**Brokers**International.

August 4, 2020

Office of Exemption Determinations
U.S. Department of Labor
*Federal eRulemaking Portal:*
*www.regulations.gov*
Docket ID Number: EBSA–2020–0003.

**Re: Improving Investment Advice for Workers & Retirees**
**Proposed Prohibited Transaction Exemption**
**Application No. D-12011**

Ladies and Gentlemen:

Brokers International, Ltd. ("BI") is pleased to have the opportunity to submit comments on the proposed prohibited transaction exemption for Improving Investment advice for Workers and Retirees.

BI is an insurance field marketing organization ("FMO") and has been in the insurance business since 1955, beginning its FMO business in the early 1980s. BI has its principal offices in Urbandale, Iowa. As an FMO, it partners with over 50 unaffiliated insurance companies to distribute and market products for the U.S. fixed indexed annuity and life insurance market. These products are distributed through a network of 50 independently contracted independent marketing organizations ("BI sub-IMO") and approximately 4,500 broker-dealer representatives, registered investment advisers, and independent insurance-only licensed insurance agents. The sub-IMOs are not co-owned with BI, and other than their contractual relationship, are not affiliated with BI.

BI is a national organization and as one of the most significant service providers in the fixed indexed annuity marketplace, BI provides a range of marketing services and access to fixed indexed annuity products that independent insurance agents offer their customers.

We appreciate the steps taken by the Department to clarify that existing exemptions will be available along with the new proposed class exemption. This appears to reflect a recognition by the Department that there are many different business paths to assisting workers and retirees in investing their retirement savings and that a number of different approaches to comply with the requirements of ERISA are appropriate. Nevertheless, as an insurance intermediary, we have certain concerns about portions of the proposal that we submit should be modified in the final exemption.



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**Summary of Comments**

1. In the preamble to the proposal, the Department appears to have departed significantly from its long-standing interpretation of the provisions of the fiduciary advice "five part test," in particular with respect to the "regular basis" portion of the test. We submit that the interpretation that rollover recommendations likely meet the five part test creates uncertainty and could lead to unwarranted claims of fiduciary status for a variety of situations that the Department may not have intended and that would be inappropriate.
2. We are also concerned that this interpretation, expressed in the preamble to a proposed class exemption, could be used to invalidate the entire exemption. The new interpretation appears to be indirect rulemaking in the guise of a prohibited transaction exemption.
3. In particular, the new interpretation could draw insurance intermediaries into fiduciary status and expose them to liability where they are merely providing information to an insurance producer, especially where the agent has no pre-existing and may have no on-going relationship with the client. In effect, this could create an unintended extension of fiduciary status to normal insurance sales.
4. Notwithstanding the foregoing concerns, we do appreciate the multiple exemption paths that the Department appears to be creating with the new exemption. That is, the Department seems to be reaffirming the availability of PTCE 84-24 in appropriate circumstances alongside of the new exemption in those instances where an insurance intermediary does become a fiduciary and must avail itself of the new exemption.
5. We also appreciate the Department's efforts to create uniformity with other "best interest" regulatory efforts, but in the insurance context, this could create new significant burdens for insurance intermediaries who are not involved in the direct line of sales.
6. In those instances where transactions involving insurance intermediaries do result in fiduciary status by intermediaries, we strongly urge the Department to include these entities in the definition of Financial Institution from the outset rather than requiring them to overcome a second obstacle of prosecuting an individual exemption application.
7. At the same time, we submit that the Department should recognize that in most situations, insurance intermediaries will not be fiduciaries under the five-part test and clarify the final exemption appropriately.
8. There are certain areas in which we submit that the exemption should be modified:
    a. We submit that the annual review and CEO certification are requirements that are unnecessary for the proposed exemption to function as intended and that will impose unnecessary burdens on firms already subject to significant regulatory requirements.



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b. Given the uncertainty of whether an insurance intermediary may be considered a fiduciary and thus required to comply with the terms of the exemption, we submit that some companies may undertake to comply even though not required to do so. While we do not object to engaging in conduct that results in a best interest recommendation to a consumer, we are concerned that the requirement to acknowledge fiduciary status in writing could subject firms to unnecessary exposure to liability when they are not, in fact, serving in a fiduciary capacity. Therefore, we urge that the written acknowledgment of fiduciary status requirement be eliminated.

