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:

Allianz Life Insurance Company of North America ("Allianz Life") appreciates the opportunity to submit comments on the Department of Labor's ("Department") notice of proposed class exemption ("Proposed Exemption") permitting reasonable compensation for fiduciary investment advice and certain principal transactions in connection with Employee Retirement Income Security Act ("ERISA") plans and Individual Retirement Accounts or Annuities ("IRA"). We also appreciate the opportunity to offer our views on the Department's new guidance announced in the preamble to the Proposed Exemption interpreting the regulatory definition of fiduciary investment advice found at 29 CFR § 2510.3-21.

Founded in 1896 and based in Minneapolis, Minnesota, Allianz Life is a leading provider of retirement and protection solutions, including fixed and variable annuities, and life insurance for individuals sold through a network of independent financial professionals, including independent insurance agents, registered representatives and investment advisor representatives. We hold more than 1.5 million contracts, with over one million customers, and manage more than $151 billion in assets. In 2019, Allianz Life provided additional value to its policyholders via distributions of $10.4 billion. Allianz Life is part of the Allianz Group, a global financial services provider based in Germany serving over 100 million retail and corporate clients in more than 70 countries.

<u>Overview:</u>

The modern financial services marketplace provides many avenues for plans and participants to receive financial assistance and advice, each of which may be subject to different laws and requirements. It is clear from the Proposed Exemption that the Department has spent a considerable amount of time developing an approach that recognizes these different business models while providing a uniform degree of protection for plans, participants and beneficiaries, and IRA owners.

- New Guidance Interpreting the "Five Part Test"

However, we have a number of concerns related to the new guidance interpreting the 1975 regulation's "five part test" defining fiduciary investment advice. We believe changes of the significance of those in the guidance should only be the product of notice and comment rulemaking seeking to amend the underlying rule, giving the public a meaningful opportunity to comment on the Department's intended changes.

As we explain in more detail below, the new guidance removes the vital clarity the five part test has provided for roughly 45 years, making it very difficult to know when a particular recommendation would be ERISA fiduciary advice, especially with respect to transactions involving insurance products. We are also concerned that the new guidance is not consistent with the legal analysis in the decision by the U.S. Court of Appeals for the Fifth Circuit vacating the Department's 2016 amendments to the 1975 regulation.[1] Accordingly, we ask the Department to withdraw the new guidance and reinstate Advisory Opinion 2005-23A. We hope our additional comments below will be helpful in understanding our concerns about the guidance.

- The Proposed Exemption

Separately, we support the Proposed Exemption subject to the modifications suggested below. Closely modeled on the Securities and Exchange Commission's ("SEC") Regulation Best Interest, the Proposed Exemption would harmonize many ERISA and securities requirements, reducing compliance burdens without sacrificing participant protections. Uniformity across different regulations and regulatory bodies benefits consumers by meeting their service expectations as well as by reducing the costs they ultimately bear. It is clear the Department intended the Proposed Exemption to be more closely aligned not only with Regulation Best Interest, but best interest and related standards promoted by the National Association of Insurance Commissioners and the Financial Industry Regulatory Authority.

At the same time, we appreciate the Department's recognition that not all financial professionals assisting plan participants and IRA owners are securities professionals. Insurance, banking and other financial professionals provide essential products and services subject to different regulatory requirements. Accordingly, we support the Department's decision to leave other existing class exemptions in place, ensuring these different types of financial professionals may continue to rely on an exemption that is designed for their specific business model (such as PTE 84-24 for insurance products). Having the option of accessing the new Proposed Exemption or of using an existing exemption provides flexibility essential to efficient regulation that enhances consumer protections rather than increasing administrative costs.

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

We offer below some specific comments that we believe are necessary to improve the utility of the Proposed Exemption. We appreciate the Department's consideration of these important modifications and clarifications.

