



10 Hudson Yards
New York, NY 10001
guardianlife.com

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Office of Regulations and Interpretations
Employee Benefits Security Administration, Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Attention: Definition of Fiduciary RIN 1210-AC02
Submitted electronically via Federal eRulemaking Portal: <http://www.regulations.gov>

Re: Retirement Security Rule: Definition of Investment Advice Fiduciary (RIN 1210-AC02)
Proposed Amendment to Prohibited Transaction Exemption 84-24 (ZRIN 1210-ZA33)
Proposed Amendment to Prohibited Transaction Exemption 2020-02 (ZRIN 1210-ZA32)

Ladies and Gentlemen:

On behalf of The Guardian Life Insurance Company of America and its subsidiaries and affiliates (collectively, “Guardian”), we are pleased to submit this comment letter regarding the Department of Labor’s (the “Department”) proposed changes to the definition of “fiduciary” under the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), the Internal Revenue Code of 1986, as amended (the “Code”), and the proposed amendments to Prohibited Transaction Exemptions 2020-02 and 84-24, class exemptions on which Guardian and other insurance companies currently rely (the “Proposal”). While we appreciate the Department’s undertaking to advance the interest of retirement savers, we believe the Proposal as drafted contains unworkable requirements. Guardian’s greatest concern is that companies that rely on statutory employee agents would be considered co-fiduciaries under PTE 2020-02 when one of their statutory employees sells a fixed insurance product from an unaffiliated insurer. As explained in detail below, companies have no practical way of acting as fiduciaries for sales that they are not aware of and have no access to the information necessary to conduct the required review. Therefore, we recommend that the Department permit statutory employees to utilize PTE 84-24 when selling non-proprietary insurance products.

I. Overview of Guardian’s Business and its Field Force Model

Guardian, founded in 1860, is a mutual life insurance company with over 5,500 employees and a network of over 2,500 financial professionals in the United States. Guardian offers a wide range of financial products and services, including individual life insurance, annuities, and disability insurance, as well as group dental, vision, and long-term disability.

Guardian, like many other insurance companies, engages “general agents” as independent contractors to operate agencies that sell insurance and financial products to consumers. General agents

recruit and develop individual financial professionals who contract with Guardian. While many of Guardian's financial professionals are also registered representatives of Guardian's broker-dealer, Park Avenue Securities, for the purposes of this letter, the sale of "products" refers to the sale of non-variable life insurance and fixed annuity policies sold outside of the broker-dealer context.

In addition to selling Guardian's proprietary products, financial professionals who contract with Guardian (hereinafter, collectively "Producers") are permitted to sell insurance products for carriers other than Guardian ("non-proprietary products"). The Producers' arrangement with Guardian includes, among other things, the following agreements:

- Producers agree that their primary business activity, **but, importantly, not their exclusive business activity**, will be to offer and service insurance products for Guardian.
- Producers and Guardian mutually agree that Producers will act as independent contractors, free to determine the manner and means by which they conduct their business including the insurance companies they will represent and the insurance products which they will offer.
- Producers may, and often do, secure appointments with other insurance companies to act as their agent, in addition to Guardian. Producers have no obligation to report these appointments to Guardian.

Consistent with this arrangement, Producers are considered statutory employees under the Internal Revenue Code. A statutory employee is not a common law employee, but rather an independent contractor who is treated as an employee for certain federal employment tax purposes and for certain employee benefit plan purposes.

The Internal Revenue Service succinctly describes the concept of statutory employees on its website as follows (emphasis added):

If workers are *independent contractors under the common law* rules, such workers may nevertheless be treated as employees by statute (statutory employees) *for certain employment tax purposes* if they fall within any one of the following four categories and meet the three conditions described under Social Security and Medicare taxes, below....

A full-time life insurance sales agent whose *principal* business activity is selling life insurance or annuity contracts, or both, *primarily* for one life insurance company.

The IRS website also explains that common law rules for employment classification turn on the extent of the right to direct and control the worker. Thus, a statutory employee is simply an independent contractor for whom an "employer" must pay and withhold Social Security and Medicare taxes, and with respect to full-time life insurance salespersons, can include in benefit plans. The very nature of statutory employee status is based on insufficient control by the insurance company over the worker.

II. Comments on the Proposal

Guardian agrees with the Department's basic premise that fiduciary retirement investment

advice should be subject to a best interest standard of care. The Proposal as written would require companies with producers who are statutory employees (“Statutory Employee Producers”), like Guardian’s Producers, to be fiduciaries for products that they do not sell and for which they do not have the requisite information to be a fiduciary. Moreover, satisfying the Proposal could potentially expose companies to antitrust and confidentiality breach risks. For that reason, Guardian agrees with the comments of the American Council on Life Insurance, the Insured Retirement Institute, the Committee of Annuity Insurers and others that the Proposal is impracticable and urges the Department to preserve both the current fiduciary definition and current prohibited transaction exemptions for sales in this market, pending further analysis.

