PACIFIC LIFE

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

Re: Comments in Response to the Department of Labor's Proposed Class Exemption Titled "Improving Investment Advice for Workers & Retirees" Application No. D-12011, Docket EBSA-2020-0003

Ladies & Gentlemen:

Thank you for the opportunity to comment on the Department of Labor's ("DOL") proposed class exemption titled "Improving Investment Advice for Workers & Retirees" ("Proposal"). Pacific Life Insurance Company ("Pacific Life") respectfully offers the comments below to assist the DOL in determining how to best revise the Proposal in order to strengthen retirement security for American investors.

Support for Reasonable and Uniform Standard of Conduct

Pacific Life is committed to acting in the best interest of our customers and supports the enactment of a *reasonable* and *uniform* standard of conduct for financial professionals that preserves consumer access to and choice of advice models and retirement products.

Although Pacific Life has significant concerns with the DOL's statements in the preamble to the Proposal ("Preamble") which purport to reinterpret the five-part test for investment advice fiduciary status, we believe the Proposal is moving in the right direction as a workable exemption to allow for the provision of fiduciary investment advice. We support the DOL's goal of offering an exemption that will allow parties who affirmatively wish to act as fiduciaries to provide investment advice and be paid for that advice. We also support that the Proposal allows for recommendations of a variety of types of annuities and does not favor one kind of annuity over another. However, unless the DOL's purported interpretations in the Preamble of the Proposal are corrected as part of the final rulemaking, the Proposal will lead to uncertainty and inconsistent application, and reduced access to critical products that protect American's retirement security.

Objection to Five-Part Test Reinterpretation

As you know, the five-part test provides, in essence, that a financial professional will be considered a fiduciary if he or she, for compensation, (i) renders advice or makes recommendations concerning securities or other property, (ii) on a regular basis, (iii) pursuant to mutual agreement, (iv) that serves as a primary basis for investment decisions, (v) and the advice is individualized based on particular needs. Pacific Life believes the test on its face, read naturally, is logical and each element plays an important role, so it is evident when a fiduciary relationship is created, and a fairly bright line exists to guide parties' behaviors and expectations.

However, the DOL now seems to adopt new interpretations of key elements that introduce uncertainty and will seemingly broaden the five-part test so that it applies to financial professionals who were clearly not fiduciaries in the past and may elect to play the same role going forward maintaining clear expectations with their clients when offering their services (e.g., brokerage services, one-time sales transactions, etc.). In seeking to correct what the DOL may perceive as technical loopholes, the DOL is undercutting essential ingredients of the five-part test which could turn the entire financial industry into fiduciaries even during casual conversations on topics related to saving, investing, and spending retirement assets.

Pacific Life urges the DOL to carefully redraft the Preamble, while reassessing the interpretation of the five-part test therein, and clearly state that any changes in the five-part test do not apply retroactively, so as to avoid creating widespread confusion within the financial industry and running afoul of the *U.S. Chamber of Commerce v. DOL* decision ("Fifth Circuit" or "Fifth Circuit Decision") in addressing who is and who is not a fiduciary in accordance with Congressional intent.

Preamble Lacks Discussion of the "Trust and Confidence Standard"

The Preamble appears to take a very expansive view of each element of the five-part test, the cumulative effect of which would be to turn many traditional financial professionals (e.g., agents and brokers) into fiduciaries, which is not consistent with the Fifth Circuit Decision. It is first important to emphasize the Fifth Circuit did not merely uphold the five-part test, but, more fundamentally, ruled that the determination of fiduciary status turns on what the Fifth Circuit called the "trust and confidence standard." The Fifth Circuit painstakingly explained the determination of who is a fiduciary is rooted in the term's dictionary meaning, common law precedent as set by courts, an existing statutory framework in the securities industry differentiating brokers from investment advisers, and intent of Congress in enacting ERISA. The five-part test is an historically respected tool used by DOL to actualize the trust and confidence standard but that is now jeopardized and potentially undermined by DOL's revised interpretation of the five-part test elements.

