TheStandard®
Positively different.

July 21, 2015

Mailed Electronically: e-ORI@dol.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Conflict of Interest Rule Hearing, Room N-5655
US Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

RE: **Comments on the Department of Labor's Proposed:**
Redefinition of "Fiduciary" Conflict of Interest Rule (RIN 1210-AB32)
Proposed Amendment to PTE 84-24 (RIN 1210-ZA25)
Proposed Best Interest Contract Exemption (RIN 1210-ZA25)

Greetings:

Standard Insurance Company ("Standard") appreciates the opportunity to comment on the proposed rule and prohibited transaction exemptions promulgated under Sections 3(21)(A)(ii) and 2510.3-21 of the Employee Retirement Income Security Act ("ERISA")(collectively, the "Proposal").

Standard is an Oregon domestic insurer with a national presence. Standard specializes in providing group disability insurance, group life, group accidental death & dismemberment, group dental and vision insurance, absence management services, retirement plan products and services and individual annuities. We provide insurance to 23,000 employer groups covering more than 6 million employees nationwide[1]. Over half of those groups are private (as opposed to government) employers and, therefore, the insurance contracts providing those benefits are subject to the ERISA.

We are submitting the following comments to call out the harmful and unnecessary burden the Proposal will bring to insurers of ERISA welfare benefit plans, the plan sponsors, plan participants and their beneficiaries, as well as to highlight several concerns regarding the Proposal's unintended impact on retirement plan participants and sponsors.

I. Welfare Plans

Standard's insurance contracts are distributed to ERISA plan sponsors through licensed professional insurance agents, brokers and consultants (collectively "producers"). The contracts

[1] As of March 31, 2015, based on internal company data.

1100 SW Sixth Avenue
Portland OR 97204-1093
tel 888.937.4783

are marketed through Standard's employees. The producers are independent of Standard and represent the interests of plan sponsors. The type and amount of compensation paid to producers may vary. The foregoing is consistent with industry practices. Under the current Prohibited Transaction Exemption (PTE) 84-24, the producer must, prior to the point of sale, disclose to the plan fiduciary the nature and extent of any compensation payable by Standard. Moreover, for welfare benefits plans annually required to file Form 5500, Standard must provide to plan sponsors an itemization of all compensation to producers for each contract sold and renewed (Schedule A Insurance Information).

As the insurer of ERISA welfare benefit plans, Standard serves as the claims administrator and to that extent is a fiduciary.[2] As a claims fiduciary, Standard is subject to ERISA's fiduciary duties. 29 U.S.C. § 1104. Should a plan participant or beneficiary disagree with Standard's claim determination, ERISA's "Civil Enforcement" section permits a lawsuit "to recover benefits due him under the terms of the plan…" 29 U.S.C. § 1132(a)(1)(B). The participant or beneficiary may also be awarded their attorney fees and costs. 29 U.S.C. § 1132(g)(1).

A. The Fiduciary Proposal

Under the current regulation and in our capacity as an insurer providing insurance contracts to ERISA welfare benefit plans, we cannot be considered an "investment advice" fiduciary under 29 C.F.R. § 2510.3-21(c). However, under the Proposal:

- A person becomes and investment advice fiduciary "if, in exchange for compensation … [they] … 1) make a recommendation to a plan, plan fiduciary, plan participant or beneficiary; 2) "as to the advisability of acquiring, holding, disposing or exchanging securities or other property…;" and
- "Plan" is defined as "an employee welfare benefit plan or an employee pension plan."

The ERISA fiduciary statutes provide that when "a guaranteed benefit policy is issued by an insurer, the assets of such plan shall be deemed to include such policy … "29 U.S.C. § 1101(b)(2). Welfare plan insurance policies are guaranteed benefit policies and, therefore, could constitute "other property" of the plan. The changes referenced above would mean insurer efforts to sell and renew welfare benefit insurance contracts is "a recommendation to a plan … as to the advisability of acquiring … [or] holding … other property…," and, therefore, constitutes "investment advice." Clearly, these products differ from retirement plans, in part, because they are not vehicles for savings purchased with the expectation of a return on investment. Instead, contacts providing life and disability benefits, and other similar products are purchased in order to obtain a specified welfare benefit. Moreover, what is currently an arm's length business transaction with a represented party (the producer), will now become a transaction where the welfare plan insurer would be subject to after the fact fiduciary liability claims and litigation over the act of negotiating the terms of a sale or renewal.

