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Office of Exemption Determinations
Employee Benefits Security Administration
Attn: D-11850
U.S. Department of Labor
122 C. St. NW, Suite 400
Washington, DC 20001

Subject: ZRIN 1210-ZA25

Ladies and Gentlemen:

Ash Brokerage Corporation ("Ash Brokerage") is pleased to comment on the U.S. Department of Labor's (the "Department") Proposed Amendment to and Proposed Partial Revocation of Prohibited Transaction Exemption ("PTE") 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies and Investment Company Principal Underwriters[1] (the "Proposal").

Ash Brokerage has been actively engaged in business since its inception in 1971. We are an insurance Brokerage General Agency ("BGA") that conducts business with independent agents, national and regional broker-dealers through their registered representatives, and duly licensed registered investment advisors. Ash Brokerage is one of the largest independently owned firms helping Americans with their retirement income strategies throughout the United States. In 2014 alone, our firm assisted agents and financial advisors with more than 30,000 American families. Based on our knowledge and experience as a BGA, we believe that we are well positioned to comment on the Proposal.

We respectfully request that the Department further consider the actual impact of the proposed amendments to and proposed partial revocation of PTE 84-24.

As proposed, PTE 84-24 would continue to be available for annuity products that are not "securities" under federal and state securities laws, but would require an adviser to satisfy an "Impartial Conduct Standard." The Impartial Conduct Standard would require an adviser to acknowledge and be subject to fiduciary status. Accordingly, the adviser will be subject to standards similar to those set forth in Section 404 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), but the remedies available for an Individual Retirement Account ("IRA") and IRA owner would not be limited to those set forth under ERISA. As

[1] DEP'T OF LABOR, EMPLOYEE BENEFITS SECURITY ADMIN., *Proposed Amendment to and Proposed Partial Revocation of Prohibited Transaction Exemption ("PTE") 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies and Investment Company Principal Underwriters*, Application No. D-11850 [ZRIN: 1210-ZA25], 80 Federal Register 22010 (Apr. 20, 2015), available at http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08837.pdf.

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proposed, the amendment to PTE 84-24 creates a fiduciary relationship between an adviser and an IRA or IRA owner when Congress did not see fit to impose one under ERISA.

As proposed, PTE 84-24 would no longer be available for annuity products that are "securities" under federal and state securities laws, but would require an adviser to satisfy the Best Interest Contract Exemption ("BICE").[2] In our experience, advisers adhere to the same practices and procedures, and utilize the same contracts regardless of whether the annuity products they provide are or are not "securities." Accordingly, and despite the continued availability of PTE 84-24 for annuity products that are not "securities," we believe that many advisers will be required to adhere to the more stringent standards of the BICE.

For this reason, we respectfully request that the Department further consider the actual impact of the Best Interest Contract Exemption ("BICE").

First, the BICE will create burdensome and expansive disclosure requirements, which will significantly affect the cost and time associated with providing retail financial services. This additional cost and time may force advisers and financial institutions to abandon the retail financial services industry,[3] or alternatively, to limit products to certain compensation levels (i.e., only provide investment advice to customers who satisfy an "economic threshold"), thereby restricting the access of retail investors to the availability of a full range of products. This creates the opposite effect that the BICE was intended to promote. Accordingly, middle-class Americans may no longer have access to investment advice pursuant to a suitability standard. Instead, middle-class Americans will be left to fend for themselves.

Second, the BICE will require advisers and financial institutions to make contractual warranties that they have adopted policies and procedures to mitigate material conflicts of interest and ensure compliance with the Impartial Conduct Standard. The added cost and time associated with the adoption and continued monitoring of such policies and procedures may substantially increase the cost of investment advice. Ultimately, these additional costs will be passed to the customer. Additionally, advisers and financial institutions will be required to make contractual warranties that prohibit employment incentives, which encourage advisers to violate the Impartial Conduct Standard. Advisers and financial institutions may determine that the potential economic liability (e.g., actual monetary damages, attorneys' fees, and court costs) associated with a breach of these contractual warranties are too significant when compared to the compensation received. Distributors, such as broker-dealers or career insurance agents, would likely limit products to certain compensation levels (i.e., only provide investment advice to customers who satisfy an "economic threshold"), thereby restricting the access of retail investors to the availability of a full range of products. This creates the opposite effect that the BICE was intended to promote.

