

February 21, 2017

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

VIA EMAIL: e-oed@dol.gov

Re: Application No. ZRIN 1210-ZA26
Proposed Best Interest Contract Exemption for Insurance Intermediaries

Dear Sir or Madam:

This letter is written on behalf of Asset Marketing Systems Insurance Services, LLC (hereinafter “Asset Marketing”), an Insurance Intermediary (“IMO”) based in San Diego, California. Asset Marketing is hereby providing its comments to the Department of Labor’s (“DOL” or “Department”) Proposed Best Interest Contract Exemption for Insurance Intermediaries (“Proposed Exemption”). This letter focuses on those areas of concern for Asset Marketing and does not provide comment on every issue where the Department is seeking comment.

Company Background

Asset Marketing was founded in 1996 to assist those in retirement or nearing retirement with retirement income planning. Since its inception, the independent insurance producers affiliated with Asset Marketing have placed over \$12 billion of fixed and fixed index annuities from a broad range of insurance companies, have placed over \$425 million of life insurance products, and have placed over \$70 million in long-term care insurance products with consumers throughout the country.

Over the years, Asset Marketing has provided marketing, training, operations, and coaching services to over 12,000 independent insurance professionals, always with the goal of teaching each producer how to serve the client with a best-interest mindset. Many of these professionals who attended Asset Marketing training in the past went on to start their own IMOs in an effort to serve the growing population of people retiring every day.

Today, approximately eighty percent of the producers affiliated with Asset Marketing are licensed to sell both insurance and securities products, and that percentage continues to grow each year. Moreover, Asset Marketing has long encouraged its producers to pursue additional training, certifications and designations, including but not limited to, CFA, CFP, CLU, CLTC, and RICP.

Asset Marketing fully supports the intent of the Department's Fiduciary Rule—to act in the client's best interest when providing advice relating to retirement assets. However, Asset Marketing believes that the Proposed Exemption places significant burdens upon both Asset Marketing and all IMOs such that the Proposed Exemption will reduce choices and limit advice for the very consumers that the Department is seeking to protect.

For the reasons set forth below in this letter, Asset Marketing firmly believes that the Proposed Exemption is not in the best interest of Retirement Investors and urges the Department to delay the applicability date of the existing Rule, to modify this Proposed Exemption, and to propose a new rule that maintains a fiduciary standard but better serves the needs of Retirement Investors.

Ability of Insurers to Change the Terms of the Fixed Indexed Annuity Contracts During the Term of the Contract, and Particularly During the Surrender Period

In its Proposed Exemption, the Department seeks comments on the ability of insurance companies to change the terms of the fixed indexed annuity (“FIA”) contract, and particularly the ability to change the terms during the surrender period. The concerns the Department raise are with the non-guaranteed elements of any given FIA contract.

Although Asset Marketing believes that the concerns the Department raise present a myriad of issues, neither Asset Marketing nor any other IMO has any control over the product changes the Department is suggesting. Those decisions lie solely with each individual insurance carrier and are subject to the regulatory oversight of the state departments of insurance. As such, insurance carriers are best suited to answer the questions raised in this portion of the Proposed Exemption.

Asset Marketing finds it remarkable that this request for comment has arisen in this Proposed Exemption, given that it was not raised (nor is it required of) the Best Interest Contract Exemption (“BIC”) currently in place. In that IMOs have no control over these types of product decisions, Asset Marketing believes that it should not be part of the Proposed Exemption and would best be addressed under the current BIC.

Definition of Financial Institution

Multiple Levels of Intermediaries

Asset Marketing believes it is impractical to have contracts with multiple levels of IMOs under the Proposed Exemption. If an IMO is to serve as the Financial Institution and sign the Contract with the Retirement Investor (“CRI”), then the IMO must also provide the supervision and oversight of each individual adviser who is providing retirement advice with respect to insurance products. The more intermediaries involved in the process, the less likely it is that supervision and oversight will adequately occur.

