

The COMMITTEE
of
ANNUITY
INSURERS

1455 Pennsylvania Avenue NW, Suite 1200, Washington, DC 20004

February 21, 2017

FILED ELECTRONICALLY

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

Re: Proposed Best Interest Contract Exemption for Insurance Intermediaries

We are writing on behalf of the Committee of Annuity Insurers (the “Committee”) in response to the Department of Labor’s (“the Department’s”) proposed Best Interest Contract Exemption for Insurance Intermediaries (“the IMO BICE”). The Committee is a coalition of life insurance companies formed in 1981 to participate in the development of federal policy with respect to annuities. The Committee’s 29 member companies represent more than 80% of the annuity business in the United States and are among the largest issuers of annuity contracts to IRAs and employer-sponsored retirement plans. A list of the Committee’s member companies is attached.

The Department’s proposed IMO BICE attempts to resolve a very significant problem the Department created in the final Fiduciary Rule¹, namely, that the Fiduciary Rule as issued would effectively prohibit the sale of fixed indexed annuities by IMOs to plans or IRAs on or after April 10, 2017, the date when the Fiduciary Rule is scheduled to go into effect.² The Department’s proposed IMO BICE would create a prohibited transaction exemption that is intended to permit the sale of Fixed Annuity Contracts through certain insurance intermediaries, such as independent marketing organizations, field marketing organizations, and brokerage general agencies (collectively referred to herein as “IMOs”).

As described below, the IMO BICE, which is based on the existing BICE, reveals significant gaps in the Fiduciary Rule and does not adequately address the problem the

¹ For purposes of this letter, the term “Fiduciary Rule” refers to 29 C.F.R. § 2510.3-21, as applicable beginning on April 10, 2017, and the new and amended class exemptions released by the Department on April 8, 2016, as corrected by 81 Fed. Reg. 44,773 (July 11, 2016).

² As of the date of this letter, the applicability date has not been delayed.

Department created. As a result, the proposed exemption should be put on hold pending the Department's review of the Fiduciary Rule ordered by President Donald Trump's February 7, 2017 Fiduciary Duty Rule Memorandum.³

I. The proposed IMO BICE demonstrates significant gaps in the Department's Fiduciary Rule.

The final Fiduciary Rule removed fixed indexed annuities from Prohibited Transaction Exemption ("PTE") 84-24 without prior notice and without soliciting public input. The BICE, which is the sole exemption under which fixed indexed annuities can be sold, did not provide a feasible exemption for fixed indexed annuities currently being sold through the independent agent channel.⁴ Had the industry been able to anticipate the removal of fixed indexed annuities from PTE 84-24 when the Department proposed its Fiduciary Rule, the industry could have provided meaningful comments on the problems created by the Department's changes – namely that fixed indexed annuities are commonly sold through an entity that cannot qualify as a Financial Institution. Instead, as the Department recognizes, the Fiduciary Rule will prohibit independent agents from selling fixed indexed annuities to retirement investors if the Fiduciary Rule, as currently constructed, takes effect on April 10, 2017.

The Department overlooked these serious consequences when promulgating its final regulation and the proposed IMO BICE is a haphazard attempt to glaze over this significant deficiency. This gap should not be addressed through a patchwork measure that would add even more conditions and requirements to the already tortuously complex BICE exemption. Rather, the Department should reconsider the treatment of indexed annuities as part of the comprehensive review ordered by the President's Memorandum. Ideally, that review would lead to recommendations that would eliminate the need for a specific IMO exemption altogether.

II. Specific provisions of the proposed IMO BICE raise significant concerns.

While we believe that the Department's comprehensive review of the overall Fiduciary Rule should lead to solutions that will eliminate the need for a specific IMO exemption, we want to identify some of the significant concerns expressed by Committee members regarding specific provisions of the IMO BICE proposal. We want to emphasize, however, that the comment period on this proposed exemption is much too short, particularly when the Committee's member companies and other retirement product providers are actively preparing for the Fiduciary Rule's

³ Fiduciary Duty Rule Memorandum, 82 Fed. Reg. 9675 (Feb. 7, 2017) (the "President's Memorandum").

