January 2, 2024

The Honorable Lisa M. Gomez
Assistant Secretary of Labor
Employee Benefits Security Administration
U. S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Submission of Comments on "Proposed Retirement Security Rule: Definition of an Investment Advice Fiduciary" (RIN 1210-AC02); Proposed Amendment to Prohibited Transaction Exemption 2020-02 (ZRIN 1210-ZA32, Application No. D-12057); and Proposed Amendment to Prohibited Transaction Exemption 84-24 (ZRIN 1210-ZA33, Application No. D-12060).

Assistant Secretary Gomez:

On behalf of the Indexed Annuity Leadership Council ("IALC"), I am writing to provide comments in response to the Department's regulatory package (collectively, the "Proposal") published on November 3, 2023, consisting of a proposed rule redefining fiduciary investment advice (the "Proposed Rule"), and amendments to several existing prohibited transaction class exemptions, including Prohibited Transaction Exemptions PTE 84-24 (the "Proposed 84-24") and PTE 2020-02 (the "Proposed 2020-02").

We strongly urge the Department to withdraw the Proposal. Despite the Department's claims to the contrary, which we address in detail below, the scope and effect of the Proposal is substantially similar to the 2016 Rule[1] vacated by the 5th Circuit Court of Appeals.[2]

The Proposal would subject essentially the same group of financial professionals (including salespersons), to essentially the same fiduciary standard, for recommending essentially the same annuities or investments, as the 2016 Rule. As a result, the Proposal would have a similarly negative effect on individual retirement investors, reducing access to financial assistance and annuity products for those who cannot afford the expense of financial planning. The Proposal would again exceed the Department's legal authority for substantially the same reasons identified by the 5th Circuit in vacating the 2016 Rule, and it would again single out state-regulated

[1] 81 Fed. Reg. 20,946 – 21,221 (April 8, 2016).

[2] *U.S. Chamber of Commerce v. U.S. Department of Labor*, 885 F.3d 360 (5th Cir. 2018).

annuities and certain insurance producers with separate conditions and limitations in an arbitrary and capricious manner.

The State and Federal regulatory environment in which the Department promulgated the 2016 Rule has fundamentally changed. Strong, new best interest standards govern sales recommendations of annuities and securities, adopted after careful deliberation and review by the primary regulators of jurisdiction. Against this backdrop, in which consumer protections are undeniably much stronger than in 2016, the Department should perceive ***less*** need for the Proposal, not more. The Department should have ***greater*** hesitation to substitute its own inexpert judgement for the institutional knowledge and expertise of more than 40 state insurance regulators and the Securities and Exchange Commission ("SEC"), all of whom just considered the same issues. Instead, the Department is rushing out an unnecessary Proposal that is written as if the Department regulates in a vacuum, using a flawed administrative process that does not meet the requirements of the Administrative Procedure Act, denying the public a meaningful opportunity to evaluate and comment on the Proposal. These failings of the Proposal are fundamental, and it must be withdrawn.

Who We Are:

The IALC is a consortium of life insurance companies that offer fixed indexed annuities ("FIA"). We are committed to providing complete and factual information about the use of fixed indexed annuities as a part of a balanced financial plan. Our mission is to help educate consumers, the media, regulators and industry professionals about the benefits of FIAs, which offer principal protection, provide a predictable source of guaranteed income in retirement, and can add balance to any long-term financial plan.

In offering our specific comments on the Proposal, we believe we must first review some essential facts about FIAs and the robust system of state regulation of annuities and insurance, as statements made by White House and Department officials suggest that the Proposal is premised on an false understanding of what these products are, how there are regulated, and the very limited authority of the Department—indeed, of the Federal government—to regulate in this area.

Fixed Indexed Annuities:

Fixed Indexed Annuities ("FIA") can help retirement savers address one of the most challenging problems in a defined contribution-based retirement system—how to provide stable, predictable retirement income that will last through the end of one's life. Private-sector, employer-provided defined contribution retirement plans, like the 401(k), have proven very effective in helping many workers accumulate retirement savings. But the reality is that these plans typically do not provide guaranteed retirement income options. Workers nearing retirement face a variety of very material risks, from retiring during a down market, to outliving their savings. Taking a portion of their accumulated retirement savings and purchasing annuity and insurance products can often be the most effective answer for workers trying to address these risks. Rather than assuming these risks themselves at or near retirement when they are least well-equipped to tolerate them, they can pass these risks onto an insurance company.

As market volatility and interest rates have increased in recent years, FIAs have been an increasingly popular option, in large measure because these annuities provide the ability for assets to grow in good markets by tracking a selected market index to a specified cap or participation rate, while providing protection against loss in a market downturn, and also providing a guaranteed minimum payment stream when needed. The prevention of downside risk combined with the preservation of opportunity for growth can make FIAs effective in protecting against longevity risk, inflation risk, and sequence of return risk facing workers.

The reality is that ERISA-covered defined contribution plans, like 401(k) plans, generally do not offer guaranteed income solutions. According to a recent survey by the Employee Benefit Research Institute, 40% of surveyed plan participants said adding investment options that provide guaranteed lifetime income would be the most valuable addition to their current plan.[3] The need for risk protection—not producer compensation—is why FIA sales increased more than 20% each year in 2022 and 2023.[4]

The Department's Mischaracterization of State Best Interest Regulation Displays a Fundamental Misunderstanding of Robust Consumer Protections by the States:

Consumers purchasing FIAs are doubly protected by strong state regulation. The solvency of insurers and their financial stability in providing the promised income payments is closely regulated by the states, and state guarantee programs provide an additional financial backstop for consumers. In addition to the financial integrity of the insurers, states also closely regulate the marketing of FIAs and other annuity products to consumers. As the Department is aware, more than 40 states have adopted the new National Association of Insurance Commissioners ("NAIC") Model Rule #275 (the "NAIC Best Interest Rule") providing a best interest standard enhancing consumer protections in the purchase of annuities, including IRA sales. These new Best Interest rules protect annuity purchasers by ensuring that the annuity recommended by their insurance professional is in their best interest based on their individual needs, that their insurance professionals may not place their own financial interest ahead of the consumer's interest, and that insurance companies must review these recommendations before issuing the annuity. As we explain in more detail below, the Department consistently misstates and mischaracterizes these protections, asserting their inadequacy even as it inaccurately describes their requirements.

The new standards were developed by the NAIC, an organization comprised of the state regulators protecting consumers in every United States state and territory. These insurance commissioners come from a wide array of political backgrounds representing very different viewpoints, but they are united in the desire to protect their citizens and to ensure well-regulated state insurance marketplaces. They have a common interest in working together through the

[3] "2023 RCS Fact Sheet #8," EBRI/Greenwald Research Retirement Confidence Survey, Employee Benefits Research Institute, available at https://www.ebri.org/docs/default-source/rcs/2023-rcs/rcs_23-fs-8_inc.pdf?sfvrsn=608d392f_4.

[4] See., "Strong Performances in Fixed Indexed and Fixed-Rate Deferred Annuities Drive Robust Overall Sales Results in Third Quarter 2023," LIMRA Press release, October 25, 2023; and "Another Record-Breaking Quarter for U.S. Retail Annuity Sales," LIMRA Press release, October 27, 2022.

NAIC to provide strong and consistent consumer protection from state to state. These rules were the product of several years of significant debate and effort by these state regulators, and their Best Interest Rule was developed through their extensive and specific expertise as insurance regulators.

