is important to recognize that the relationship between a consumer and independent insurance agent is transactional in nature. Once the transaction has been completed and the policy has been delivered, the agent has no ongoing obligation with respect to the consumer. That said, many agents will continue to perform regular agent functions such as helping with beneficiary changes or other servicing questions the consumer may have. No additional fee or excess compensation is owed to the agent for these services. The agent provides these services on a voluntary basis; not as a fiduciary – it is just good business. If an agent is fearful that a springing fiduciary duty would attach to these follow-up meetings, he or she may be less likely to help. This ultimately harms the consumer, the agent, and the relationship – which seems to be contrary to the Department’s desires.

The guidance undermines the basic understanding of fiduciary status of the 1975 regulation it purports to interpret. We urge the Department to rescind the guidance, and to formally acknowledge that sales of insurance contracts are not ERISA fiduciary advice.

The Proposed Exemption Creates an Un-Level Playing Field for Insurance Professionals

While we believe that insurance sales of FIAs are not ERISA fiduciary advice and the new guidance is fundamentally misguided, in the event that a recommendation to purchase an annuity is fiduciary investment advice under ERISA, the prohibited transaction rules in ERISA and the Tax Code would apply to the compensation received by the financial professional making the recommendation.

¹⁰ 85 Fed. Reg. 40,840.

¹¹ Id.

Insurance product compensation is typically commission or transaction-based, a form of compensation generally not permitted under these prohibited transaction rules. Moreover, the Department has determined that compensation to a fiduciary in connection with a rollover recommendation is generally a prohibited transaction regardless of the form of the compensation. As the preamble explains, the rollover recommendation presents a conflict because the fiduciary "...can generally expect to earn transaction-based compensation such as commissions, or an ongoing advisory fee, from the IRA, but may or may not earn compensation if the assets remain in the Plan. [Therefore] ERISA and the Code prohibit an investment advice fiduciary from receiving fees resulting from investment advice to Plan participants to roll over assets from a Plan to an IRA."¹²

To address this, the Department published the Proposed Exemption, which would permit reasonable compensation if conditions modeled on Reg BI are followed. While this is useful for broker-dealers, who have already established compliance systems based on this standard, it provides a significant compliance challenge for insurance professionals.

Insurance companies and their distribution systems work differently than those in the securities industry. To require insurance companies and their agents to adopt practices and policies that are designed for the securities industry, where regular advice with respect to the purchase and sale of securities is often the standard, would place them at a competitive disadvantage. The insurance industry and securities industry models are different, and a one-size-fits-all approach will not create an exemption that best serves the interest of participants and beneficiaries.

- Insurance Oversight is Different than Securities Oversight

While the Proposed Exemption is modeled on the notion that a financial institution can act in an investment advisory fiduciary capacity, this is not applicable in an insurance context. Insurers' training and supervision of independent insurance agents is, by the very nature of the insurance products they offer, entirely different and they are simply not able to supervise independent agents in the way that is expected with respect to fiduciaries in the securities industry. In addition to substantial differences in products and inherent guarantees regulated by state insurance departments, independent agents represent multiple insurers and are not controlled by a single insurance company or marketing organization. The independence of these agents is good for consumers, as it allows them to offer many different options to better serve their clients. This is one of the foundations on which insurance regulation has been designed.

Insurers do not have the necessary "control" over independent agents that it would take to serve as a fiduciary financial institution under the Proposed Exemption. Insurers also do not have the ability to manage the independent agent's product offerings or "product shelf" the way other fiduciary financial institutions can. It is thus unreasonable for insurance carriers to "supervise

¹² Id.

independent insurance agents and... create oversight and compliance systems through contracts with intermediaries.”¹³

The Department recognizes this by stating in the preamble that the insurer would not need to consider “unrelated and unaffiliated insurers.” The NAIC model rule goes further, recognizing that insurers not only cannot consider other companies’ products, but also cannot consider the independent agent’s product shelf, its commission arrangements or its potential conflicts of interest. This gap is important and must be appropriately considered by the Department.

The Proposed Exemption Should Provide a Set of Conditions for Insurance Professionals Based on NAIC Model Rule #275

The Department must modify the Proposed Exemption to recognize that the Reg BI-based model is not appropriate for insurance professionals by providing alternative conditions modeled on NAIC Model Rule #275.

If the Department’s goal is to preserve different kinds of advice relationships and product-delivery methods, then these differences must be properly addressed in the Final Exemption. Like the SEC efforts that led to Reg BI, the NAIC worked diligently to formulate best interest standards and regulatory requirements that fit the insurance industry. And while the NAIC model has not been widely adopted to date – mostly due to COVID-19 – our expectation is that it will be adopted in a majority of states within the next two to three years. Note also that Section 989J of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) requires the states to adopt NAIC Model Rule #275 in order to avoid federal preemption with respect to the regulation of FIAs. In short, NAIC Model Rule #275 will soon be widely adopted by insurance companies regardless of state adoption in order to avoid such preemption.

NAIC Model Rule #275 includes standard of conduct, supervision and disclosure obligations that overlap significantly with the Proposed Exemption’s impartial conduct standards. However, the Proposed Exemption does not incorporate these NAIC standards with respect to insurance products. Accordingly, IALC recommends that satisfaction of the NAIC’s standards detailed in NAIC Model Rule #275 should be considered by the Department as satisfying comparable requirements under ERISA. This would put the best interest approach that was specifically tailored to the insurance industry on level ground with the nationwide application of Reg BI.

Other Needed Changes in the Proposed Exemption:

In addition to adopting a NAIC model rule-based set on conditions, we urge the Department to make the following amendments to the Proposed Exemption.

- Financial Institution and Insurance Intermediaries

The Proposed Exemption requires a financial institution and an investment professional to work together. The Department has limited those institutions to banks, insurance carriers, broker-

¹³ See Id. at 40,846.

dealers and registered investment advisors. We ask the Department to consider expanding the definition of financial institution to include insurance intermediaries that may wish to take on the responsibility of financial institutions.

- Remove Written Fiduciary Status Requirement

As discussed above, the new guidance makes it very difficult to know when ERISA fiduciary status will apply to the recommendation to purchase an FIA. In addition, the financial institution may not be a fiduciary itself, even though the investment professional is. The Proposed Exemption should be available for use even when one is not certain of fiduciary status, and we ask that Sec II(b)(1) be removed.

- Remove Ongoing Monitoring for “Unusual” Investments

The Department was correct to state that the Best Interest standard of care does not require ongoing monitoring, but wrong to qualify that statement. The Department’s view that, “investments that possess unusual complexity and risk, for example, may require ongoing monitoring to protect the investor’s interests,”¹⁴ should be removed. We have no definition of what such an investment might be, and would reject the notion of the Department creating such a list.

- Remove Retrospective Review

We do not believe the retrospective review and certification is necessary, and it is not typical for class exemptions. A failure to follow the conditions results in the loss of the exemption, as with all other class exemptions.

Conclusion:

We appreciate the opportunity to offer the perspective of fixed indexed annuities as the Department reviews the Proposed Exemption. We urge you to rescind the guidance that accompanied the Proposed Exemption, as it will cause significant harm, and to expand the Proposed exemption to include an insurance-based compliance mechanism to complement the securities-based mechanism proposed.

Thank you for your consideration, and please don’t hesitate to contact us with any questions or concerns.

Sincerely,



¹⁴ Id at 40,843.