While the "[c]ounterparties to the plan" (sellers carve-out) would allow insurers to avoid investment advice fiduciary status for certain employer groups, the proposed changes will

[2] "[A] person is a fiduciary with respect to a plan to the extent ... (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C.A. § 1002(21)

unnecessarily add cost and burden to the establishment and maintenance of employee welfare benefit plans. For insurance contracts covering 100 or more plan participants or representing "at least $100 million in employee benefit assets,[3]" the insurers might not be considered an investment advice fiduciary. However, in order to qualify for the carve-out, the insurer would have to obtain certain pre-sale written representations from the plan fiduciary. The additional administrative burdens are unnecessary given the sophistication of the employer groups, that they are represented by producers, and the current producer point of sale and annual insurer compensation disclosures (PTE 84-24 and Form 5500 Schedule A).

The proposed carve-out does not apply to ERISA plans with under 100 plan participants. Standard has 23,565 in force group life and disability insurance contracts issued to ERISA plan sponsors[4] and would be considered an investment advice fiduciary with respect to its efforts to sell and renew <u>its own</u> products and services. ERISA requires fiduciaries act "solely in the interest of the participants and beneficiaries and - (A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan ..." 29 U.S.C. § 1104(a)(1)(A).

Conceivably, insurers of welfare benefit plans with under 100 participants could be subject to the following litigation:

- The cost for the insurance coverage is based on the expected risk and expenses incurred in providing the coverage, and the insurer's profit margin. This is subject to competition among insurers and negotiations with a represented plan sponsor. Under the Proposal, plan participants or fiduciaries could bring a lawsuit claiming the agreed to cost could have been lower.[5]
- Under the Proposal, any communication that constitutes a "recommendation" falls within the scope of fiduciary investment advice. A "recommendation" is defined as "a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action." It appears that an insurer's response to a request for proposal (RFP) would be considered a "recommendation" – and by extension, investment advice. An insurer's inclusion or omission of a policy provision in response to an RFP could give rise to a lawsuit for breach of fiduciary duties.

The act of selling proprietary products to businesses at arm's length should not create a fiduciary relationship between the insurer and ERISA plan. Yet, the Proposal does just that and needlessly exposes insurers to uncertainty, unnecessary litigation and the added costs attendant with those risks. We suggest the proposed Fiduciary rule definitions be changed as follows (including the addition of one new item):

---

[3] The "$100 million in employee benefit assets" trigger further demonstrates why these changes are inappropriate for welfare benefit plans. The ERISA fiduciary statutes provide that when "a guaranteed benefit policy is issued by an insurer, the assets of such plan shall be deemed to include such policy, but shall not, solely by reason of the issuance of such policy, be deemed to include any assets of such insurer."29 U.S.C. § 1101(b)(2). Claim reserves held by an insurer are not plan assets. If the trigger means premium charged or the coverage amounts for life and insured payroll for disability, it does not meet a common sense understanding of the term "assets."

[4] As of June 11, 2015, based on internal company data.

[5] ERISA's civil enforcement provisions permit actions for breach of fiduciary duties. 29 U.S.C. § 1132(a)(2)

(f) Definitions. For purposes of this section –

(2)(i) "Plan" means any ~~employee benefit~~ plan described in section 3(~~3~~2) of the Act ....

(9) "Investments" means securities, insurance and annuity contracts, property or other financial instruments held by a plan or IRA. The term "investments" does not include any contract issued by an insurance company for the provision of benefits under a plan described in section 3(1) of the Act.

B. PTE 84-24 Proposal

An insurer of an ERISA welfare benefit plan is both a claims fiduciary and party in interest.[6] Currently, PTE 84-24 exempts certain transactions otherwise prohibited under 29 U.S.C. § 1106 (a)(1)(C). One is "the purchase, with plan assets, of an insurance or annuity contract from an insurance company PTE 84-24, Sec. III(d). Another exception is an insurer's payment of commission to a producer "in connection with the purchase…of an insurance…contract." PTE 84-24, Sec. III(a). This exception has further requirements, including that the producer compensation is "reasonable" and the producer make certain disclosures to the plan fiduciary prior to the sale.

The Proposal would still allow the exceptions mentioned above. However, for plans with under 100 participants the exception would not apply and an insurer would be deemed an investment advice fiduciary with respect to the sale and renewal of its insurance contracts. Now, in order for the exemptions to apply, the insurer must:

- Act in the "Best Interest of the plan," which means act "with the care, skill, prudence, and diligence … without regard to [the insurer's or another party's] …financial …interests … "
- Disclose any "Material Conflict of Interest" which occurs when the insurer "has a financial interest that could affect the exercise of its best judgment as a fiduciary rendering advice to the plan..."
- Maintain records demonstrating that the above conditions have been met.

