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February 21, 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:

We respectfully submit our comments on the Department of Labor's ("Department") Proposed Best Interest Contract Exemption for Insurance Intermediaries [1] (the "Proposal"). If granted, the Proposal will allow certain "insurance intermediaries," insurance companies and insurance agents to receive compensation in connection with fixed annuity transactions that may otherwise be a prohibited transaction under the Employee Retirement Income Security Act of 1974 ("ERISA") and the Internal Revenue Code ("Code"). Given the significance of the Proposal for many independent marketing organizations ("IMOs"), insurance companies, and thousands of independent insurance agents and the impact it may have on their ability to continue to offer fixed annuity products to their clients, we very much appreciate the opportunity to share our thoughts with you.

About the Commenters

This letter is being submitted on behalf of the entities listed on Schedule A to this letter. They are a diverse group involved in the sale of fixed annuity products, including IMOs and others of varied sizes and business structures.

Seven of the eight entities listed on Schedule A have submitted applications for an individual exemption to be treated as an insurance intermediary financial institution under the Department's Best Interest Contract Exemption (the "BIC Exemption") after which the Proposal is modeled. The remaining entity has not submitted an application but is keenly interested in the future of the Proposal.

[1] 82 Fed. Reg. 7336 (Jan. 19, 2017)

Overview

The following summarizes our comments and concerns:

1. The $1.5 billion sales threshold is not the proper standard for measuring the ability of an entity to fulfill the requirements of the Proposal. We also submit that, if such a threshold is retained, the dollar amount should be significantly reduced in light of the fact that fewer than 5% of all IMOs can meet this threshold.

2. The 1% fiduciary liability insurance or liquid net worth requirement is inappropriately high and should be reduced.

3. The requirement to publish audited financial statements is inappropriate and should not be required. The Department should consider substituting a compliance audit (similar to that provided for in ERISA Section 408(g)(5)) for a financial statement audit.

4. The final exemption must not include any disclosure requirements, including fixed indexed annuity contract illustrations, which are inconsistent with state insurance laws. Not only would such requirements not be necessary but it would not be possible for insurance intermediary financial institutions to comply with the requirements.

5. The failure to require exclusivity in the contracts between financial institutions and agents will obligate an insurance intermediary to obtain information from the agents working with it. We suggest that this concept be included in the exemption itself (rather than only in the preamble) and that it be explicitly stated that entities may rely on the information provided without independent verification.

6. Review of marketing materials by the insurance intermediary should not be required because the Department's objective is already addressed by the condition of the Proposal that statements made to clients not be misleading and by state insurance laws prohibiting false or misleading statements in insurance product transactions. Further, any product specific documents used by an agent in the sales process would have been reviewed and approved by the insurance carrier as required by state insurance regulations. However, if the requirement is retained, we request that the Department provide clarification regarding the "marketing materials" that a financial institution is required to review and provide a separate transition period for completing this review.

7. The annual ERISA training requirement should not be imposed on insurance intermediaries as there is no similar requirement imposed on other financial institutions under the BIC Exemption. However, if the requirement is retained, we request that the Department clarify the requirement for annual training, including specificity of who would qualify as an "expert" in ERISA matters and how the training must be delivered.

8. We submit that sales of life insurance should be added as a product that may be sold pursuant to the exemption.

9. We anticipate that the applicability date of the fiduciary advice regulation and the Best Interest Contract Exemption will be extended from April 10, 2017. Accordingly, we submit that the transition period under the Proposal should be extended to at least 12 months after the new applicability date for the regulation.

Recommendations for Modifications to the Proposal

Premium Threshold of $1.5 Billion

Section VIII(e)(4) of the Proposal requires the Financial Institution to have transacted annual premium sales of fixed annuity products averaging at least $1.5 billion over each of the last three prior fiscal years.[2] The Department noted that it has "tentatively concluded that the premium threshold is a better indicator that an intermediary can serve" the fiduciary functions required by the exemption.[3]

In response to the Department's request for comment on alternative approaches, we respectfully disagree with the conclusion that a focus on premium levels is an effective measure of compliance. While we applaud the Department in attempting to find a metric that will ensure an entity's ability to comply with the supervision requirements of the exemption, we submit that there are two serious detriments to using the proposed premium threshold:

- First, we submit that it is the wrong standard to apply in determining whether an insurance intermediary is capable of providing the supervision of agents required by the Proposal. It is not an accurate measure of an entity's internal capability to comply with the Proposal.

