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August 7, 2017

VIA EMAIL AND U.S. MAIL
EBSA.FiduciaryRuleExamination@dol.gov

Office of Exemption Determinations
EBSA (Attention: D-11933)
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

**Re: Request for Information Regarding the Fiduciary Rule and Prohibited
Transaction Exemptions**

Ladies and Gentlemen:

We respectfully submit our comments on the Department of Labor's ("DOL") Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions ("RFI").¹ Our comments are limited to those affecting the sales of fixed and fixed indexed annuity products through independent insurance agents and insurance intermediaries.

This letter is being submitted on behalf of the entities listed in Schedule A to this letter. They are a diverse group involved in the sale of fixed annuity products, including independent marketing organizations ("IMO") and other insurance intermediaries of varying sizes and business structures.

Executive Summary

The following summarizes our comments and recommendations in response to issues raised in the RFI.

1. PTE 84-24 should continue to apply to the recommendation of all annuities, subject to the impartial conduct standards.
 - a. We urge that PTE 84-24 as currently applied during the transition period be made permanent, subject to two changes: a change regarding the compensation and other amounts payable under the exemption and

¹ 82 Fed. Reg. 31278 (July 6, 2017).

clarification that the exemption applies to distribution and rollover recommendations that are incidental to the recommendation of the annuity or insurance product, discussed below.

- b. This change would eliminate the need for a separate exemption that extends the definition of Financial Institution (or an amendment to the BIC Exemption) to apply to insurance intermediaries.
2. We submit that continuing to permit all annuity sales under PTE 84-24 (as has been permitted since the adoption of the original exemption) would not give a competitive advantage to annuities over products that are or may in the future be covered by the BIC Exemption.
3. The definition of the compensation and other amounts payable to insurance agents, brokers and others under PTE 84-24 should be clarified to permit insurance companies and insurance intermediaries to provide marketing support, education and other benefits to agents, brokers and others.
4. The final form of PTE 84-24 should clearly apply to “incidental” distribution and rollover recommendations. We urge that this exemption that was contained in the amended 84-24 exemption be carried over to the final 84-24 exemption. It is not clear in the transition form of the exemption that it applies to distribution and rollover recommendations.
5. The Fiduciary Rule exclusion for communications with independent fiduciaries with financial expertise should be expanded to include communications between insurance intermediaries and independent agents.
 - a. This expansion would make it possible for wholesalers to be covered by the exclusion when assisting independent agents in making recommendations to their clients. We submit that this would facilitate necessary interactions between IMO's and agents.
6. To ensure a “level playing field,” the same disclosure requirements should apply under both PTE 84-24 and the BIC Exemption. That is, the BIC Exemption disclosures should be simplified to mirror more closely those under 84-24. The reason for the latter recommendation is to avoid confusion in communications with the investing public.

Discussion

Issue No. 1: PTE 84-24 should continue to apply to the recommendation of all annuities, subject to the impartial conduct standards.

During the current transition period, the Department returned to the PTE 84-24 exemption as it has existed for decades, with one change.² That change was to add the requirement that those relying on the exemption comply with the impartial conduct standards as set forth in the amended 84-24 exemption. We do not object to the addition of the impartial conduct standards. Acting in the best interest of clients and being truthful in communications with clients are standards that are consistent with state insurance disclosure and suitability requirements as well as the market conduct guidelines and codes of conduct of many companies in the insurance industry. We believe that codification of these standards – so that everyone in the industry will be required to adhere to them or face adverse consequences – will be helpful to provide additional protection to consumers.

The other positive feature of “transition 84-24” is the return to the pre-amendment transactions covered by the exemption. Since the late 1970s, there has been a prohibited transaction exemption for the sale of annuities and other insurance products in the plan and IRA markets. This has enabled independent insurance agents, who are not securities licensed but are fully licensed and regulated under the 50 state insurance laws (plus the District of Columbia and Puerto Rico), to assist many thousands of clients in their retirement planning through the purchase of fixed indexed and fixed annuities. (We note that there have been far fewer consumer complaints about fixed indexed and fixed annuities than other financial service products.³)

We submit that with the addition of the impartial conduct standards as a condition for relying on PTE 84-24, no discernible regulatory benefit was achieved by limiting the availability of the exemption to the sale of fixed annuities only. Put another way, the effect of the 2016 amendment to PTE 84-24 would have been to require agents to rely on another exemption to assist their clients with recommendations on fixed indexed annuities. The most likely exemption would have been the BIC Exemption, which requires that a Financial Institution be involved in the sale. And while the Department may have perceived this to be beneficial to consumers, it would have been highly disruptive to the advice and sales process, since independent agents, by definition, do not

² In this letter, we refer to the exemption that became effective in 2016 as “amended 84-24.” The exemption as in effect during the transition period is referred to as “transition 84-24”, and the exemption as it existed prior to the 2016 changes is referred to as “old 84-24.”