- *The Department Falsely Asserts—Repeatedly—that the NAIC Best Interest Rule Allows Producers to Put their Interests Before Their Clients:*

There is no ambiguity in the NAIC Best Interest rule regarding the duty of insurance professionals to put the consumers' interests first. Sec. 6(A) of the NAIC Best Interest Rule states:

> "A producer, when making a recommendation of an annuity, shall act in the best interest of the consumer under the circumstances known at the time the recommendation is made, ***without placing the producer's or the insurer's financial interest ahead of the consumer's interest.*** " [emphasis added].[5]

This is literally the first line of Sec. 6, which specifies the "Duties of Insurers and Producers." This unambiguous requirement is then followed by the detailed obligations relating to care, disclosure, conflicts, documentation, insurer supervision requirements, and prohibited conduct. Insurers are responsible for ensuring compliance with these requirements, and state insurance regulators are authorized to order corrective actions by insurers, agencies and producers, including assessing fines and penalties described in Sec. 8, when consumers are harmed by violations.

In what may charitably be described as a tortured reading, the Department asserts that clients do not come first under this statement, because "…the specific care, disclosure, conflict of interest, and documentation requirements do not expressly incorporate the obligation not to put the producer's or insurer's interests before the customer's interests, even though compliance with their terms is treated as meeting the 'best interest' standard."[6] In other words, because the words at the beginning of the section—which are binding—are not repeated within each subsection, the Department implies they do not control, and that the NAIC Best Interest Rule is not really a "best interest" standard.

Unfortunately, this false assertion is not an isolated comment from the Department.

Elsewhere in the Proposal, the Department explains that it includes its own version of a best interest requirement as a component of the Impartial Conduct Standards in Proposed PTE 84-24 and PTE 2020-02 to ensure "…that it is impermissible for the Investment Professional to recommend a product that is worse for the Retirement Investor because it is better for the Investment Professional's or the Financial Institution's bottom line…The Department notes this standard is consistent with the SEC's standards for both registered investment advisers and

[5] Available at https://content.naic.org/sites/default/files/inline-files/MDL-275.pdf.

[6] 88 Fed. Reg. at 75,898 (November 3, 2023).

broker-dealers."[7] The Department specifically does NOT note that the NAIC Best Interest Rule also requires this.

The most clear statement, however, came during the second day of the public hearing on the Proposal (which, as we note in more detail below, was held several weeks before the comment period ended, preventing the IALC and likely many other members of the regulated community from participating because we were still reviewing the Proposal and its impacts).

In the hearing, an important Employee Benefits Security Administration ("EBSA") official made the specific assertion that the non-fiduciary sales relationship established by the NAIC Best Interest Rule allows the insurance producer to recommend the "worst" option for the consumer. In an exchange with a witness regarding the difference between a best interest sales recommendation and a fiduciary advice recommendation, Deputy Assistant Secretary for Program Operations Timothy D. Hauser, the highest-ranking career official at EBSA, stated:

> "So in what part of the conversation does [disclosure of non-fiduciary status] go on between a representative who is recommending…a fixed index annuity and the customer?...Are people told hey, you really do need to think of me as a sales person? ***I'm just here to sell you this product and I have an obligation to make sure it's good enough. But I could actually sell you a worst [sic] product because it's better for me financially.*** I mean is that what I'm understanding you're saying as the relationship? Because I don't think that it's probably how people hold themselves out of [sic] these communications." [emphasis added][8]

This is categorically wrong. The NAIC Best Interest Rule does not allow a producer to recommend a "good enough" annuity that is "worse" for the client because it is "better" for the producer. Sec. 6 requires the producer to know her client through evaluation of the individual's financial circumstances, needs and objectives, having made a reasonable effort to gather from the client the relevant profile information (which includes at least 14 specific items). Sec. 6 requires that producer to understand the products reasonably available to her to recommend. Sec. 6 requires the producer to utilize this information to recommend an option that effectively addresses her client's needs and objectives. Sec. 6 requires the producer to explain the basis for her recommendation to the client. Throughout that process, the producer cannot put her financial interest, or the insurance company's financial interest, ahead of her client's.

Thus, the standard is not just "good enough" any more than ERISA Title I's fiduciary standard is "good enough." Both the best interest and fiduciary standards recognize that there is almost never only one "right" answer and that a range of options meet the criteria to be recommended.[9] Both best interest and fiduciary standards recognize that the person making the recommendation is not obligated to consider and recommend options not available to them, or that they are not

[7] 88 Fed. Reg. at 75,983.

[8] Transcript of "Public Comment Hearing, Retirement Security Rule: Definition of an Investment Advice Fiduciary," pg. 46, December 13, 2023.

[9] "Investments can and do differ in a wide range of attributes, but when considered in their totality, may serve the financial interests of the plan equally well." Statement by the Department in the Preamble to the "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights" regulation, 87 Fed. Reg. 73,822 at 73,836 (December 1, 2022).

licensed or trained to recommend.[10] Nonetheless, this is how the Department repeatedly mischaracterizes the sales relationship under the NAIC Best Interest standard.

In another revealing exchange with witnesses regarding the NAIC Best Interest Rule, Dep. Sec. Hauser and Ms. Megan Hansen, Senior Attorney-Advisor in the Office of the Solicitor of Labor, both questioned why, because the consumer expects a sales recommendation to be in their best interest, there is any difference between a best interest sales relationship and a fiduciary advice relationship. Specifically, they asked:

> MS. HANSEN: Can you clarify what the difference between a fiduciary standard and a best interest standard is? Is there a difference? You're saying there's a difference between those? Can you just clarify that difference?
> …
> MR. ROBERTS: …the NAIC model standard is not the fiduciary standard and it is a best interest standard. And it's a best interest standard because it's a standard that supports responsible selling activity. And there is nothing wrong with that. And we need to be clear that the mere fact that sales people who are professionals and who sell for transaction-based compensation are not fiduciaries, nor can they easily be fiduciaries because of the fact that they have an interest in the transaction. Those two –
> (Simultaneous speaking.)
> MS. HANSEN: I'm sorry that I'm having a hard time understanding this. I just want to make sure I understand the point you're making and the terminology is causing me just a bit of difficulty. So what you are saying is that they do have to act in the best interest of their client. You are saying it is a best interest standard –
> MR. ROBERTS: Yes.
> MS. HANSEN: -- so they have to act in the way that is best for their client, but that, that is not a fiduciary standard.
> MR. ROBERTS: That's correct.
> MS. HANSEN: So they do have to do what is best for their client –
> MR. ROBERTS: That's correct.
> MS. HANSEN: -- but they don't have to act as a fiduciary.
> MR. ROBERTS: That's correct.
> MS. HANSEN: And so what is the -- I'm still trying to understand where the -- what the action would be that would be both in the best interest -- the thing that is best for their client, but is not a fiduciary act. I'm still trying to understand where that line is.
> …
> Mr. HAUSER: …But the question I guess I have and what's confusing to me -- and this really, I think is following up on Megan Hansen's line of questions, which is I mean it appears to me as I understand the way this relationship works, the advice -- there's

[10] "[PTE 2020-02] can be satisfied by Financial Institutions and Investment Professionals that provide investment advice on proprietary products or on a limited menu of investment options…Product limitations can serve a beneficial purpose by allowing Financial Institutions and Investment Professionals to develop increased familiarity with the products they recommend…The Department confirms that the exemption does not require Financial Institutions to compare proprietary products with all other investment alternatives available in the marketplace. There is no obligation to perform an evaluation of every possible alternative, including those the Financial Institution or Investment Professional are not licensed to recommend…" Preamble to the current PTE 2020-02, 85 Fed. Reg. 82,798 at 82,836-82837, (December 18, 2020).

> advice, it's individualized. It's about a fairly complex set of products that ordinary investors can't really understand without this expert assistance. And the people they're dealing with hold themselves out as acting in the customer's best interest. And so from all of that, what is the thing that makes this not a relationship of trust and confidence, at least in those circumstances where the advisor is making a recommendation?[11]

While the Department noted at the beginning of the hearing that we should "…not draw any inferences or conclusions based on how the Government panelists frame a particular question or series of questions,"[12] this line of questioning is entirely consistent with the Department's assertion in the Preamble to the Proposal that "…the Department rejects the purported dichotomy between a mere 'sales' recommendation to a counterparty, on the one hand, and advice, on the other, in the context of the retail market for investment products."[13] As discussed in more detail below, however, the 5th Circuit (and indeed Congress when it enacted ERISA) rejected the Department's view that there is no difference between sales recommendations and fiduciary advice in its ruling vacating the 2016 Rule—and the NAIC, the Securities and Exchange Commission and more than 40 states recognize the difference between a best interest sales recommendation and a fiduciary advice relationship.

