

August 7, 2017

Office of Exemption Determinations  
Employee Benefits Security Administration  
United States Department of Labor  
200 Constitution Avenue NW, Suite 400  
Washington, D.C. 20210

Attn: D-11933

VIA EMAIL: [EBSA.FiduciaryRuleExamination@dol.gov](mailto:EBSA.FiduciaryRuleExamination@dol.gov)

Re: RIN 1210-AB82  
Comments in response to the Fiduciary Rule and Prohibited Transaction Exemptions

Dear Sir or Madam:

This letter is written on behalf of Asset Marketing Systems Insurance Services, LLC (hereinafter “Asset Marketing”), an Insurance Intermediary (“IMO”) based in San Diego, California. Asset Marketing is hereby providing its comments to the Department of Labor’s (“DOL” or “Department”) Request for Information (“RFI”) Regarding the Fiduciary Rule (“Rule”) and Prohibited Transaction Exemptions (“PTE”) as published in the Federal Register on July 6, 2017 (82 FR 31278).

Asset Marketing appreciates this opportunity to provide feedback on the Rule and PTEs. As stated in our previous comment letters, Asset Marketing believes it is imperative for the Department to take the necessary time to review the Rule and respond to the Presidential Memorandum of February 3, 2017.

The comments in this letter address several of the issues raised by the Department in questions 2 through 18 in the RFI. 82 FR at 31279 et seq.<sup>1</sup> We will only address those issues that are relevant to Asset Marketing as an IMO—several of the questions raised in the RFI are best answered by other affected parties, including insurance carriers, broker-dealers, registered investment advisers, etc.

**Asset Marketing has taken significant steps to comply with the Rule, but the current state of the Rule and Proposed IMO Exemption leaves the insurance industry in a quandary.**

Asset Marketing has taken numerous steps preparing for compliance with the Rule and PTEs. Shortly after the final Rule was released on April 7, 2016, we began the process reviewing our

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<sup>1</sup> Asset Marketing previously addressed question 1 in its letter of July 17, 2017.

policies, procedures and practices to determine changes we would need to implement to comply with the Rule.

Because IMO's were not defined as Financial Institutions ("FI") under the Rule, Asset Marketing took steps to prepare for becoming an FI or for partnering with other institutions that were FIs—insurance carriers, broker-dealers, and registered investment advisers. Insurance carriers quickly informed us that they were not signing the Best Interest Contract ("BIC") under the Rule.

We also implemented new technology to streamline the process of review and submission of fixed indexed annuity ("FIA") applications to insurance carriers, although much of that technology is still under development.

We have also provided multiple comment letters back to the Department, and we specifically commented in our letter of February 21, 2017, to the Department's Proposed Best Interest Contract Exemption for Insurance Intermediaries ("Proposed IMO Exemption") issued on January 19, 2017. 82 FR 7336.

We began preparing our independent producers and advisors for the Rule in training events back in the fall of 2015. Since that time we have held numerous live webinars and live training events, including a live event in March 2017 to prepare for the April 10, 2017.

The delay to June 9, 2017, was welcome relief and required us to modify our training and rollout of the Impartial Conduct Standards. As such, we provided regular updates via email and also conducted a series of webinars designed to prepare our producers for compliance with the Rule. We also provided sample disclosure forms for producers to use with clients.

Since June 9, we have continued to provide updates and ongoing training, including product and compliance training, we have continued to respond to questions from advisors concerning the upcoming January 1, 2018, applicability date, we have worked closely with insurance carriers, broker-dealers, registered investment advisers, and other IMO's to determine the best course of action moving forward.

In that IMO's are not defined as financial institutions ("FI") under the Rule and the Department has yet to provide any feedback or guidance as to the state of its Proposed IMO Exemption, Asset Marketing is left in the untenable position of having to provide training and guidance to its independent producers on how to comply with the Rule on January 1, 2018, without clarity as to who will act as the FI under the Rule.

**The Rule and PTEs do not provide the appropriate balance needed to best serve the needs of retirement investors.**

IMO's provide a valuable service to insurance carriers who use independent producers to distribute products. Unlike captive insurance agents who can only sell products of the insurance carrier that employs them, independent producers are appointed by multiple carriers and provide

multiple product options to consumers—thus providing a broad array of solutions to meet the best interest needs of retirement investors. This is especially true when it comes to fixed annuity and fixed-indexed annuity products.

