



February 17, 2017

Office of Exemption Determinations  
Employee Benefits Security Administration  
Attention: D-11926  
U.S. Department of Labor  
200 Constitution Avenue N.W. Suite 400  
Washington, D.C. 20210

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

The Indexed Annuity Leadership Council (IALC) appreciates the opportunity to comment on the proposed Best Interest Contract Exemption (BICE) for Insurance Intermediaries published on January 19, 2017 in the Federal Register.

The IALC is a consortium of life insurance companies<sup>1</sup> that offer fixed indexed annuities (FIAs). IALC was established in 2011 with a mission to educate the public (including regulators) about the benefits of FIAs, which offer principal protection and a predictable, guaranteed retirement income, and can contribute balance to retirement savers' long-term financial plans. The majority of FIAs offered by IALC members are sold by independent insurance agents who work through independent marketing organizations (IMOs). IALC members, like other insurance companies, frequently contract with IMOs to distribute their products through an IMO's independent insurance agents. These IMOs and their insurance agents typically sell annuity products offered by more than one insurance company.

The lack of a workable exemption for IMOs in the current BICE impairs the ability of IALC member companies to offer FIAs through independent insurance agents to retirement savers using their IRAs and qualified pension assets. This is because under the current BICE only an insurance company can qualify as a financial institution for purposes of offering FIAs through independent insurance agents. The insurance company is required to sign a BICE contract when an independent insurance agent offers retirement advice; however, signing such a contract would expose the insurance company to liability for advice given by an independent insurance agent who offers competing products and over whom the insurance company cannot fully manage the advice that is offered. The new proposed exemption appears to reflect the Department's

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<sup>1</sup> American Equity Investment Life Insurance Company, Midland National Life Insurance Company, National Life Group, North American Company for Life and Health, Life Insurance Company of the Southwest

concurrence that it failed to offer a workable prohibited transaction exemption for the sale of FIAs through independent insurance agents.

The proposed regulation published on April 15, 2015, properly treated all fixed annuities similarly and would have allowed agents selling FIAs to continue relying on PTE 84-24. IALC continues to believe that the revocation of the new definition of “Fiduciary” is appropriate; absent that action, the Department should amend PTE 84-24 to encompass all fixed annuity products. Alternatively, unless and until there is a workable exemption that accommodates the sale of FIAs through independent insurance agents, the Department should extend the compliance date for the new fiduciary rule. As the Department states “(f)ixed indexed annuities, with their blend of limited financial market exposures and minimum guaranteed values, can play an important and beneficial role in retirement preparation...”<sup>2</sup> Yet without corrective action by the Department retirement savers may be unable to receive advice from independent agents to include FIAs as part of a their retirement planning when such advice is in their best interest.

The Department’s basis for singling out FIAs for adverse treatment is without merit. The Department continues to express its concerns that the products may at times be improperly marketed. It continues to support its position by citing staff concerns from the Securities and Exchange Commission (SEC), the Financial Industry Regulatory Authority, and the North American Securities Administrators Association. These concerns are outdated, and in many instances, inaccurate, given the meaningful insurance regulatory actions taken since they were raised, and are from staff and organizations that have no experience regulating annuity products that are not securities. The Department repeatedly references the SEC’s statement that a policyholder could lose money in an FIA. This is simply not true. Loss of principal due to market conditions does not happened with an FIA. A policyholder could be charged a surrender charge if the policyholder terminates the policy early but this is a fee charged for taking certain actions under the policy and is not a loss of principal due to changes in the market. Also as our prior comment letter references, consumer complaints about FIAs are extremely low – in fact well below the levels of complaints on products that these entities regulate.<sup>3</sup> Thus, the concern that FIAs may be improperly marketed is without any basis in fact and is contrary to more recent data.

The proposal poses a number of questions regarding the structure of fixed index annuities. For example, there are questions regarding caps, spreads, and participation rates. We have met with the Department in the past and described these product features to them; much of that information is responsive to the questions posed in the proposed exemption. Each of these features is part of the insurance contract approved by a state insurance department. Like any feature of an annuity or life insurance policy, they are features described by a state licensed insurance agent to those purchasing an FIA in compliance with state insurance sales practice requirements. They are also described in detail in marketing materials that must comply with state insurance requirements. In addition, the National Association of Insurance Commissioners (NAIC) has a consumer guide that describes many of these features.<sup>4</sup> As we have offered in the

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<sup>2</sup> At 7344

<sup>3</sup> Footnote letter

<sup>4</sup> [http://www.naic.org/documents/prod\\_serv\\_consumer\\_anb\\_la.pdf](http://www.naic.org/documents/prod_serv_consumer_anb_la.pdf)

past, we are happy to again meet with the Department to provide additional information and respond to any particular questions about any of these product features.