The "thing that makes this not a relationship of trust and confidence" is that sales recommendations have always involved both individualized recommendations and a legal duty to recommend suitable products, but this legal duty nevertheless was always distinct and different from the fiduciary advice legal obligation. Congress wrote this specific distinction into law in the different legal duties of broker-dealers under the Securities Exchange Act of 1934 and of registered investment advisers under the Investment Advisers Act of 1940, 40 years before ERISA was written. Sales recommendations arose in the context of commercial law in which both parties have agency and purchasers make their own decisions. By contrast, fiduciary advice under ERISA is a specific outgrowth of trust law in which fiduciaries make decisions for others and have to act solely in their interest, a special relationship of trust and confidence that Congress created specifically for employee benefit plans. The Department is attempting to appropriate two aspects of a traditional sales relationship to declare that they are the hallmarks of a fiduciary trust obligation in a manner exactly contrary to Congressional intent and the law. The use of the term "best interest" to describe the non-fiduciary sales obligation owed to the consumer does not transform an individualized sales recommendation into a fiduciary "special relationship of trust and confidence."

Finally, the Department incorrectly asserts that the NAIC Best Interest Rule "disregard[s] compensation as a source of conflicts of interest" because it, "…carves out 'cash compensation or non-cash compensation' from treatment as sources of conflicts of interest."[14] This is also not true. The NAIC Best Interest Rule specifically recognizes that certain compensation practices--

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[11] December 13 Hearing Transcript at 36-44.

[12] Transcript of "Public Comment Hearing, Retirement Security Rule: Definition of an Investment Advice Fiduciary," pg. 13, December 12, 2023. Mr. Thomas Roberts was testifying on behalf of the National Association for Fixed Annuities.

[13] 88 Fed. Reg. at 75,907.

[14] 88 Fed. Reg. at 78,593.

sales contests, sales quotas, bonuses and non-cash compensation based on sales of specific annuities within a limited time frame—are conflicted and bans them entirely in Sec. 6(C)(2)(h). In addition, Sec. 6(A)(2) requires disclosure of permitted compensation to the consumer.

It is worth noting that for nearly 80 years, the regulation of insurance and annuities like FIAs is and has been solely the authority of the states under Federal law.[15] Further, the Department's own authority in this regard is specifically and separately limited in ERISA Sec. 514 which "saves" state insurance law from ERISA's otherwise broad preemption authority.[16] As a result, the Federal government generally, and the Department specifically, has little to no role in the regulation of insurance, and, consequently, has very little experience and expertise in these insurance and annuity matters. This is a significant contributing factor, in our view, to the Department's mischaracterization of the Best Interest standards adopted by nearly all of the states to date.

"Loopholes" and "Junk Fees"—Factually Incorrect and Misleading Statements by the CEA Underscore the Federal Government's Limited Understanding of Insurance:

Unfortunately, ignorance regarding state insurance regulation is not limited to the Department. We were very surprised and concerned by statements issued by the White House and the President's Council of Economic Advisors in connection with the Department's new Proposals. The White House Fact Sheet claims that state regulation of insurance products results in "inadequate protections" that "var[y] from state to state."[17] The CEA's blog post on October 31st suggested the Federal government—through the Department's new Proposals—must take action "…to close loopholes and ensure that the financial advice that Americans get for retirement is in their best interest" because Federal "securities laws and regulations do not broadly cover recommendations to purchase non-securities, such as…certain kinds of annuities…"[18]

These statements are both false and misleading. First, they ignore the existence of specific "best interest" rules adopted by almost all states. Second, they imply that only Federal securities laws provide consumer protection. The reality is that securities and insurance are fundamentally different, and they are, therefore, regulated differently by different regulators. The Proposals are premised on a false understanding that a securities-based regulatory regime can—or should—be used to regulate insurance and annuity products.

We were not alone in our surprise at these false assertions. The NAIC responded immediately, stating, "[w]e fundamentally disagree with the White House's characterization of state consumer

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[15] See, McCarran-Ferguson Act, approved March 9, 1945 (15 U.S.C. 1011 et seq.).

[16] See, ERISA Sec. 514(b)(2)(A) "…nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance…"

[17] "Fact Sheet: President Biden to Announce New Actions to Protect Retirement Security by Cracking Down on Junk Fees in Retirement Investment Advice," White House Press Statement, October 31, 2023, at https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/31/fact-sheet-president-biden-to-announce-new-actions-to-protect-retirement-security-by-cracking-down-on-junk-fees-in-retirement-investment-advice/

[18] "CEA Blog: The Retirement Security Rule — Strengthening Protections for Americans Saving for Retirement" posted October 31, 2023, at https://www.whitehouse.gov/cea/written-materials/blog/

protections for annuity products. The White House press statement that oversight…provides 'inadequate protections and misaligned incentives' suggests either ignorance of, or willful disregard for, the hard work of the 40 states and counting that have worked diligently to enhance protections for consumers by adopting the NAIC's Suitability in Annuity Transactions Model Regulation." [emphasis added][19]

The CEA went on to specifically discuss FIAs, making false comparisons to investment products with no guarantees; making false assertions as to the reasons for increased consumer demand for FIAs in recent years; and demonstrating a troubling lack of understanding of how downside risk protection works.

We emphasize our concern regarding these statements because they illustrate the Department's misunderstanding of FIAs and state insurance regulation. In the Proposals, the Department's essential premise is that state regulation of annuity and insurance products does not sufficiently protect retirement investors, and that the Department has the authority to impose its own regulatory regime on the state insurance marketplace. Neither of these contentions by the Department are true.

The Proposals Would Likely Result in Reduced Access to Financial Assistance and Annuities for Many Retirement Investors:

The Proposal would cause harm to retirement investors in the form of reduced access to vitally important financial assistance and products, including FIAs. We believe the Proposal, if finalized, would cause similar harm to that of the Department's 2016 Rule in which reduced access to products and assistance was documented in studies and in court proceedings. This is because the scope of the Proposals, as we explain in more detail below, is equally as broad as the 2016 Rule despite the Department's efforts to recast an individualized sales recommendation as fiduciary advice.

In vacating the 2016 Rule, the 5th Circuit Court of Appeals documented these negative effects on consumers, writing that "The Fiduciary Rule has already spawned significant market consequences, including the withdrawal of several major companies…from some segments of the brokerage and retirement investor market. [Other] companies…have limited the investment products that can be sold to retirement investors."[20] Studies conducted later found that the 2016 Rule reduced access to financial assistance for as many as 10 million accounts holding $900 billion in assets.[21]

[19] "State Insurance Regulators Work to Protect Consumers Who Buy Annuities," National Association of Insurance Commissioners press statement, November 1, 2023, at https://content.naic.org/article/state--isurance-regulators-work-protect-consumers-who-buy-annuities-naic-releases-statement-dol/

[20] *Chamber v. Dep't of Labor*, 885 F.3d 360 at 368.

[21] "Analysis of the Effects of the 2016 Department of Labor Fiduciary Regulation on Retirement Savings and Estimate of the Effects of Reinstatement," report for the Hispanic Leadership Fund prepared by Quantria Strategies, at iii, November 8, 2021.

Taking regulatory action that would reduce access to annuitization and financial assistance for workers and retirees is completely at odds with the bipartisan retirement policies embodied in the original SECURE Act of 2019 and in the SECURE 2.0 Act of 2022.[22] These laws were designed in part to remove barriers to wider use of annuities, not only in ERISA-covered Title I plans, but also in individual retail products.