To be clear, the Preamble makes virtually no mention of the trust and confidence standard articulated by the Fifth Circuit and fails to acknowledge it as the benchmark of analysis. Absent an explanation of how modifying the meaning of the five-part test elements to comport with and support the trust and confidence standard, the reinterpretations adopted by the DOL are inadequate at a minimum and potentially harmful at worst. Pacific Life submits that the DOL, upon closer analysis, will see it has strayed from the true meaning of the Fifth Circuit Decision by redrawing boundaries of each element that, in aggregate, will have the effect of causing everyday financial professionals to be fiduciaries where there is no substantive basis for, nor reasonable expectation of, such a relationship.

For example, the Securities and Exchange Commission's ("SEC") Form CRS was designed to assist retail investors with the process of deciding whether they engage with the financial professional in a brokerage or advisory capacity. The purpose is to limit investor confusion about their relationship with the financial professional. We suggest a similar principle-based approach by the DOL to promote clarity to limit any confusion of the applicable relationship between the financial professional and the consumer when discussing options tied to retirement assets.

Regular Basis Interpretation is Overly Broad

The Preamble asserts that "the regular basis prong of the five-part test would be satisfied when an entity with a pre-existing advice relationship with the Retirement Investor advises the Retirement Investor to roll over assets from a Plan to an IRA."[1] This statement is overly broad and not consistent with the relationship many individuals have with financial professionals. Many individuals seek assistance from a financial professional *whom they know* when making a decision about a rollover. This financial professional may have sold or otherwise provided assistance on other insurance products in the past, thus it is likely that there is a pre-existing relationship. That doesn't mean, however, that the pre-existing relationship is *fiduciary* in nature, nor that previous recommendations were made "on a regular basis."

Furthermore, the Preamble states that in the case of "an investment advice provider who establishes a new relationship with a Plan participant and advises a rollover of assets from the Plan to an IRA, 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."[2] This statement is even more concerning, as it provides no workable guidance for a financial professional to be able to reach a mutual understanding that no fiduciary relationship exists. The fact is, financial professionals that sell annuities and other products must know at the moment a rollover recommendation is made whether or not they are a fiduciary. Unless the client has specifically requested and is paying for ongoing investment advice, and the financial professional has agreed to provide those services, the existence of a later relationship should not transform the understanding of the parties that recommendations are being provided on a "regular basis."

Primary Basis Interpretation is Too Inclusive

The Preamble also asserts that "the five-part test does not look at whether the advice serves as 'the' primary basis of investment decisions, but whether it serves as 'a' primary basis."[3] While it is true that the 1975 regulation does use the word "a" and not "the," this is, as far as we know, the first time the DOL has placed emphasis on this distinction.

This suggests that *any* recommendation that might be taken into account by an individual is automatically a primary basis for investment decisions. Such a statement undermines the fundamental difference between a sales or educational conversations, which may or may not involve some sort of recommendation, and may not necessarily give rise to or create a relationship of trust and confidence under which the Retirement Investor will expect with fiduciary investment advice. We disagree that the regulation should be this broad.

Even more concerning, the Preamble suggests that simply complying with other *non-fiduciary* regulatory rules would satisfy the primary basis prong when it states "When financial service professionals make recommendations to a Retirement Investor, particularly pursuant to a best interest standard such as the one in the SEC's Regulation Best Interest ("Reg BI"), or another requirement to provide advice based on the individualized needs of the Retirement Investor, the parties typically should reasonably understand

[1] *See* DOL Release at 40840
[2] *See* DOL Release at 40840
[3] *Id.*

that the advice will serve as at least a primary basis for the investment decision."[4] The DOL attempts to contrast this with "a one-time sales transaction, such as the one-time sale of an insurance product," which the DOL states "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."[5] The problem with this distinction is that the SEC and many states are now requiring that any recommendation, even in a sales context, meet a "best interest" standard. Thus, financial professionals are put in the dilemma where, by simply complying with Reg BI or a similar state rule (such as one based on the NAIC's Suitability in Annuity Transactions Model Regulation or "NAIC Model Reg"), neither of which confer fiduciary status, the financial professional is pushed to worry this might trigger fiduciary status under ERISA or the Code, which in turn forces the financial professional to rely on the new exemption, which in turn requires affirmative acknowledgement of fiduciary status.