Given the current size of Asset Marketing and most other IMOs, however, it is important that the Proposed Exemption allow for one or two levels of intermediaries below the IMO acting as the Financial Institution. Asset Marketing, on its own, does not have the annual sales volume

required under the Proposed Exemption and it would be forced to affiliate with another, larger IMO who could serve as the Financial Institution. And as will be discussed in more detail below, Asset Marketing does not believe that the premium threshold of \$1.5 billion is appropriate given the number of IMOs who fail to meet that annual production requirement.

Independent Financial Audit & Posting on Firm Website

Asset Marketing currently has its financial statements audited annually by an independent accounting firm, has done so for several years, and plans to continue this practice for the foreseeable future, even though it is not currently required by any regulatory body to do so. Asset Marketing does not believe, however, that the requirement proposed by the Department for 1) annual audited financial statements, and 2) the publication of such audited financials on a public website is appropriate.

The Department's requirement that a privately held company disclose its financial information to the public at large (the vast majority of whom are not clients of the firm) does not provide any additional protection to Retirement Investors. Rather, the Department's request could actually create an inherent conflict of interest whereby the IMO is focused more acutely on its bottom line so that the audited financials look better rather than focusing on what is in the best interest of the Retirement Investor. Moreover, such publication exposes an IMO's proprietary financial information to competitors and the public without adequate justification.

Furthermore, the Department did not make a similar requirement of other Financial Institutions under the existing Rule. Under the Rule, a single-member Registered Investment Adviser ("RIA") with minimal assets under management is not required to produce audited financial statements or publish those statements online to the public. Yet the Department has defined this entity as a Financial Institution under the Rule, without regard to its financial condition, its operating processes and procedures, and its internal controls.

Asset Marketing would be willing to provide copies of its audited financial statements to the Department, a state department of insurance, or a Retirement Investor upon request within a reasonable time frame.

Asset Marketing believes that the publication of proprietary financial information on a public website will simply create a system of enforcement delegated primarily to plaintiff's attorneys, thereby driving an increase in litigation and ultimately will drive up costs to Retirement Investors due to increased litigation costs for insurance carriers. Similar to current regulatory schemes in insurance and securities, regulation should be carried out by the implementing agency rather than outsourcing enforcement to Retirement Investors or plaintiff's lawyers with a vested financial interest in suing Financial Institutions.

Audit of Internal Controls

Asset Marketing believes that an audit of internal controls would be a welcome addition to the Proposed Exemption. Asset Marketing, along with several smaller IMOs who would not meet

the minimum premium threshold requirement, have good internal controls to train and supervise its independent agents always to have the best interest of the client at the forefront of everything they do. We would welcome the opportunity to showcase our processes and procedures to the Department via an internal control audit.

Asset Marketing believes that publication of compliance and best interest audits would be far more useful to Retirement Investors and the general public than the publication of financial audits. If an IMO knows that their internal controls, policies and procedures, and overall supervision of independent agents will be audited annually, the IMO will surely take the steps necessary to ensure that it is in compliance with all that is required to ensure that a transaction is in the best interest of the Retirement Investor.

Insurance or Assets Set Aside for Potential Liability

Asset Marketing strongly disagrees with the Department's requirement in the Proposed Exemption to establish insurance or to set aside cash or unencumbered assets in an amount equal to one percent (1%) of the average annual sales of Fixed Annuity Contracts to Retirement Investors. This requirement, coupled with the requirement of at least \$1.5 billion in annual sales is a potentially crushing requirement to any IMO seeking to qualify under the Proposed Exemption. An IMO with \$1.5 billion in annual sales would need to carry between \$10 million and \$15 million of insurance and/or set aside unencumbered assets in that amount. Given that this is a low margin business, such a requirement could easily put many IMOs out of business.