The Department Again "Attempts to Rewrite the Law" to Regulate FIA Sales—"This it Cannot Do" Ruled the 5th Circuit:

In the *Chamber* case, the 5th Circuit decided to vacate the 2016 Rule in large part because the Department misinterpreted what Congress meant by "investment advice for a fee" in ERISA sec. 3(21)(a)(ii). The Court found that the Department's expansive interpretation of that phrase exceeded Congress' clear intent, as it encompassed sales recommendation that were not intended by Congress to be fiduciary in nature.

The Department's claim that the new Proposed Rule complies with the 5th Circuit's ruling because its new formulation of "advice" is "…much more narrowly tailored than the 2016 Final Rule"[23] is demonstrably false. In fact, in many respects, the new Proposed Rule is actually broader in scope that the 2016 Rule because it does not contain specific exclusions that were part of the 2016 Rule. The 5th Circuit wrote that Congress intended for the fiduciary advice definition in ERISA to apply only where there was a "special relationship of trust and confidence," and that this relationship did not apply in the context of salespersons.[24]

The Proposed Rule seeks to create a special relationship of trust and confidence where one does not legally exist. In the Department's Proposal, if an insurance producer—who is a salesperson operating in most states under a best interest standard of care—regularly makes recommendations of annuities as part of her business, and makes a recommendation to a Retirement Investor under circumstances that the retirement investor would reasonably believe constitute an individualized recommendation that he or she can rely on as being made in his or her "best interest," then the recommendation is fiduciary advice.[25] In other words, the Department is attempting to say that a special relationship of trust has been established in an ordinary sales recommendation under state law—exactly the relationship that the 5th Circuit ruled was not such a special relationship of trust and confidence, and that Congress did not intend to make it a fiduciary relationship. Or as the 5th Circuit so succinctly put it, "Had Congress intended to abrogate both the cornerstone of fiduciary status—the relationship of trust and

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[22] See, Setting Every Community Up for Retirement Enhancement Act of 2019, Pub. Law 116-94 (Secure 1.0) and Secure 2.0 Act of 2022, Pub. Law 117-3 (Secure 2.0).

[23] 88 Fed. Reg. at 75,901.

[24] *Chamber*, at 376.

[25] Indeed, the Proposed Rule definition is even broader in scope, as it encompasses a single recommendation by a producer under 3(21)(c)(1)(ii) who "directly or indirectly (e.g., through or together with any affiliate) makes investment recommendations to investors on a regular basis as part of their business…" (emphasis added). Thus, "regular basis" is met by any professional who is part of an investment firm or insurance agency where others regularly give such recommendations, even if the individual producer does not regularly do so.

confidence—and the widely shared understanding that financial salespeople are not fiduciaries absent that special relationship, one would reasonably expect Congress to say so."[26]

As in 2016, the effect of the Proposal's new formulation would be that all recommendations to purchase an annuity that relate to ERISA plans or IRAs (including not only rollovers, but recommendations regarding the use of distributions from a plan or IRA) would be fiduciary advice.

The Department is fairly transparent in its real purpose, writing the Preamble that, "More fundamentally, the Department rejects the purported dichotomy between a mere 'sales' recommendation to a counterparty, on the one hand, and advice, on the other, in the context of the retail market for investment products."[27] Of course, the "purported dichotomy" the Department "rejects" is actually the central issue in the 5th Circuit's decision. In enacting ERISA, Congress did not reject that "purported dichotomy," it ratified it.

The 5th Circuit found that "When enacting ERISA, Congress was well aware of the distinction, explained further below, between investment advisers, who were considered fiduciaries, and stockbrokers and insurance agents, who generally assumed no such status in selling products to their clients. The Fiduciary Rule improperly dispenses with this distinction. [emphasis added]"[28]

In the Proposed Rule, the Department attempts to make the annuity standard of care in most states—best interest—proof of a fiduciary relationship. This is especially concerning as State and Federal regulators made it very clear that they adopted a "best interest" standard of care in a variety of different circumstances <u>precisely because it was not a fiduciary standard of care</u>. Both the SEC and the NAIC adopted their best interest standards of care after considering and rejecting a fiduciary standard of care because it was not appropriate for sales relationships.[29] As the SEC wrote, "We have declined to subject broker- dealers to a wholesale and complete application of the existing fiduciary standard…we believe (and our experience indicates), that this [fiduciary] approach would significantly reduce retail investor access to differing types of investment services and products, reduce retail investor choice in how to pay for those products and services, and increase costs for retail investors of obtaining investment recommendations."[30]

The Proposed Rule has the same legal failure as the 2016 Rule in that it attempts to create a fiduciary relationship in state insurance sales that Congress did not intend. The faulty premise underlying the White House statements and the Department's Proposed Rule is the same—their misunderstanding of the state regulated insurance marketplace and their own role as regulators of employer-provided retirement plans has led them to substitute their preferred policy for the law.

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[26] *Chamber*, at 376.

[27] 88 Fed. Reg. at 75,907.

[28] *Chamber,* at 372.

[29] And as the 5th Circuit noted, "Under ERISA, however, fiduciaries are generally prohibited from selling financial products to plans. 26 U.S.C. § 4975(c)(1), 29 U.S.C. § 1106(b)." Id at 382.

[30] 84 Fed. Reg. at 33,322 (July 12, 2019).

As the 5th Circuit wrote in 2018, "The DOL interpretation, in sum, attempts to rewrite the law that is the sole source of its authority. This it cannot do."[31]

The Department Lacks the Authority to Impose a Fiduciary Standard of Care on ERISA Title II Plans (Which Include Individual Retirement Accounts and Annuities, Health Savings Accounts, and Medical Savings Accounts)

As it attempted to do in the vacated 2016 Rule, the Proposal attempts to establish a fiduciary standard of care applicable to IRAs and other ERISA Title II tax vehicles—despite the fact that Congress expressly declined to create a separate standard of care for Title II and did not grant authority to the Department to do so. The Department's argument that it can do so because the definition of fiduciary investment advice applies to Title II plans under the prohibited transaction rules in Sec. 4975 of the Tax Code requires one to ignore the existence of detailed Title I authority regarding standards of care, remedies and the Department's role while Title II is otherwise silent on these subjects. As the 5th Circuit ruled in vacating the 2016 Rule, "Title II did not authorize DOL to supervise financial service providers to IRAs in parallel with its power over ERISA plans."[32]

The reasons for the different standards in Title I (employer-provided plans) and Title II (individually-directed savings vehicles) is simple. In an employer-provided retirement plan, fiduciaries make decisions for participants over which the participants have little or no control. Basing the rules on the long history of trust law, Congress created a fiduciary standard of care, and provided specific legal remedies to hold fiduciaries accountable for those decisions. By contrast, in an IRA under Title II, the IRA owner makes her own decisions—it is functionally like any other investment account, but with special tax rules and preferences. Congress did not create a special standard of care or legal remedy under Title II because the IRA owner makes her own choices. She can choose to buy investments from a salesperson, or to engage a fiduciary financial advisor—in either case, the financial professional is already separately regulated and held to an appropriate standard of care and legal remedy.

What Title I and Title II have in common are very similar prohibited transaction rules in ERISA Sec. 406 and Tax Code Sec. 4975. In Title I, these rules prevent people close to the plan from taking advantage of their position (such as by causing the plan to rent space in a building the fiduciary owns at an inflated price). In Title II, the prohibited transaction rules serve to prevent the IRA owner from engaging in abusive tax practices (such as by owning a building in an IRA and "renting" space to themselves to increase their current business deductions while also exceeding the IRA contribution limits).

The Department tries to engage in a legal two-step to do indirectly what it cannot do directly. The first step is to expand the definition of fiduciary under the prohibited transaction rules, making the financial professional's compensation in the IRA a prohibited form of self-dealing (using fiduciary advice to influence one's own compensation). The second step is to use the Department's authority under ERISA sec. 408 to grant exemptions from the prohibited

[31] *Chamber* at 373.

