SHURWEST

August 7, 2017

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
United States Department of Labor
200 Constitution Avenue NW
Washington, D.C. 20210

Attn: D-11933

VIA EMAIL: EBSA.FiduciaryRuleExamination@dol.com

Re: RIN 1210-AB82
Comments in response to Fiduciary Rule and Prohibited Transaction Exemptions

Ladies and Gentlemen:

This letter is written on behalf of Shurwest, LLC (hereinafter "Shurwest"), an Insurance Intermediary ("IMO") based in Scottsdale, AZ. Shurwest is hereby providing its comments to the Department of Labor's ("DOL" or "Department") Request for Information Regarding the Fiduciary Rule ("Rule") and Prohibited Transaction Exemptions ("RFI") as published in the Federal Register on July 6, 2017 (82 FR 31278).

Shurwest appreciates this opportunity to provide additional commentary on the substantive questions raised in the RFI. Shurwest previously submitted several comment letters on the Rule. We recently submitted a letter dated July 20, 2017, in which we strongly recommended a further delay of the Applicability of the Rule until after the Department completed its review as mandated by the Presidential Memorandum of February 3, 2017, and the clarification of a number of issues, including clarification on the Proposed Best Interest Contract Exemption for Insurance Intermediaries ("Proposed IMO Exemption") issued on January 19, 2017. 82 FR 7336.

In this letter, Shurwest addresses only those issues raised in the RFI that are relevant to our business as an IMO. Several of the questions included in the RFI are best answered by other parties affected by the Rule, such as insurance carriers, broker-dealers, and registered investment advisors.

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Q2. What has the regulated community done to comply with the Rule and PTEs to date, particularly including the period since the June 9, 2017, applicability date? Are there market innovations that the Department should be aware of beyond those discussed herein that should be considered in making changes to the Rule?

Shurwest spent a significant amount of time educating and preparing its independent producers for compliance with the June 9, 2017 implementation of the Rule and PTEs, and specifically the Impartial Conduct Standards. As part of this preparation, we conducted training for our independent producers and advisors on the requirements of the June 9 Rule, provided sample disclosure forms for our producers and advisors to use with clients, and provided timely updates via email.

Since June 9, we have continued to answer questions from our producers and advisors as they arise and examined ways to streamline our operations via technology. We also developed a series of measures intended to meet the requirements of the Best Interest Contract Exemption ("BICE") in anticipation of the January 1, 2018 applicability date.

Unfortunately, since IMOs are not currently recognized as a Financial Institution ("FI") empowered (or required) to execute a Best Interest Contract ("BIC") with a retirement investor, we have been significantly hindered in our ability to fully prepare for the Rule. In addition, insurance companies whose products we distribute have decided not to sign best interest contracts, leaving us in the untenable position in which no entity would act as the FI for products sold by insurance producers and advisors who are affiliated with us. We believe that unless this void is filled, it will have a devastating impact on our business, the producers and advisors who work with us, and their clients.

In our comment letter of February 21, 2017, we provided input to the Department on the Proposed IMO Exemption and, like other industry participants, still await the Department's follow up or guidance on its position or any clarification as to the status of the proposed exemption. At this time, we do not know if we will be required to act as an FI to continue to perform our role and function in the marketplace, or what type of entity we may be authorized or forced to use as an FI to comply with the Rule and PTEs.

The lack of follow up action and clarification by the Department has resulted in confusion in the industry. This clarification needs to take place before implementation of the Rule since we will be required to add additional resources, including staff. Before doing this, however, we must have clarity about their roles, responsibilities and the volume of work

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we expect for them. Without this clarity, we cannot determine staffing needs, thereby putting our company at risk.

Q3. Do the Rule and PTEs appropriately balance the interests of consumers in receiving broad-based investment advice while protecting them from conflicts of interest? Do they effectively allow Advisers to provide a wide range of products that can meet each investor's particular needs?

No. The Rule does not strike the appropriate balance between advisors providing broad-based investment advice and protecting consumers from conflicts of interest. The Rule and PTEs create an implied preference for fee-based products, and assumes that only fee-based products are conflict free and appropriate. For an IMO such as Shurwest, the Rule and PTEs also result in a major obstacle for consumers to receive advice on a wide range of products, including fixed indexed annuities ("FIAs"), which are unique insurance products that can provide lifetime retirement income with protection of principal.

