

**GRADIENT | INSURANCE BROKERAGE, INC**

August 6, 2020

Hon. Jeanne Klinefelter Wilson  
Acting Assistant Secretary  
Employee Benefits Security Administration  
Office of Exemption Determinations  
U.S. Department of Labor  
200 Constitution Avenue NW  
Room N-1513  
Washington, DC 20210

*Submitted Electronically:* <https://beta.regulations.gov/comment/EBSA-2020-0003-0001>

**Re: Response to Request for Comments on Notification of Proposed Class Exemption Entitled “Improving Investment Advice for Workers and Retirees” (Application No. D-12011) (ZRIN 1210-ZA29) (Docket ID No.: EBSA-2020-0003)**

Dear Acting Assistant Secretary Klinefelter Wilson:

Gradient Insurance Brokerage, Inc. (hereinafter “Gradient”) appreciates the opportunity to comment on the Department of Labor’s (hereinafter “the Department”) notification of proposed class exemption entitled “Improving Investment Advice for Workers and Retirees.”

Gradient recognizes the Department’s purpose behind drafting the proposed rule and creating a new prohibited transaction exemption. It is evident the Department attempted to align the proposed rule with the enhanced standards of care required by other regulatory agencies, like the Securities and Exchange Commission (“SEC”) Regulation Best Interest (“Reg. BI”) and the recent revisions to the National Association of Insurance Commissioner’s (“NAIC”) Suitability in Annuity Transactions Model Regulation (#275). Additionally, the Department’s purpose of creating an enhanced standard of conduct for investment professionals to further protect consumers is commendable.

While Gradient appreciates the Department’s intent behind the proposed rule and new prohibited transaction exemption, we believe the Department must provide clarification on some key issues in order to apply the new regulatory framework to financial services professionals who are insurance agents. Gradient asks that the Department provide further clarification and better align the proposed rule with recent revisions to the NAIC’s Suitability in Annuity Transactions Model Regulation (#275). If the Department does not adequately address these key issues, Gradient believes the proposed rule could cause confusion among insurance agents on their requirements when advising consumers on necessary insurance products. Specifically, and as addressed in further detail herein, the Department’s interpretation of the five-part test and its application to insurance transactions could cause confusion among insurance agents as to whether they are, or are not, providing “investment advice” and must adhere to the requirements of the proposed



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rule. Without further clarification, the Department's proposed rule could also cause confusion among consumers on whether or not they are working with a financial services professional who is acting in a fiduciary capacity.

While Gradient believes the Department must clarify the proposed rule and new prohibited transaction exemption before applying the requirements to insurance agents, Gradient commends the Department for taking a much more practical approach to establishing a new standard of care for financial services professionals compared with previous attempts by the Department. It is apparent that the Department attempted to craft a rule that considered the unique role of insurance agents and the different distribution models that exist in the insurance industry. The Department's proposed rule allows for greater flexibility for insurance agents when educating and informing consumers on insurance products compared to previous iterations of the rule. If the Department moves forward with the proposed rule and the new prohibited transaction exemption, Gradient asks that the Department provide clarification on some provisions that are described in more detail below. Gradient believes that clarification on these issues will serve to reduce confusion among insurance agents and improve the advice that is given to consumers.

### **Overview**

Gradient is an independent marketing organization (IMO) that supports independent financial services professionals in offering fixed annuities and life insurance products. The financial services professionals who partnered with Gradient are collectively licensed to sell insurance in all 50 states. The financial services professionals who work with Gradient are state insurance licensed and many have additional licensure as registered representatives and/or investment adviser representatives.

Gradient provides a wide range of services to independent financial services professionals who advise their clients with respect to fixed annuities and life insurance. The services provided by Gradient are designed to assist financial services professionals in providing advice to their clients regarding the use of fixed annuity and life insurance products as part of a comprehensive retirement strategy. Some of the services Gradient provides independent financial services professionals includes state licensing and insurance carrier contracting; product training and education; regulatory/legislative updates; new business application review and submission; and, marketing services. The services provided by Gradient assist independent financial services professionals in educating and informing clients on fixed annuity and life insurance products and enhances their ability to provide services to their clients that is in the best interest of their clients.