[32] Id. at 364.

transaction rules, but only if special conditions are met. The Proposed PTE 84-24 and Proposed 2020-02 each require compliance with a new standard of care as one of their many conditions. This, the Department asserted in 2016, and asserts again in the Proposal, allows the Department to impose a standard of care under Title II indirectly that it lacks the authority to impose directly.

The 5th Circuit rejected the Department's argument that its authority under ERISA Sec. 408 to grant exemptions from the prohibited transaction rules in ERISA Sec. 406 and Code Section 4975 could be used to invent a Title II standard of care where Congress did not create one. This, the court wrote, was improperly requiring "…insurance salespeople [to] assume obligations of loyalty and prudence only statutorily required of ERISA plan fiduciaries"[33] under Title I. The Proposal is no different than the 2016 Rule in this regard, and therefore exceeds the Department's authority under the statute.

The Department Lacks the Authority to Regulate Recommendations Regarding the Use of Rollover Proceeds or Distributions from Plans:

The Proposed Rule seeks to apply a fiduciary standard to recommendations regarding the use of distributions from plans and IRAs. Not only does the Department lack the authority to apply a fiduciary standard regarding Title II plans at all for the reasons discussed above, but it lacks the authority to regulate the use of assets that are no longer held in a Title I plan as well.

The Proposed Rule at Sec. 2510.3-21(f)(10)(i) defines "recommendation" to include the use of assets "…after the securities or other investment property are rolled over, transferred, or distributed from the plan or IRA." This is simply not consistent with the statute. ERISA Sec. 3(21)(A)(ii) applies to "…investment advice for a fee…with respect to any moneys or other property of such plan…" [emphasis added]. By definition, assets rolled out of or distributed from a plan no longer are part of that plan, and are beyond the scope of the definition. The Department therefore lacks the authority to impose a standard of care on any assets that are not inside an employer-provided retirement plan.

The Department does not explain the legal theory by which it claims the authority to regulate advice pertaining to the use of the proceeds from a distribution. We speculate that the Department is attempting to close a perceived "loophole," in which a financial professional does not specifically recommend a rollover or distribution from a Title I plan, but does say to the plan participant, "If you do decide to do take your money out, here's what we would recommend you do with it." However, the Department's belief that such a situation should be subject to their jurisdiction does not make it so. If the recommendation does not involve assets in the plan, but only recommendations about what to do with such assets *after* they are no longer in the plan, then the advice does not apply to "moneys or other property of such plan."

The Proposed Rule Does Not Contain Needed Exclusions for Recommendations Between Investment Professionals, Applying "Retail" Concerns to the "Institutional" Market:

[33] Id. at 382.

Th 2016 Rule was very broad, but it contained important exclusions from fiduciary advice for certain sophisticated counterparties. Unfortunately, these exclusions were not retained in the Proposed Rule. As a result, the Proposed Rule creates a potential trap for discussions between financial professionals, such as insurance company wholesalers recommending their company's products to independent producers who are fiduciaries to retail clients.

While the Preamble reads that "…the Department believes [wholesaling] communications to financial intermediaries would typically fall outside the scope of proposed paragraph (c)(1)(ii) because they would not involve recommendations based on the particular needs or individual circumstances of the plan or IRA serviced by the intermediary," the Department goes on to say that nothing prevents fiduciary status for wholesalers if the definition is met because, "In general, however, the Department envisions that proposed paragraph (c)(1)(ii) would apply broadly to recommendations to plan and IRA fiduciaries acting on behalf of plans and IRAs."[34]

Such a granular "facts and circumstances" analysis simply is not workable in the real world, and seems well beyond the Department's concerns in offering the Proposal. The Department should not be setting technical legal traps in which the fiduciary status of the wholesaler depends on whether the recommendation is of the new annuity product in general, or in response to a producer's inquiry as to how the new annuity product would address a person with specified characteristics. In both cases, two insurance professionals are discussing their business, not making recommendations to a retail consumer. This type of inadvertent fiduciary status is especially concerning as it is not clear whether an exemption would apply to the wholesaler in every relevant circumstance.

The Proposed Rule Potentially Applies to a Wide-Array of Vaguely-Defined Insurance Products:

The Proposal applies to securities and other "investment property." Despite the fact that investment property is not an appropriate term to describe an annuity or other insurance product, the Department clearly intends these to be covered. However, the definition is vague, potentially covering many insurance products not ordinarily considered to be part of retirement investing, simply because they are recommended for purchase with the proceeds of a distribution. For example, if a distribution is used to purchase an insurance product with an "investment component," the Department asserts the fiduciary standard would apply. The "investment property" definitions merely states that the Proposed Rule would not apply to "…health insurance policies, disability insurance policies, term life insurance policies, or other property to the extent the policies or property do not contain an investment component." This exposes insurance producers selling non-retirement vehicles to the risk of unanticipated regulation.

The Proposal Presents New Litigation Risks to Insurance Producers and Carriers

The Department may technically be correct that the Proposals, unlike the 2016 Rule, do not expressly create a "new" cause of action. However, the Proposals would nonetheless significantly increase the litigation risks facing insurance producers and carriers selling annuities.

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[34] 88 Fed. Reg. at 75,907.

The effect of the Proposals is to make sales recommendations under state law that were never before subject to ERISA to become fiduciary recommendations under ERISA. Thus, where those recommendations involve a Title I plan—such as in connection with a rollover recommendation—the existing cause of action in Title I is now applicable to the insurance producer and the co-fiduciary insurance carrier as a new liability risk that did not previously exist. Further, because these parties have now acknowledged fiduciary status in writing, it is likely that this written acknowledgment will be used in other contexts, such as to support state law causes of action under different bodies of law. Indeed, part of the reason other regulators reiterated that their standards are not fiduciary standards is to avoid confusion and unintended consequences that might result from being a "fiduciary" in other legal contexts. The Department also has not considered the fiduciary insurance issues presented by the Proposals. Insurance producers likely do not have any professional liability coverage that will cover fiduciary conduct. Many thousands of individuals and small business entities would have to seek new professional insurance that will address their status as fiduciaries.

The Proposed Rule Undermines the Important Role of Independent Marketing Organizations (IMOs) and Other Intermediaries in Independent Distribution

The proposed changes to the definition of fiduciary investment advice, in conjunction with the proposed changes to the prohibited transaction exemptions, in particular Proposed PTE 84-24, would introduce undue confusion for insurance intermediaries like Independent Marketing Organizations (IMOs) and the producers who work with them. In fact, the Proposal would appear to expose insurance intermediaries to potential fiduciary status for some of their common activities, which today would never be considered within scope. Further, there is no prohibited transaction exemption clearly applicable to an IMO or other intermediary if it is determined to be acting in a fiduciary context, which could significantly disrupt the vital role that they play in the independent distribution model.

Intermediaries, like IMOs, are essential to the independent distribution of annuities. These intermediaries provide a wide variety of necessary services to independent producers, including marketing support, training, lead generation, technological assistance, back office and compliance support, and practice building services. Despite their importance, the Proposal essentially ignores intermediaries, but for footnote 10 in Proposed PTE 84-24 clarifying that "The Insurance Sales Commission may be paid directly to an intermediary such as an intermediary [sic] marketing organization (IMO) or field market organization (FMO), which then compensates the individual Independent Producer who has provided investment advice."[35] While the clarification that intermediaries may pass through commissions rather than mandating only direct commissions to producers from insurance issuers is useful, recognition of one small potential service intermediaries provide does not scratch the surface of the types of activities provided by this crucial piece of the independent, insurance-only producer distribution model.

Under the Proposed Rule, it is not clear when some of the services commonly provided by IMOs and other intermediaries are fiduciary in nature. For example, an intermediary may help a producer narrow the field of annuities to recommend to a client based on the client's individual

[35] Id. at 76,007.

needs and circumstances, as relayed by the independent producer. Is this fiduciary advice? If so, there is no exemption clearly applicable for such a "recommendation." An intermediary is not a financial institution under Proposed 2020-02, and it likely is not an independent producer receiving an "Insurance Sales Commission" under Proposed 84-24.

