



February 17, 2017

**VIA CERTIFIED MAIL & EMAIL**

Office of Exemption Determinations  
Employee Benefits Security Administration, (Attention: D-11926)  
U.S. Department of Labor  
200 Constitution Ave., NW., Suite 400  
Washington, DC 20210  
e-OED@dol.gov

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

Ladies and Gentlemen:

On behalf of Saybrus Partners, Inc. ("Saybrus"), we wish to provide comments to the Proposed Best Interest Contract Exemption for Insurance Intermediaries, a Proposed Class Exemption, issued by the Employee Benefits Security Administration on January 19, 2017 ("Proposal").

By way of background, Saybrus is a national distributor of annuities and life insurance. We assist financial professionals in addressing clients' needs with solutions for basic income and death benefit protection, as well as income, estate, and business planning. Our partner firms include financial institutions, insurance retailers, broker/dealers and the industry's top life and annuity carriers. Since our inception in 2010, Saybrus has helped to secure futures for our partners' clients and their families with \$6.5 billion of annuity deposits and \$72 billion in life insurance.

Saybrus continues to believe that mere sales of fixed annuities and fixed indexed annuities to retirement investors do not involve fiduciary advice. However, in light of the final Fiduciary Duty Rule<sup>1</sup>, Saybrus prepared and submitted to the Department of Labor ("Department") an application for an individual exemption on October 5, 2016. As noted by the Department, the individual exemption process was available to alleviate the exclusion of insurance intermediaries from the definition of "Financial Institution" under the Best Interest Contract Exemption.<sup>2</sup>

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<sup>1</sup> Conflict of Interest Rule-Retirement Investment Advice, 81 FR 20946.

<sup>2</sup> PTE 2016-02, 81 FR 21089 (April 8, 2016), as corrected at 81 FR 44784 (July 11, 2016).

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Following this submission, Saybrus has prepared to act as a Financial Institution ("FI") for sales of Fixed Annuities and Fixed Indexed Annuities in light of the requirements for FIs contained in the Best Interest Contract Exemption ("BICE") and its own judgement as to how best to supervise advice activities of independent producers, including by considering exclusive contracting.

After careful review of the Proposal, we offer specific comments below which reflect our most significant concerns with the conditions of the Proposal.

Additionally and importantly, we note that the content and effect of the Proposal, including its timing, which would effectively exclude more than 2/3 (two-thirds) of the individual applicants for FI status<sup>3</sup> from attaining that status as of the current applicability date of the Fiduciary Duty Rule, is likely in conflict with the principles set forth in President Trump's Presidential Memorandum regarding the Fiduciary Duty Rule.<sup>4</sup> In this regard, and as described below, the Proposal is likely to harm investors due to a reduction in access to retirement savings offerings and related financial advice; will result in dislocation and disruptions in the retirement services industry by virtue of the loss of distributors for retirement products; and is likely to increase the costs investors and retirees must pay for services as a result of unnecessary compliance requirements, forced consolidations, and litigation of various kinds.

### **Specific Comments:**

The BICEII creates an arbitrary class of FIs through several eligibility conditions that are not reasonably designed to promote the intended objectives of the Fiduciary Duty Rule. The Proposal contains eligibility requirements that discriminate against insurance intermediaries generally, and have a disparate impact on certain insurance intermediaries. These requirements will diminish the range of and ease of access to financial products and advice for retirement investors. This result is contrary to President Trump's stated priority; facilitating the ability of Americans to save for their retirements and other lifetime expenses.

1. The BICEII requires that an insurance intermediary ("Entity") have an average of \$1.5 billion in fixed annuity premiums in each of the last 3 years. This premium threshold is arbitrary and does not advance the purposes of the Fiduciary Duty Rule for the following reasons:
  - a. Requiring an Entity to achieve and maintain a certain level of production may motivate sales aimed at achieving the production level requirement rather than at providing a product in the client's best interest, in direct contradiction to the Fiduciary Duty Rule.

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<sup>3</sup> "Proposed Best Interest Contract Exemption for Insurance Intermediaries" ("Proposal"), 82 FR 7361, footnote 92.

<sup>4</sup> Presidential Memorandum on Fiduciary Duty Rule, Feb. 3, 2017.