³ See, e.g., NAIC report, Closed Confirmed Consumer Complaints by Coverage Type as of July 24, 2017. This report shows complaints about various insurance products. For example, of the roughly 68,000 complaints in the first half of 2017, 345 related to annuities.

work with a Financial Institution. Plus, this would have negatively impacted consumer access to products that meet their financial and retirement goals and provide them with guaranteed returns and income.

Further, the entities with which independent agents are most likely to work, insurance intermediaries or IMOs – the entities that have the greatest depth of experience and expertise in this market – were not included in the list of entities that qualified as Financial Institutions. The process of possibly granting Financial Institution status to IMOs was fraught with delay and ultimately with serious definitional issues and remains unresolved roughly eight months after the initial proposed exemption was released.

It should be noted that insurance companies are generally unwilling to serve as a Financial Institution for recommendations made by independent agents because of the limited nature of their relationship and interaction. Even if they were, the insurance company would likely offer a proprietary-product only platform of annuities. Though this is permissible, it limits the options that an agent could recommend to his or her clients. IMOs generally are in a better position to ensure adherence to the impartial conduct standards through regular and close contact with the agents and the training, supervision and other guidance they provide in determining what products are in the best interest of clients.

For these reasons, we urge that PTE 84-24 be re-amended to apply to all annuity sales...in other words, to put fixed indexed annuities back under 84-24 and adopt transition 84-24 as the final exemption. The exemption has operated effectively for decades. By adding the impartial conduct standards, it provides added protections for consumers on recommendations for retirement products. We also submit that this approach would be preferable to an attempt to adopt a new insurance intermediary exemption or to amend the BIC Exemption, which we believe would suffer from the same definitional issues that impacted the original regulatory process. In our view, such an exemption is not necessary, since virtually the same consumer protections have already been built into transition 84-24. And dealing with the complexities of adopting such an exemption would also be unnecessary if all annuities sales (fixed indexed and fixed) are included in PTE 84-24.

In adopting the provisions of transition 84-24, we also urge that two changes be included. These are discussed in Issues 3 and 4, below.

Issue No. 2: Continuing to permit all annuity sales under PTE 84-24 would not give a competitive advantage to annuities over products that are covered by the BIC Exemption.

In the RFI, the Department asked whether permitting all annuity sales under PTE 84-24 would give a competitive advantage to annuities over products that are covered by the BIC Exemption. We submit that permitting the continuation of a policy that has existed since the 84-24 exemption was first adopted would not create a competitive advantage for annuities.

Perhaps implicit in the Department's question is a concern that the BIC Exemption requirements are too extensive and place too much of a burden on the financial services community, at least at the Financial Institution level. At the level at which annuities and investment products are sold – by agents or advisers – the exemption requirements are essentially the same (though there are many other regulatory requirements that apply to annuities as well as various securities products).

Both exemptions require that agents or advisers comply with the impartial conduct standards in making recommendations to their clients. This includes the requirement that recommendations be in the best interest of the client (which is the same standard in both) and that the compensation be reasonable. Presumably, these standards will continue to apply under both exemptions. Both require a level of disclosure to their clients in connection with a recommendation; indeed, during the transition period, only transition 84-24 imposes that requirement and only 84-24 imposes a specific requirement to disclose material conflicts of interest. Presumably, these requirements will continue to apply under both exemptions going forward. (For comments on the nature of these disclosures, see the discussion under Issue No. 6 below)

The BIC Exemption does impose compliance requirements on Financial Institutions that would not apply under PTE 84-24 (since there is no Financial Institution involved). Any perceived disadvantage this creates for advisers relying on the BIC Exemption can be easily resolved by eliminating various of these requirements.