In addition, it is unclear whether independent producers will need to receive exemptive relief for the additional services that they receive from insurance intermediaries (i.e. product support, training, etc…). If so, independent producers would be unable to receive exemptive relief for these services under Proposed PTE 84-24 given the narrow definition of "Insurance Sales Commission." Moreover, it is unclear if the intermediaries can receive override payments from the insurance company for the important external wholesaling services they provide to producers, as such payments typically come from the commission paid by the insurance company. While there appears to be more latitude for different arrangements under Proposed PTE 2020-02 (as long as they are "reasonable") the extreme limits in Proposed PTE 84-24 Proposal makes the normal role of intermediaries potentially untenable.

The Proposal's changes threaten to upend the independent distribution model as we know it today. It would undercut the ability to market FIAs, undermine sales, training, and product assistance for independent producers, and ultimately reduce consumer access to guaranteed income solutions distributed through independent producers and intermediaries. As the Department admits, "It is challenging to estimate the number of independent producers selling annuities to the retirement market" and the Department assumes from "anecdotal" evidence that only 4,000 independent producers would be affected.[36] This estimate is far too low, especially given the incredibly broad scope of the Proposal that includes recommendations regarding the use of plan and IRA distributions. We believe tens of thousands of independent producers will be affected. Intermediaries will play a prominent role in educating thousands of producers running small businesses who have never before been subject to ERISA.

We are skeptical that any version of the Proposal would properly take into account the realities of independent distribution and the unique and critical role of intermediaries, as the Department lacks the necessary expertise in state-regulated insurance markets. Services provided by IMOs and other intermediaries to independent producers should not be potential fiduciary acts by intermediaries, nor should the receipt of such services require exemptive relief. This problem is magnified by the arbitrary and capricious limits on compensation in Proposed PTE 84-24 as compared to Proposed PTE 2020-02. Intermediaries should be able to receive override payments for their external wholesaling services without concern that these are out of scope of the narrowly defined "Insurance Sales Commission."

Proposed PTE 84-24 and Proposed PTE 2020-02 are Arbitrary and Capricious in Their Treatment of Independent Producers:

The Proposed PTE 84-24 Proposal would arbitrarily permit only certain insurance producers, selling only certain products, to receive only "Insurance Sales Commissions." No other form of

[36] Id. at 75,936

compensation, regardless of its reasonableness, utility to the consumer, or transparency of disclosure, would be permitted.

This excessively restrictive approach fails to account for a variety of different forms of compensation that are common in the marketplace and are consistent with a best interest standard of care. These limits are directly at odds with all state laws—laws developed by legislative bodies and Insurance Commissioners with actual expertise in the marketplace. It was not by accident that the NAIC Best Interest Rule permits assistance with marketing, office support, retirement benefits, or other reasonable compensation, but prohibits other forms of clearly compensation entirely. By contrast, the Department would seek to substitute its judgment—fixed in time by Federal regulation, changeable only by notice and comment rulemaking—to define only one narrow business model. Further, the narrow definition of "Insurance Sales Commission" makes it very difficult and dangerous for producers, intermediaries and insurance companies to seek any innovation or change to compensation models, regardless of how beneficial it would be to retirement investors.

The arbitrary compensation restrictions in the Proposed PTE 84-24 significantly deviate from the Department's longstanding interpretation of acceptable compensation under current PTE 84-24. What's even more arbitrary is that the narrow "Insurance Sales Commission" in Proposed PTE 84-24 is also completely incompatible with the compensation permissible under Proposed PTE 2020-02. This makes no sense, as two independent producers, who are alike in every way except thar one receives employee benefits from an insurance company, recommending the same annuity to the same client, must use entirely different business models.

While PTE 2020-02 is also too limited, as discussed below, it nevertheless permits multiple forms of reasonable and disclosed compensation. As the Proposed PTE 84-24 and the Proposed 2020-02 are otherwise largely identical in their requirements, there is no valid reason for the Department to arbitrarily prohibit perfectly legal and disclosed compensation when received by an independent insurance producer, but broadly permit such compensation when it is received by other types of financial professionals.

Given the Department's statements that its goal in the Proposal is to achieve uniformity in recommendations to retirement investors, to "level the playing field" and to prevent "regulatory arbitrage," it seems fundamentally inconsistent to create two very different treatments for producers without any substantive explanation of the need for the difference. There is no material difference between an independent producer who is a statutory employee and one who is not—both of whom may operate independent of any particular carrier, recommending the products of multiple carriers.

In an additional display of arbitrary and capricious rulemaking, Proposed PTE 84-24 singles out state-regulated annuities for separate and unequal treatment without any material discussion of the rationale for the difference. The same producer is potentially able to recommend an insurance-only annuity and an annuity that is a security. The Proposed PTE 84-24 forces that producer to use two different exemptions without a clear reason why, other than the registered or variable annuities are treated differently. We must note that similarly separate

treatment—excluding FIAs from PTE 84-24—was a material factor in the 5th Circuit's decision to vacate the 2016 Rule in part because the treatment of the FIAs was arbitrary and capricious.[37]

Restrictions on Sales Incentives are Opaque and Unnecessary:

As part of the Proposed PTE 84-24, an insurance company's policies and procedures "must identify and eliminate quotas, appraisals, bonuses, contests, special awards, differential compensation, riders and or other similar features that are intended, or that a reasonable person would conclude are likely, to incentivize Independent Producers to provide recommendations that do not meet the Impartial Conduct Standards."

Like many aspects of the revisions in Proposed PTE 84-24, this language is unnecessary in light of similar restrictions in the NAIC Best Interest Rule and the SEC Regulation Best Interest, but goes further than those rules that were carefully calibrated to the realities of the marketplace by their primary regulators. The NAIC Best Interest Rule requires an insurer to have procedures "to identify and eliminate any sales contests, sales quotas, bonuses, and non-cash compensation that are based on the sales of specific annuities within a limited period of time." The SEC's Regulation Best Interest requires the broker-dealer to "Identify and eliminate any sales contests, sales quotas, bonuses, and non-cash compensation that are based on the sales of specific securities or specific types of securities within a limited period of time.[38]

The proposed amendments to PTE 2020-02 include similarly restrictive language regarding sales incentives, stating that "Financial Institutions may not use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other similar actions or incentives that are intended, or that a reasonable person would conclude are likely, to result in recommendations that are not in Retirement Investors' Best Interest." This is a change from the current PTE 2020-02 (itself only in effect for two years) that required "Financial Institutions' policies and procedures mitigate Conflicts of Interest to the extent that a reasonable person reviewing the policies and procedures and incentive practices as a whole would conclude that they do not create an incentive for a Financial Institution or Investment Professional to place their interests ahead of the interest of the Retirement Investor."

These proposed restrictions in PTE 84-24 and 2020-02 intimate that the existence of certain sales incentives, by themselves, constitute a violation of the Impartial Conduct Standards. This is inaccurate, and it represents a significant departure from the approach taken in the original PTE 2020-02, in which the Department noted their intent "to apply a principles-based approach to sales contests and similar incentives."

The Department's departure from a principles-based analysis to imposing its arbitrary judgement regarding specific issues even goes so far as determining the attendance at educational conferences. Rather that limiting attendance to producers who recommend, for example, the type of product to be discussed at the conference, the Department asserts that "educational

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[37] See., e.g., Chamber at 366, "In a novel assertion of DOL's power, the Fiduciary Rule directly disadvantages the market for fixed indexed annuities in comparison with competing annuity products."

[38] 17 CFR § 240.15l-1(a)(2)(iii)(D)

opportunities should be offered equally to all" because "training is a necessary" for Best Interest Advice."[39]

Ultimately, the Department does not adequately explain why these changes to current PTE 2020-02 or the restrictions in Proposed PTE 84-24 are necessary, given that the NAIC Best Interest Rule and the SEC's Regulation Best Interest already address these concerns. The Proposal seems to be a general limitation on differential compensation, an even more restrictive and unreasonable policy than that of the 2016 Rulemaking, which at least allowed for differential compensation based on "neutral factors."