A. The Department Should Amend PTE 84-24 to Apply to Statutory Employees Selling Non-Proprietary Products.

As proposed, PTE 84-24 would remain available for only “Independent Producers” who are defined as “a person or entity that is licensed under the laws of a state to sell, solicit or negotiate insurance contracts, including annuities, and that sells to Retirement Investors products of multiple unaffiliated insurance companies but is not an employee of an insurance company (including a statutory employee under Code section 3121)” (emphasis added.) As discussed above, Statutory Employee Producers can sell insurance contracts, including annuities, of multiple unaffiliated insurance companies. Under the current language of PTE 84-24, Statutory Employee Producers would be redirected to PTE 2020-02.

If PTE 2020-02 is the only exemption available to Statutory Employee Producers, it will not be workable because Guardian and similarly situated companies who rely on statutory employees cannot hold themselves out as fiduciaries of non-proprietary product sales. Specifically, these companies are not privy to the necessary information related to the sale of non-proprietary products to meet their ERISA fiduciary obligations as drafted within PTE 2020-02. Moreover, in many cases, these companies have no visibility into the other products the statutory employee can offer, and the compensation those other non-affiliated companies pay. Guardian and other similarly situated companies may also be limited, if not prohibited, under privacy requirements, from obtaining client information from the non-proprietary sale and therefore unable to complete the proposed fiduciary analysis. As such, the current Proposal would leave Statutory Employee Producers without a viable exemptive solution.

In the preamble to the proposed amendments to PTE 84-24, the Department acknowledges a limited version of PTE 84-24 is being retained in response to the insurance industry’s comments that they have insufficient control over insurance producers who sell products for more than one company and cannot serve as the PTE 2020-02 Financial Institution. The situation is no different for Statutory Employee Producers who are permitted to sell for more than one insurance company. As explained above, classification as a statutory employee has no effect on the independence of the producer. The very reason that the producers are statutory employees rather than common-law employees is because the company with which the producer contracts lacks sufficient control over how the producer conducts its work.

We urge the Department to remove the exclusion of statutory employees from PTE 84-24 and to allow statutory employees, like all other independent producers, to make use of that exemption when selling non-proprietary products.

B. The Department Should Clarify That it is Permissible for Statutory Employees to Participate in Employee Benefit Plans.

It is essential that the Department clarify that it is permissible for Statutory Employee Producers to receive benefits under the producer's contracting company's employee benefit plans. As the agency with responsibility for employer-sponsored benefits plans, the Department needs no explanation of the importance of encouraging participation in employee benefit plans. Indeed, by participating in these retirement plans, producers are retirement investors themselves, worthy of the same protections that the Department is trying to achieve through the Proposal.

Without clarification, we are concerned not only that Guardian and other companies will have to restructure their employee benefit plans to accommodate the exemption conditions, but that their statutory employees will lose their benefits coverage and the ability to participate in employee benefit plans. The Department must clarify that participation in employee benefit plans is sufficiently remote from any particular transaction that it does not give rise to ERISA section 406(b) concerns for which exemptive relief is required.

Therefore, if the Department goes forward, it should state in the preamble to PTE 2020-02 as amended that participation in employee benefit plans is not a personnel action that is inconsistent with the impartial conduct standards and the Financial Institution policies and procedures requirement.

C. The Department Should Narrow the Proposed Definition of Fiduciary.

As was the case in 2015, and maybe even more so with the current Proposal, the proposed changes to the fiduciary definition are so broad that any financial services professional will almost always be considered a fiduciary for purposes of ERISA and the Code when interacting with a plan fiduciary, participant or IRA owner. The Proposal's underlying premise that virtually every interaction with a financial services professional involves fiduciary advice is inconsistent with normal business practices and the common meaning of the term "fiduciary."

The breadth of the proposed definition of fiduciary investment advice without adequate carve-outs will effectively require persons to assume fiduciary status even in situations in which no plan fiduciary or IRA owner could reasonably expect that the person is acting in a fiduciary capacity. This only serves to add additional unnecessary and impractical costs that will ultimately be borne by the very retirement investors that the Department is trying to protect from unnecessary costs.

For these reasons, we respectfully urge the Department to reconsider its Proposal to discard the five-part test, which is well understood and operates in a manner so that non-fiduciary interactions do not get mixed into the fiduciary world. We believe that the proposal, however well-intentioned, will lead to unfortunate consequences to those most in need of retirement and financial planning.

Sincerely,



Michael Ferik
Head of Individual Markets