Pacific Life would urge DOL to consider ways to ensure the marketplace is not adversely affected by the Proposal, including, perhaps, creation of a safe harbor. For example, the DOL could create a safe harbor for financial professionals who disclaim being a fiduciary, abide by "best interest" standards established by functional regulators (i.e., SEC or NAIC), and disclose compensation and conflicts (both of which are required under Reg BI and the NAIC Model Reg). Such a safe harbor would serve as a bright line test and let consumers decide whether they prefer working with a fiduciary rather than having that decision made for them by regulation. Further, this can aid in better alignment with other regulatory rules where "best interest" is the foundation to the standard of care without potentially limiting choice (i.e., fiduciary status is triggered for retirement assets vs. brokerage or advisory for non-retirement assets).

Objection to the Expansion of DOL's Jurisdiction to Rollovers

Pacific Life is concerned about the withdrawal of Advisory Opinion 2005-23A ("Deseret Letter") to the extent it could mean the DOL is directly or indirectly extending its jurisdiction over IRA transactions involving the rollover of ERISA plan assets.

In the vast majority of cases, especially those involving rollovers, the parties do not know where the relationship will go, and certainly the financial professional has not agreed to take on, nor charge for, ongoing investment advice. It is critical that there be certainty during the rollover process, whether an exemption is needed to cover the commission or other compensation paid in connection with the rollover. Pacific Life believes financial professionals should be able to sell IRA products to Retirement Investors without being pulled into ERISA and being subjected to ERISA based litigation. The DOL's implication that a rollover recommendation is advice subject to ERISA, as opposed to the Code, should not apply where the financial professional is unrelated to and not engaged by the plan sponsor. This is especially true in cases where the participant may have long ago separated and no longer works for the employer who sponsors the retirement plan.

The DOL's implication that a rollover recommendation is advice subject to ERISA, as opposed to the Code, should be clarified in particular, not to include situations where the participant decides on his or her own to withdraw assets from an employer plan and rollover funds to an IRA recommended by a financial professional. It is important in those situations to distinguish between the recommendation of the rollover itself from the sale and establishment of an IRA.

It would also be helpful for the DOL to acknowledge that plan participants may control their own accounts and exercise independent discretion such that the decision to rollover and the decision to purchase an IRA can be separate acts so that financial professionals are not giving advice on plan assets

[4] *Id.*
[5] *Id.*

(subject to ERISA) if they only advise as to the latter, leaving any decision to withdraw from the plan solely to the participant. Obviously, it would be incumbent in those situations for the financial professional who is the provider of the IRA to make this distinction explicit to the plan participant and advise that any information or advice about the retirement plan account itself – including the decision to liquidate the account – be provided by the plan sponsor or another fiduciary.

Objection to the Definition of "Financial Institution" and Exclusion of Intermediaries

A fundamental problem with the "Best Interest Contract Exemption" proposed in the 2016 DOL Fiduciary Rule ("2016 Regulation") was that the insurance company using an independent distribution model was forced to monitor and control agents that the insurance company was in no position to monitor or control. As discussed below, it would seem the Proposal repeats this problem.

Consider Including Intermediaries in the "Financial Institution" Definition

In the Proposal, the DOL identifies several "Financial Institutions" (and their individual employees, agents, and representatives) that are likely to act in a fiduciary capacity under the five-part definition of an investment advice fiduciary. The list of affected entities includes SEC- and state-registered investment advisers (IAs), broker-dealers (BDs), banks, and insurance companies.[6] Notably excluded from the definition of Financial Institution in the Proposal, however, are insurance intermediaries such as independent marketing organizations (IMOs), field marketing organizations (FMOs), and brokerage general agencies (BGAs). When products are distributed through these channels, the DOL instead shifts the burden of compliance[7] onto the insurance companies (unless these intermediaries separately request an individual exemption[8]).[9] In the highly likely scenario that some sizable number of these intermediaries decide not to take on an investment advice fiduciary status, the nature of the relationship between insurance companies and the independent third-party distributors does not justify imposing a new requirement that the insurance company adopt policies and procedures to ensure independent third-party distributors comply with the Impartial Conduct Standards, nor does it lend itself to conducting a retrospective review of compliance.