Supervisory Requirements in Proposed PTE 84-24 are Duplicative of State Laws and Unreasonably Vague:

Although insurance companies are not formally co-fiduciary financial institutions under the Proposed PTE 84-24, they are required to engage in almost all of the same supervision activities as co-fiduciary financial institutions under PTE 2020-02. Many of these requirements ignore that the insurance companies selling in the independent distribution market do not have the ability to control an independent producer's conduct in the same way that other financial institutions control the activities or their representative. Given the draconian consequences for failing to ensure full compliance—potentially a ten-year ban on being able to sell policies to retirement investors—it is unreasonable to impose the full panoply of these supervisory responsibilities on the insurance company. These requirements are inherently inconsistent with the realities of the state-regulated independent distribution model.

The Department contends that insurance companies are not fiduciaries and only need to supervise their own products, but the Proposed PTE 84-24 creates a novel regulatory landscape in which "non-fiduciary" supervisors are assigned responsibility for exemption compliance over the "fiduciary" producers actually charged with legal responsibility. In addition, the complexity of the supervision requirements would lead to a variety of different policies and procedures from different insurance companies, introducing a significant compliance burden and confusion for Independent Producers selling products from multiple insurance companies. Ultimately, this would result in agents choosing to sell from fewer companies, undermining the very strengths of the independent distribution model. There would be less competition and access to fewer options for consumers.

The NAIC model includes strong supervision requirements that are more appropriate for the independent distribution model. Creating a mandate for insurance companies to layer additional policies and procedure and retrospective review requirements on top of their obligations through the NAIC model would be duplicative, unnecessary, and costly.

For example, insurance companies must adopt a prudent process for reviewing each independent producer to identify those producers who (1) "have failed or are likely to fail to adhere to the Impartial Conduct Standards," or (2) "who lack the necessary education, training, or skill." Proposed PTE 84-24 Sec. VII(c)(2) states that the process must consider specific issues, and that

[39] 88 Fed. Reg. at 76,011.

the carrier must document the initial review and conclusion, as well as conduct and document annual retrospective reviews thereafter for every independent producer selling their products.

What prudent process is necessary to determine whether a producer is likely to fail to adhere to the Impartial Conduct Standards? What is the necessary education or skill? How does this differ from training? The "wrong" answer to these unanswerable questions could cause the Department to assert a ban on an insurance company using the exemption, with very limited rights to appeal the Department's decision.

As noted by the Fifth Circuit Court of Appeals in overturning the Department's 2016 rulemaking, Section 989J of Dodd-Frank deferred regulation of fixed-index annuities to the states, "which have traditionally and under federal law borne responsibility for thoroughgoing supervision of the insurance business." Instead of superseding the NAIC model in violation of Congressional intent, the Department should fully align insurance companies' obligations under PTE 84-24 with their responsibilities under the NAIC model.

The Eligibility Provisions in PTE 84-24 and PTE 2020-02 would Inappropriately Restrict Insurance Producers and Carriers from the Marketplace for Reasons Unrelated to Investment Advice:

The eligibility provisions would deny retirement investors access to insurance producers and annuities for reasons completely unrelated to the producers' conduct as insurance professionals, and the Proposal would limit the due process rights for those declared ineligible. The inclusion of nearly identical criteria in both PTE 84-24 and PTE 2020-02 likely results in no alternative investment advice exemptions available to an ineligible person, and while the Department suggests that an ineligible person could apply for an individual exemption, the Department separately issued a pending proposed regulation stating that the Department "ordinarily will not consider" exemption applications from similar persons.[40]

The Department should clarify that the eligibility criteria apply prospectively from the date the class exemptions are granted. To do otherwise could have disastrous and unanticipated consequences on the services and service providers immediately available to retirement investors. The Department does not provide an explanation of why such an expansion is necessary and did not indicate that the current language in PTE 2020-02 has proved inadequate for enforcement of the exemption. Instead, it merely asserts that the current eligibility standards in PTE 2020-02 are "too narrow…" and that the changes described below "…will help foster a culture of compliance throughout the organization in recognition of the importance of investment advice to Retirement Investors."[41]

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[40] See, Proposed exemption procedures Sec. 2570.33 providing that the Department "…ordinarily will not consider…an application involving a party in interest who is the subject of such an investigation or who is a defendant in an action…[by]…any other regulatory entity to enforce…any other Federal or state laws." 87 Fed. Reg. 14,722 (March 15, 2022). The final rule has been approved for publication in the Federal Register but has not been released as of this writing.

[41] 88 Fed. Reg. at 75,989.

The criteria causing ineligibility under the current version of PTE 2020-02 are appropriately limited to those crimes referenced in ERISA Sec. 411 that "aris[e] out of such person's provision of investment advice to Retirement Investors"[42] and that are committed by the Investment Professional, the Financial Institution or another Financial Institution in the same Control Group.[43] In other words, one is ineligible if the misconduct is related to the acts of the persons involved in providing fiduciary advice and their closely related entities.

By contrast, the language in Proposed PTE 84-24 and Proposed PTE 2020-02 removes any required connection with the provision of investment advice, and expands disqualifying conduct to include crimes under Federal, State or foreign law. Further, the more limited term "Control Group" is replaced by the broadly defined term "affiliate." Affiliate in both proposed exemptions would include "Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with…" the insurance producer, insurer, investment professional or financial institution, including their directors, officers, relatives and partners.[44]

The Proposals would also significantly limit the ability of persons declared ineligible to challenge the Department's determination.

Effective Date 60 Days After Publication is Arbitrary and Capricious:

The Proposal generally would go into effect only 60 days after publication in the Federal Register. This is quite simply impossible to meet, given the magnitude of the changes proposed. This is especially true for insurance producers and carriers, whose traditional state-regulated sales activities would be improperly converted into fiduciary advice, and subject to a new, extensive, detailed, and burdensome Federal regulatory regime. Put simply, it is hard to imagine an effective date that is less connected to the realities of compliance with the Proposals' broad requirements—or that better exemplifies arbitrary and capricious rulemaking.

The Elements of the Proposal Cannot Stand in Isolation—the Proposal Should Not Be Severable:

We do not agree with the Department's statement that it "…intends discrete aspects of this regulatory package to be severable."[45] The Proposal is specifically designed by the Department to be an integrated package in which four pieces operate together. The conditions of the proposed exemptions PTE 84-24 and PTE 2020-02 are inextricably linked to the fiduciary status the Proposed Rule seeks to create for financial professionals. Proposed PTE 84-24 and Proposed PTE 2020-02 become the only exemptions available for investment recommendations, as several current exemptions providing such provisions are separately amended in yet another part of the

[42] PTE 2020-02 Sec. III(a)(1).

[43] Id. at Sec. III(b)(2) and (3).

[44] See, Proposed 2020-02 Sec. III(v)(a) and Proposed 84-24 Sec. X(a).

[45] Id. at 75,912.

package, removing those provisions. All of the elements comprising the Proposal should be vacated if any part of it is vacated, as the failure of an individual piece could result in a gap for which there is no regulatory or exemptive solution.

Concerns Regarding the Regulatory Process and Economic Analysis:

We urge that the Proposals be withdrawn for several reasons. In the foregoing comments, we discussed the fundamental problems with the substance of the Proposal itself. However, we also believe the administrative process does not comply with the Administrative Procedure Act ("APA")[46], and that the economic analysis is wholly inadequate—these are also sufficient grounds for the Department to withdraw the Proposal.