The bases for concluding that annuities will not obtain a competitive advantage are summarized as follows:

- Any perceived disadvantage created by the BIC Exemption and any regulatory imbalance between the exemptions can be corrected by the Department by reducing certain of the BIC Exemption requirements imposed on Financial Institutions.
- To the extent avoiding competitive disadvantages is a concern, we submit that it does not make sense to split different types of annuities into different exemptions. Annuities compete with other annuities rather than with traditional investment

vehicles, such as stocks, bonds and mutual funds. In other words, the agents who sell fixed and fixed indexed annuities are in a different market from advisers who sell other investment products, so that the differences between the exemptions – to the extent they exist – will have little to no impact.

- The requirement that agents comply with PTE 84-24 has existed for decades, whereas there has been no similar requirement imposed on most investment product sales. During that period, hundreds of billions of dollars of fixed indexed and fixed rate annuities have been recommended to clients and sold (though sales of fixed and fixed indexed annuities have declined as a result of the fiduciary rule and the exemptions⁴). The existence of PTE 84-24 does not appear to have significantly hindered annuity sales. Using this as a gauge, this suggests that the imposition of fiduciary status and compliance with BIC conditions (especially reduced conditions) will not unduly hinder investment product sales.
- Sales of products largely occur at the agent/adviser level, and the requirements at that level will be essentially the same going forward under both 84-24 and BIC. Thus, neither agents nor advisers have a competitive advantage or disadvantage. Rather, it is consumer needs, retirement goals and financial objectives that drive product sales.
- If a competitive advantage would exist for annuities under PTE 84-24, restricting that exemption to the sale of fixed rate annuities would not address that imbalance. Put another way, the way to address the imbalance is not to make it harder to sell fixed indexed annuities but, as noted earlier, to ease the regulatory requirements on the sale of other investment products, while maintaining the critical elements of the impartial conduct standards.

For all of these reasons, we submit that permitting annuity sales under PTE 84-24 will not create a competitive advantage. Conversely, requiring fixed indexed annuity sales under the BIC Exemption may limit consumer access to these products, since insurance carriers are generally unwilling to serve as a financial institution under BICE.

4 Karen DeMasters, "DOL Rule Dragging Down Annuity Sales, LIMRA Says," **Financial Advisor** (May 19, 2017), citing statistics from LIMRA's First Quarter 2017 U.S. Retail Annuity Sales Survey, indicating that fixed annuity sales were down 15% and fixed indexed annuity sales 13% during the first quarter of 2017.

Issue No. 3: The definition of the compensation and other amounts payable to insurance agents, brokers and others under PTE 84-24 should be clarified.

We urge that the Department clarify the compensation and payments that may be made to the agents or brokers who rely on the 84-24 exemption. This would include items such as reasonable reimbursement or allowances for marketing and payment of the reasonable expenses of educational events attended by the agents at which they learn about new products and regulatory developments and requirements. We submit that these items are beneficial to agents by giving them tools to assist their clients. They do not represent incentive compensation that creates conflicts or promotes the sale of one product over another and, we submit, do not need to be prohibited to avoid violating the impartial conduct standards. Indeed, in our view, these items would not be properly included in sales commissions.

Another item that we believe should be considered for inclusion in the exemption are non-cash incentives received by agents in connection with their sales activities. These incentives have been a long-standing practice in the marketplace. The value of these incentives, as a percentage of an agent's annual compensation, is quite small – well under 5% of their total compensation and possibly as low as 1% to 2% of total compensation. We submit that they are not sufficiently significant to constitute an inappropriate incentive that would cause an agent to violate the impartial conduct standards. In effect, these types of modest incentives are a form of recognition that is worth far more than the dollar amounts involved.

We also urge that the DOL preserve the option of how the compensation disclosure is made, either as a dollar amount or a percentage. It may be difficult in some situations to know whether a dollar amount disclosure is “feasible.” If there is a controversy, reliance on PTE 84-24 could be lost because of the manner of disclosure, not the lack of it.