Asset Marketing would need to increase its current Errors & Omissions ("E&O") policy coverage limits of \$2 million substantially in order to comply with this requirement, and the increase in premium cost for such a plan will be far greater, if such insurance is even available. This one requirement alone would have a substantial negative impact on the operating results of the company, and could force Asset Marketing out of the business altogether, to the detriment of its owners, its valued employees, and its independent producers.

Over the course of its lifetime, Asset Marketing has never had a claim against its E&O policy on account of the marketing or sale of an insurance product. That alone suggests that the proposed coverage amount is excessive.

Asset Marketing believes that given its history and the litigation history of the FIA industry as a whole, a requirement of the magnitude the Department is requiring is unreasonable, will reduce competition in the industry, and ultimately will reduce the number of choices for the Retirement Investor. If the Department believes that insurance and/or an asset set aside is necessary, then Asset Marketing would suggest the requirement be modified to be a reasonable amount, taking into account a number of factors, including but not limited to sales volume, client profile, claims history, and number of independent agents.

It should also be noted that independent agents are also currently required by most insurance carriers to carry E&O insurance in order to conduct business and that all securities

representatives are required to carry such insurance. Asset Marketing fully supports the requirement by carriers that independent agents carry E&O insurance.

Lastly, it is important to note that no other Financial Institution under the current Rule is required to carry the insurance the Department is requiring of IMOs under the Proposed Exemption. If such a requirement had originally been placed on the class of Financial Institutions as defined in the Rule, the Department would certainly have received a significant number of negative comments on this as it would have a significant negative economic impact on all such Financial Institutions, including those who fully supported the Rule.

Given the short amount of time to comply with such an onerous requirement, it is doubtful that any IMO will be able to obtain the necessary insurance coverage needed in time to comply with the Proposed Exemption. While Asset Marketing has not yet put such a policy out to bid, it has been advised by other IMOs that they have been unable to obtain coverage or that the coverage quoted was significantly higher than existing coverage, and in most cases, cost prohibitive.

Premium Threshold

Asset Marketing believes that the premium threshold of \$1.5 billion from sales of Fixed Annuity Contracts proposed by the Department focuses solely on the wrong metric—sales volume. While we agree that an IMO needs scale and operational capacity, a threshold of this magnitude will force smaller IMOs either to leave the business entirely or partner with other IMOs that do not share the same culture.

At Asset Marketing, our annual sales are currently well below the threshold, so we would be forced to consolidate with another IMO who shares our culture. We have never believed that pushing a specific insurance carrier's product serves the needs of Retirement Investors; rather, we have always strived to be product agnostic and provide a product solution that best fits the needs of a particular client. We currently carry fixed and fixed indexed annuity products from over 25 carriers, representing over 200 product choices.

The premium threshold proposed by the Department might actually create a conflict of interest for the IMOs who are "on the bubble" and wish either to gain or maintain Financial Institution status. Forcing consolidation among IMOs in order to reach the arbitrary \$1.5 billion threshold will not produce the results the Department is seeking to achieve. And given the disruption that such a requirement would create, further examination and consideration of a more workable solution would help the stakeholders in this matter reach a more appropriate and equitable result. If the Department believes that a premium threshold is needed, a much more reasonable number that allows for greater competition should be considered. Asset Marketing believes that a more reasonable number is around \$300 million in annual sales.

Marketing Material Review

Asset Marketing believes the Department needs to provide additional clarification as to what producer marketing materials are required to be reviewed by an IMO, including specifics when it

comes to educational materials as opposed to what constitutes a recommendation. That is of particular concern given the Department's FAQs to the Rule that seem to indicate that a dinner seminar would be considered retirement advice and not an educational event.

Requiring that all marketing material be reviewed is simply not practical, and may even be contrary to the Department's focus on what is in the best interest of the Retirement Investor. The Department's proposal fails to differentiate between types of marketing material and, as a result, imposes an overgeneralized requirement that would be extremely difficult, if not impossible, to implement.

