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Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
United States Department of Labor
200 Constitution Avenue NW
Washington, D.C. 20210

Attn: Fiduciary Rule Examination

RIN 1210-AB82

Ladies and Gentlemen:

This letter is written on behalf of Advisors Excel, LLC ("Advisors Excel or AE"), a Topeka, Kansas based independent marketing organization ("IMO"). Thank you for the opportunity to comment on the United States Department of Labor's ("DOL or Department") Request for Information ("RFI") on the Department's Conflicts of Interest Rule ("Rule").

AE has previously submitted a number of comment letters on the Rule. Most recently, we submitted a letter dated July 13, 2017, in which we repeated our position that the further delay of the Rule is the prudent course of action for the Department. The purpose of this letter is to provide additional commentary on the substantive questions raised in the RFI.

2. What has the regulated community done to comply with the Rule and PTEs to date, particularly including the period since the June 9, 2017, applicability date? Are there market innovations that the Department should be aware of beyond those discussed herein that should be considered in making changes to the Rule?

Advisors Excel has, like many others, taken numerous preparatory steps in anticipation of compliance with the Rule and PTEs. Beginning soon after the final Rule was announced, we began a top-down review of our policies, procedures and practices to determine what compliance gaps could exist between our then–current practices and those believed to be required under the Rule and PTEs. Based upon this review, we developed many new measures that are designed to meet the requirements of the Best Interest Contract Exemption ("BICE").

Unfortunately, an external deficiency significantly hindered our ability to fully prepare: under the BICE, IMOs are not recognized as a Financial Institution ("FI") that are empowered (or required) to execute a best interest contract with a retirement investor. Pairing this with the fact that the insurance companies whose products we distribute determined that they would not sign best interest contracts, we were faced with the untenable circumstance under which no entity would be available to act as the FI for products sold by insurance agents who are affiliated with us. This void, if left unfilled, would have a devastating effect on us, the agents who work with us, and their clients. Consequently, we began a dialogue with the Department concerning the possibility of our being recognized as an FI.[1] Those efforts culminated in our formal application to the Department for FI status under BICE. In our application, we described the various efforts we had undertaken and were prepared to undertake to support recognition as an FI, from reviewing recommendations made by affiliated agents for being in the "Best Interest" of their clients, to supervising agent conduct, to developing robust disclosure regimes. Ultimately, the Department issued a proposed Best Interest Contract Exemption for Insurance Intermediaries (the "IMO BICE") that essentially grouped individual exemption requests into a new class exemption.

The proposed IMO BICE contained requirements that would significantly limit the number of IMOs that could qualify for the exemption and would be practically unworkable even for the few IMOs that could qualify. Advisors Excel submitted comments to this effect earlier this year.[2] Even while we have to move toward an ever-nearer compliance date, we have received no response or further inquiry from the Department in relation to our comment or on the exemption in general. As a result, it is still not known to us whether we will be authorized or required to act as an FI in order to perform our role in the market.

This lack of clarity has been a major impediment to our compliance efforts and, presumably, similarly situated entities. It is still not known whether we will be required to act as a Financial Institution in order to perform our role in the market or, if so, what entity we will be authorized or forced to use as such FI to comply with the Rule and PTEs.

The implementation of this new program will require us to hire additional staff. But before hiring additional personnel, we must have clarity about their role, responsibilities, and the volume of work we expect for them. Without clarity as to what rules will apply, it is impossible to perform that analysis and, consequently, to start staffing up without taking on risk.

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[1] Request for Individual Prohibited Transaction Exemption – Advisors Excel, LLC Application for BICE Financial Institution Exemption filed August 26, 2016.
[2] Advisors Excel, LLC Comment Letter regarding Proposed Best Interest Contract Exemption for Insurance Intermediaries filed February 16, 2007.

3. Do the Rule and PTEs appropriately balance the interests of consumers in receiving broad-based investment advice while protecting them from conflicts of interest? Do they effectively allow Advisers to provide a wide range of products that can meet each investor's particular needs?