<u>Concerns Regarding the New Interpretive Guidance:</u>

While we appreciate that the Department provides sub-regulatory guidance to assist in interpreting ERISA regulations, the new guidance announced in the preamble to the Proposed Exemption raises a number of concerns that such guidance typically does not. These changes are not appropriate for sub-regulatory guidance given the potential magnitude of their effect, and the fact that the Department is effectively reversing its fundamental understanding of how to apply the rule that has been in place for 45 years.

- These Changes Should be the Product of Notice and Comment Rulemaking

The Department uses a number of mechanisms to provide sub-regulatory guidance, such as Advisory Opinions, Information Letters, Field Assistance Bulletins, and Interpretive Bulletins. These typically address certain discrete issues to assist in applying the more general requirements in the statute or the regulations to specific situations or conditions. Indeed, the historical use of such guidance by the Department generally has been consistent with the purpose of the President's Executive Order 13891 that prohibits guidance documents from implementing requirements that should be adopted through notice and comment rulemaking.[2] The new guidance, however, seems to be of the sort the Executive Order prohibits.

The new guidance would interpret the five part test in a completely new way, reversing roughly 45 years of the prior interpretation, and would appear to have the effect of significantly expanding the scope of ERISA's fiduciary definition. Just as significantly, the changes the guidance adopts would make it very difficult for financial institutions and financial professionals to determine whether they are fiduciaries. This lack of clarity creates a material problem because of the serious consequences that result from being an ERISA fiduciary. For example, commissions and other common forms of transaction-based compensation are prohibited under ERISA, limiting options for consumers to access valuable financial assistance. The SEC specifically cited the effect of the Department's 2016 fiduciary rule on transaction-based services, writing that, "With the adoption of the now vacated Department of Labor Fiduciary Rule, there was a significant reduction in retail investor access to brokerage services, and we believe that the available alternative services were higher priced in many circumstances."[3] Insurance producers, carriers and intermediaries need to be able to determine with confidence whether they are ERISA fiduciaries in connection with a rollover recommendation—the new guidance makes this very difficult to do.

[2] See., Executive Order 13891, Promoting the Rule of Law Through Improved Agency Guidance Documents, 84 Fed. Reg. 55,235 (October 15, 2019).

[3] *84 Fed Reg 33,322 (July 12, 2019)*

- The Guidance Is Inconsistent with the Fifth Circuit Ruling

While we believe participants and IRA owners need access to quality financial assistance in making decisions to roll over assets from an ERISA plan, Congress never intended ERISA's fiduciary structure—the highest duty known to law[4]—to apply to all recommendations involving ERISA plans and participants. This was one of the primary reasons the 2016 rule was vacated by the Fifth Circuit.

The Fifth Circuit specifically identified the 1975 rule as striking the right balance in capturing Congressional intent, writing, "The 1975 regulation 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] Essential to the court's favorable view of the 1975 regulation was the "regular basis" prong of the five part test.

By fundamentally changing its interpretation of what the words "regular basis" mean to reach a new conclusion after so many years of the prior interpretation, the Department risks running afoul of the legal reasoning of the court. In *Chamber*, the Court specifically expressed skepticism of such newfound interpretations, writing, "Moreover, that it took DOL forty years to "discover" its novel interpretation further highlights the Rule's unreasonableness."[6]

- The Guidance Makes Fiduciary Status Speculative and Unclear.

The guidance results in significant uncertainty about fiduciary status. For example, even though the retirement investor and the financial professional have met perhaps only once, the guidance finds the "regular basis" prong could be satisfied because, "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][7] This is an unconventional reading that equates "regular basis" with the concept of an "anticipated ongoing relationship." However, it is not at all clear what future activity "may" occur that "could" create an ongoing common-law fiduciary relationship.

While the Department does helpfully 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,"[8] the new standard nonetheless creates considerable uncertainty for insurance transactions. The guidance conflates compensation and services with fiduciary investment advice, stating that "…insurance agents may have or contemplate an

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[4] 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).