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[2] 82 Fed. Reg. at 7372.

[3] Id. at 7348. This position seems to be inconsistent with the concept suggested by the Department in the *FAQs about Conflict of Interest Rules and Exemptions, Part I,* FAQs 22 and 23, which suggest that an entity serving as a financial institution could contract with other entities for compliance work. Id. at 7341. If an entity that does not meet the sales threshold is capable of providing the compliance required by the Proposal, what is the relevance of the sales threshold?

- Second, if such a threshold is retained, we submit that it is too high and has the effect of inappropriately narrowing the field of entities that may serve as a financial institution in selling fixed annuity products, since only a relatively small number of entities meet the threshold.[4]

An entity's overall ability to sell a specified level of product does not necessarily mean it has the capability to meet the supervision and compliance requirements of the Proposal. Inasmuch as the exemption is conditioned on compliance with the Impartial Conduct Standards, which require the establishment of policies, procedures and supervision to ensure compliance by the financial institution and independent agents, it remains our view that a sales threshold is not required or appropriate. If an entity seeking to rely on the exemption fails to meet the compliance requirements of the exemption, the fact that it has significant sales volume will not change the result. And if an entity meets the compliance requirements of the exemption, the fact that it has significant sales volume will not change that result either. Smaller entities may be just as well equipped to adequately supervise fixed annuity product transactions, and there are other metrics to demonstrate an entity's capability to provide the requisite oversight that should be evaluated.

For example, a number of the applicants indicated that they had a history of regulatory supervision and compliance because of their affiliation with entities such as broker-dealers and registered investment advisers. Both of the latter entities may serve as financial institutions under the BIC Exemption without meeting a sales threshold. In addition, some IMOs have many years of experience with providing compliance and supervision duties delegated to them by insurance carriers. These delegated responsibilities have included suitability review, agent training, monitoring and supervision, and review of advertising materials. This history of compliance through affiliation with a securities-licensed entity and/or experience in providing compliance services to insurance carriers, more than sales, in our view demonstrates the ability of these institutions to meet the requirements of the Proposal. Various applicants went to great lengths in their applications to demonstrate their efforts in developing systems, procedures and training to ensure compliance by independent agents. To suggest that these concentrated efforts that are focused on compliance are not equal to a large volume of sales seems inappropriate in our view.

In proposing this requirement for the definition of "Financial Institution," the Department noted its intention that only insurance intermediaries "with the financial stability and operational capacity to implement the anti-conflict policies and procedures required by the exemption" that are "sufficiently large and established to stand behind their

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[4] *See, e.g.,* Tuohy, Cyril, *FIA Distribution Could Turn into 'Monopoly'*, insurancenewsnet.com (February 10, 2017).

contractual and other commitments to Retirement Investors, and to police conflicts of interest."[5] The Department also noted that the premium threshold, specifically, aims "to ensure that the insurance intermediary is in a position to meaningfully mitigate compensation conflicts across products and insurers, which is a critical safeguard of the exemption, as proposed."[6] As alternatives to a premium threshold metric, the other metrics discussed above satisfy the policy considerations to ensure that the interests of Retirement Investors are protected.

While we disagree with the premium threshold as a metric for compliance, if a premium threshold is retained as part of the final class exemption, we respectfully submit that the dollar amount is unrealistically high and that it should be substantially reduced to take into account a more realistic view of the IMO marketplace. In this respect, we suggest that the Department survey the market to determine the average annual sales of all IMOs and use that as a threshold if a dollar amount is considered necessary at all. As noted earlier, however, we submit that more relevant factors should replace the sales threshold, such as management experience and tenure, years in business, staffing, current systems and processes, and the entity's history of performing key compliance functions such as supervising suitability reviews and managing independent agents.

A premium threshold, especially at the level set in the Proposal, inappropriately narrows the field of organizations that would be able to continue to participate in the marketplace and discourages competition. There are approximately 350 independent and field marketing organizations operating nationwide.[7] The Department has noted that, at most, an estimated 19 IMOs would meet the threshold and could qualify for the exemption under the Proposal.[8] It is our understanding that this estimate is too high and that the number is actually less than half of that number.[9] In formulating the $1.5 billion threshold value, the Department only cited to the premium threshold levels of four IMOs.[10] Recognizing the significant size of the threshold value, the Department noted that the $1.5 billion threshold "may accelerate mergers and acquisitions among IMOs."[11] We submit that using the Proposal to foster such business combinations is inappropriate and does not serve the interests of the consumers that the Proposal is designed to assist. For example, this could narrow the range of products available to consumers, since the remaining entities might not have contracts with all of the relevant insurance carriers.