No. From the perspective of the IMO, the Rule and PTEs create major impediments to the ability of the consumers to receive advice on a wide range of products, but particularly with regard to fixed index annuities.

Initially, lack of clarity around the treatment of FIAs creates confusion for regulated entities who are making good-faith attempts to implement compliant policies and procedures. This has led to such entities taking a wait and see approach before pulling new policies and procedures off the shelf and into action, and hiring additional staff that will be required for them to do so. But even where there is clarity, many of the conditions of the Rule and PTEs are not workable.

It is also worth noting here our concern that the Department appears to assume that conflicts arise only in the context of advice concerning commissionable products. We acknowledge that a point of sale commission creates an incentive for an adviser to recommend a product; but so does an ongoing fee. There are many situations where an adviser may be paid more for recommending a fee-based product than a product that pays a commission. Consequently, if the Department is concerned not with compensation in the first place, but the propriety of that compensation, the question the Department needs to ask is whether that incentive is consistent with the needs and objectives of the investor. In the context of a product that is intended to be in place for a number of years and to provide benefits for that term or longer but requires no advice from the advisor after the initial purchase, a commission paid to the adviser on the initial sale is entirely appropriate. Take for example the sale of a fixed index annuity that an insured purchases for long-term retirement income and expects to hold for a term of ten years. For this example we will say the insured is buying a $100,000 annuity with a commission to the agent of 7%. In this scenario the agent will receive $7,000 from the insurance company (which will presumably be factored into the product's pricing). There are no more fees that the insured will pay to the agent for this product. So this will average out to a fee of 0.70% over the ten year period and would go down if the insured holds the product for a longer period (0.47% if held for 15 years).

If the insured had instead invested funds with an investment manager at an annual fee of 1%, they would have paid more over that period. If the invested asset does not go up in value and simply stays at $100,000 then the investor would pay $10,000 over a 10 year period. Which means the advisor would receive 43% more in payments (($10,000-$7,000)/$7,000) and this would increase the longer the insured holds the annuity contract.

If one assumes the investment goes up by 2% a year and the investor continues to pay 1% annual fee on the total asset value then the investor would pay $11,169 in fees over 10 year, which is 60% more than the $7,000 that the agent would receive on the Fixed Indexed Annuity for potentially the same performance without any downside risk over the same period.

4. To what extent do the incremental costs of the additional exemption conditions exceed the associated benefits and what are those costs and benefits?

Advisors Excel has repeatedly stated in correspondence with the Department that we generally support a best interest standard. However, a best interest standard with requirements such as those in the Rule and PTEs goes too far by creating significant compliance costs for industry with no clear benefit to consumers. These costs include the development and maintenance of new technology to process and monitor business, new systems to oversee compliance with duplicative regulatory regimes, including new disclosure and recordkeeping requirements, and the people to staff all of these functions. The costs include increased litigation risk and the attendant increase in insurance costs, which we anticipate will be significant.

Product manufacturers and distributors will have no option but to pass compliance costs onto consumers by cutting services and limiting product benefits. We further anticipate that providers at every level of the industry will consolidate, which may reduce the available number of advisers to consumers, primarily those consumers with lower levels of investable assets.

We respectfully submit that a number of alternatives exist that would help provide the benefits the Department seeks to provide to consumers while mitigating many of these costs. These alternatives could include eliminating the BICE written contract requirement and relying on the Impartial Conduct Standards, and coordinating with other regulatory agencies with historical subject-matter jurisdiction over the industries that the Department seeks oversight here, such as the SEC and State insurance regulators.

5. What is the likely impact on Advisers' and firms' compliance incentives if the Department eliminated or substantially altered the contract requirement for IRAs? What should be changed? Does compliance with the Impartial Conduct Standards need to be otherwise incentivized in the absence of the contract requirement and, if so, how?

The Impartial Conduct Standards ("ICS"), if modified to address to clarify certain points, would provide a sufficient standard for professional conduct by advisers to retirement investors. Consequently, we believe that the Department should eliminate the contract requirement for IRAs. As we noted previously:

> With respect to the BICE's requirement to enter into an enforceable agreement with the retirement investor, the DOL has historically not imposed such a requirement in PTEs for individual retirement accounts and other investment vehicles excluded from ERISA but subject to the prohibited transaction provisions of the Internal Revenue Code ("Code").

