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Office of Exemption Determinations
Employee Benefits Security Administration
Attn: D-11926
United States Department of Labor
200 Constitution Avenue, NW Suite 400
Washington, D.C. 20210

Re: ZRIN 1210-ZA26 - Proposed Best Interest Contract Exemption for Insurance Intermediaries

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") Proposed Best Interest Contract Exemption for Insurance Intermediaries ("IMO Exemption"). Advisors Excel restates its support of the intent of Conflicts of Interest Rule ("Rule").

As expressed in our comment letter to the Rule proposal, our application for an individual exemption and during our in-person meeting with DOL staff, we believe acting in the best interest of the Retirement Investor is the practice of the large majority of financial professionals, including Advisors Excel and our advisors.

Changing Non-Guaranteed Terms of Fixed Annuity Contract

With respect to the Department's request for comment regarding whether the IMO Exemption should be limited to annuity contracts that do not allow the insurance carrier to change non-guaranteed terms during the period the customer is subject to surrender charge or penalty, Advisors Excel believes such a modification is unjustified for three reasons. First, only the insurance carriers have the ability to modify the terms of their products. IMOs do not have the ability to modify contract surrender charges or any other product features. Second, the Department did not incorporate this requirement in the Best Interest Contract Exemption (PTE 2016-1) ("BICE") applicable to insurance carriers who are the sole parties that could implement such product modifications. Third, the BICE and IMO Exemption already adequately address this issue as surrender charges would have to be considered by the financial institution in

determining whether the product is in the best interest of the customer and would have to be disclosed to the customer. Consequently, Advisors Excel strongly believes that any requirement to condition the IMO Exemption on insurance product design is unjustified and should not be implemented.

Definition of Financial Institution

Audited Financial Statement Disclosure

Advisors Excel does not believe the requirement of posting audited financial statements on a public website furthers the goal of protection of retirement investors. As set forth in its individual exemption application, Advisors Excel fully supports audits of internal controls and processes as a means of establishing safeguards to protect retirement investors. Further, Advisors Excel supports annual financial audits and will make the audit results available to DOL auditors or retirement investors upon request. However, it is unclear what purpose posting the audited financial statements on a public website serves. In addition to being an unprecedented requirement for privately held companies to provide their financial statements to the general public (the large majority of which would not even be clients of the IMO), this requirement is not imposed on other financial institutions under the BICE. For example, a small RIA, with no capital requirements, serving as a financial institution presents substantially more risk to retirement investors than an IMO that has presumably satisfied the \$1.5 billion premium threshold required by the IMO Exemption. The Department appears to have imposed this requirement because of its understanding that insurance carriers submit their quarterly annual financial statements to the National Association of Insurance Commissioners ("NAIC"), which are made available to state insurance commissioners. We do not see how mandatory public disclosure is equivalent to making financial statements available to state insurance commissioners through the NAIC. Moreover, unlike insurance companies, IMOs do not pay amounts owed under the insurance policies; therefore, information regarding the IMO's assets and liabilities is unnecessary to determine whether it has sufficient assets to pay claims incurred under the insurance policies.

The DOL proposed the audited financial disclosure requirement in order "to confirm that the IMO has sound business practices." Advisors Excel believes the responsibility for financial oversight of IMOs pursuant to the IMO Exemption should rest with the DOL and not be delegated to the general public or plaintiff's attorneys. As stated above, we do not see how mandated disclosure to the public (rather than the DOL) is consistent with the DOL's goal of ensuring the IMO has sound business practices. In addition, Advisors Excel believes audits of internal controls and processes related to IMO Exemption compliance would be more beneficial to retirement investors, and would achieve better the DOL's goal of verifying that the IMO has sound business practices. The former would ensure IMO Financial Institutions have the compliance measures in place to confirm the transaction was in the retirement investor's best interest. The latter would have no bearing on whether the IMO was complying with the IMO Exemption's requirements.

Insurance/Asset Set Aside

Advisors Excel does not agree the IMO Exemption should specify that insurance/asset requirements be based upon a percentage of prior sales of fixed annuity contracts. This arbitrarily set percentage is unreasonably high and impractical given the proposed insurance alternative is likely unavailable in the marketplace. If a threshold is required, Advisors Excel supports a standard in which the coverage is reasonable rather than assigning a specific percentage of premium sales.

As pointed out in our prior correspondence with the Department, this insurance requirement is not placed upon other financial institutions under the BICE. Using the same example as above, a small RIA, with no capital requirements and no minimum insurance threshold presents a substantially higher risk to retirement investors than an IMO which would hold 1% of the bare minimum \$1.5 billion premium requirement.