We believe that the NAIC and state insurance regulators who must approve FIA terms and which regulate sales practices have strong and robust consumer protections in place. Congress has evidenced its trust in the strength of such regulation when it adopted the so-called “Harkin Amendment,”<sup>5</sup> which reaffirms the state regulatory role over FIAs. That provision of federal law incorporates by reference state suitability standards established by the NAIC and relies on state monitoring of compliance with such standards.

The IALC believes that the proposed BICE Exemption for Insurance Intermediaries is too narrow in scope and imposes unworkable conditions. For example, the requirement that an IMO maintain specific levels of capital reserves or fiduciary liability insurance (with specific terms identified in the exemption) would make qualifying nearly impossible. We are unaware of any such insurance in the marketplace today, and given the Department’s stated intention to force concentration in the industry (discussed below), it is unlikely to be made available in the market. Also, it proposes to establish a requirement that an IMO average more than \$1.5 billion of fixed annuity sales over a three year period to qualify for the exemption. This would require the IMO to hold, at a minimum, capital reserves of \$15 million if it is unable to obtain insurance as discussed above. Capital requirements of this magnitude do not exist for broker/dealers or state or federally registered investment advisors, which qualify as financial institutions. For example, under BICE, any broker/dealer is eligible for financial institution status and the minimum net capital they are required to maintain may be as little as \$5,000.<sup>6</sup> Thus, to act as a Financial Institution, an IMO would need 3000 times more capital than a broker/dealer. With these types of requirements only a small number of IMOs would satisfy the exemption. And perhaps most importantly, these conditions could create the very situation that the Department states it is trying to avoid – an IMO close to falling below the minimum sales threshold would be incented by the Department’s own rule to increase fixed annuity sales creating a financial incentive to act in ways other than in a saver’s best interest.

The IALC also notes that the proposed exemption extends the Department’s reach into the role of regulating insurance and insurance practices that far exceeds its traditional role as a regulator of qualified retirement plans. For example, it would require independent insurance agents who are licensed and regulated by state insurance departments to undergo specific training regarding ERISA, the tax code, and ethical conduct. The preamble to the proposed regulation acknowledges that such training would exceed that which would likely be covered by state insurance requirements.

Similarly, the preamble suggests that one likely consequence of the proposed exemption would be the acquisition of smaller IMOs by larger ones, resulting in a smaller number of large IMOs. It suggests this outcome would be beneficial and create efficiencies. This outcome would certainly not be beneficial to the thousands of individuals employed by those small business IMOs that will be put out of business by the proposed exemption. The IALC believes that the market and especially retirement savers would best be served by a larger number of competing

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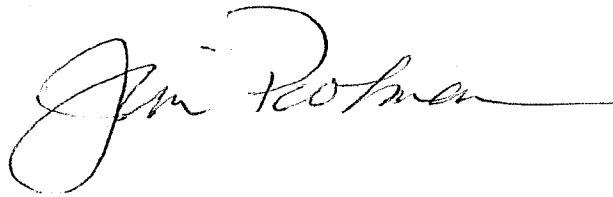
<sup>5</sup> Section 989J of the Wall Street Reform and Consumer Protection Act, Pub. L. No. 11-203, 124 Stat. 1376 (2010).

<sup>6</sup> See SEA Rule 15c-1

IMOs, not an artificial concentration caused by a Department exemption intended to avoid conflicted retirement financial advice.

In conclusion, the IALC concurs with the Department's efforts to ensure that retirement savers receive financial advice that is in their best interest. We hope that the Department will help achieve this objective by taking swift action to ensure that advisors, and especially independent insurance agents, can continue to recommend FIAs to their clients when such an option is in their best interest. We urge the Department to act to make certain that appropriate exemptions to protect retirement savers are put into place.

Sincerely,

A handwritten signature in black ink, appearing to read "Jim Poolman". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Jim Poolman, Executive Director