These requirements further demonstrate the inappropriateness of construing an insurer's business of selling and renewing proprietary welfare benefit insurance contracts as "investment advice" and making insurers a fiduciary with respect to that function. For example, insurers have some discretion in the premium they charge in the marketplace. A sale or renewal other than the lowest possible cost could be construed as not in the "Best Interest of the plan." Further, the insurer and its sales personnel will obviously receive income from the sale of its contracts. Arguably that would constitute a "Material Conflict of Interest" requiring disclosure. Requiring this disclosure is nonsensical and provides no added protection to plan sponsors.

C. Best Interest Contract Exception (BICE) Proposal

Under the Proposal, insurers offering contracts to welfare benefit plans with fewer than 100 participants would be a "Financial Institution" and its sales employees would be "Advisers."

[6] 29 U.S.C. § 1002(14)

Producers representing plan sponsors may also meet the definition of Advisors. The forgoing status is based on the result (discussed above) that insurers engaged in the sale and renewal of proprietary welfare benefit insurance contracts are acting as "investment advice fiduciaries." The Proposal would add onerous requirements to qualify under PTE 84-24 and allow an insurer to receive compensation (e.g. premiums) for the purchase of insurance contracts with plan assets and permit the insurer's payment of producer compensation in connection with the sale. As a threshold matter, BICE requirements are predicated on advice given to "Retirement Investors," and on its face demonstrates the why the Proposal should not apply to welfare benefit plans.

In order to avoid a prohibited transaction with respect to compensation, BICE requires that before making a "recommendation" (e.g., proposal, sales presentation, producer evaluation), the insurer, its sales employees and the independent producer (collectively "they") agree to the following in a written contract with the plan sponsor:

- They are fiduciaries under ERISA with respect to the recommendation
- They act in the "Best Interest" of the plan
- They receive no more than "reasonable compensation"
- They will not make any misleading statements
- They make the following warranties:
    - Will comply with all applicable federal and state laws, and
    - Have written policies and procedures to mitigate conflicts of interest, and
    - Have identified any material conflicts and adopted measures to make sure that they do not violate the BICE "impartial conduct standards", and
    - Do not use incentives, quotas or other personnel actions, bonuses, contests, special awards, differential compensation or other actions that would encourage an adviser to make recommendations that are not in the Best Interest of the plan sponsor, and
    - The written contract does not contain any exculpatory provisions disclaiming or otherwise limiting the liability of the insurer or Advisors for a violation of the contract's terms, or waives their right to bring a class action regarding the dispute.

- The written contract must also contain the following disclosures:
    - Detail material conflicts of interest;
    - Inform the plan sponsor of its right to obtain information about fees;
    - Disclose whether the insurer offers proprietary products or receives 3rd party payments with respect to the sale or renewal of its insurance contracts and provides the website where that information can be located (the "initial disclosure");
    - Provide point of sale disclosures explaining the total projected cost of the "Asset"[7] (the "point of sale disclosure");
    - Provide an annual disclosure of each "Asset" (e.g. insurance contract) purchased and sold in the past year, and the compensation received by the Adviser (the "annual disclosure");
    - The insurer maintain a website that shows the cost and the direct and indirect compensation paid to the insurer and Adviser (the "website disclosure");
    - Make a range of "Asset" (e.g. insurance contracts) options available that is broad enough to enable the Adviser to make recommendations from all the "asset classes reasonably necessary to serve the plan sponsor's Best Interest," or, if they do not

[7] "Asset" definition includes "insurance contract"

offer such range, make a written finding that limits on the Assets offered do not prevent the Adviser from providing advice that is in the Best Interest of the plan sponsor; and

- Provide, upon Department of Labor request, the identity of the Advisor the beginning and end-of-quarter "value of the… [plan sponsors] "Portfolio." "Portfolio" is defined as the pan sponsor's "combined holding of assets held in the Plan account of IRA advised by the Advisor."