The DOL indicated this requirement is being imposed because IMOs are not historically regulated entities like the financial institutions listed under the BICE. However, federal RIAs are not subject to minimum insurance or capital requirements. While some states impose minimum capital requirements, they are normally very small (e.g., \$3,000). Broker dealers are subject to minimum capital of \$5,000 for a limited purpose broker dealer (e.g., placement agent for mutual fund shares on agency basis) to \$250,000 for self-clearing brokers.¹

In contrast to the above nonexistent or nominal requirements that apply to state RIAs and broker dealers, the requirement proposed under the IMO Exemption is unreasonably massive. As applied to Advisors Excel, this would require over \$50 million of minimum capital or insurance. The unreasonableness of this requirement is exacerbated by the fact the Department delayed releasing the IMO Exemption until January 20, 2017, giving IMOs only eighty days to procure massive, unprecedented levels of insurance to comply with the IMO Exemption requirements. Moreover, because the proposal requires any insurance to cover solely claims brought by the IRS, DOL, PBGC or retirement plan investors or fiduciaries relating to fixed annuity contract transactions, such insurance likely is unavailable in the current marketplace as fiduciary insurance products historically are not so limited.

Advisors Excel recommends that in lieu of the above requirements, the DOL simply impose a minimum level of insurance for all IMOs that is not connected to premiums sold and also require individual advisors to have insurance. For example, Advisors Excel currently maintains insurance levels of \$5 million per claim and many of its advisors have insurance of \$1 million per claim to comply with insurance carrier requirements. The Department noted in the preamble that it had considered this approach previously.

¹ While banks and insurance companies may be required to have capital requirements that are higher than state RIAs and broker dealers, those financial institutions are liable for paying the bank deposits or insurance and are not financial intermediaries like RIAs, broker-dealers and IMOs. Accordingly, there is no policy justification for imposing minimum capital or insurance requirements similar to a bank or insurance company.

If the DOL insists on imposing a minimum capital or insurance requirement, such requirement should be waived during the transition relief period, provided the requirements in Section IX are met.

Marketing Material Review

Advisors Excel believes that requiring all “marketing material” to be reviewed by the IMO is impractical and unnecessarily burdensome as such materials would not be limited to reviewing whether potential recommendations meet the best interest standard. For example, a dinner seminar invite (which clearly constitutes marketing material) should not be considered a recommendation that requires review due to the fact that an adviser would not know any potential retirement investors’ financial situation, and thus, not know which product to recommend without meeting them. We recommend that only marketing materials that could reasonably be viewed as a “recommendation” under the investment advice regulation should be reviewed by the IMO. Marketing materials that do not meet this standard are outside the scope of the Rule and should be excluded.

Written Approval of Transactions

The IMO Exemptions’ requirement that IMOs approve transactions in writing on April 10, 2017, is arbitrary and discriminatory. This requirement was not placed upon other financial institutions in the BICE and it is unclear why it is being required only of IMOs. This requirement adds additional compliance burdens upon IMOs already struggling to comply with the Rule’s mandates given the late release of the IMO Exemption and the lack of clear guidance from the Department. Had the Department provided clear specific direction on the IMO Exemption requirements earlier, IMOs could have had more of an opportunity to put systems in place to comply with this additional requirement. Advisors Excel respectfully requests that Section IX(d)(5) be modified so that the transition relief provided under that section is not contingent on the written approval requirement.

Disclosure Conditions

Advisors Excel believes the NAIC Annuity Disclosure Model Regulation (“Regulation”) requires appropriate information for retirement investors involving fixed annuity contracts. The Regulation currently requires a detailed description of the contract features as well as examples of how they apply. (See Section 5). These requirements include explanations of the elements used to determine the index-based interest, such as participation rates, caps or spreads and how they operate as well as others. Advisors Excel believes the disclosures required in the Regulation provides the necessary information for retirement investors to make an informed decision as to whether to purchase the product. The adequacy of these disclosures is evidenced in the relatively low number of complaints on fixed annuity products nationwide with state insurance regulators. Requiring further disclosures in addition to the comprehensive list prescribed by the Regulation runs the risk of disclosure deluge upon the retirement investor leading to more confusion than currently exists. Advisors Excel supports leaving the disclosure requirements to state insurance departments which maintain regulatory authority over the products and the individuals licensed to sell them. Finally, as pointed out earlier, IMOs do not

have the ability to control which disclosures accompany the products; this is entirely within the purview of the insurance carriers in accordance with state insurance law. Advisors Excel believes this requirement would be better addressed in the BIC rather than in the IMO Exemption.

Expand IMO Exemption to Include all Insurance Products

The BICE covers insurance carrier financial institutions sales of insurance products generally, provided the other requirements of the exemption are met, and is not limited to sales of fixed annuity contracts. Because IMOs can sell life insurance and other insurance products that are not fixed annuity contracts, Advisors Excel requests that the IMO Exemption to be expanded to cover sales of insurance products generally.

Effective Date of IMO Exemption

If the effective date of the Rule is delayed, Advisors Excel requests that the effective date of the IMO Exemption be delayed for the same period. In addition, if the Rule is modified in any material respect before it becomes effective, Advisors Excel requests the Department reopen the comment Proposed IMO Exemption for an adequate period of time before the effective date of the Rule.

Conclusion

Thank you for the opportunity to comment on the proposed IMO Exemption. The list of concerns with the proposed IMO Exemption set forth in this letter are not exhaustive, we believe there are substantial issues which will arise if this proposed IMO Exemption is implemented in its current form.

Sincerely,



Eric R. Keller
of PAUL HASTINGS LLP

cc: Michael L. Spafford