- Administrative Process Denies the Public a Meaningful Opportunity to Comment

The Department has not observed the requirements of a valid regulatory process under the Administrative Procedure Act. IALC was among those denied a meaningful opportunity to comment on the Proposal at the public hearing in December, as it was held several weeks before the end of the comment period, an unprecedented DOL hearing procedure that we believe is inconsistent with not only the APA, but the Department's own regulation governing the exemption process.[47] Like many others, IALC was still attempting to review and understand the Proposal in the mere 39 business days provided within the 60 day period. We did not believe we could reasonably be prepared to draft testimony, discuss our concerns, and face questions, challenges and information requests from Department officials—who have been steeped in the details of the Proposal for three years—after only a few weeks. We note that even those who did testify indicated that they had not completed their review of the Proposal—one witness even used her 10 minutes simply to pose questions to the Department about what was meant by its many ambiguous and vague provisions.[48] We believe this unprecedented step of holding hearings before the end of the minimum required comment period violates the requirements of an administrative process that complies with the law. Put simply, the Proposal is being promulgated through an arbitrary and capricious process that does not value input from the regulated community.

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[46] 5 U.S.C. §§ 551–559.

[47] The Department's procedural regulations require it to publish in the same notice as the proposed exemption a designated time period for submitting comments and for adversely affected persons to request for a hearing. The deadline specified in the proposed exemption notices was 60 days. The Department cannot hold a hearing of its own motion prior to the expiration of the period during which affected persons have the right to request a hearing. See., 29 CFR §2570.42 (*The Department, "…will publish a notice of a proposed exemption in the Federal Register…the notice will:... (c) Inform interested persons of their right to submit comments to the Department…relating to the proposed exemption and establish a deadline for receipt of such comments; and (d)…inform interested persons of their right to request a hearing under § 2570.46 of this subpart and establish a deadline for receipt of requests for such hearings."*) and 29 CFR §2570.46(a) (*"Any interested person who may be adversely affected by an exemption which the Department proposes to grant from the restrictions of section 406(b) of ERISA, section 4975(c)(1)(E) or (F) of the Code…may request a hearing before the Department within the period of time specified in the Federal Register notice of the proposed exemption."*).

[48] See, Testimony of Ms. Chantel Sheaks on behalf of the U.S. Chamber of Commerce, Transcript of "Public Comment Hearing, Retirement Security Rule: Definition of an Investment Advice Fiduciary," pgs. 155-166, December 12, 2023.

- Economic Analysis Demonstrates Insufficient Knowledge on Which to Base a Proposal, Relies on Academic Conjecture While Dismissing Valid Evidence, and Misinterprets Different Role of Annuities Versus Investments

The Department requests comment and data on over 180 specific issues in the Proposal. This is a remarkable degree of uncertainty for a project on which the agency has been working since 2010. It clearly suggests that the Proposal should have been a Request for Information. The Executive Orders governing the regulatory process require a thorough analysis, including consideration of less restrictive alternatives to the rule, but this appears to be an economic analysis that was written to justify a predetermined policy outcome, not to assist in developing an efficient regulation informed by the facts and likely effects of policy.

The analysis materially underestimates the costs of the Proposal, especially with respect to the burden on small businesses. At the same time, the analysis assumes that "retirement investors" will universally benefit in a variety of not-clearly defined ways. Of greatest concern is that the analysis makes little real effort to evaluate how the 2016 Rule actually affected retirement savers.

Academic Projections Should Not Replace Actual Evidence:

The Department does consider that the 2016 Rule was in effect for a year or so before it was vacated, but to the extent the Department engages with the evidence of the 2016 Rule, it is to look favorably on academic studies of questionable utility while dismissing as invalid actual surveys of how financial institutions responded to the 2016 Rule. Direct evidence from investment advisors, publicly available research, and testimony of interested parties show that low and middle-income households, including the underserved, will bear the most substantial cost of the rule in the form of foregone advice, access to fewer solutions, and greater financial vulnerability. But that evidence is largely rushed aside by the Department.

Here's an example of a study cited by the Department as finding a favorable result from the 2016 Rule. This study that "found that the Department's 2016 Final Rule reduced flows into funds with excess loads or loads that were higher than would otherwise be expected based on the fund's characteristics."[49] This conclusion was reached by "…examining the period from 1993 to 2017…taking into consideration preexisting marketplace trends, anticipatory effects, the April 2015 Proposal, and the April 2016 Final Rule."[50] In other words, mutual funds that in the study authors' methodology had excessive fees were used less in 2017 than the study authors think they would have been had the 2016 Rule not been adopted.

Regardless of the academic rigor behind this study, its findings are hardly dispositive in assessing the impacts of the 2016 Rule as a whole on retirement savers. Even compiling a list of such studies of discrete issues, as the Department does in the economic analysis, doesn't address the fundamental questions of whether the net effect of the 2016 Rule was positive or negative, and why.

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[49] 88 Fed. Reg. at 75,937.

[50] Id.

But even as these are cited favorably, the Department dismisses other studies that examined how the 2016 Rule impacted small savers and underserved groups by actually looking at what financial institutions and financial professionals planned to do or did.[51] Based on data available at the time the studies were released, all three concluded that the 2016 Rule substantially impacted the market for financial advice, particularly among underserved and middle market households, and suggests that further action will perpetuate the trend.

For example, a 2017 Deloitte survey of 21 major financial institutions which found that 29% percent had limited advice and 24% had eliminated advice to small dollar clients in response to the 2016 Rule. Despite being direct surveys of financial service providers, the Department implied that the study may not be reliable through a footnote quoting the fine print in which Deloitte wrote, "The findings were made based on the analysis of information and data provided by the study participants to Deloitte…[who] was not asked to and did not independently verify, validate or audit the information presented by the study participants."[52]

The Analysis Does Not Consider the Unique Benefits of Annuity Guarantees

Annuities are not short-term investments, but long-term, risk-shifting guarantees. The economic analysis generally ignores this--for example, there is no consideration of the long-term outcomes of different types of portfolios, including those that are annuity-focused versus those that aren't.

The Proposal and the analysis tend to emphasize annuity restrictions and costs, which are necessary to provide the guarantee, but not the value of the guarantee itself. Most of the academic studies cited in support of the proposal do not adequately take the function of annuities into account, if at all, and are instead narrowly focused on the investment component of *some* annuities, neglecting the trade-off between returns and risk mitigation. In effect, most of the cited studies treat annuities like expensive mutual funds where the added expense only benefits the advisor and harms the retirement investor, ignoring the value of the guarantees they provide.

The Department also ignores the very different cost structures required to offer annuities. The solvency rules applicable to life insurance companies compel insurers to hold reserves equal to liabilities and to hold additional capital. At year-end 2021, life insurers held $1.6 trillion in variable annuity reserves for contracts with guaranteed minimum death benefits and $1.0 trillion for contracts with guaranteed living benefits.[53] In 2022, life insurers held a total of $4.0 trillion in annuity reserves.[54] The value that guarantees offer to retirement savers comes at a cost, and

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[51] Hispanic Leadership Fund, Analysis of the Effects of the 2016 Department of Labor Fiduciary Regulation on Retirement Savings and Estimate of the Effects of Reinstatement, November 8, 2021; U.S. Chamber of Commerce, The Data is In: The Fiduciary Rule Will Harm Small Retirement Savers, Spring 2017; Deloitte, The DOL Fiduciary Rule: A Study in How Financial Institutions Have Responded and the Resulting Impacts on Retirement Investors, August 9, 2017.

[52] 88 Fed. Reg. at 75,946.

[53]10 American Council of Life Insurers, Annuity Product Line Report, 2022. Estimates are based on company surveys.

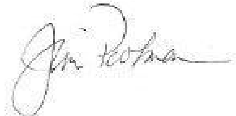
[54]American Council of Life Insurers, Life Insurers Fact Book, 2023.

failing to compare these structural cost differences between annuities and investments (or to assess the value of the guarantee to retirement savers) makes the cost comparisons inapposite.

Conclusion:

For the reasons discussed above, the Proposal should be withdrawn. We would be happy to discuss these matters with the Department at your convenience.

Sincerely,



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