⁴ The existing BICE conditions relief upon a "Financial Institution" entering into a contract with the purchaser of an annuity and agreeing to accept certain new legal obligations outlined by the exemption. For purposes of the existing BICE, a Financial Institution can only be a bank, broker-dealer, insurance company, registered investment adviser, or any entity that is described as a Financial Institution in an individual exemption granted by the Department. IMOs are not typically organized as one of those enumerated entities and DOL has not yet granted any individual exemptions. This means that insurance intermediaries, like IMOs, cannot serve as a Financial Institution for purposes of the existing BICE and are not eligible for any exemption that would permit the sale of fixed indexed annuities through the independent distribution channel, unless some third-party entity agrees to serve as a Financial Institution.

applicability date. Additional problems will inevitably be identified by all concerned as the proposed exemption is more thoroughly considered.

A. Changing Contract Terms

The preamble to the proposed IMO BICE expresses a vague concern with certain insurance features that allow an insurer to “change critical terms, such as the participation rate, indexing method, cap, or relevant fees and charges,” during a surrender period.⁵ According to the preamble, the Department believes that such features can allow an insurer to affect its own compensation. Although the Department’s rationale for including this language in the preamble to the proposed IMO BICE is not entirely clear, we find a discussion of those issues in the proposed exemption for IMOs to be strikingly out of place. The Department then asks a number of questions that would be much more appropriate for a broad Request for Information.

Issues and concerns affecting the ability of insurers to change the features referenced above, during a surrender period or otherwise, have significant implications for how insurers can design their products. The legal theory behind the assertion that such features allow an insurer to affect its own compensation also has implications for many other products and services. Any discussion of those matters should be reserved for its own separate rulemaking. This discussion should not be floated as an afterthought in the preamble to a proposed PTE that is necessary to correct access and distribution gaps overlooked during the Fiduciary Rule’s promulgation.

B. Sales Threshold

The proposed IMO BICE would condition relief upon an IMO having transacted sales of Fixed Annuity Contracts averaging at least \$1.5 billion in premiums per fiscal year over its prior three fiscal years. We understand that only a small number of IMOs would meet this requirement. This annual sales requirement is much too high and would serve as a significant barrier to entry for any IMO. In fact, it is hard to imagine any condition that would be more harmful to market competition. We recommend this requirement be removed or reduced by a number of orders of magnitude.

C. Proposed Insurance and Capital Requirements

The proposed IMO BICE would condition relief upon an insurance intermediary maintaining fiduciary liability insurance, or unencumbered cash, bonds, bank certificates of deposit, U.S. Treasury Obligations, or a combination of these, available to satisfy potential liability under ERISA or the Code as a result of the firm’s failure to meet the terms of the exemption, or any contract entered into for purposes of satisfying the exemption. The proposed IMO BICE would require such insurance or reserves to equal at least 1% of the average amount of Fixed Annuity Contract premium sales by the IMO over the prior three fiscal years. Given the proposed exemption’s counterpart \$1.5 billion annual sales threshold, this insurance / reserve

⁵ Proposed Best Interest Contract Exemption for Insurance Intermediaries, 82 Fed. Reg. 7336, at 7344 - 45 (January 19, 2017).

requirement means that any entity seeking to rely on the exemption must maintain an insurance policy or reserves covering at least \$15 million (*i.e.*, 1% of \$1.5 billion). In some cases, the insurance / reserve requirement could be considerably larger. For example, one IMO that conducts business with a member of the Committee has indicated that it would be required, based on its sales in recent years, to maintain an insurance policy or reserves covering at least \$25 million.

This insurance / reserve requirement is excessive and inconsistent with analogous requirements for investment advisers and broker-dealers. Advisers registered with the U. S. Securities and Exchange Commission are not subject to any reserve or bonding requirements. In addition, while Rule 15c3-3 under the Securities Exchange Act of 1934 requires broker-dealers to segregate and safeguard customer funds and securities from misuse by the broker-dealer and from the claims of creditors of the broker-dealer, these requirements are less severe than what would be imposed on IMOs pursuant to the proposed IMO BICE.