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[5] Id at 7345.
[6] Id. at 7347.
[7] Warren S. Hersch, *IMOs to DOL: Fiduciary rule class exemption sets too high bar*, LifeHealthPRO (Jan. 24, 2017) http://www.lifehealthpro.com/2017/01/24/imos-to-dol-fiduciary-rule-class-exemption-sets-to
[8] 82 Fed. Reg. at 7361 n. 92.
[9] Indeed, one estimate is that the number is about 25% of the Department's estimated number of entities.
[10] Id. at 7630 n. 82 and n. 85 citing fixed indexed annuity sales of Advisors Excel, Annexus, InForce Solutions, and Futurity First Financial.
[11] Id. at 7360.

The threshold requirement would put many small IMOs out of business or require them to alter their business organization entirely, seeking out affiliations with larger entities and losing some of the independence and flexibility afforded to small businesses that serves as a protection for Retirement Investors. The direct consequence would narrow the field and concentrate access to fixed annuity products to less than 5% of the current provider population, reducing competition and potentially incentivizing limitations on the available fixed annuity products that could prove harmful to Retirement Investors, just the opposite of the Department's goal.

In addition, a number of applicants for the insurance intermediary exemption indicated that they intended to form new special purpose entities that would focus exclusively on compliance with the BIC Exemption. The stated purpose of forming these entities was to ensure that they were not burdened with or distracted by other compliance requirements but could instead make certain that they were in a position to comply with the supervision requirements of the BIC Exemption (which have been transported into the Proposal). This distinct and unfettered focus on compliance would ensure that the interests of consumers were protected and that both the entity and the agents who worked with it met their fiduciary duties and adhered to the Impartial Conduct Standards. The $1.5 billion threshold would likely prevent such new entities, dedicated exclusively to compliance with the Best Interest standard, from serving as financial institutions. We submit that this is contrary to the intent of the BIC Exemption and the Proposal and does a disservice to the interests of consumers.

The three-year look back period for establishing premium sales may also preclude the Financial Institution from setting up a "special purpose" entity to serve as the Financial Institution that would exclusively focus on the supervision of insurance agents, fixed annuity product sales and compliance with the Proposal. As discussed above, we view such a special purpose entity as an enhanced protection to Retirement Investors because the entity ensuring compliance with the Proposal directs its undivided attention to ensuring that fixed annuity product sales are in the Best Interest of the Retirement Investor. This special purpose entity would not be able to comply with the three-year look back period because it would be newly formed. Furthermore, it would not be able to comply with the premium sales threshold for the same reason. While it may be affiliated with other entities, they may not have the types of sales that would meet the requirements of the Proposal. Accordingly, if the sales threshold is retained, we recommend that sales of other types of products (other than fixed annuities) be included and that sales by affiliated entities that may not be insurance licensed be included.

The sales threshold as currently contemplated raises another issue. What happens if an entity that qualifies as an insurance intermediary financial institution under the definition in the Proposal has a fall-off in sales at a future date? As we read the Proposal, the three year look back is a rolling period that must be met continuously for the exemption to be

available. But if an entity has a significant reduction in sales in a future year, it will no longer be able to service the clients who relied on that entity initially.

The stated rationale for the sales threshold is to demonstrate that the entity has the ability to serve as a financial institution under the exemption. While we disagree with this premise, we submit that once an entity has achieved the sales threshold and thus shown its ability to fulfill the conditions of the exemption, the sales threshold should no longer be needed. That is, a reduction in product sales would not seem to indicate that the entity has lost the ability to supervise agents or otherwise meet the requirements of the exemption. Similarly, a reduction in product sales should not penalize the entity from being able to continue in business under the exemption or penalize its clients who have relied on the entity in the past. For this reason, we submit that to the extent a sales threshold is required, it should be a one-time condition that must be met at the time the entity first begins to rely on the exemption. It should not be a rolling requirement that must be met on a continuous basis.