This implied preference or inherent bias that the Rule and PTEs create for fee-based products has also resulted in a major disruption in the insurance industry, as most products are sold on the basis of commission where the carrier pays the commission to the agent or advisor. Based on our experience, this lack of clarity regarding the treatment of FIAs is creating confusion for regulated entities taking a good-faith approach to complying with the Rule and implementing the appropriate policies and procedures.

As to whether an up-front commission like that typically paid on an FIA creates an incentive for an advisor to recommend that product, we would note that there are many situations where an advisor may be paid more for recommending a fee-based product. So, if the Department is concerned with the propriety and intent of a product's commission rather than just the commission itself, the Department's question should focus on whether the incentive is consistent with an investor's needs, objectives and time horizons with regard to the product.

A commissionable product may indeed be in the best interest of an investor/consumer based on the product type, the consumer's investment objectives, and time horizon, such as if the product is part of a broad-based retirement income plan. Moreover, a commission paid to the advisor on the initial sale of a product is entirely appropriate in a context where that product is intended to be in place over a number of years and provide benefits for the contract term or longer.

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Q4. To what extent do the incremental costs of the additional exemption conditions exceed the associated benefits and what are those costs and benefits?

As we have stated in previous correspondence with the Department, Shurwest generally supports a best interest standard and believes that the independent advisors and insurance producers who work with us seek to provide solutions that are in the best interest of clients. However, the implementation requirements in the Rule and PTEs create significant compliance costs for the industry with no clear benefit to consumers. To date, Shurwest has spent a significant amount of time and financial resources preparing for the Rule. Across the financial industry, compliance estimates range from insurance carriers spending upwards of eight figures to try to comply with the Rule to an estimate by the Securities Industry and Financial Markets Association ("SIFMA") indicating start-up costs for large and medium-sized broker-dealers would be $4.7 billion with on-going costs of $1.1 billion per year.

These costs include the development and maintenance of new technology to process and monitor business, new systems to oversee compliance with duplicative regulatory regimes, including new disclosure and recordkeeping requirements, and increased staff for all of these functions. The costs also include estimates for increased litigation risk and the attendant increase in insurance costs, which we anticipate will be significant.

Product manufacturers and distributors will surely pass compliance costs on to consumers by cutting services and limiting product benefits. It is also expected that providers at every level of the industry will consolidate, which will likely reduce the available number of advisors to consumers, primarily those consumers with lower levels of investable assets (the very retirement investors the Rule seeks to protect).

We strongly recommend that the Department deploy alternatives to the Rule as written that would help provide the benefits the Department seeks to provide to retirement investors while mitigating many of the aforementioned costs. These alternatives include, but are not limited to 1) eliminating the BICE written contract requirement and rather relying on the Impartial Conduct Standards, and 2) coordinating with other regulatory agencies and organizations with historical regulatory jurisdiction over the industries that the Department seeks to regulate, such as the SEC, FINRA, and State insurance regulators.

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Q5. What is the likely impact on Advisers' and firms' compliance incentives if the Department eliminated or substantially altered the contract requirement for IRAs? What should be changed? Does compliance with the Impartial Conduct Standards need to be otherwise incentivized in the absence of the contract requirement and, if so, how?

The Impartial Conduct Standards, if modified to clarify specific points, could provide a sufficient standard for professional conduct by advisers to retirement investors. Based on this assertion, we believe that the Department should eliminate the BICE requirement for IRAs.

Specifically, with respect to the BICE's requirement to enter into an enforceable agreement with the retirement investor, the DOL has not historically imposed such a requirement in PTEs for individual retirement accounts and other investment vehicles excluded from ERISA but subject to the prohibited transaction provisions of the Internal Revenue Code ("Code").

In addition, eliminating the written contract requirement will not leave IRA retirement investors without a remedy as such investors already have enforceable remedies under federal and state securities given laws and state insurance laws for misrepresentation and other deceptive sales practices.