> The Department stated that it imposed such a requirement to give an enforceable private right of action to retirement investors investing through non-ERISA plans because it felt that the excise taxes triggered by the Code were an inadequate means of incentivizing compliance. Best Interest Contract Exemption, 81 FR 21002, 21022 (Apr. 8, 2016) ("Without a contract, the possible imposition of an excise tax provide an additional, but inadequate, incentive to ensure compliance with the exemption's standard's based approach."). However, the DOL cited no support for this conclusion even though it is a dramatic departure from the DOL's 40 plus years practice of not imposing such a requirement as a condition of relief under class PTEs for products sold to IRAs and other non-ERISA plans. We also agree with the position taken by plaintiffs challenging the validity of the Rule in litigation that the DOL should not be able to impose indirectly through BICE a private right of action for violations of the Code when it does not have the statutory authority to do so directly.[3]

Eliminating the written contract requirement will not leave IRA retirement investors without a remedy as such investors already have enforceable remedies under federal and state securities laws and state insurance laws for misrepresentation and other deceptive sales practices.

6. What is the likely impact on Advisers' and firms' compliance incentives if the Department eliminated or substantially altered the warranty requirements? What should be changed? Does compliance with the Impartial Conduct Standards need to be otherwise incentivized in the absence of the warranty requirement and, if so, how?

We believe the avoidance of prohibited transaction excise taxes provides a sufficient incentive to ensure compliance with the Impartial Conduct Standards and, therefore, warranties are unnecessary to incentivize compliance.

8. How would advisers be compensated for selling fee-based annuities? Would all of the compensation come directly from the customer or would there also be payments from the insurance company? What regulatory filings are necessary for such annuities? Would payments vary depending on the characteristics of the annuity? How long is it anticipated to take for an insurance company to develop and offer a fee-based annuity? How would payments be structured? Would fee-based annuities differ from commission-based annuities in any way other than the compensation structure? How would the fees charged on these products compare to the fees charged on existing annuity products? Are there any other recent developments in the design, marketing, or distribution of annuities that could facilitate compliance with the Impartial Conduct Standards?

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[3] Advisors Excel, LLC Comment Letter filed April 17, 2017 in response to Department's Examination of Fiduciary Rule in Light of President Trump's February 3, 2017 directive to the Department's Secretary.

We believe that questions of product design are best left to product manufacturers, but we do want to take the opportunity to note that the recommendation of a fee based product in itself does not resolve the question of an adviser's conflict of interest, nor does it resolve the question of which compensation method provides the most value to the consumer. The reality is that an annuity is often a one-time purchase that does not require ongoing maintenance or advice. Given this, a one-time commission may be completely appropriate. On the contrary, ongoing fees are usually justified by the provision on ongoing maintenance, which service an adviser may not provide in relation to annuity products. To the question of conflict and the amount of compensation that is ultimately paid to the adviser, a fee-based product may well end up providing more compensation to the adviser than an upfront commission.

10. Could the Department base a streamlined exemption on a model set of policies and procedures, including policies and procedures suggested by firms to the Department? Are there ways to structure such a streamlined exemption that would encourage firms to provide input regarding the design of such a model set of policies and procedures? How likely would individual firms be to submit model policies and procedures suggestions to the Department? How could the Department ensure compliance with approved model policies and procedures?

We are generally supportive of any form of regulation or exemptive relief that could provide clarity and ease the administrative burden on regulated entities. Many of the advisers we work with are small business owners who, despite their good faith efforts to comply, do not have the capacity to develop the policies and procedures required under present rules on their own. Any assistance that the Department could provide them in establishing a reasonable level of compliance would be beneficial.

However, for a streamlined exemption to be broadly effective, the Department will have to actively engage industry-at all levels-in a way it has failed to do. The Department will have to create a balanced set of disclosures, policies, and procedures that do not create a competitive advantage to larger, more organizationally sophisticated entities over small business. If the Department is considering such a streamlined exemption, it should delay any further applicability or implementation dates until such exemption is finalized.