Insurance carriers are heavily regulated by each state department of insurance and must submit products to each state for review and approval prior to sale. In addition, insurance carriers must meet certain minimum capital requirements in order to continue selling products. One of the ways that insurance carriers manage the capital requirements of the states is to adjust product terms that can be offered at any point in time for new sales. At any given time, one carrier's product may be a better fit for a retirement investor than another carrier's product. Only independent producers can offer the wide array of products and provide a solution that is truly in the best interest of a retirement investor.

It is obvious from the Rule and PTEs that the Department did not adequately account for how insurance products are distributed through independent channels. The Rule simply does not and cannot strike the appropriate balance between advisors providing broad-based investment and insurance advice and protecting consumers from conflicts of interest.

When a captive insurance producer sells his/her company's products, that insurance carrier can act as the financial institution and sign the BIC, attesting that a particular product is in the best interest of the consumer without regard for any other carrier's products on the market. Under the Rule, the carrier is only responsible for its own products.<sup>2</sup>

On the other hand, an independent insurance producer who represents multiple carriers, and who may also have securities licenses, finds himself/herself in a quandary. Who is the financial institution? Is it the carrier, the broker-dealer, or the registered investment adviser? If a particular retirement strategy involves both insurance products and securities products, who signs the BIC? Are there multiple BICs? The broader the product offerings being used in the retirement strategy the more complicated it becomes when attempting to comply with the Rule. Since the Department modified PTE 84-24 and also introduced the BIC, compliance with the Rule definitely creates some major challenges for advisors and firms alike.

The Rule and PTEs also create an implied preference for fee-based products. This inherent bias has created a major disruption in the insurance industry since most insurance products are sold on a commissionable basis where the carrier pays the commission. Depending upon the needs and objectives of the retirement investor, the time horizon, etc., a commissionable product is often a better solution than a fee-based product.<sup>3</sup> And while a few carriers have begun creating

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<sup>2</sup> Under the final Rule, the Department determined that best interest only applied to the products an advisor could actually sell. So an insurance producer who can only sell Carrier A's products need not be concerned about whether Carrier B's products are actually a better fit for the consumer. While Asset Marketing agrees with the Department's conclusion that the best interest obligation only extends to products an advisor can actually sell, the unintended consequence is that the product offerings available to consumers have narrowed as both firms and advisors seek to manage compliance risk.

<sup>3</sup> Consider this example: A retirement investor who purchases a \$100,000, 10-year FIA contract from an insurance carrier versus investing the same \$100,000 for 10 years with an RIA in a fee-based investment

fee-based annuity products in response to the Rule, it is not yet clear if these products will be better solutions for the retirement investors.

**The incremental costs of the Rule and PTEs currently exceed the “associated benefits.”**

Compliance with the full Rule on January 1, 2018, will create a major disruption in how insurance products are sold to retirement investors. Fixed and fixed-indexed annuity products are unique insurance products that can provide lifetime retirement income with principal protection.

According to the leading industry source for annuity sales information, over \$58 billion of fixed indexed annuity (FIA) products were sold to retirement investors in 2016, with nearly \$36 billion of that coming from the independent channel.<sup>4</sup> Captive agents, banks, broker-dealers, and registered investment advisers accounted for the balance of the sales.

Because IMOs cannot act as an FI, sales of FIAs in general, and in particular the IMO channel, have suffered as a result of the Rule. After years of steady growth, sales started to decline following the release of the final Rule on April 7, 2016, and sales have continued to slide in 2017. With the continued uncertainty surrounding the Rule as it relates to IMOs and with the looming January 1, 2018 applicability date, FIA sales are expected to continue to decline.

One of the biggest fears of retirement investors is running out of money. FIAs help to solve that problem by providing contractually guaranteed income for life. Retirees need income to live on in retirement. FIAs help to solve that problem, but the Rule is actually hurting retirement investors as advisors and carriers alike seek to comply with the Rule while at the same time

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vehicle. For the FIA, the insurance carrier pays the insurance producer an up front commission of 6% (\$6,000) with no on-going trailing commissions over the term of the contract; the retirement investor does not pay any commissions to the producer, and often received a bonus of 10% upon execution of the contract, thus increasing the basis from which the interest is credited and growth occurs from \$100,000 to \$110,000.

If the retirement investor were to take the same \$100,000 and invest in in fee-based assets with an RIA where the advisor receives an annual percentage based on assets under management (“AUM”), those fees are paid by the consumer on a monthly or quarterly basis and deducted from the balance in the consumer’s account. Assuming no asset growth and a 1% AUM fee over a 10-year period, the consumer would have paid \$10,000 in fees to the advisor.