### **Increasing Demand for Financial Services Professionals**

There is an increasing demand in the United States for financial services professionals that can assist consumers that are approaching retirement. The Baby Boomer generation is entering retirement in large numbers and will continue phasing into retirement through



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2030<sup>1</sup>. The generation of Americans that are in retirement, or nearing retirement, face unique challenges to financial and retirement security, including:

- Retirees are living longer and may need to plan for more years in retirement than previous generations<sup>2</sup>;
- A period of historically low interest rates has made it more difficult to generate adequate retirement income in many traditional financial vehicles<sup>3</sup>;
- The high costs of healthcare in retirement, including long-term care costs, can impose a significant burden on individuals and families<sup>4</sup>; and,
- Previous generations were more likely to have defined benefit plans (ex. a pension) rather than defined contribution plans (ex. 401(k)s), which typically provided more certainty on the amount of retirement income that would be paid under the defined benefit plan<sup>5</sup>.

Independent financial services professionals are uniquely positioned to assist consumers with the challenges they face in their financial lives and when they transition into retirement. Independent financial services professionals are not affiliated with a specific financial services firm and are not required to sell a firm's proprietary products. Independent financial services professionals provide services to consumers regarding financial products offered through multiple financial services firms. The freedom that independent financial services professionals have to assist consumers on products with multiple financial services firms allows them to find products that appropriately meet the financial situation, goals/objectives, and risk tolerance of their clients. Ultimately, independent financial services professionals are well-positioned to assist consumers and they play an indispensable role in the financial and retirement landscape.

Many consumers that are approaching retirement age are uncertain about how to transition from accumulating assets during their working years into generating income in retirement. In many instances, retirees have a large percentage of their retirement assets in qualified retirement plan accounts, like 401(k)s and Individual Retirement Accounts (IRAs). According to a recent study conducted by the Insured Retirement Institute (IRI), eight in ten Baby Boomers rated "guaranteed income" and "guarantee of principal" as the two most important traits of a retirement asset<sup>6</sup>. Fixed annuities are products that are well-suited for many retirees that wish to generate retirement income. Fixed annuities typically feature a fixed interest rate and many also have retirement income features. Some fixed annuity or fixed indexed annuity products offer guaranteed lifetime income

<sup>1</sup> <https://www.census.gov/library/stories/2019/12/by-2030-all-baby-boomers-will-be-age-65-or-older.html>

<sup>2</sup> <https://www.cdc.gov/nchs/data/hus/2016/015.pdf>

<sup>3</sup> <https://www.macrotrends.net/2016/10-year-treasury-bond-rate-yield-chart>

<sup>4</sup> <https://www.kff.org/coronavirus-covid-19/issue-brief/rising-cases-in-long-term-care-facilities-are-cause-for-concern/>

<sup>5</sup> <https://www.bls.gov/opub/ted/2018/51-percent-of-private-industry-workers-had-access-to-only-defined-contribution-retirement-plans-march-2018.htm>

<sup>6</sup> [https://www.myirionline.org/docs/default-source/default-document-library/iri\\_babyboomers\\_whitepaper\\_2019\\_final.pdf?sfvrsn=55bc4364\\_0](https://www.myirionline.org/docs/default-source/default-document-library/iri_babyboomers_whitepaper_2019_final.pdf?sfvrsn=55bc4364_0)



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that is designed to provide a certain amount of retirement income for the life of the policyowner and/or their spouse. The guaranteed lifetime income feature of some fixed or fixed annuity products is unique and not available on most other retirement income products. Additionally, fixed annuities are not subject to market risk. Life insurance is also an important part of many retirement strategies. Life insurance offers a unique benefit by providing owners with a death benefit that is typically tax-free to their beneficiaries. Fixed annuities and life insurance are financial products that are an important part of the retirement income plan for many Americans.