Q6. What is the likely impact on Advisers' and firms' compliance incentives if the Department eliminated or substantially altered the warranty requirements? What should be changed? Does compliance with the Impartial Conduct Standards need to be otherwise incentivized in the absence of the warranty requirement and, if so, how?

We believe warranties are unnecessary to incent compliance since the avoidance of prohibited transaction excise taxes provides a sufficient incentive to ensure compliance with the Impartial Conduct Standards.

Q8. How would advisers be compensated for selling fee-based annuities? Would all of the compensation come directly from the customer or would there also be payments from the insurance company? What regulatory filings are necessary for such annuities? Would payments vary depending on the characteristics of the annuity? How long is it anticipated to take for an insurance company to develop

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and offer a fee-based annuity? How would payments be structured? Would fee-based annuities differ from commission-based annuities in any way other than the compensation structure? How would the fees charged on these products compare to the fees charged on existing annuity products? Are there any other recent developments in the design, marketing, or distribution of annuities that could facilitate compliance with the Impartial Conduct Standards?

Overall, Shurwest believes that questions regarding product design are best answered by the insurance carriers that create the products. At this time, only a few carriers have introduced fee-based annuities into the market, and these products have limitations on which advisors can sell them.

As carriers are also still in the process of working on product design, it is also not immediately clear if consumers would benefit from a fee-based compensation model should carriers choose to eliminate commissions altogether. It is entirely possible, as previously noted, that the compensation paid to an insurance agent, advisor or producer from a fee-based annuity may actually result in more compensation than an upfront commission.

Under most fee-based compensation business models, consumers pay a percentage of the assets under management (AUM) to the advisor each year. When retirement investors purchase FIAs, it is the carrier that pays the commission to the insurance producer. In many cases, retirement investors purchasing FIAs also receive bonuses from the carrier depending on the length of the FIA contract and product design. While the consumer gives up some liquidity when purchasing a long-term FIA, this is no different than the liquidity risk a consumer experiences when purchasing a multi-year bank certificate of deposit (CD). The interest earned on an FIA is generally much higher that that earned on a bank CD product—often by a few hundred basis points.

Q10. Could the Department base a streamlined exemption on a model set of policies and procedures, including policies and procedures suggested by firms to the Department? Are there ways to structure such a streamlined exemption that would encourage firms to provide input regarding the design of such a model set of policies and procedures? How likely would individual firms be to submit model policies and procedures suggestions to the Department? How could the Department ensure compliance with approved model policies and procedures?

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We are generally supportive of any form of regulation or exemptive relief that could provide clarity and ease the administrative burden on regulated entities. Many advisers are small business owners who, despite their good faith efforts, do not have the resources or capacity to develop the policies and procedures required under present rules. We submit that assistance that the Department can provide these advisers in establishing a reasonable and balanced level of compliance would be beneficial.

For a streamlined exemption to be broadly effective; however, the Department will have to more proactively engage the entire industry in a way that it has not yet been able to do. It will also be necessary for the Department to create a more balanced set of disclosures, policies, and procedures that do not create a competitive advantage to larger entities with more resources, compared to small businesses.

In general, any model policies and/or procedures would take time to publish, review and provide for ample comment from all interested parties, including IMOs such as Shurwest. If the Department is considering a streamlined exemption, it would be another reason we believe that any further applicability or implementation dates should be delayed until the Department finalizes such an exemption.

> *Q11. If the Securities and Exchange Commission or other regulators were to adopt updated standards of conduct applicable to the provision of investment advice to retail investors, could a streamlined exemption or other change be developed for advisers that comply with or are subject to those standards? To what extent does the existing regulatory regime for IRAs by the Securities and Exchange Commission, self-regulatory bodies (SROs) or other regulators provide consumer protections that could be incorporated into the Department's exemptions or that could serve as a basis for additional relief from the prohibited transaction rules?*

Clarity and the ability to implement rules with minimal confusion are first principals of effective regulation. The Rule and PTEs unfortunately have been drafted in a manner that creates neither. A key aspect of the lack of clarity and confusion created by the Rule and PTEs involve their relationship to existing and developing standards of conduct that are applicable to investment advisers, broker-dealers, and insurance producers.