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[2] Dep't of Labor, Employee Benefits Security Admin., *Proposed Best Interest Contract Exemption*, Application No. D-11712 [ZRIN: 1210-ZA25], 80 Federal Register 21960 (April 20, 2015), available at http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08832.pdf.

[3] In addition to the anticipated effect on middle class Americans, such a significant change in the retail financial services industry could have a material effect on the continued employment of professional in this industry.

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Third, the BICE exposes advisers and financial institutions to state-based actions based on required contractual warranties, which may create an unacceptable level of risk. For claims made by an IRA or IRA owner, this will result in litigation based on state law. Advisers and financial institutions will be required to monitor developments on a state-by-state basis. This necessarily will require advisers and financial institutions to adopt and utilize different service agreements depending on the customer's state of residency.

Fourth, the BICE exposes advisers and financial institutions to the unacceptable level of risk associated with class actions, as the contract may not require the investor to waive or qualify its right to bring or participate in a class action (or other representative action). The retail financial services industry has long required customers to agree to arbitration of claims against advisers and institutions alike. Although the BICE does not bar arbitration provisions, it does ensure access to courts for class actions.

Fifth, the Impartial Conduct Standard prohibits an adviser from recommending an asset if the total amount of compensation anticipated to be received by either the adviser or affiliates will exceed "reasonable compensation" in relation to the total services they provide. Although the obligation to pay no more than reasonable compensation to service providers is long recognized under Section 408(b)(2) of ERISA and Department Regulations 2550.408b-2(a)(3) and 2550.408c-2, the reasonableness of fees depends on the particular facts and circumstances. A facts and circumstances approach to determine "reasonableness" may be too vague for advisers and financial institutions that provide services to an IRA or IRA owner. For example, the Department wrote, "a Financial Institution could compensate an Adviser differently for advisory work relating to annuities, as opposed to shares in a mutual fund, if it is reasonably determined that the time to research and explain the products differed."[4] The necessary time to research and explain products could vary greatly based on (a) the complexity of the product, (b) the number and complexity of applicable riders attached to the annuity product, (c) the sophistication of the retail investor, and (d) the actual economic circumstances of the retail investor, including, but not limited to his or her (i) risk tolerance, (ii) asset diversification, and (iii) other longevity concerns. Nevertheless, broker-dealers may be unwilling to allow registered representatives to sell annuity products with different compensation schedules, even if the product's applicable riders changed the nature of the annuity product, in an effort to avoid liability associated with a retail investor's allegation that the "conflict of interest" standard was breached.

Sixth, the Impartial Conduct Standard may create a standard that would require an adviser to recommend an investment product of a competitor if the adviser, acting impartially, believed that the competitor's investment product was more appropriate. This would necessarily require a significant change to existing business models, which would have a material impact on the costs associated with the recommendations of investment products.

The BICE attempts to draw an appropriate balance between continued use of wide-spread and settled industry compensation practices and protection of the interest of retail investors.

[4] See FN 2; Example 4 of Section 4 entitled "Warranty – Policies and Procedures."

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Unfortunately, in our view, the BICE fails to achieve such balance for the reasons set forth above. Retail investors (i.e., middle-class Americans) may no longer have access to investment advice pursuant to a suitability standard. Instead, middle-class Americans will be left to fend for themselves. The Department should not create a Prohibited Transaction Exemption ("PTE") that prohibits middle-class Americans from obtaining investment advice for their own retirement.