- b. As acknowledged by the Department in the Proposal, the sales threshold will eliminate competition and force organizations to consolidate<sup>5</sup> or forego providing clients with retirement advice altogether. These activities could disrupt offerings to customers and reduce competition, neither of which is good for retirement investors.
  - c. There is no correlation between the proposed premium threshold and an Entity's track record for compliance and serving its customers well. Where sales practices concerns have been identified in the industry they have resulted from failures of a compliance structure or culture and these have occurred in large, high production organizations, as well as in smaller businesses. Conditions that encourage compliance structure would be better designed to achieving the Department's goals. Additionally, if there is some relationship between level of premium and the ability to properly exercise fiduciary responsibility, setting the appropriate threshold based on fixed annuity sales alone is too narrow a view. The Department has advised that required minimum distributions, when used to fund life insurance, are subject to the Fiduciary Duty Rule.<sup>6</sup> Therefore, for consistency, all products and investments, including life insurance under the jurisdiction of the Fiduciary Duty Rule should be included when calculating any minimum premium threshold.
  - d. Under BICE, broker dealers ("BDs"), registered investment advisors ("RIAs"), banks or similar financial institutions, and insurance companies automatically qualify as FIs without reference to their size or sales volume. Imposing a premium threshold that does not relate to the ability of Entities to exercise fiduciary duty acts as a discriminatory hurdle in favor of the types of FIs recognized under BICE. This discriminatory impact will disrupt distribution of fixed annuities and fixed indexed annuities to retirement investors and will limit their choices
2. The BICEII Rule arbitrarily requires that the Entity maintain cash reserves and/or Errors and Omissions Insurance coverage at least equal to 1% of premium sales. This requirement is unduly burdensome, disproportionate, and will eliminate many Entities from qualifying and will dissuade others from entering the marketplace, thereby reducing the choices available to retirement investors and potentially increasing their costs. In this regard we note the following:
- a. No such insurance, as contemplated by the Proposal, exists in the marketplace today thereby making it impossible for an Entity to comply through insurance coverage alone. Should this insurance become available, it is expected to be very expensive.

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<sup>5</sup> Proposal, p. 7362.

<sup>6</sup> Conflicts of Interest FAQs (Part II), U. S. Department of Labor, Employee Benefits Security Administration, January, 2017, Q.4.

- b. There is no correlation between the required level of cash reserves and/or insurance coverage and the ability of the FI to exercise fiduciary duty in favor of a retirement investor. As noted above, conditions fostering a strong compliance structure are well-targeted to protect retirement investors.
  - c. The cash reserve and/or insurance requirement does not apply to BDs, RIAs, banks or similar financial institutions, and insurance companies and represents unfair discrimination against Entities.
  - d. The cash reserve far exceeds the statutory net capital requirements imposed on BDs who hold customer funds. The requirement could result in one-third (1/3) to one-half (1/2) of an Entity's override being held in reserve. We are not aware of another industry in which such a high cash reserve requirements exists.
- 3. The BICEII Rule imposes an impossible requirement inasmuch as it requires that the Entity be aware of, monitor, and regulate all compensation earned by the advisor from any source. Without exclusively contracted agents, complying with this requirement would effectively require FIs to share their proprietary information or to limit the products available to the agent. This requirement may operate to dictate a business model for Entities that is not required of the FIs under BICE and may limit products and advice available to retirement investors.
- 4. Other requirements of BICE II are arbitrary, are not required for BDs, RIAs, banks and insurance companies under BICE, and do not foster the regulatory purpose of requiring Entities to exercise fiduciary duty in providing advice to retirement investors.
  - a. Section VII(e)(2) of the Proposal requires that Entities annually audit and publicly disclose financial statements. This requirement will drive up costs of doing business in the retirement marketplace, and could make Entities targets of litigation as opposed to privately-held BDs, RIAs, banks and insurance companies whose financial statements may not be accessible to retirement investors. Additionally, this requirement does not provide additional value where an Entity is subject to insurance and/or cash reserve requirements.
  - b. Section II(d)(5) of the Proposal would require "a person designated....as responsible for addressing Material Conflicts of Interest...{who}.....approves, in writing, recommended annuity applications...prior to transmitting the applications to the insurance company". Under BICE, FIs must have compliance procedures that ensure the appropriate exercise of fiduciary duty and a Fiduciary Officer charged with overseeing the compliance program. The same construct should be available to Entities under BICE II without the compulsory requirement of a written approval for each application.



- c. Section II(d)(4) of the Proposal requires the Entity to approve, in advance, all written marketing materials ...after determining that such materials provided a balanced description of the risks and features of the Fixed Annuity Contracts to be recommended.” This requirement is vague in that it does not provide any guidance with respect to meeting the required content standards. Additionally, an Entity’s contractual relationship with an insurance carrier would allocate responsibility for appropriate marketing materials to the carrier. Once an Entity has determined that a carrier’s product meets its standards for promotion, it should not be obligated to undertake an independent review of carrier-produced marketing materials. This requirement to review and approve, in advance, third-party marketing materials is not required for BDs, RIAs, banks or similar financial institutions and insurance companies who are automatically able to qualify as a FI under the BICE.

In creating the proposed class exemption, the Department has improperly assumed that certain characteristics of larger entities that submitted individual exemption applications puts them in a superior position to ensure compliance with the Fiduciary Duty Rule. As noted throughout, requiring a compliance structure and reasonable assurance that an Entity can meet liabilities that may arise from the conduct of a fiduciary business would further the regulatory intent. As stated above, the Proposal’s methods for achieving the regulatory goals are not well designed to meet them. Moreover, the Proposal is in direct conflict with President Trump’s Presidential Memorandum as it negatively impacts the ability of Americans to make independent financial decisions and informed choices in the marketplace, save for retirement, and build individual wealth.

Accordingly, the BICE II Rule should be withdrawn and, if reintroduced, should contain conditions designed to serve the regulatory purpose and be consistent with the principles of the Presidential Memorandum.

Sincerely,



Saybrus Partners, Inc.

BY:

Edward Cassidy

Its’ Managing Principal