One last thought: The $1.5 billion sales threshold for the IMO side of the business to be able to stay in business could result in an inappropriate incentive that would encourage the entity to drive sales to the IMO rather than looking at a Retirement Investor's needs and putting assets into other products. For example, consider the situation where an IMO is affiliated with an RIA. The affiliation is designed to permit an entity to offer fixed annuities where appropriate for the client or to offer advisory services on securities products when that is more appropriate. But if the entity is forced to meet a sales goal each year in order to continue in business as an insurance intermediary, it may steer clients away from its affiliated RIA to the detriment of its customers.

For all of these reasons, we urge that the $1.5 billion sales threshold be eliminated. If it is retained, it should be significantly reduced. Further, it should be calculated with respect to product sales other than fixed annuities and sales by non-insurance licensed affiliated entities, not solely with respect to a single, existing entity. We submit that it is inconsistent with Department's stated goal of protecting Retirement Investors to disallow the creation of special-purpose affiliated entities to act as the financial institution. By permitting the calculation based on affiliated entities, insurance intermediaries can utilize dedicated entities that focus on the specific compliance and consumer protection issues presented by the exemption.

Fiduciary Liability Insurance Standard

Section VIII(e)(3) of the Proposal requires the Financial Institution to maintain either fiduciary liability insurance or liquid cash reserves of at least 1% of the average annual premiums on the sale of fixed annuity products over its prior three fiscal years.[12] The

[12] Id. at 7372.

Department noted its views that "basing the insurance coverage or reserve requirement on premiums…as the most efficient way to ensure that Financial Institutions have sufficient financial resources to satisfy any potential liabilities."[13]

We disagree with this premise and further submit that the 1% of premiums requirement is too high. This is especially true since, as we understand it, there is no product currently available in the insurance market that would provide the insurance coverage specified in the Proposal. This means that IMOs seeking to rely on the exemption would be forced to set aside liquid assets equal to 1% of their annual premiums. If the $1.5 billion sales threshold is retained, this would mean that the unencumbered cash, bonds, CDs or government bonds they would have to set aside would equal $15.0 million dollars. We submit that this amount is too high for both the insurance and the liquid net worth requirement.

Given the fact that the margins on which IMOs operate are relatively slim, the 1% requirement would heavily impact their net revenues just to satisfy this requirement. As with the $1.5 billion sales threshold, this would place an inappropriately high and heavy burden on IMOs. It would necessitate sequestering resources that the Financial Institution could otherwise funnel toward compliance and the internal structures necessary to comply with the exemption.

In addition, we submit that the coverage being mandated in the Proposal is unnecessary for the protection of consumers. Even if the consumer is able to demonstrate that the purchase of the annuity was not in his or her Best Interest, the consumer will not experience a total loss of invested principal unless the insurance carrier which issued the annuity goes out of business.[14] The consumer will have suffered a loss, but we submit that the loss is not of the magnitude apparently contemplated by the Department.

For this reason, we submit that tying the insurance or liquidity requirement to premiums is inappropriate because the premiums, which are paid to the carrier, have not been lost. We suggest, instead, that the Department look to another standard such as a percentage of net commissions on sales of products to Retirement Investors under the exemption. We believe this would be more reflective of the potential liability exposure of the entity.[15]

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[13] Id. at 7359.

[14] Even in that circumstance, a total loss of principal is unlikely since state guaranty associations provide protection ranging from $100,000 to $500,000. *See,* http://www.nafa.com/wp/wp-content/uploads/2012/07/State-Guaranty-Fund-Directory.pdf

[15] If the entity were to fail to meet the conditions of the exemption by failing to act in the Best Interest of the client, it would engage in a prohibited transaction. Presumably, the "amount involved" in the prohibited transaction would be the compensation the Financial Institution received, *i.e.,* the commissions received in the transaction.

A sliding scale of coverage is doubtless appropriate, since the more sales a financial institution has, the greater its potential liability exposure. That said, we submit that the 1% requirement should be eliminated and that the exemption specify a "reasonable" level of coverage. If that concept is not acceptable, we urge that the 1% threshold of premiums be eliminated and that a different standard – such as a realistic percentage of net commissions on products sold under the exemption – that does not financially impair the entity, should be substituted. We note that a lowering of the insurance or liquidity requirement would be consistent with the treatment of broker-dealers (which are treated as financial institutions under the BIC Exemption without the imposition of this type of requirement) that do not custody client assets. The capital requirements for such broker-dealers is very low, and they are not required to maintain liability insurance under the BIC Exemption. IMOs also do not custody client assets – the premiums are paid to the insurance carrier that issues the annuity – and we submit that they should be accorded similar treatment to broker-dealers.