As a business that is engaged in the distribution of insurance products, it has been problematic to see the Department seek to regulate advice relating to insurance products

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when it has minimal institutional experience or expertise in doing so. As a result, we feel the Department should defer to or at least work in concert with standards set by regulators with subject-matter expertise, such as the SEC, FINRA, and state insurance commissioners. We understand the NAIC is currently developing revisions to its Annuity Suitability Model Rule that would establish a "best interest" standard of care for the recommendation of annuities. This serves to support our assertion that the primary subject–matter regulatory authority is moving forward with regulation that will accomplish the Department's most critical goals. We respectfully submit to the Department that it defers to the NAIC and allow state regulating authorities to develop regulation in their specific field of expertise.

> *Q13. Are there ways to simplify the BIC Exemption disclosures or to focus the investor's attention on a few key issues, subject to more complete disclosure upon request? For example, would it be helpful for the Department to develop a simple up-front model disclosure that alerts the retirement investor to the fiduciary nature of the relationship, compensation structure, and potential sources of conflicts of interest, and invites the investor to obtain additional information from a designated source at the firm? The Department would welcome the submission of any model disclosures that could serve this purpose.*

Rather than developing up-front model disclosures that attempt to simplify the BICE, Shurwest believes that the BICE is not necessary to further the Department's goals and intent. We believe that a focused disclosure that provides relevant information to the consumer on key issues would be beneficial to that consumer.

However, any "model" disclosure that the Department develops would be viewed as an additional provision requiring mandatory compliance, again, paving the way for additional liability for any deviation from that model.

Since the Rule was introduced in April 2016, consumers have been bombarded with information regarding what a fiduciary is and why they should or should not work with a fiduciary. Consumers are better informed about how to choose an advisor, commission costs, conflicts of interest, and best interest versus suitability. This was largely not the case before the Rule.

> *Q16. To what extent are firms and advisers relying on the existing grandfather provision? How has the provision affected the availability of advice to*

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investors? Are there changes to the provision that would enhance its ability to minimize undue disruption and facilitate valuable advice?

Shurwest has received minimal information to date on the reliance of advisors on the grandfather provision. We do assert that in its current state, the grandfather provision is too restrictive. For example, the Department should eliminate the requirement that compensation must be received under an agreement that has not come up for renewal after the Applicability Date. If the investment was purchased before the Applicability Date, the compensation received from that purchase should be exempt regardless of whether the agreement is subsequently renewed.

Another concern is the purchase of life insurance with Required Minimum Distributions (RMDs). It is Shurwest's view that RMDs from retirement accounts should not retain their status as qualified money. In the Department's FAQs published in January 2017, RMDs used to fund life insurance purchases would be treated as qualified money and require a BIC or other PTE. This creates an additional burden for the consumer, advisor and firm, and is not consistent since taxes have already been paid on the money used to fund the life insurance purchase. We believe, at a minimum, that this FAQ should be rescinded.

Q17. If the Department provided an exemption for insurance intermediaries to serve as Financial Institutions under the BIC Exemption, would this facilitate advice regarding all types of annuities? Would it facilitate advice to expand the scope of PTE 84-24 to cover all types of annuities after the end of the transition period on January 1, 2018? What are the relative advantages and disadvantages of these two exemption approaches (i.e., expanding the definition of Financial Institution or expanding the types of annuities covered under PTE 84-24)? To what extent would the ongoing availability of PTE 84-24 for specified annuity products, such as fixed indexed annuities, give these products a competitive advantage vis-à-vis other products covered only by the BIC Exemption, such as mutual fund shares?

For reasons stated within this letter and in our prior responses to the Department, we believe that the BICE generally hinders rather than facilitates advice regarding all types of annuities. More specifically, we strongly believe that the BICE disproportionately impacts FIAs when compared to fixed annuities and variable annuities. The Proposed IMO exemption does not solve this problem.

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FIAs are primarily distributed through independent insurance agents who are affiliated with IMOs. The Proposed IMO Exemption hinders advice regarding FIAs by creating new and unnecessary requirements pertaining to professional liability insurance, financial reporting, marketing review, etc. As a result, even the few IMOs who are large enough to qualify as an FI under the Proposed IMO Exemption ($1.5 billion or more in annual sales) will not be able to afford to operate under this proposed exemption based on the other requirements put forth by the Department. Instead, IMOs will be forced to find an alternative regulated entity to serve as FI.