The DOL must allow insurance companies that distribute their retirement products through independent third-party distributors to maintain these existing and important relationships without becoming a Financial Institution (i.e., investment advice fiduciary). Furthermore, the DOL should impose this status and its attendant compliance responsibilities on the intermediary that is closest to the Retirement Investor and the front-line financial professional advising that investor. The final rule should clarify that

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[6] "The DOL assumes that 11,782 Financial Institutions, comprising 1,957 BDs, 6,729 SEC-registered IAs, 2,710 state-registered IAs, and 386 insurers, are likely to engage in transactions covered under this PTE. For a detailed description of how the number of entities is estimated, see the Paperwork Reduction Act section." *See* Improving Investment Advice for Workers & Retirees, 85 FR 40834,fn. 102, 40850 (July 7, 2020) (DOL Release), available at https://www.federalregister.gov/documents/2020/07/07/2020-14261/improving-investment-advice-for-workers-and-retirees

[7] "Insurers could also create a system of oversight and compliance by contracting with an IMO to implement policies and procedures designed to ensure that all of the agents associated with the intermediary adhere to the conditions of this exemption. Thus, for example, as one possible approach, the intermediary could eliminate compensation incentives across all the insurance companies that work with the intermediary, assisting each of the insurance companies with their independent obligations under the exemption. This might involve the intermediary's review of documentation prepared by insurance agents to comply with the exemption, as may be required by the insurance company, or the use of third-party industry comparisons available in the marketplace to help independent insurance agents recommend products that are prudent for the Retirement Investors they advise." *See* DOL Release at 40846

[8] "Additional types of entities, such as IMOs, FMOs, or BGAs, that are investment advice fiduciaries may separately apply for relief for the receipt of compensation in connection with the provision of investment advice on the same conditions as apply to the Financial Institutions covered by the proposed exemption" See DOL Release at 40838

[9] "Insurance companies can supervise independent insurance agents and they can also create oversight and compliance systems through contracts with intermediaries such as independent marketing organizations (IMOs), field marketing organizations (FMOs) or brokerage general agencies (BGAs)." *See* DOL Release at 40846

intermediaries such as IMOs, FMOs, or BGAs are Financial Institutions in their own right (to the extent they satisfy the five-part test[10]).[11]

Insurance Companies Cannot Serve as Financial Institutions for and/or Supervise Independent Financial Professionals

Additionally, some portion of insurance companies' retirement business is conducted without the involvement of intermediaries and, instead, directly with independent financial professionals. The proposal also seeks to require insurance companies to serve as Financial Institutions and supervisors for independent insurance agents and other independent financial professionals.[12] While *captive* distributors and *independent* agents (and financial professionals) both act on behalf of insurance companies, the former category of enterprises are owned or otherwise controlled by the insurance company. Where insurance companies are providing products to Retirement Investors through their own captive agents, it makes sense for these companies to act as the Financial Institution because they have both knowledge of and control over the captive's operations and decision-making. However, insurance companies should not have the same responsibility with respect to independent agents and financial professionals when the insurance company's main role is that of a product manufacturer.

Insurance companies do not have insight into or control over these independent agents' and financial professionals' business and/or behavior and do not consent to or authorize their activities. In particular, the insurance companies do not control or have knowledge of these independent agents' and financial professionals' behaviors that would determine whether they become investment advice fiduciaries under the Proposal and the five-part test. For example, the Proposal suggests that a rollover recommendation can constitute the start of an ongoing relationship and thereby trigger fiduciary status.[13] Insurance companies are not privy to whether a given (independent) insurance agent contemplated or conducted an ongoing relationship with a customer. In fact, the insurance company likely does not know about or participate in these decisions. Most important, the insurance company does not have existing systems for capturing this information, and establishing comprehensive monitoring systems that supervise every independent insurance agent and financial professional who might distribute their products would impose an extreme burden. In fact, the DOL acknowledges that independent agents and financial professionals typically work with multiple insurance companies.[14] Thus, insurance companies inevitably will have overlapping monitoring systems to inform them when a situation requiring them to supervise an independent agent or financial professional has arisen. The burden on the independent agents and financial professionals of multiple redundant systems also will be extraordinary.