Independent financial services professionals play a critical role in assisting consumers with their financial and retirement needs. Also, the use of products, like fixed annuities and life insurance, is of great importance to the financial health of many Americans. While we believe the Department must add clarity to the proposed rule before applying it to insurance agents and insurance transactions, we appreciate the Department drafting a rule that considers the important role of independent financial services professionals in assisting Americans approaching retirement. Additionally, we commend the Department for providing flexibility in the proposed rule compared to previous versions of this rule in that it considers the importance of independent financial services professionals in providing their clients with essential retirement products, like fixed annuities and life insurance.

### Comments

There are several provisions within the proposed rule and the new prohibited transaction exemption that the Department can provide additional clarification on to improve the rule before it is enacted. The Department adding clarification on some provisions within the proposed rule will help to further protect consumers and will provide financial services professionals with additional certainty to ensure that they are meeting their requirements as fiduciaries under the proposed rule. Gradient respectfully requests that the Department consider the following points of clarification prior to the enactment of the proposed rule.

#### Definition of “Financial Institution”

The definition of “financial institution” provided under the Department’s proposed rule specifies the firms that are financial institutions as “registered investment advisers, broker dealers, banks, and insurance companies.” Gradient believes that the definition of “financial institution” provided under the proposed rule is clear and provides the most practical approach for independent financial services professionals who offer fixed annuity and life insurance products to their clients. Gradient believes that the Department should move forward with the definition of “financial institution” under the proposed rule without significant change. Gradient does not believe it would be appropriate for the Department to revise the proposed rule to include intermediaries such as an independent marketing organizations (IMOs), field marketing organizations (FMOs) and brokerage general agencies (BGAs) in the definition of “financial institution.”



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In the proposed rule, the Department states:

*Insurance companies can supervise independent insurance agents and they can also create oversight and compliance systems through contracts with intermediaries such as independent marketing organizations (IMOs), field marketing organizations (FMOs) or brokerage general agencies (BGAs).*

As an IMO, Gradient works directly with many insurance carriers in the fixed annuity and life insurance markets. Gradient has close relationships with insurance carriers and works cooperatively with insurance carriers to ensure that insurance carrier policies/procedures are carried out by independent insurance agents with respect to common functions like suitability review, agent monitoring, advertising review, and product training. Gradient is positioned to work directly with insurance carriers to ensure that the proper oversight and compliance systems are in place under the new rule. Gradient believes that the Department's recognition that insurance companies can cooperate with intermediaries to create a system of oversight and compliance is an appropriate approach given the unique nature of the independent insurance distribution channel system.

In the independent insurance agent market, it is common for financial services professionals to utilize the services of multiple IMOs. This contrasts with registered representatives in the securities industry who only affiliate with a single broker-dealer and that broker-dealer has supervisory authority over their registered representatives. Broker-dealers are in a much better position to exercise supervisory authority over registered representative compared to insurance intermediaries that contract with independent insurance agents. The use of multiple IMOs by independent insurance agents makes it more difficult for an IMO to act as a financial institution with respect to any individual independent insurance agent. An independent insurance agent who is utilizing multiple IMOs makes it unachievable for any single IMO to have a complete understanding of that independent insurance agent's business practices. The use of multiple IMOs by independent insurance agents makes it infeasible for IMOs to act as financial institutions. Gradient believes it is appropriate to move forward with the definition of "financial institution" provided in the proposed rule.

The proposed rule provides a clear definition of "financial institutions" that includes "registered investment advisers, broker dealers, banks, and insurance companies." In many instances under the proposed rule, financial services professionals will fall under the oversight of multiple financial institutions. For example, if a financial services professional is providing advice on plan assets regarding an insurance product, and that financial services professional is also licensed as a registered representative with a broker-dealer, the transaction will fall under the purview of multiple financial institutions including the insurance carrier and the registered representative's broker-dealer. Gradient believes it is unnecessary to include additional firms under the definition of "financial institution" and will cause further confusion among consumers on who they are owed specific duties provided under the rule.