We remain steadfast in our position that the proper place for fixed index annuities is under PTE 84-24. The provisions of PTE 84-24 provide for disclosure of relevant information to consumers that align with the objectives of the Department for retirement investors.
PTE 84-24 treatment of FIAs does **not** give them a competitive advantage over other products. The Department's question appears to rely on the assumption that other products covered by BICE are similar products. They are not. FIA's are insurance products and are **not** securities. They are fundamentally different from investment products with different risks, benefits, and, notably, subject to different regulatory agencies.

As originally proposed by the Department in 2015, the revised PTE 84-24 would be applicable to life insurance, fixed annuities, and FIAs, while advice regarding all other financial products would be governed by BICE. This made perfect sense to break the products down this way, since existing insurance regulatory agencies would be applied to the insurance products that would be governed by PTE 84-24 while securities agency regulations applied to those products governed by BICE.

The Department's subsequent change in its final Rule and PTEs, however, moved FIAs under BICE. Since then, the Department has spent a significant amount of time justifying this decision because of the "complexity" of FIAs. We strongly assert that the term complexity is not the proper criteria for determining whether a product should be treated under BICE or PTE 84-24. Additionally, if the Department is using product complexity as a criterion for determining whether a product should be treated under BICE or PTE 84-24, then it has applied that criterion inconsistently and should rethink that application.

Equity investments can only be recommended under BICE. While aspects of the various types of these products may be complicated, that is not their common denominator. What they have in common is that they are securities in which an investor has a risk of market loss, due to circumstances in a market that are out of the investors' control.

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We surmise that in all cases other than FIAs, products were included in BICE not because of their complexity but because of the risk of investment loss they present to the retirement investor and because of their traditional regulation as a security. We believe there can be no other logical explanation.

Unlike equity investments, there is no risk of market loss with FIAs. Like many other types of financial products, there are contractual requirements and limitations inherent in FIAs, including potential charges to consumers who want to exit the contract early. These charges and other costs and benefits of FIAs are already a required disclosure under current insurance regulations.

It is understandable that the Department is striving for disclosure of relevant information about FIAs, and all investment products for that matter. But we assert that the Department's solution with respect to FIAs does nothing to solve perceived problems. The BICE does not require disclosure of any information that would shed any light on the complexities of FIAs believed to exist by the Department. The features, costs, and benefits of FIAs must already be disclosed to consumers under applicable insurance regulation. The BICE disclosure requirements add an additional layer of documentation that will further obscure disclosures concerning key aspects of FIAs. We submit that, if complexity is the real issue here, the Department should put forth its concerns with insurance regulators and provide suggestions for additional disclosure requirements under applicable insurance regulations.

Q18. To the extent changes would be helpful, what are the changes and what are the issues best addressed by changes to the Rule or by providing additional relief through a prohibited transaction exemption?

We believe the Department should clarify that an insurance agent who is providing advice on a product under PTE 84-24 is an independent fiduciary, versus that of an IMO which is not a fiduciary for which the exemption would be necessary. The IMO provides support services but does not communicate directly with any consumer in connection with recommendations made by the agent.

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CONCLUSION

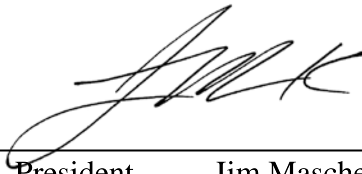
Shurwest strongly recommends that the Department:

1. Modify or rescind the current Rule and its PTEs;
2. Work closely with the SEC and other regulators to develop a uniform standard; and
3. Delay the January 1, 2018, Applicability Date until the Department has been able to complete its mandated review of the rule and make the required changes (for at least one year).

Overall, firms will need a reasonable amount of time to build or modify systems and processes for compliance with any modifications to the Rule. We believe that a delay of at least 12 months is necessary for all affected parties to be fully prepared for an updated Rule.

We will be happy to discuss the above, and provide additional input in an interactive discussion as to a proposed length of delay. Please feel free to contact us directly at (800) 440-1088.

Sincerely,



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