Finally, we note that disclosure of overrides and gross dealer concessions by agents is not required under transition 84-24. We urge that the elimination of this disclosure be retained in the final exemption. This information is not readily available to individual agents, and no mechanism currently exists for them to obtain it. Since the individual agent is responsible for preparing, delivering and obtaining a signed copy of the disclosure/approval form from the client, this puts agents in a difficult if not impossible position. The receipt of overrides and other payments by IMOs has little to no bearing on an agent's recommendation, since the agent does not have the information. Thus, eliminating this disclosure item will not adversely affect consumers and, we submit, will not impact, directly or indirectly, the recommendation made by the agent,

Issue No. 4: The final form of PTE 84-24 should clearly apply to “incidental” distribution and rollover recommendations.

We also urge the Department to clarify that the 84-24 exemption extends to distribution and rollover recommendations that are incidental to the annuity purchase recommendation. This was made clear in the amended 84-24 but was not included in transition 84-24, since the Department essentially deferred all of the amendments to the exemption other than the impartial conduct standards. We submit that providing this clarification would require little effort because the language that was included in amended 84-24 could be added to the final exemption.

Issue No. 5: The Fiduciary Rule exclusion for communications with independent fiduciaries with financial expertise should be expanded to include communications with insurance intermediaries and independent agents.

Under the fiduciary rule, communications by a fiduciary adviser with certain defined “independent fiduciaries with financial expertise” are not considered to be recommendations and thus not investment advice. We presume this provision was included to facilitate communications between, among others, wholesalers and those who sophisticated advisers who recommend their products to clients.

This type of communication is an integral part of agent training and the annuity sales process as well. Indeed, it is essential for an individual agent to be able to obtain information from insurance companies and insurance intermediaries about alternatives in order to determine which product, if any, is in the best interest of the client. But under the current rule, the communication by the representative of the insurance company or IMO could be considered fiduciary investment advice. This result may not have been intended, but it significantly complicates or limits the process of analyzing a client’s needs and may limit access to better suited products that might otherwise be unfamiliar to the agents.

As a result, we urge that the rule be modified to expand the definition of independent fiduciary with financial expertise to include communications with IMOs and independent insurance agents. This change would prove beneficial to consumers because it would enable agents to be armed with information they need to be able to make a best interest recommendation.

Issue No. 6: BIC Exemption disclosures should be simplified and the same disclosure requirements should apply under both the BIC Exemption and PTE 84-24.

This issue is relevant to the other items discussed in these comments because it goes to the question of competitive advantages or disadvantages and ultimately to the protection of consumers. This suggestion is also premised on our earlier comments about leaving the sale of annuities under PTE 84-24 at the end of this regulatory process.

The disclosure requirements that have existed under PTE 84-24 over 30 years are straightforward and provide the consumer the information needed to make an informed decision about whether to accept the agent's recommendation. Essentially, the disclosures go to the issue of the conflict an agent has in making the recommendation: how much does the agent make? Is the agent prevented from recommending a wide range of products because of his/her affiliation with insurance companies? What other material conflicts does the agent have in making the recommendation? (The exemption also requires disclosure of information that is important to the client, such as the costs associated with the product that might not otherwise be apparent.)

But consider the disclosures that have to be made under the BIC Exemption. They are much more complicated and less specific, since they do not necessarily get to the question of what the adviser actually makes in connection with the recommendation. In addition, if the advice being given to a consumer relates to both a possible annuity purchase and investment in other types of products, the consumer will receive two very different types of disclosure, and in vastly different levels of detail. For the annuity recommendation, the client receives essential information. For the investment recommendation, the client is overwhelmed with information but may not be receiving the essentials he or she needs.

Our suggestion is that at the agent/adviser level – at the consumer level – the information that is required to be delivered to the consumer be the same or as nearly the same as possible given that the products themselves may have essential differences that need to be disclosed. And as part of this, our suggestion is that the BIC Exemption disclosures be streamlined to be more in line with those required under PTE 84-24. We submit that this will facilitate compliance, will facilitate consumer understanding and will maintain the objective of promoting the best interests of consumers.

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Thank you for the opportunity to submit these comments for your consideration. Please do not hesitate to contact me to discuss any of these comments or if we may answer any questions.

Very truly yours,

A handwritten signature in black ink, appearing to read "Bruce L. Ashton". The signature is stylized with a large initial "B" and a long, sweeping horizontal line.

Bruce L. Ashton

Schedule A

Annexus
Brokers International, Ltd.
C2P Advisory Group, LLC
Ideal Producers Group
InsurMark
Kestler Financial Group, Inc.
Legacy Marketing Group
Senior Market Sales, Inc.