11. If the Securities and Exchange Commission or other regulators were to adopt updated standards of conduct applicable to the provision of investment advice to retail investors, could a streamlined exemption or other change be developed for advisers that comply with or are subject to those standards? To what extent does the existing regulatory regime for IRAs by the Securities and Exchange Commission, self-regulatory bodies (SROs) or other regulators provide consumer protections that could be incorporated into the Department's exemptions or that could serve as a basis for additional relief from the prohibited transaction rules?

We believe that clarity and predictability are first principals of effective regulation. The Rule and PTEs unfortunately have been drafted in a manner that creates neither. A central aspect of the lack of clarity and unpredictability created by the Rule and PTEs involve their relationship to existing and developing standards of conduct that are applicable to investment advisers, broker dealers, and insurance agents.

As a business that is engaged in the distribution of insurance products, it has been troubling to see the Department seek to regulate advice relating to insurance products when it has little historical institutional experience or expertise in doing so. Consequently, the Department should defer to or at least coordinate with standards set by regulators with subject-matter expertise, such as the SEC, FINRA, and state insurance commissioners.

The NAIC is currently developing revisions to its Annuity Suitability Model Rule that would establish a "best interest" standard of care for the recommendation of annuities. It is clear, therefore, that the primary subject –matter regulator is moving forward with regulation that will largely accomplish the Department's goals. We would respectfully propose that the Department defer to the NAIC and allow state regulators to develop appropriate regulation in their field of expertise.

13. Are there ways to simplify the BIC Exemption disclosures or to focus the investor's attention on a few key issues, subject to more complete disclosure upon request? For example, would it be helpful for the Department to develop a simple up-front model disclosure that alerts the retirement investor to the fiduciary nature of the relationship, compensation structure, and potential sources of conflicts of interest, and invites the investor to obtain additional information from a designated source at the firm? The Department would welcome the submission of any model disclosures that could serve this purpose.

As stated previously, we do not believe that the best interest contract is necessary to further the Department's goals. We agree that disclosure is a key component of the relationship between the adviser and the consumer. As a result, we believe that a focused disclosure that provides relevant information to the consumer would be helpful.

16. To what extent are firms and advisers relying on the existing grandfather provision? How has the provision affected the availability of advice to investors? Are there changes to the provision that would enhance its ability to minimize undue disruption and facilitate valuable advice?

To date, we have received limited information on the reliance of advisers on the grandfather provision. However, we believe the grandfather provision is presently too restrictive. For example, the requirement that the compensation must be received under an agreement that has not come up for renewal post-Applicability Date should be eliminated. If the investment was purchased before the Applicability Date, compensation received from that purchase should be exempt regardless of whether the agreement is subsequently renewed.

17. If the Department provided an exemption for insurance intermediaries to serve as Financial Institutions under the BIC Exemption, would this facilitate advice regarding all types of annuities? Would it facilitate advice to expand the scope of PTE 84-24 to cover all types of annuities after the end of the transition period on January 1, 2018? What are the relative advantages and disadvantages of these two exemption approaches (i.e., expanding the definition of Financial Institution or expanding the types of annuities covered under PTE 84-24)? To what extent would the ongoing availability of PTE 84-24 for specified annuity products, such as fixed indexed annuities, give these products a competitive advantage vis-à-vis other products covered only by the BIC Exemption, such as mutual fund shares?

Initially, for reasons stated elsewhere herein, we believe that BICE and IMO BICE generally hinder rather than facilitate advice regarding all types of annuities. Further, as currently written, both BICE and IMO BICE hinder advice regarding fixed index annuities disproportionately in relation to fixed annuities and variable annuities.