The effect of the BICE may ultimately prohibit retail investors from purchasing annuity products that were previously available under PTE 84-24. Retail investors, including those members of the Baby Boomer generation, rely greatly on annuity products to secure their retirement. In its current form, PTE 84-24 allows financial professionals to address a variety of concerns that face middle-class Americans with a wide range of solutions. More importantly, studies show that the Baby Boomer generation and financial professionals successfully address many of their clients' retirement income strategies through product solutions that currently fall under PTE 84-24. Some interesting statistics on annuity ownership within the Baby Boomer generation include:

- More than nine (9) in ten (10) Baby Boomers who own annuities have money saved for retirement, whereas less than half of Baby Boomers who do not own annuities have retirement savings.[5]

- Eight (8) in ten (10) Baby Boomers who own annuities expect their money to last throughout retirement and to have at least some disposable income for travel and leisure, compared to less than half of those who do not own annuities.[6]

- More than six (6) in ten (10) Baby Boomers who own annuities have calculated the amount they will need to save to retire, versus less than one-third of non-annuity owners.[7]

- More than six (6) in ten (10) Baby Boomers that own annuities have consulted a financial advisor to help them prepare for retirement, whereas fewer than two (2) in ten (10) non-annuity owners have taken this step.[8]

These statistics serve to demonstrate the value of annuity solutions and the relationship Americans have with their financial professionals. Ash Brokerage believes that education about a person's retirement gap is important to understand, and by having access to financial professionals through exempt product solutions, more Americans will take personal responsibility for their retirement rather than depending solely on government provided

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[5] Boomer Expectations for Retirement 2015, Fifth Annual Update on Retirement Preparedness of the Boomer Generation, Insured Retirement Institute, April 2015.

[6] Id.

[7] Id.

[8] Id.

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programs. We believe reliance on personal savings and retirement strategies can help reduce the pressures on existing government subsidies.

Under those client engagements not requiring a fiduciary relationship, we feel the recent reforms from state regulators provide protection for most transactions. Since the withdrawal of the Department's 2010 proposed rule (the "2010 Proposal"),[9] state insurance commissioners forced carriers to comply with more stringent suitability thresholds to protect client interests. Closed state department of insurance complaints on fixed indexed annuity sales remained under 100 in each year since the 2010 Proposal. For example, (1) fifty (50) complaints for 2011, (2) fifty-four (54) complaints in 2012, (3) forty-six (46) complaints in 2013, and (4) seventy-seven (77) complaints 2014.[10] In 2008, there was one complaint for every $100 million of issued premium.[11] In 2014, there was only one complaint for every $633 million of issued premium.[12] FINRA reported that complaints were less than ten (10) per year in 2013 and 2014.[13] Clearly, significant improvements took place since the 2010 Proposal. Ash Brokerage believes the existing regulators should continue to enforce and enhance the suitability standards as client conditions change. We support continuity with other regulatory entities that already exist and set suitability standards for non-fiduciary transactions. Ash Brokerage believes that changes made by the Department to the Proposal, which address these concerns, would still hold our industry to fiduciary standards, when appropriate, while allowing middle-class Americans to receive appropriate and affordable investment advice using current and applicable suitability standards.

In summary, we do not believe that the Department is addressing the greatest concern for the overall health of the pre-retiree and current retiree population. The Proposal creates an unattainable standard for many financial professionals to work with the average American in retirement income strategy planning. A collateral effect of the Proposal is a likely reduction in available solutions for financial professionals to use with their clients. Getting clients to move from a transactional engagement to a fee-based arrangement may prove more costly for financial professionals, broker-dealers and, most importantly, American consumers.

We support a "best-interest" philosophy for client interactions; however, a contractual-based, state-enforced fiduciary standard is not a business model that should be required in every client engagement. We respectfully request that the Department work with the insurance industry to reconsider the proposed amendments to and proposed partial revocation of PTE 84-24, and alternatively, revise the BICE in a manner that provides a workable and meaningful exemption for client engagements that require a suitable, transactional investment solution. Finally, we

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9 DEP'T OF LABOR, EMPLOYEE BENEFITS SECURITY ADMIN., *Proposed Definition of the Term "Fiduciary,"* RIN: 1210-AB32, 75 Federal Register 65263 (October 22, 2010), available at https://www.federalregister.gov/articles/2010/10/22/2010-26236/definition-of-the-term-fiduciary.

10 Jack Marrion, president of Fixed Index Annuity ("FIA") research firm, on www.insurancenews.net (March 11, 2015).

11 Id.

12 Id.

13 Id.

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respectfully request that the Department coordinate the regulatory environment for financial professionals with existing regulatory bodies to provide clarity, vision, and direction.

Sincerely,

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