As applied to the sale and renewal of insurer welfare benefit contracts, some of the BICE requirements are plainly impossible to comply with. As noted earlier, a guaranteed benefit policy issued by an insurer is a plan asset, but the assets (e.g. reserves) of the insurer are not. With respect to "Portfolio" information, welfare benefit insurance contracts have no beginning and ending–of-quarter "value." Further, the point of sale disclosure of the total projected cost requires a chart describing the cost "of investing in the Asset for 1-, 5-, and 10-year periods." The cost of life and disability insurance contracts is largely impacted by the plan's experience. While contracts frequently have rate guarantee periods, 5 years is relatively rare and usually the maximum. Having to estimate what premium would need to be charged 5-10 years out would be nothing more than an educated guess and of no value to the plan sponsor.

Many of the remaining BICE requirements are exceedingly prescriptive, ambiguous and unnecessary given the current disclosures applied to an insurer's efforts to sell its proprietary products that only provide a specified welfare benefit. The BICE offers plan sponsors no benefits and will only add unnecessary cost.

Generally, if a fiduciary does not comply with every requirement of the BICE, the fiduciary risks engaging in a prohibited transaction. Under the Proposal, welfare benefit insurers would be unable to comply with all the requirements and uncertain as to whether they are meeting many of the remaining. Failure to meet BICE would mean an insurer has engaged in a prohibited transaction and, therefore, subject to a civil enforcement action for breach of fiduciary duties. Moreover, the required written contract will also allow the plan fiduciary to bring a claim for breach of contract. This creation of litigation threat and exposure is unnecessary and will only add to the cost of welfare benefit insurance contracts for under 100 employee businesses.

D. Conclusion

"One of Congress' purposes in adopting ERISA was to further the formation of retirement benefit plans. *See* H.R.Rep. No. 533, 93d Cong., 2nd Sess. 1, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4639 ('The primary purpose of the bill is the protection of individual pension rights, but the committee has been constrained to recognize the voluntary nature of private retirement plans.')"[8] That notion applies with equal force to welfare benefit plans. The Proposal is unnecessary as applied to insurance contracts providing those welfare benefits. The proposal will needlessly create litigation risk and exposure. Any benefit over the current regulatory regime is insignificant compared to substantial burdens and costs it will add to the establishment and maintenance of these critical employee benefits. This harm will hit small

[8] Siskind v. Sperry Retirement Program, Unisys, 47 F.3d 498, 505 (2nd Cir. 1995)

businesses the hardest. Accordingly, we recommend that employee welfare benefit plans, as defined in 29 U.S.C. § 1002(1), be expressly excluded form the Proposal.

II. Pension Plans

Standard Insurance Company is a member of the American Council of Life Insurers (the "ACLI"), and we join in the comments they submit. We write separately to encourage the Department to give special consideration to the following concerns regarding the unintended consequences some features of the Proposal will have on retirement plan sponsors, their participants, and those employers and employees who do not currently enjoy the benefits of a qualified retirement plan.

A. <u>Small plans and their participants will have less access to advice and bear increased costs under the proposed regulations</u>.

The Counter Party Carve-out set forth in Section 2510.3-21(b)(1) currently applies only to certain large plans, defined as Plans with over 100 participants or having greater than $100 million in assets. The Department's commentary on the Counter Party Carve-out notes that its purpose is to avoid imposing fiduciary obligations on sales pitches that are part of an arm's length transaction where neither side assumes the other is impartial. However, in our experience, plan size is not a reliable predictor for sophistication. Indeed, many small plans are quite knowledgeable regarding financial services. We believe this arbitrary delineation will have the unintended effect of causing many advisers to avoid the small plan market altogether, significantly limiting the choice of advisers available to small plan sponsors, making access to sound advice harder to obtain, and ultimately discouraging small employers from offering a retirement plan to their employees.

Additionally, the costs to comply with the proposed regulations' disclosure regime and needed IT system enhancements will be substantial. At least some portion of those increased costs of doing business will be passed along to plan sponsors, their retirement plans, and ultimately to plan participants. This hardly seems the outcome intended by the Department, or a result that will lead to increased retirement savings by plan participants.