When comparing the FIA commission cost to the Advisor AUM cost over the 10-year period, the advisor would receive 66% more by steering the client into AUM versus the FIA. And the consumer pays the fees under the AUM model versus the insurance carrier under the FIA model.

Both commissions and fee-based products should be part of a retirement investor’s plan. It is an important part of the planning process for the advisor to discuss compensation and fees with the client and to explain when one compensation model is better for the client based on needs, time horizon, etc.

<sup>4</sup> *Wink’s Sales & Market Report 4<sup>th</sup> Quarter, 2016*. Wink, Inc. [looktowink.com](http://looktowink.com).

minimizing their own risk—the net result is lower sales and fewer retirement investors with access to this important retirement asset.

Other significant burdens caused by the Rule include the following:

- Reduced service or elimination of service for smaller clients. The cost of servicing the client isn't worth the risk to the advisor for minimal dollars.
- Technology costs have increased dramatically, especially as firms seek to implement technology that can aid in best interest decision-making.
- The risk of litigation, specifically class-action litigation, and its associated costs has many firms paring back product offerings and reducing service to clients.
- Firms and advisors alike now are dealing with multiple regulator schemes, including the DOL, SEC, FINRA, State Departments of Securities, and State Departments of Insurance—all of which increase costs that are ultimately passed on to the consumer.
- Firms must now increase compliance staff and designate a BIC officer. Since this is a new position with significant liability, firms are finding it a challenge to fill this position.
- IMOs are faced with significant premium increases in E&O insurance, assuming the insurance is even available. The lack of data on the associated risk under the Rule is making it extremely expensive to obtain this insurance.
- The cost of disclosures and associated recordkeeping will become a significant issue once the BIC is required on January 1, 2018.

The burdens outlined above ultimately harm the retirement investors the Rule seeks to protect. Incremental costs will be passed on to clients and service levels will decline or be eliminated.

**Eliminating the contract requirement under the Rule and moving to a common regulatory approach is a better alternative than the current Rule.**

Asset Marketing fully supports acting in a client's best interest, but it believes that the Rule as written actually harms the retirement investor by limiting access to products and services and by increasing costs.

Since the Impartial Conduct Standards are already in place as of June 9<sup>th</sup>, implementation of the full Rule on January 1, 2018 is a mistake. The Rule has created chaos in the industry (especially the FIA industry) and several modifications should be made in order to create a workable best interest standard.

- The requirement of a BIC should be eliminated entirely. The confusion surrounding the BIC, when it applies, how it applies, and who is signing the BIC are all problematic issues under the current Rule.
- The class action litigation enforcement mechanism should be eliminated entirely. Currently aggrieved parties have recourse through the SEC, FINRA, State Departments of Securities, and State Departments of Insurance. These regulatory bodies take their jobs seriously and the addition of DOL enforcement through class action litigation only creates additional costs with no incremental benefit.

- The PTE 84-24 set to become applicable on January 1, 2018 creates major issues as it relates to the sale of FIA and insurance products in general. If anything, PTE 84-24 should be returned to its pre-Rule state.
- The Department should work closely with other regulatory bodies to create a uniform fiduciary standard. This means collaboration with the SEC, FINRA, NAIC, and state departments of securities and insurance is necessary to ensure that all retirement asset classes are adequately covered. But it is important to note that insurance products should **not** be treated as if they are securities.

**Fee-based annuities are newer to the market and the compensation is still being refined.**

Currently, there are only a few carriers who have introduced fee-based FIAs to the market, and those carriers have substantially restricted and limited the number and type of producers who can sell these fee-based products.

Carriers are constantly looking for ways to improve products for customers, modify compensation schemas for distribution, and provide better service and a better overall customer experience. If carriers eliminated commissions altogether and switched solely to a fee-based compensation model, it is not immediately clear that this would benefit the consumer. Under most fee-based compensation systems, the consumer pays a percentage of the assets under management (“AUM”).

When a retirement investor purchases an FIA, on the other hand, the carrier pays the commission to the insurance producer. The consumer does not directly pay this commission, and in many cases, receives a bonus from the carrier depending upon the length of the contract. In exchange for this, the consumer gives up some liquidity, much like a consumer does when purchasing a multi-year certificate of deposit (“CD”). The difference is that the interest earned on the FIA is usually significantly higher than a corresponding CD.

Some carriers have deployed systems whereby the insurance producer has options as to how to be paid—commission upon sale or reduced commission with small annual trailing commissions. Under these scenarios, the Carrier is still paying the commission, not the consumer. And the commission rate is based upon the initial contract commitment, not an increasing asset base like traditional AUM.

