



September 24, 2015

Office of Exemption Determinations
Employee Benefits Security Administration
Attention D-11712 & D-11850
U.S. Department of Labor
200 Constitution Avenue NW. Suite 400
Washington, DC 20210

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

Re: RIN 1210-AB32: Employee Benefits Security Administration's Notice of Proposed Rulemaking Definition of the Term "Fiduciary;" Conflict of Interest Rule-Retirement Investment Advice; ZRIN: 1210-ZA25; D-11712: Proposed Best Interest Contract Exemption; ZRIN: 1210-ZA25; D-11850: Proposed Amendment to and Proposed Partial Revocation of Prohibited Transaction Exemption 84-24

Dear Assistant Secretary Borzi:

As you know, the Indexed Annuity Leadership Council (IALC) is a consortium of life insurance companies that offer fixed indexed annuities or "FIAs". Established in 2011, the IALC educates consumers, the media, regulators and industry professionals about FIAs. IALC companies today have more than 1.3 million policies in force with more than \$84 billion in assets.

We appreciate the time spent by the Department staff during the numerous meetings with the IALC and its member companies to discuss fixed indexed annuities (FIAs) and the opportunity provided to me to testify on behalf of the IALC and to respond to questions from the Department. The IALC has filed two comment letters that offer constructive suggestions on how to make the PTE function as intended for all fixed annuities. We are aware that the National Association of Fixed Annuities (NAFA) has also met with the Department and filed similar comment letters.

As we have underscored, fixed annuity products, including FIAs, offer consumers an ability

to invest a portion of their retirement savings in products that provide guaranteed income streams and principal protection. Preserving the distribution network for these products through the proposed PTE 84-24 will help maintain a competitive market and consumer choice to achieve these retirement objectives.

In each instance we have described how FIAs are insurance products that are *identical* to other fixed annuity products except for the method of crediting earnings. In addition, the IALC and NAFA comment letters and the testimony offered by the IALC at the DOL hearing underscored the fact that FIAs are in every way the same financial product as other fixed annuities, all of which directly compete against one another in the market.

In fact, each and every suggested modification to PTE 84-24 offered by the comment letters we have already submitted offer suggestions for all fixed annuities – because the products are legally indistinguishable from one another. Under state insurance law regulation FIAs are treated like every other fixed annuity. Under federal securities law FIAs are treated like every other fixed annuity and are exempt from registration under section 3(a)(8) of the Securities Act of 1933 as a state-regulated insurance product. Most recently, Congress in section 989J of the Dodd–Frank Wall Street Reform and Consumer Protection Act (P.L. 111- 203) reaffirmed that under federal securities law FIAs are like every other fixed annuity product.

Why?

Because as the comment letters already submitted make clear, the only difference between an FIA and any other fixed annuity is the method by which earnings are credited to the policy. Fixed annuities can credit earnings based on a periodically declared rate, a multi-year guaranteed rate, or a rate established based on a formula that references a market index (a fixed indexed annuity). In each case, the contract’s premium is not invested in a separate account or specific investment, but rather is supported by the general account of the insurance company. In the case of an FIA, the index is only used to compute earnings credited to the policy, there is no actual investment by the policyholder or the insurance company in the financial instruments that comprise the particular index. A typical fixed index annuity policy allows the policyholder to elect to switch the chosen index or computation method from year-to-year, or alternatively, to select a fixed rate for the year. The only difference among these fixed annuity products is the method for determining the interest earnings that are credited to the policy.

FIAs like every other fixed annuity are supported only by the general account of the insurer, investment risk is borne by the insurer, no fees are directly paid by the policyholder to and for the benefit of the insurance agent, there is no risk of principal loss, they all offer a predictable guaranteed income amount through both base contracts and riders, receive identical protection under state guaranty funds, and are sold through state licensed insurance agents. The chart below highlights these facts.

Types of Annuities

Characteristics	Fixed Annuities that are not Indexed Annuities	Fixed Indexed Annuities	Variable Annuities
Investment Vehicle	General account of insurer	General account of insurer	Separate accounts
Investment Risk	Borne by insurer	Borne by insurer	Borne by policyholder
Fees	No direct charge to policyholder	No direct charge to policyholder	Mortality and expense risk charge; administrative charge; underlying fund expense charge
Risk to Principal	No risk of loss	No risk of loss	Risk of loss due to underlying fund performance
Predictable Guaranteed Income Amount			
<ul style="list-style-type: none"> • Through Base Contract 	Yes	Yes	No
<ul style="list-style-type: none"> • Through Income Rider 	Yes	Yes	Yes
Tax Deferral	Yes	Yes	Yes
State Guaranty Fund Protection	Yes	Yes	Yes - amounts tied to general account obligations No - amounts in separate account investments
Regulatory Authority	State insurance commissioner	State insurance commissioner	SEC, FINRA, State insurance and securities regulators
Seller Licensing Requirement	State issued life insurance license	State issued life insurance license	FINRA issued Series 6 or 7 license; state issued life insurance license