D. Review of Insurance Applications and Marketing Materials

Among other conditions new to the IMO BICE, the proposed exemption would condition relief upon (a) the IMO approving each recommended annuity application before transmitting such application to the issuing insurance company, and (b) the IMO approving all written marketing materials used by its advisers. Each of these new requirements raises unique concerns.

The requirement to approve each annuity application imposes a burdensome requirement on IMOs that are not imposed on Financial Institutions eligible to rely on the existing BICE. Furthermore, given the array of disclosures, warranties, and other significant conditions already imposed upon IMOs by the proposed IMO BICE, it is unclear whether this additional requirement to approve individual applications would provide any marginal protections for investors.

The requirement to approve marketing materials used by advisers is not clear as drafted. If the proposed IMO BICE were to be adopted, the Department would need to clarify the scope of any materials that must be approved. For example, does it cover materials on specific products used by advisers but provided to them by the insurer? Does it cover general educational materials? Does it cover materials filed and approved by state insurance departments? These questions, among others, would need to be resolved before such a requirement could be satisfied.

III. The proposed IMO BICE should be put on hold until the Fiduciary Rule is thoroughly reviewed and resolved.

The future of the IMO BICE is intricately tied to the future of the Fiduciary Rule, which is set to undergo a thorough review pursuant to the President's Memorandum. In fact, the Department has filed a proposed regulatory amendment with the Office of Management and Budget seeking to delay the applicability date for at least some portions of the Fiduciary Rule. Taken together, those actions create significant uncertainty surrounding the future of the

Fiduciary Rule. In light of this uncertainty, we urge the Department to suspend all efforts to implement the Fiduciary Rule, including the promulgation of an IMO BICE, until the fate of the broader regulation is settled. In the absence of such clarity, discussions aimed at resolving the overall regulation's unintended consequences through additional exemptions are misguided.

Finally, we want to reiterate that the need for a pause is further amplified by the wholly inadequate 30-day comment period accompanying the proposed IMO BICE. A 30-day comment period is much too short for an exemption of this magnitude and complexity. It is unreasonable to expect interested stakeholders to provide meaningful comments on the proposed IMO BICE until the fate of the broader Fiduciary Rule has been resolved following a thorough top-to-bottom review.

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If you have any questions, or if we can be of any assistance in your consideration of the issues summarized above, please do not hesitate to contact either of the undersigned at 202-347-2230.

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Attachment

THE Committee
OF
Annuity Insurers
www.annuity-insurers.org

AIG Life & Retirement, Los Angeles, CA
Allianz Life Insurance Company, Minneapolis, MN
Allstate Financial, Northbrook, IL
Ameriprise Financial, Minneapolis, MN
Athene Annuity & Life Company, Des Moines, IA
AXA Equitable Life Insurance Company, New York, NY
Fidelity Investments Life Insurance Company, Boston, MA
Genworth Financial, Richmond, VA
Global Atlantic Life and Annuity Companies, Southborough, MA
Great American Life Insurance Co., Cincinnati, OH
Guardian Insurance & Annuity Co., Inc., New York, NY
Jackson National Life Insurance Company, Lansing, MI
John Hancock Life Insurance Company, Boston, MA
Life Insurance Company of the Southwest, Dallas, TX
Lincoln Financial Group, Fort Wayne, IN
MassMutual Financial Group, Springfield, MA
Metropolitan Life Insurance Company, New York, NY
Nationwide Life Insurance Companies, Columbus, OH
New York Life Insurance Company, New York, NY
Northwestern Mutual Life Insurance Company, Milwaukee, WI
Ohio National Financial Services, Cincinnati, OH
Pacific Life Insurance Company, Newport Beach, CA
Protective Life Insurance Company, Birmingham, AL
Prudential Insurance Company of America, Newark, NJ
Symetra Financial, Bellevue, WA
The Transamerica companies, Cedar Rapids, IA
TIAA-CREF, New York, NY
USAA Life Insurance Company, San Antonio, TX
Voya Financial, Inc., Atlanta, GA

The Committee of Annuity Insurers was formed in 1981 to participate in the development of federal policies with respect to annuities. The member companies of the Committee represent more than 80% of the annuity business in the United States.