In order for fee-based annuities to work and take hold in the market, carriers need time. Carriers control product design, compensation design and structure, and are in the best position to comment on plans for fee-based FIAs. The shift from up-front commission to a long-term payout, however, completely changes the cash-flow model for advisors and takes time to implement. If the commission model was turned upside down immediately, many advisors would be forced to exit the business since their current business model would no longer support the business in the short-term.

**Model disclosures developed by the Department could create increased liability for those firms choosing to use disclosures not developed by the DOL.**

One of the challenges of the current Rule is that the Department did not issue specific guidelines for how to comply with the Rule. Based on questions 11 and 13 in the RFI, the Department is now asking whether model disclosures or policies would be a good idea.

At first blush, model disclosures seem like a good idea—they would provide specific guidelines for everyone to follow. Upon further reflection, however, model disclosures coming from the Department is a terrible idea. Anything that the Department issued would be viewed as an additional provision requiring compliance, even if issued as a “model” disclosure or policy. If it comes from the Department, it has the weight of the Department behind it.

One has to look no further than the FAQs issued by the Department on October 27, 2016. Once the FAQs were issued, firms across the country immediately changed their recruiting practices, often rescinding offers to advisors in the process.<sup>5</sup>

Any model disclosure would be viewed by the industry as a mandatory requirement, not a model, and any deviation from the model disclosure would create additional liability. A model disclosure coupled with the class action provision would open the door to a flood of litigation.

Given the volume of information that is readily available through a wide variety of media, consumers are better informed than they have ever been. There is a plethora of information available on what a fiduciary is and why they should/should not want to work with a fiduciary. Over the past 18 months, the conversation between an advisor and the consumer has changed—consumers now routinely ask questions about fiduciary status, compensation, conflicts of interest, and best interest. Most of these questions were never asked prior to the Rule.

**Other suggested changes to the Rule.**

Short of a full rescission of the Rule and in addition to the comments above, Asset Marketing believes that the Department should also undertake some additional changes, including:

- A Required Minimum Distribution (“RMD”) from a retirement account should not retain its status as qualified money. Under the Department’s FAQs in January 2017, an RMD used to purchase life insurance was to be treated as qualified money and would require a BIC or other PTE.<sup>6</sup> This is an absurd conclusion by the Department and creates an

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<sup>5</sup> In response to Q12 of the October 27, 2016 FAQs, firms immediately began changing their “back-end” recruiting policies. See, e.g., InvestmentNews, *Frequently asked questions on the DOL fiduciary Rule’s FAQs*, November 3, 2016, (<http://www.investmentnews.com/article/20161103/FREE/161109968/frequently-asked-questions-on-the-dol-fiduciary-rules-faqs>).

<sup>6</sup> The Department’s answer to Q4 states that an advisor who provides advice to a retirement investor concerning RMDs is subject to the Rule. This is in spite of the fact that taxes are paid on the RMD and the money is no longer inside a qualified account.

additional burden for the consumer, advisor, and firm. At a minimum, this FAQ should be rescinded.

- PTE 84-24 as proposed requires disclosure of all compensation paid to the advisor, the firm, the IMO, etc. This is also an absurd requirement and is completely impractical to implement. Most advisors do not know the compensation paid to others in their hierarchy, and disclosing “potential” compensation only creates confusion for all involved. This attempt by the Department at “transparency” when it comes to compensation will do nothing but kill sales of important retirement products.
- The Proposed IMO Exemption must be addressed. It has been over 6 months since the Department issued its Proposed IMO Exemption. Nothing has been done since. This needs to be addressed one way or another soon so that all IMOs can begin preparations to comply. We continue to believe that this Proposed IMO Exemption as written is completely unworkable, but we believe it is important that the DOL work with the industry to develop a workable solution for IMOs to become an FI.

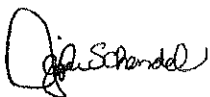
## CONCLUSION

Asset Marketing believes that the Department should modify or rescind the current Rule and its PTEs, should work closely with the SEC and other regulators to develop a uniform standard, and should delay the January 1, 2018, Applicability Date until the Department has been able to complete its mandated review of the rule and make the required changes. Firms will need a reasonable amount of time to build or modify systems and processes for compliance with any modifications to the Rule. We believe that a delay of at least 12 months will be required for all affected parties to be fully prepared for an updated Rule.

Thank you again for the opportunity to provide comments and feedback. Please feel free to reach out to me with any questions, comments, or concerns.

Sincerely,

ASSET MARKETING SYSTEMS INSURANCE SERVICES, LLC



Jennifer K. Schendel  
President & CEO