We also submit that if a net worth requirement is retained, the type of assets that satisfy the requirement not be specified. That is, a financial institution should not be required to maintain capital consisting of essentially cash. Instead, if under generally accepted accounting principles, the entity has a net worth meeting the percentage amount requirement of the exemption, that should be sufficient.

Public Disclosure of Audited Financial Statements

Section VIII(e)(2) of the Proposal requires the Financial Institution to conduct an annual audit of its financial statements.[16] Additionally, section III(b) of the Proposal requires the Financial Institution to publish its most recently audited financial statements to its website.[17] The Department notes that the requirement of annual audited financial statements coupled with their disclosure "would provide reasonable assurance of the entity's financial health" and "will provide an opportunity for the Department and other interested persons to be alerted to any financial weaknesses or other items of concern with respect to the stability or solvency of the Financial Institution, or its ability to stand behind its commitments to Retirement Investors."[18] As an alternative the Department considered the suggestion of an audit of the intermediary's internal controls and procedures, similar to the SSAE 16 (formerly SAS 70) required of banks and other financial institutions.[19] The Department decided against this alternative but requested

[16] Id. at 7372.
[17] Id. at 7369.
[18] Id. at 7346.
[19] Id. at 7346.

comments on the "utility of the proposed audited financial statements requirement …[and]…suggested alternative audit of internal controls and procedures."[20]

We respectfully object to the public disclosure of the annually audited financial statements. Most IMOs are non-public entities and distributing financial statements freely to the public on a website would risk disclosure of sensitive corporate information the private company is not otherwise required to make public. Furthermore, the requirement of audited financial statements is a problem for newly formed "special purpose" entities, discussed above. We agree that the Department has an interest in ensuring that Financial Institutions seeking relief under the Proposal are financially stable and will be able to meet their commitments to Retirement Investors.

We submit that the concern could be assuaged in one of two ways. One possibility is for the financial institution to provide financial statements to the Department on a confidential basis on request (but not more frequently than annually). Another is for the entity to obtain a certification from an accounting firm that it is a "going concern." A third is to adopt an alternative approach under which the financial institution would obtain a compliance audit (similar to that required under ERISA Section 408(g)(5)) with respect to the entity's compliance with the requirements of the exemption. This audit could be published on the entity's website, which we submit, would provide greater assurance to Retirement Investors that it is acting in their Best Interest and in a manner consistent with the requirements of the exemption.

As noted previously, an insurance intermediary is the facilitator of the fixed annuity product sale. Once the sale is completed, the Retirement Investor's assets are backed by the insurance company that issued the annuity contract. We submit that this means the IMO only needs to ensure that the recommendation and the process by which the fixed annuity product is sold complies with the Proposal and is in the Best Interest of the Retirement Investor and would not be required to stand behind the annuity contract itself. Just because an entity has adequate capital to operate as reflected by its financial statements does not necessarily mean that the internal policies and procedures are adequate or that it will comply with and ensure that agents working through it comply with the requirements of the exemption. A compliance audit to ensure that the Financial Institution is meeting the requirements of the Proposal would more closely satisfy the Department's overall interest in ensuring that the Financial Institution adequately protects Retirement Investor interests from conflicts of interest.

We respectfully disagree with the Department's comparison of such an audit to the SSAE 16 report required of banks and trust companies and with the Department's conclusion that it would require cooperation with the accounting industry to formulate the

[20] Id. at 7346.

appropriate data points for an internal controls audit.[21] This kind of compliance audit has already been approved as an adequate protective measure in ERISA Section 408(g) and the regulations thereunder. Requiring a similar independent internal audit of the Financial Institution's compliance with the Proposal here would not require additional input; it would simply transfer the knowledge already gained from 408(g) audits to compliance with the Proposal.