[5] *Chamber v. DOL, at 365.*

[6] Id at 380.

[7] 85 Fed. Reg. 40,840 (July 7, 2020).

[8] Id.

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."[9]

We do not believe the form of commission is relevant to this analysis. There are various economic reasons why insurance carriers and insurance brokers, agents or producers may wish to structure a commission to be paid over a period of time. Regardless of the timing or structure of the commission, however, it is still just compensation paid for the sale of an insurance product, not an indicator of an ongoing relationship of the kind contemplated by the 1975 regulation. Put simply, trailing compensation is not an indicator of whether or not ongoing fiduciary advice is being provided.

We also do not believe that providing "ongoing recommendations or services" related to an annuity mean that fiduciary advice is being provided on a "regular basis." These services and recommendations frequently do not involve activities that are considered investment advice, such as assisting the client in completing a change of address request or helping the client find and fill out the correct forms to start income payments or to request a withdrawal. An ongoing sales or service relationship with a client isn't transformed into a fiduciary relationship simply because it is ongoing.

The net effect of the guidance in the preamble with respect to rollover advice is to transform the five part test from a clear indicator of fiduciary status to a speculative presumption that a financial professional may be a fiduciary depending on the future course of dealings. This is not an administrable standard or a natural reading of the 1975 regulation. We urge the Department to withdraw the new guidance and to reinstate Advisory Opinion 2005-23A.

<u>Suggested Modifications to the Proposed Exemption:</u>

Following are some specific suggestions we believe are necessary to improve the utility of the final exemption.

- Definition of Financial Institution

The Department requested comments on whether the exemption is broad enough to capture the full range of arrangements among carriers, intermediaries and producers. To that end, we believe the Department should expand the definition of financial institution to include insurance intermediaries. As the Department notes, there are a variety of ways insurance products are distributed through financial professionals, and it may not be feasible for insurance carriers to serve as the financial institution in each of the various combinations. While the Department notes that insurance carriers may contract with intermediaries such as independent marketing organizations, field marketing organizations or brokerage general agencies to provide training, supervision and oversight, we believe these intermediaries should have the additional option to be financial institutions if they choose to do so.

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[9] Id.

- Fiduciary Status

Section II of the Proposed Exemption states that "the exemption requires Financial Institutions to acknowledge fiduciary status under ERISA and/or the Code." Section II(b)(1) of the Proposed Exemption requires, "written acknowledgment that the Financial Institution and its Investment Professionals are fiduciaries under ERISA and the Code, as applicable, with respect to any fiduciary investment advice provided by the Financial Institution or Investment Professional to the Retirement Investor."

We urge the Department to clarify the application of this requirement. First, as discussed above regarding the new guidance reinterpreting the five part test, it may not be clear when a recommendation to a retirement investor is subject to ERISA's fiduciary standard, especially with regard to rollover recommendations. Requiring an affirmative statement acknowledging fiduciary status forces financial professionals to accept a status that may not be applicable, and it prevents such financial professionals from using the Exemption in good faith when their fiduciary status is not clear. We do not believe the Department has provided a justification for why such acknowledgment is needed, especially as this information could be misleading to participants. We do not think an affirmative statement of fiduciary status is necessary for the Department to achieve its goals in the Proposed Exemption, and we think it could be used in a manner contrary to the Department's stated intention that it "…does not intend the fiduciary acknowledgment or any of the disclosure obligations to create a private right of action..."[10]

In addition, even where the financial professional is a fiduciary, it does not automatically follow that the financial institution is an ERISA fiduciary. The Proposed Exemption disclosure requirement is modeled on Regulation Best Interest, and Regulation Best Interest is designed solely for the broker-dealer business model. Regulation Best Interest, therefore, does not contemplate the very different business models common in insurance transactions in which the financial professional is independent of the financial institution. The minimum amount of control and supervision the financial institution has over the independent financial professional makes it unreasonable to assume common fiduciary status for the financial professional's recommendation. We ask the Department to clarify that a financial institution is not a fiduciary simply because it agrees to be party to the Proposed Exemption.