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[10] "Exemption relief for an insurance intermediary would only be required if the intermediary is an investment advice fiduciary under the applicable regulations. An exemption is not necessary for an insurance intermediary or its insurance agents who conduct sales transactions and are not fiduciaries under ERISA or the Code." *See* DOL Release at fn. 30, 40838

[11] "The proposal also allows the definition of Financial Institution to expand after the exemption is finalized based upon subsequent grants of individual exemptions to additional entities that are investment advice fiduciaries that meet the five-part test seeking to be treated as covered Financial Institutions." *See* DOL Release at 40838

[12] "Insurance companies could implement the policies and procedures by monitoring market prices and benchmarks for their products and services, and remaining attentive to any financial inducements they offer to independent agents that could result in a misalignment of the interests of the agent and his or her Retirement Investor customer. Insurers could also create a system of oversight and compliance by contracting with an IMO to implement policies and procedures designed to ensure that all of the agents associated with the intermediary adhere to the conditions of this exemption." *See* DOL Release at 40846

[13] "[When the] advice provider has been giving financial advice to the individual about investing in, purchasing, or 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. Similarly, advice to roll assets out of the Plan into an IRA where the advice provider will be regularly giving financial advice regarding the IRA in the course of a more lengthy financial relationship would be the start of an advice relationship that satisfies the "regular basis" requirement. In these scenarios, there is advice to the Plan—meaning the Plan participant or beneficiary—on a regular basis." *See* DOL Release at 40839

[14] *See* DOL Release at 40837

We urge the DOL to clarify that the entity closest to the independent insurance agent (or Retirement Investor), rather than the insurance company, is best positioned to serve as the Financial Institution to ensure compliance with the Proposal.

Revise Proposal to Incorporate Certain Carve-Outs

Pacific Life recommends that the DOL recognize that not all conversations that result in a new retirement account being opened constitute fiduciary investment advice. The principles furthered by the DOL's interpretive efforts should generally be designed to protect individual and retail investors. The DOL highlighted the need for these important consumer protections with its work on the 2016 Regulation and its predecessor rulemaking proposals, but the DOL must address the unintended consequences of applying the five-part test to relationships that were not considered "advice" under the 2016 Regulation.

For example, in the 2016 Regulation, the DOL included an exception for certain transactions with independent fiduciaries with financial expertise. This exception does not reemerge in the Proposal, as the Proposal does not change the language of the 2016 Regulation. Though, in light of the Preamble's expansiveness, we believe that the Department should consider interpretively providing relief along the lines of the independent-fiduciary exception of the 2016 Regulation, with express clarification that interactions between individuals/entities and plan sponsors with over $50 million in assets and other independent plan fiduciaries, absent a formal written agreement stating otherwise, are deemed *not* to meet the five-part test, because the those transactions are not with respect to a mutual agreement to provide advice that will serve as the primary basis for investment decisions with respect to a plan.

Conclusion

Pacific Life appreciates the DOL's desire to ensure that American Retirement Investors are receiving advice in their best interest. For the reasons stated above, Pacific Life supports a better solution to reach this level of consumer protection.

Pacific Life joins the American Council of Life Insurers, the Insured Retirement Institute, and the Committee of Annuity Insurers in supporting a full and comprehensive review of the Proposal so as to not inadvertently create a fiduciary duty to those financial professionals that neither intend to become nor have historically been deemed a fiduciary. In order for us to achieve our shared goal for American retirement investors to save for a secure retirement, and receive advice that is in their best interest, we firmly believe it is in everyone's best interest to get the Proposal and implementation done correctly to minimize market disruption and ongoing consumer confusion.

Sincerely,

DocuSigned by:
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