Proposed Disclosure Requirements – Fixed Indexed Annuity Contract Illustrations

Section III of the Proposal requires Financial Institutions to provide Retirement Investors with an annuity-specific disclosure that would apply to all fixed annuity product transactions.[22] In the preamble to the Proposal, the Department requested comments on whether, specifically for fixed indexed annuity contracts, this disclosure should include an illustration "designed to convey the difference between the performance of the applicable index or indices and the amount credited to the customer's annuity, in light of the indexing features such as the participation rate; any spread, margin or asset fees; interest rate caps or floors; and the recognition of dividends."[23]

Insurance companies already require annuity disclosure documents to be completed and signed by the consumer and agent at the time of solicitation for all fixed annuity sales. Further, most states require the agent to provide a NAIC Annuity Buyers Guide at the time of solicitation. Both documents are designed to provide the consumer with detailed and unbiased information so that they may make an informed decision regarding the purchase. If the Proposal were to require an illustration, this could conflict with the NAIC Annuity Disclosure Model Regulation and the NAIC Annuity Illustration Model Regulation. More importantly, if a Financial Institution created such materials specific to an annuity product, those materials would need to be approved by the insurance company prior to use by the agent. As such materials would violate state insurance regulations, most, if not all insurance companies would not approve them. In other words, it may be impossible for financial institutions and agents to fulfill such a requirement.

There is another reason why the requirement of an illustration included in fixed indexed annuity disclosures is unworkable. A number of state insurance regulators prohibit providing illustrations for products linked to an index if the index has been in existence for less than 10 years. This requirement would effectively foreclose sales of fixed indexed annuity products with timelines of less than 10 years under this Proposal in many key states.

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[21] *See* Id. at 7346.
[22] Id. at 7368.
[23] Id. at 7352.

Accordingly, we recommend the Department not require any disclosures, including an illustration, other than as specified under state insurance laws.

Supervision without Exclusivity

Section II(d)(3) of the Proposal requires Financial Institutions to implement policies and procedures that "prohibit the use of quotas, appraisals, or performance or personnel actions, bonuses, contests, special awards, differential compensation, or other actions or incentives if they are intended or would reasonably be expected to cause Advisers to make recommendations that are not in the best interest of the Retirement Investor."[24] The Department goes on to explain that this requirement applies "regardless of the source of the incentive" and that although it does not require an exclusive relationship with the insurance agent, the Financial Institution is nonetheless responsible for implementing these policies and procedures across all sources of income and incentive arrangements for insurance agents.[25]

We note that the Department has indicated that it is not requiring that the contracts between insurance intermediary financial institutions and insurance agents be exclusive (though presumably an entity could require exclusivity as a matter of practice). The Department suggests that, in the absence of exclusivity, Financial Institutions could require an insurance agent to provide an accounting of all of the compensation and incentives provided in the context of fixed annuity product sales.[26]

We are concerned that this may prove to be a difficult requirement for financial institutions to police. For that reason, we recommend that this approach be spelled out in the exemption itself and that the exemption indicate that a financial institution may rely on the representations made by an agent without a duty to independently verify the information unless it has reason to suspect that the information is not accurate.

Review of Marketing Materials

In Section II(d)(4) the Proposal requires the Financial Institution to approve all written marketing materials used by insurance agents in fixed annuity product transactions. The Department noted that this requirement meets the Department's objective that those relying on the Proposal will "describe recommended annuity contracts fully and fairly, and that the Retirement Investor must be made aware of aspects of the annuity contract" that could impact future retirement income.[27]

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[24] Id. at 7349.
[25] Id. at 7349-50.
[26] Id. at 7350.
[27] Id. at 7350.

We note that under state insurance laws, entities and agents that sell insurance products are already required to meet general advertising law requirements against false or misleading statements, which aligns with one of the conditions of the Proposal that statements made to clients not be misleading. We submit that these requirements should be sufficient without imposing an additional requirement on insurance intermediaries to perform and document an additional step.

We suggest that to the extent the Proposal contains any requirement regarding marketing materials, it be limited to those that fit within the NAIC definition of advertising. The NAIC defines advertising as material designed to create public interest in life insurance or annuities or in an insurer, or in an insurance producer; or to induce the public to purchase, increase, modify, reinstate, borrow on, surrender, replace or retain a policy. We note that most materials are already subject to approval by insurance carriers, and this should be sufficient for purposes of compliance with the exemption.

Assuming the requirement to review agent marketing materials is retained, we suggest that a special 180 day transition period be added to the proposal. During this period, financial institutions will still be subject to non-misleading statements requirement, but will have time to obtain, review and document their review of materials used by agents.

Finally, we also suggest that financial institutions be able to rely on a certification from agents that the materials they have submitted for review are the only materials used by the agent when working with that financial institution, unless the entity has reason to or becomes aware that the certification is untrue.