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The proposed rule allows the definition of “financial institution” to expand through individual exemptions for firms that meet the five-part test and wish to act as a financial institution. Gradient asks that the Department provide more clarity on the application process, specifically:

- If a firm, such as an IMO, FMO, or BGA, applies for an individual exemption to act as a financial institution and it is granted the exemption by the Department, will other, similar firms be automatically included in the definition of financial institution and subsequently be required to act as a financial institution? Or, must firms apply for individual exemptions on a firm-by-firm basis? If the Department elects to allow firms to apply for individual exemptions to act as financial institutions, Gradient recommends that the Department not grant exemptions on a broad basis and that the application process for firms wishing to act as financial institutions only be granted on a firm-by-firm basis.

### Prohibited Transaction Exemption (PTE) 84-24

The Department’s proposed rule discusses the availability of PTE 84-24 after the enactment of the rule and the new prohibited transaction exemption. The Department’s proposed rule states:

*Eligible parties can also continue to use relief under the existing exemption for insurance transactions, PTE 84-24, as an alternative.*

Gradient believes that the Department’s acknowledgement that PTE 84-24 is still available as exemptive relief for insurance transactions is appropriate. Allowing insurance transactions to fall under PTE 84-24 will provide greater flexibility for investment professionals acting as insurance agents and advising clients on the use of plan assets in funding annuities that can provide necessary retirement income. Gradient recommends that the Department continue to allow PTE 84-24 to be available regarding insurance transactions, in addition to the new proposed prohibited transaction exemption.

### Definition of “Investment Advice”

The proposed rule reaffirms the five-part test for determining whether an investment professional is rendering investment advice for the purposes of ERISA. Gradient believes that the five-part test does not provide a clear framework for insurance agents to understand when they are providing “investment advice” and will fall within the ambit of the proposed rule. Additionally, the lack of clarity around the five-part test could hinder consumers’ ability to understand when they are receiving advice from a fiduciary under the new prohibited transaction exemption. The proposed rule requires that financial institutions and investment professionals provide a written acknowledgment of their fiduciary status when advising clients. This will present insurance agents with a very difficult dilemma. The insurance agent can assume that they are going to meet the five-part test and provide the consumer with the acknowledgement of fiduciary status beforehand, without knowing for certain whether they will meet the five-part test and fall within the scope of the proposed rule. Alternatively, the insurance agent can presume that they will not meet the five-part test and opt to not provide the consumer with the



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acknowledgment of fiduciary status, even though they may not fully understand the services they will need to provide the consumer in the future. Ultimately, the use of the five-part test by the Department must be clarified with respect to insurance agents providing consumers with services regarding fixed annuity and life insurance products.

A key element of the five-part test is that advice be provided by an investment professional to a retirement investor on a “regular basis”. In the proposed rule, the Department states:

*The Department acknowledges that advice to take a distribution from a Plan and roll over the assets may be an isolated and independent transaction that would fail to meet the regular basis prong.*

Gradient believes that the Department is correct in that the distribution of plan assets may be an isolated and independent transaction that does not give rise to providing advice on a “regular basis” and fails to meet that prong of the five-part test. However, the Department fails to add clarity on the sort of relationship between insurance agents and consumers that may give rise to providing advice on a “regular basis.” For example, many insurance agents meet with their clients periodically (semi-annually, annually, etc.) to review the performance of their insurance product. Additionally, many insurance agents meet with their clients periodically to review features of their product, like their policy allocations and rider features. Based on the proposed rule and the Department’s commentary, it is unclear if common activities by insurance agents, like annual policy reviews, will give rise to a relationship that meets the “regular basis” prong of the five-part test. Gradient believes that the Department should provide more clarity around the “regular basis” prong of the five-part test as it relates to insurance agents, specifically:

- What are the facts and circumstances surrounding the relationship between financial services professionals and clients that would meet the regular basis requirement? For financial services professionals working on a transactional, commission basis (i.e., insurance agents and registered representatives) what activities would cause the advice to meet the regular basis prong? Additional clarity on this issue will help financial services professionals understand when the advice they are giving meets the regular basis requirement of the five-part test and their advice must adhere to the fiduciary obligations under the proposed rule.

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Gradient appreciates the opportunity to provide these comments to the Department and would be happy to discuss them in more detail.

Sincerely,



Chad Roesler, President  
Gradient Insurance Brokerage, Inc.