9. Finally, we request that the Department remove the language suggesting that monitoring is required for "unusually complex" or "unusually risky" investments. These terms are not defined, and we doubt the Department wishes to maintain lists of such investments. At a minimum, the Department must clarify whether some insurance products should be considered inherently "complex" so that monitoring is required. If the Department believes that some products do meet the "complex" standard, we request that the Department make clear which products do and which do not meet that standard.

**Discussion**

*Five-Part Test Interpretation*

In the preamble to the proposed exemption, the Department acknowledges that

> "All prongs of the five-part test must be satisfied for the investment advice provider to be a fiduciary within the meaning of the regulatory definition, including the 'regular basis' prong…."

The preamble also states that whether advice satisfies the five-part test, including the regular basis requirement depends on the surrounding facts and circumstances.

With respect to rollovers, the Department also confirms 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."

On the other hand, rollover advice may be part of an ongoing relationship – such as where a financial adviser has been previously been giving advice to a participant regarding investment decisions – which would meet the regular basis requirement. However, the Department seems to depart from long-standing views on the regular basis concept in two important respects: first, by suggesting that the ongoing relationship need not have previously involved advice regarding ERISA plans or IRAs, but merely any financial "instruments;" and second, by suggesting that advice that is part of "an anticipated ongoing relationship" would also meet the five-part test.

As to the first, it is not clear whether the Department would consider an ongoing relationship that had previously involved only sales recommendations of insurance products outside of the ERISA context to meet the "regular basis" test. As to the second, the preamble states:

> "[F]or an investment advice provider who **establishes a new relationship** with a Plan participant and advises a rollover of assets from the Plan to an IRA, the rollover recommendation **may be seen as the first step in an ongoing advice relationship** that could satisfy the regular basis prong of the five-part test depending on the facts and circumstances." [emphasis added]

In footnote 40 in the preamble, the Department adds that

> "… advice by a paid solicitor to take a distribution from a Plan and to roll over assets to an IRA could be part of ongoing advice to a Retirement Investor, if the Financial Institution that pays the solicitor provides ongoing fiduciary advice to the IRA owner."

We submit that the interpretation reflected in the language just quoted is inappropriate for several reasons. First, it can be read as a modification of the fiduciary advice regulation without going through the normal procedural steps required for changing a regulation. The interpretation can be read as essentially doing away with the regular basis requirement given the speculative nature of whether advice is given in anticipation of a long term relationship or not. While it can be debated whether it is appropriate to eliminate the regular basis requirement, we submit that doing so indirectly by way of language in the preamble to a prohibited transaction is not the proper way of going about making the change.

Second, it is unclear whether this interpretation is limited to rollover advice – and is thus consistent with the SEC position taken in Regulation Best Interest and the Investment Adviser Interpretation – or whether it has broader implications for other instances in which a recommendation is made that *may* constitute a "first step" in an advice relationship carried out on a regular basis. The Department does acknowledge that "a one-time sales transaction, such as the one-time sale of an insurance product, does not by itself confer fiduciary status under ERISA or the Code," but adds in footnote 41 the following:

> "Like other Investment Professionals, however, insurance agents may have **or contemplate** an ongoing advice relationship with a customer. For example, agents who receive trailing commissions on annuity transactions may continue to provide ongoing recommendations or service with respect to the annuity." [emphasis added]

In our view, whether advice satisfies the regular basis requirement does not and should not depend on whether it is a "first step" or given in *contemplation* of an ongoing advice relationship. It should not depend on what an Investment Professionals *hopes* will happen in the future. Rather, it must be determined based on affirmative steps taken by the parties. For example, have the parties entered into an agreement in which the Investment Professional undertakes to provide ongoing



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advice in the future? If so, that would be a definitive concrete step taken by the parties indicating that advice will be provided on a regular basis. But, we submit, to speculate that there will be ongoing advice on the basis of hope should not be the basis for a legal determination of fiduciary status.

We therefore urge that the Department provide a clearer, objective set of criteria with which to determine whether the regular basis prong of the test is met, including when a "first step" must be viewed as the establishment of a "regular basis" relationship. If the standard as outlined in the preamble to the proposal is retained, we also urge that the Department clarify whether it applies solely in the rollover context or whether it could apply in other situations.