All types of fixed annuities offer various options to consumers known as riders. ***There is nothing particularly more complex about FIAs as compared with other fixed annuities.*** In fact, many of the riders offered with FIAs are also offered with other fixed annuities. Of course, whether a product feature is more complex or not is irrelevant as to which prohibited transaction rule should apply. Complexity in of itself does not create conflicted advice. Every financial product inherently has some level of complexity, just as every consumer has a different level of financial sophistication. The proposed application of a uniform fiduciary standard – a standard that requires the adviser to act in his or her customer’s best interest – is intended to protect consumers regardless of such levels of complexity or sophistication. On the other hand, the proposed PTE is intended to minimize the harm of conflicted advice. However, and most importantly, there is in fact no more complexity with an FIA than with any other fixed annuity product.

Lastly, ***there is no different conflict created when an insurance company pays a commission to an insurance agent selling a fixed annuity that is an FIA than a fixed annuity that is not an FIA.*** For example, there are no other fees, future payments, or other financial incentives with an FIA that creates a greater or different conflict than a fixed annuity that is not an FIA. Thus, it is only appropriate to continue to treat all fixed annuities identically for purposes of an exemption from the prohibited transaction rules. To do otherwise, would be unreasonable and would create competitive advantages and disadvantages among competing fixed annuity products.

For the reasons discussed below, the new proposed Best Interest Contract Exemption (BICE) would not work in the context of any fixed annuity product, including an FIA.

First, FIAs are predominantly sold through state licensed insurance agents. While those agents may or may not also be licensed as broker-dealers or registered investment advisers, for the sale of FIAs they are regulated as state insurance agents. Insurance companies offering fixed annuities rely on independent insurance agents to sell the vast majority of their products. In fact, more than 70% of FIAs are sold through such agents.¹ As independent agents there is no financial institution that could sign a contract to act as a fiduciary as required under BICE. While the insurance agent has the interaction with the customer in order to be able to make recommendations about insurance products that are in the customer’s best interest, the insurance company does not have the detailed knowledge of the particular customer to act as a co-fiduciary. The insurance company, unlike a broker-dealer or registered investment adviser, simply does not have access to a comprehensive detailed list of financial products purchased or owned by the consumer and does not offer advice on such matters. This does not mean that under state insurance law an insurance company does not have specific legal obligations to its customers. But the notion of extending a fiduciary duty to an insurance company for the advice offered to a particular consumer by an independent agent ***is simply not feasible.*** Similarly, an insurance company that sells only fixed annuities will not be in a position to certify that its limited product offering is sufficient for any particular customer of an independent insurance agent as required by BICE.

¹Wink’s Sales & Market Report 2nd Quarter, 2015 published by Wink’s Inc.

Second, independent agents are in most instances authorized to sell fixed annuities offered by more than one insurance company. Unlike a broker-dealer or registered investment adviser with respect to their registered representatives, an insurance company does not control the product portfolio of the independent insurance agents authorized to sell its products. Thus, an insurance agent might have to request customers to sign contracts with multiple insurance companies. Similarly, such independent agents would need to adopt a phalanx of policies and procedures to ensure compliance with BICE as each company would insist on its own processes and procedures to minimize conflicted advice as required under that exemption.

Third, the fee disclosures required under BICE do not reflect fixed annuity products, including FIAs, because as noted above, there are no fees or payments made by a consumer to the insurance agent other than premiums and fees for riders paid to the insurance company. PTE 84-24 as amended would require disclosure to the consumer of all commissions paid to the insurance agent, while BICE would in addition require annual disclosures to customers and disclosures on the insurance agent's website of all fees. The notion of annual disclosures by an independent insurance agent that there are no fees paid to the agent would be costly, but it would provide absolutely no benefit to the consumer or additional protection from conflicted advice.

As we stated above, fixed annuity products, including FIAs, offer consumers an ability to invest a portion of their retirement savings in products that provide guaranteed income streams and principal protection. Excluding one or more fixed annuity products or features from PTE 84-24 would disadvantage consumers whose best interest would be served by investing in a lifetime income option.

We appreciate that the Department's proposed PTE 84-24 has maintained all fixed annuities including FIAs as eligible to rely on the exemption. To date we have not found comments in the public record or testimony that suggests that the Department was wrong in so doing. The proposal is consistent with federal law as reaffirmed by the Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203) that FIAs are fixed annuities. Finally, the proposed PTE treats all fixed annuity products that compete against each other equally. Moving some or all fixed annuity products into BICE could totally disrupt the distribution channels for such products and would not serve the best interest of consumers seeking to protect their retirement savings against longevity risk.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jim Poolman".

Jim Poolman, Executive Director
JimPoolman@indexedannuityinsights.com