The reason for this lies in the unique distribution structure of fixed index annuities, which is primarily through independent insurance agents who are affiliated with IMOs. As currently written, IMO BICE hinders advice regarding fixed index annuities by creating artificial and unnecessary requirements concerning professional liability insurance, financial reporting, marketing review, and so on for the few IMOs that are large enough to even qualify under the exemption's size requirement. What this means is that even those IMOs who are large enough to qualify will likely not be able to rely on the exemption and will thus be forced to find an alternative regulated entity to serve as FI and/or to restructure their operations. While these concerns were raised to the Department months ago, we have received no response or seen any revisions to the proposed IMO BICE. Given the current status of the IMO BICE, we are not prepared to speculate whether such an exemption could facilitate advice.

It has been our positon that the proper place for fixed index annuities under PTE 84-24. The provisions of PTE 84-24 provide for disclosure of relevant information to consumers that further the goals of the Department. Treatment of fixed index annuities under PTE 84-24 also recognizes the structural reality of the distribution of fixed index annuities. Fixed index annuities are by and large not distributed through traditional FI channels such as broker dealers and investment advisers. Securities annuities, such as variable annuities, are distributed through such FI channels. Consequently, those products are more amenable to BICE conditions.

PTE 84-24 treatment of FIAs does not give them a competitive advantage in relation to certain other products that are covered only under BICE. The Department's question rests on the assumption that other products covered by BICE are otherwise similar products. They are not.

They are fundamentally different products with different risks, benefits, and, notably, subject to different regulatory regimes.

As originally proposed by the Department in 2015, the revised PTE 84-24 would apply to life insurance, fixed annuities, and fixed index annuities, while advice regarding all other financial products would be governed by BICE. It made perfect sense to break the products down this way, as existing insurance regulatory regimes applied to the insurance products that would be governed by PTE 84-24 and securities regimes applied to those products governed by BICE.

Of course, the Department changed course in its final Rule and PTEs and moved FIAs under BICE. Since then, the Department has spent a significant amount of time justifying this decision because of the "complexity" of FIAs. We respectfully submit that "complexity" is not the proper criterion for determining whether a product should be treated under BICE or PTE 84-24. Further, if the Department has used product complexity as a criterion for determining whether a product should be treated under BICE or PTE 84-24, then it has applied that criterion with wild inconsistency.

Equity investments in public companies are the simplest investments one can make: An investor purchases a share in a company and the price of that share rises or falls. Mutual funds are only a basket of stocks. Debt instruments can be simple as well. Yet these products can only be recommended under BICE. While iterations of these products may be complicated, that is not their common denominator. What they truly have in common is that they are securities in which an investor has a risk of market loss, that is, a devaluation of their investment due to circumstances in a market that are out of their control.

We would submit that in all cases other than FIAs, products were included in BICE not because of their complexity but because of the risk of investment loss they present to the consumer and because of their traditional regulation as a security. There is no other credible explanation.

However, there is no risk of market loss in FIAs. Like many other types of financial products, there are contractual requirements and limitations inherent in FIAs. These include potential charges to consumers who want to exit the contract early. These charges and other costs and benefits of FIAs are already required to be disclosed under applicable insurance regulations.

We appreciate the Department's concern that the relevant information about FIAs- and all investment products for that matter- need to be clearly disclosed to consumers. But the Department's solution for the concern with respect to FIAs does nothing to solve the alleged problem. The BICE does not require disclosure of any information that would shed any light on the alleged complexities of FIAs. Indeed, the features, costs, and benefits of FIAs must already be disclosed to consumers under applicable insurance regulation. If anything, BICE disclosure requirements add an additional layer of documentation that will further obscure or drown out disclosures concerning the qualities of FIAs. We would suggest that, if complexity is the real issue here, the Department discuss its concerns with insurance regulators and provide suggestions for additional disclosure requirements under applicable insurance regulations.

18. To the extent changes would be helpful, what are the changes and what are the issues best addressed by changes to the Rule or by providing additional relief through a prohibited transaction exemption?

Our only comment to this point is that the Department should clarify that an insurance agent who is providing advice on a product under PTE 84-24 is an independent fiduciary and that an IMO that provides support services but does not communicate directly with any consumer in connection with recommendations made by the agent is not the fiduciary for which an exemption would be necessary.

Sincerely,

Eric R. Keller
of Paul Hastings LLP