We make these requests especially in the context of insurance intermediaries. IMOs, FMOs and BGAs often provide marketing or informational support to insurance producers but are not, in fact, involved in making a recommendation to a consumer. This support may include the preparation of illustrations based on criteria and information provided by the producer, with no exercise of independent judgment by the intermediary. We are concerned that new interpretation could draw insurance intermediaries into fiduciary status and expose them to liability where they are merely providing information or what can best be described as ministerial assistance to an insurance producer. This is especially true where the producer is dealing with a consumer for the first time and may have no on-going advice or sales relationship with the consumer in the future. While we appreciate the reference to a "one time sale of an insurance product," we believe that further amplification is required in order to avoid an unintended extension of fiduciary status to normal insurance sales.

*Exemption Availability*

Though we do have some concerns about the proposal, we appreciate the Department's recognition of the value that Investment Professionals provide to consumers and its willingness to work towards solutions that will permit the provision of advice that serves the interests of consumers but also permits Financial Institutions and their advisors to receive reasonable compensation.

In this vein, we appreciate the recognition that other exemptions continue to be available for the sale of various types of investment products, including in particular Class Exemption 84-24 for the sale of insurance products.

The preamble states that "Eligible parties can also continue to use relief under the existing exemption for insurance transactions, PTE 84–24, as an alternative." We understand this to refer to the exemption as last modified in 2006 and in effect before the adoption of the vacated fiduciary advice regulation and the accompanying amendments to various class exemptions. If this is not intended, we request that the Department's view be clarified.



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*Uniformity with Other "Best Interest" Guidance*

The Department explains in the preamble to the proposal the efforts it has undertaken to create uniformity with other "best interest" regulatory efforts, including the SEC's Regulation Best Interest and Investment Adviser Interpretation and the NAIC annuity model regulation, which to date has been adopted in two states. The preamble states

> The standard is to be interpreted and applied consistent with the standard set forth in the SEC's Regulation Best Interest and the SEC's interpretation regarding the conduct standard for registered investment advisers.

In footnote 55, the Department also notes that

> The NAIC's updated Suitability in Annuity Transactions Model Regulation includes a safe harbor for recommendations made by financial professionals that are ERISA and Code fiduciaries in compliance with the duties, obligations, prohibitions and all other requirements attendant to such status under ERISA and the Code.

While we appreciate this effort (as we assume do most others who will offer comments on the proposal), we have one suggestion and one concern.

The suggestion is that the Department indicate in the exemption that, to the extent the requirements between the exemption and the SEC and/or NAIC guidance are essentially the same, an entity that complies with those other requirements be deemed to have satisfied the similar requirement in the exemption. In the preamble, the Department acknowledges that

> Because [broker-dealers] with retail businesses are subject to the SEC's Regulation Best Interest, they already comply with, or are preparing to comply with, standards functionally identical to those set forth in the proposed exemption.

Given that the SEC requirements are already in effect and will have been for a number of months before the exemption is finalized, we submit that where the compliance requirements are "functionally identical," an entity seeking to rely on the exemption will be deemed to have satisfied the exemption requirement if it satisfies the SEC requirement. For entities that are or will become subject to the NAIC model regulation requirements, we also urge that satisfaction of substantially identical requirements under that regulation also be deemed to constitute compliance with the exemption.

We are not suggesting that compliance with the other "best interest" rules will constitute complete satisfaction of the exemption conditions. To the extent the exemption imposes additional requirements or significantly different requirements, an entity would have to satisfy those requirements. But to the extent they are essentially the same, it would substantially relieve compliance burdens and reduce unnecessary duplication of efforts if this suggestion were adopted. Further, we submit that it would also reduce confusion by consumers who may receive three sets



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of disclosures that are required by the different regulatory regimes, even though the information is substantially identical.

The compliance burden and duplication of effort among the different regimes is also the basis for our concern. That is, for insurance intermediaries that are not involved in the direct line of sales but may be considered to be fiduciaries under the five-part test (especially under the expanded interpretation of the test as discussed earlier), compliance with the requirements of the exemption will create new and, we submit, unnecessary new burdens.

*Financial Institution Definition*

We assume that there will be situations in which insurance intermediaries are properly determined to be fiduciaries under ERISA and the Code. Unfortunately, as currently drafted, they will not be able to rely on the new exemption because they do not meet the definition of a Financial Institution. This, we submit, will place them at an unfair competitive disadvantage with other entities that automatically fall within the definition.

The Department clearly recognizes the role that insurance intermediaries play in the sale of non-variable annuities, given the references to these entities in the preamble to the proposal and the suggestion that insurance companies (that will be treated as Financial Institutions without extra steps) may contract with insurance intermediaries to fulfill many of the administrative requirements of the exemption, including especially oversight over independent insurance producers. This suggestion seems to recognize that insurance intermediaries have both the resources and the ability to carry out these tasks.