For these reasons we strongly urge the Department to simply require sellers to clearly disclose to the plan that they are not undertaking to provide advice to the plan, and that they have a financial interest in the matter. This would provide the needed transparency, without overlaying possibly erroneous assumptions regarding the sophistication of the plan fiduciaries. We urge the following revision of Section (b) (1), which combines current sections (B) and (C) per our suggestions:

> *(1) Counterparties to the plan--(i) Counterparty transaction with plan fiduciary with financial expertise. In such person's capacity as a counterparty (or representative of a counterparty) to an employee benefit plan (as described in section 3(3) of the Act), the person provides advice to a plan fiduciary who is independent of such person and who exercises authority or control with respect to the management or disposition of the plan's assets, with respect to an arm's length sale, purchase, loan or bilateral contract between the plan and the counterparty, or with respect to*

a proposal to enter into such a sale, purchase, loan or bilateral contract, if, prior to providing any recommendation with respect to the transaction, such person satisfies the following requirements:

(A) Such person fairly informs the independent plan fiduciary of the existence and nature of the person's financial interests in the transaction and that the person is not undertaking to provide impartial investment advice, or to give advice in a fiduciary capacity;

(B) Such person does not receive a fee or other compensation directly from the plan, or plan fiduciary, for the provision of investment advice (as opposed to other services) in connection with the transaction; and

(C) Such person knows or reasonably believes that the independent plan fiduciary has sufficient expertise to evaluate the transaction and to determine whether the transaction is prudent and in the best interest of the plan participants (the person may rely on written representations from the plan or the plan fiduciary to satisfy this subsection (b)(1)(i).

Similarly, as currently drafted the Best Interest Contract Exception is not available to advisers who provide services to small participant directed retirement plans. Since the stated goals of the BICE are to provide such plans with advice that is un-conflicted and in the best interests of participants, while preserving existing compensations structures so that advisers will continue to provide needed advice to plans, these plans should have the same protections and access to advice that larger plans would. If an investment adviser is willing to enter into a Best Interest Contract with such a plan, there seems to be no logical public policy reason to treat such plans differently based on size or participant direction. Again, we urge the Department to extend the Counter-party carve-out to small plans. If the Department is not willing to take that step, at a minimum, advisers of small participant-directed plans should be allowed to utilize the BICE.

B. <u>The Carve-Out for Investment Education is too narrow and will significantly curtail participants' ability to receive necessary investment education.</u>

The Carve-Out provided for investment education in Section 2510.3-21(b)(6) currently contains a prohibition on recommending a specific investment products. This prohibition is very troubling in the context of discussions regarding asset allocations and runs counter to every effort to increase participant engagement in retirement plan options. The proposed rule would shift the burden of identifying which particular investment is representative of a particular asset class to the participant, potentially leading to delay or even disengagement from participation in the plan. Rather than narrow permissible investment education practices, we strongly urge the Department to simply retain the existing principles of Interpretive Bulletin 96-1 in order to avoid the unintended consequences the current proposal will surely cause. Alternatively, at a minimum we ask that the Investment Education Carve-Out be amended to allow the identification and provision of information regarding specific investment alternatives within asset allocation model discussions and interactive investment materials. This could be accomplished by deleting Sections (b)(6)(iii)(C) and (b)(6)(iv)(E).

C. The Proposal contains no objective standard to determine if compensation is reasonable and customary.

ERISA contemplates service providers being paid compensation that is reasonable for the services provided. Indeed, Section 409(b)(2) of ERISA contains an exception for arrangements for necessary services provided to a retirement plan for which no more than reasonable compensation is paid. Yet the Proposal contains numerous references to "reasonable compensation" without any specific definition. As a practical matter, it is an ERISA plan fiduciary who makes the determination whether or not an advisor's compensation is reasonable given their specific plan needs, typically utilizing a competitive bid or request-for-quote process. For that reason we urge the department to confirm that the existence of a reasonable process whereby a plan fiduciary selects an advisor is sufficient to establish that the adviser's compensation is reasonable and customary.

D. The 60-day window for the regulations becoming effective, and the 8 month applicability date are unreasonably short.

Even if the Department substantially simplifies the regulation in order to make its provisions workable, the time frame needed to review processes, update systems capabilities, provide training and revise materials will take significantly longer than 8 months. By way of analogy, the 408(b)(2) and 404a-5 regulations, which were similar in scope, but had a much longer comment period in which to analyze the regulations, also gave service providers and employers two years between publication and implementation. We request that a window of at least three years be provided in order to properly analyze any final regulation and properly implement the vast array of changes, particularly IT system updates that compliance with this regulation will require.

Again, we appreciate the opportunity to provide comments on the proposed rules. We are happy to answer any questions or to provide additional assistance to the Department.

Sincerely,

Lawrence Frank
Vice President and Associate Counsel
Phone 971.321.7822
larry.frank@standard.com

Miriam Lohmann
Assistant Counsel
Phone: 971.321-8915
miriam.lohmann@standard.com