Annual ERISA Training Requirement

Section II(d)(8) of the Proposal requires Financial Institutions to "attend annual training on compliance with the exemption, conducted by a person who has appropriate technical training and proficiency with ERISA and the Code."[28] We request that the Department delete this requirement. There is no similar condition imposed on banks, insurance companies, broker-dealers or RIAs that are able to serve as financial institutions under the BIC Exemption. To our knowledge, there is nothing to suggest that such entities inherently have expertise in ERISA matters, yet they are not subject to an annual training requirement in this area of the law but are still permitted to sell products and services to Retirement Investors.

We do not believe such a requirement is appropriate for entities that qualify as financial institutions under the BIC Exemption because, in our experience, the entities that chose to sell products and services to Retirement Investors are professional enough to recognize that they must understand the rules to do so. Likewise, we submit that entities seeking to

[28] Id. at 7350.

sell fixed annuities under the Proposal also have the same level of professionalism and that this requirement is inappropriate. While we do not object to a requirement of annual training, we submit that requiring specialized training by an ERISA "expert" should not be made a condition of the exemption.[29]

If the condition is retained, we request that the Department clarify the type of person or entity that would qualify as the "expert" described in the Proposal.

Life Insurance Should Be Included

We note that although most of the applications only cited fixed indexed annuity products, the Proposal includes fixed annuities in the exemption (despite the fact that an exemption for the sale of such products is available under PTE 84-24). We also note that many IMOs also sell life insurance. We recommend that life insurance transactions be added to the list of transactions granted relief under the Proposal in the same way that fixed annuities may be sold under the exemption. That is, agents should be able to sell life insurance under either PTE 84-24 or under the Proposal once it is finalized.

Extension of the Transition Period

Section IX of the Proposal provides for a transition period from April 10, 2017 to August 18, 2017, during which fewer requirements apply.[30] We understand that the applicability date of the fiduciary advice regulation and the BIC Exemption may be extended. We assume that the transition period referred to in Section IX would also have an extended start date. While we appreciate the Department's recognition of the need for an additional transition period, the requirements of the Proposal will require organization and training, most of which will take longer to put in place. Accordingly, we request that the transition period be extended to a date that is not less than 12 months after the applicability date of the Proposal.

We also submit that if the advice regulation and other exemptions issued in conjunction with the regulation are modified, PTE 84-24 be amended back to its pre-April 2016 provisions and that the sale of fixed annuities (including fixed indexed annuities) but shifted back to PTE 84-24.

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[29] Under the NAIC 2010 Suitability Model Regulation, most states require agents take product-specific training prior to solicitation of fixed annuity sales and at least 4 hours of periodic continuing education training on annuity suitability.

[30] Id. at 7373.

Additional Concerns

Insurance intermediaries that qualify as financial institutions under the Proposal will be subject to numerous requirements to provide supervision and training for independent agents. Those interactions may entail discussions of products included on the financial institution's "platform" and education about the situations in which those products may be prudent to recommend to Retirement Investors. It is unclear whether those discussions would be considered to be investment advice and whether they would make the financial institution a fiduciary for those purposes (as opposed to situations in which the entity is assisting an agent with a sale to a specific client). As a general interpretive matter, because the insurance intermediary class exemption is based on the BIC Exemption, we also request that FAQ and other guidance previously provided regarding the BIC Exemption be deemed applicable to the new insurance intermediary class exemption.

Further, we request that the final exemption clearly state that insurance intermediaries and independent agents are eligible to be independent fiduciaries with financial expertise as described in 29 CFR 2510.3-1(c)(1). This clarification will ensure there is no question that, for example, wholesalers representing insurance carriers can discuss insurance products with independent agents and insurance intermediaries without providing fiduciary advice to those agents and intermediaries.

To the extent possible, we would like to see clarification on these issues in the final exemption, or at least in the preamble to the final exemption.

Conclusion

We would be pleased to discuss any of these proposals with the staff. Please do not hesitate to contact either of us for additional information or clarification.

Respectfully submitted,

Bruce L. Ashton

Bradford Campbell

Exhibit A

Entities on Whose Behalf Comments are Submitted

The Annuity Source, Inc.
Brokers International, Ltd.
C2P Advisory Group, LLC dba Clarity 2 Prosperity
First Income Advisers
Financial Independence Group, LLC
Ideal Producers Group
InsurMark
Legacy Marketing Group, Inc.
Senior Market Sales, Inc.*

* Did not submit an individual exemption application