To address this unequal treatment of insurance intermediaries, the Department indicates that insurance intermediaries (and potentially others) may apply for an individual exemption to be included within the definition of a Financial Institution. This is similar to the guidance provided in the vacated fiduciary rule and related Best Interest Compliance Exemption. Indeed, this firm applied for such an exemption, but after an extended period and substantial back-and-forth discussions with staff, no action was taken on that application. In particular, we felt the structure of an insurance intermediary was quite similar to that of a typical registered investment advisor.

We submit that it is inappropriate to require insurance intermediaries to go through an additional step of applying for a separate exemption if they engage in insurance sales that would make them a fiduciary under the five-part test. Therefore, we strongly urge the Department to include these entities in the definition of Financial Institution from the outset rather than requiring them to overcome a second obstacle of prosecuting an individual exemption application. In our view, we believe we have the resources, the staff and the background to fulfill the obligations imposed on a Financial Institution under the proposal and that we should be able to rely on the exemption when it is finalized.



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At the same time, we believe that the Department should recognize that in most situations, insurance intermediaries will not be fiduciaries, especially since in most sales situations, the intermediary is not sufficiently involved in the sales process to meet the requirements of the five-part test. Based on this, we request that the Department clarify in the final exemption release that insurance intermediaries that meet certain limitations will not need to rely on the exemption because they will not rise to the status of a fiduciary.

We (and other IMOs) provide assistance to independent insurance producers, but we (and many other IMOs) are not directly involved in structuring a recommendation to a consumer. This is true even where we document an insurance illustration that may be given to the consumer at the request of a producer. Indeed, we often do not know whether the illustration is even presented to the consumer, since the producer may obtain several illustrations (either directly from an insurance company or from other intermediaries) and make a decision on which one to present to the consumer. We would be pleased to provide the staff with additional information on the role we play – and the portions of the recommendation process where we are *not* involved – if this would assist the Department in providing the requested clarification.

*Other Modifications*

Assuming the Department accepts our recommendation to include insurance intermediaries as Financial Institutions (whether in the final exemption or a subsequent individual exemption), there are certain areas in which we submit that the exemption should be modified:

1. We submit that the annual review and CEO certification are unnecessary for the exemption to function as intended, and are requirements that will impose unnecessary burdens on firms already subject to significant regulatory requirements. Therefore, we urge that these requirements be eliminated.

2. As noted, we request that the guidance issued with the final exemption explicitly recognize that in many instances an insurance intermediary should not be considered a fiduciary and thus not need to comply with the exemption. If this is not done, we submit that there will be sufficient uncertainty that some intermediaries may conclude that, as a risk management matter, they should comply with the terms of the exemption even though not required to do so. This would include the requirement to acknowledge in writing that the intermediary is a fiduciary. While we do not object to engaging in conduct that results in a best interest recommendation to a consumer, we are concerned that the requirement to acknowledge fiduciary status in writing could subject firms to unnecessary exposure to liability when they are not, in fact, serving in a fiduciary capacity. As a result, we urge that the written acknowledgment of fiduciary status requirement be eliminated.



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*Complex Products*

Finally, we note that the Department has indicated that some investment products may be sufficiently complex that the Financial Institution and Investment Professional must undertake to monitor the investment on behalf of the investor in order to satisfy the requirements of the exemption. We believe this clause should be removed, as the Department provides no guidance as to how to implement these vague standards, and we do not believe the Department wishes to maintain a list of such investments. If the Department does not remove the provision, at a minimum it should clarify that neither fixed nor fixed index annuities should universally be considered "complex" products so that monitoring is required. We believe this clause should be removed, as the Department provides no guidance as to how to implement these vague standards, and we do not believe the Department wishes to maintain a list of such investments. If the Department does not remove the provision, at a minimum it should clarify that If the Department believes that some products do meet the "complex" standard, we request that the Department make clear which products do and which do not meet that standard.

**Conclusion**

We appreciate the Department's issuance of the proposed exemption and the desire to obtain comments from affected investment providers and professionals. We believe that the exemption, when finalized, will continue the needed relief carried forward under the non-enforcement policy and will benefit both the investment community and consumers. As noted in this letter, however, we believe there are areas where the final exemption needs to be modified or clarified. We would be pleased to discuss these issues with the staff at any time.

Very truly yours,

Mark Williams, President and CEO



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