- Ongoing Monitoring

We support the Department's conclusion that the Impartial Conduct Standards do not require ongoing monitoring. We agree that whether monitoring services are provided should be a matter decided between the parties involved. However, we are concerned about the vague standard created by the statement in the preamble that, "Investments that possess unusual complexity and risk, for example, may require ongoing monitoring to protect the investor's interests."[11] There is no guidance to suggest what an unusually complex or risky investment might be. This puts financial professionals at risk of potentially breaching their fiduciary duty for failing to provide

[10] Id. at 844.

[11] 85 Fed. Reg. 40,843 (July 7, 2020).

ongoing monitoring in connection with a particular investment. Absent further guidance on what constitutes a "complex investment", we urge the Department to clarify that monitoring is not required.

- Documenting Best Interest in Rollovers

Section II(c)(3) requires that, "The Financial Institution documents the specific reasons that any recommendation to roll over assets…is in the Best Interest of the Retirement Investor." We read this to mean that the financial institution must adopt policies and procedures that ensure the relevant information and analysis is to be gathered, analyzed and retained. Indeed, this appears to be one of the primary purposes of the annual retrospective review, to assist in evaluating the effectiveness of policies and procedures and modifying them as needed.

However, we do not read Section II(c)(3) to require the financial institution to review and approve each transaction to determine best interest on a case by case basis and ask the Department to make this clear.

- Review and Certification

We do not believe that the retrospective review, report and certification by the financial institution's chief executive officer required in Section II(d) is necessary for the Proposed Exemption to function as intended. This is a very atypical requirement for a class exemption because it is unnecessary—one is either in compliance with the requirements or not. If not, the exemption is simply not available, and the transaction is prohibited. As you know, there is no analogous report in the SEC's Regulation Best Interest.

We urge the Department to remove the requirement to review, report and certify entirely. However, if it retains the provisions, they should be modified to permit the report to be certified instead by the chief compliance officer or equivalent official in an institution. Given the Department's purpose in having the report inform improvement to the policies and procedures, requiring the chief compliance officer to fill this role will ensure that the information is reviewed by the officer best positioned to act on it.

- Eligibility and Enforcement

While we certainly agree that criminal conduct should make a financial institution ineligible for the Proposed Exemption, we do not believe the control group approach described by the Department is the best way to define eligibility. A common parent is not an indicator of any other connection between corporate entities, and financial institutions often are completely separate in every material way from other companies owned by a common parent. Further, different forms of ownership make it difficult to determine how to apply the 80% threshold suggested.

We urge the Department to modify the eligibility provisions to retain the automatic ineligibility provision for a criminal conviction related to the financial institution itself, but we do not think automatic illegibility in only 10 days resulting from a conviction of an otherwise unrelated company in the control group is reasonable or administrable. The financial institution may not reasonably even be aware of a conviction of an otherwise unrelated entity in the control group within 10 days (for example, the conviction under state law of embezzlement of $5,000 by a small local bank that is owned by an entity that is owned by an entity that is owned by a control group that also owns the financial institution using the Proposed Exemption). The Proposed Exemption provides a strong enforcement process for this kind of situation through the Office of Exemption Determination's ability to review eligibility on its own motion.

Conclusion:

We appreciate the opportunity to offer comments to improve the utility of the Proposed Exemption for participants. We also urge the Department to withdraw the new guidance and reinstate the Advisory Opinion 2005-23A because we are concerned that the new guidance confuses the clear and long standing five part test that helped financial professionals determine when they were ERISA fiduciaries for 45 years.

Thank you for your consideration, and please do not hesitate to contact us with any questions or concerns.

Sincerely,

Gretchen Cepek
Senior Vice President and General Counsel