For example, under the Department's proposal, an adviser who sends out fifty dinner seminar invitations to prospective clients would be deemed to have made a recommendation regardless of whether the prospect attended the seminar or disposed of the invitation upon receipt. Given that the adviser has not met the prospect, has no knowledge of the prospect's goals, needs, history, family situation, financial situation, etc., it is difficult to fathom the adviser having made a retirement recommendation to that prospect; however, under the Department's broad approach that is exactly what would have been presumed to have happened. This is nonsensical and places an undue burden on advisers as well as likely deprives Retirement Investors of advice due to the classification of the marketing material as a recommendation. Asset Marketing recommends the Department revisit this requirement under the Proposed Exemption.

Written Approval of Transactions

The requirement in the Proposed Exemption that IMO's approve transactions in writing beginning April 10, 2017 is both arbitrary and discriminatory. None of the other Financial Institutions under the existing Rule or BIC are subject to a similar requirement, and the Proposed Exemption does not provide any clear rationale as to why an IMO should be held to a different standard. This additional requirement adds significant compliance burdens upon IMO's, and with such a late release of the Proposed Exemption, it is impossible for IMO's to put the processes and procedures in place by the deadline. At a minimum, this burden provides sufficient justification to delay the Proposed Exemption to allow full compliance.

Had the Department provided clear and specific direction on the Proposed Exemption requirements earlier, IMO's would have had more of an opportunity to put additional systems in place to comply, resulting in a more controlled rollout. Conversely, a rushed and haphazard implementation of this Proposed Exemption does not serve the needs of the Retirement Investors the Department is seeking to protect. Rather, it will be detrimental to both the Retirement Investors and the advisers seeking to assist them with their retirement needs.

Disclosure Conditions

Asset Marketing believes that the NAIC Annuity Disclosure Model Regulation ("NAIC Regulation") requires appropriate and sufficient information for Retirement Investors with respect to Fixed Annuity contracts.

The NAIC Regulation currently requires a detailed description of the contract features as well as examples of how they apply. *See* NAIC Regulation, Section 5. For example, these requirements include explanations of the elements used to determine any index-based interest, such as participation rates, caps, spreads, and how each of these elements operate.

Asset Marketing believes the disclosures required in the NAIC Regulation provide all of the information Retirement Investors need to make an informed decision as to whether to purchase product Fixed Annuity contract. Given the fact that Fixed Annuity contracts generate a relatively low number of complaints nationwide to state insurance regulators, the current disclosure requirements under state laws appear to be working as intended.

Requiring additional disclosures beyond those prescribed by the NAIC Regulation runs the risk of burying the Retirement Investor with so much disclosure information that it leads to greater confusion than currently exists. Asset Marketing supports leaving any disclosure requirements of this sort to state departments of insurance which maintain regulatory authority over the products and the individuals licensed to sell them.

Finally, it should be noted that IMOs do not have the ability to control which disclosures accompany the products. Product design and the accompanying disclosures are the sole responsibility of the insurance carriers, subject to the legal requirements and approval of each state department of insurance. As with the ability of the carriers to change product terms during the contract period (as discussed above), Asset Marketing believes that this requirement would be better addressed in the BIC than in this Proposed Exemption.

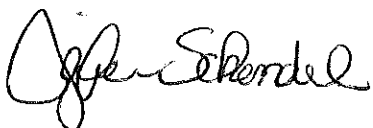
Conclusion

We appreciate the opportunity to comment on this Proposed Exemption. We have attempted to comment on the issues that we believe would have the most significant negative impact on the Retirement Investors by limiting product choice and availability.

The issues we have highlighted in this comment letter are not exhaustive. We believe that there are substantial additional problems and issues which will arise if this Proposed Exemption is implemented in its current form. Accordingly, we strongly urge the Department to consider a delay of the entire Rule to ensure that systems are put into place appropriately to the benefit of the Retirement Investor, whose best interest we so assiduously wish to serve.

Sincerely,

ASSET MARKETING SYSTEMS INSURANCE SERVICES, LLC



Jennifer Schendel
President & Chief Executive Officer