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July 20, 2015

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Conflict of Interest Rule
Room N–5655
U.S. Department of Labor
200 Constitution Avenue N.W.
Washington, DC 20210

Re: Department of Labor, Employee Benefits Security Administration, Proposed Rule Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice 29 CFR Parts 2509 and 2510, RIN 1210–AB32

Dear Sir/Madam:

The National Association of Mutual Insurance Companies ("NAMIC") appreciates the opportunity to provide comments regarding the proposed rules and request for comment set forth above (the "Notice").

NAMIC is the largest property/casualty insurance trade association in the country, serving regional and local mutual insurance companies on main streets across America as well as many of the country's largest national insurers. The 1,400 NAMIC member companies serve more than 135 million auto, home and business policyholders and write more than $196 billion in annual premiums, accounting for 50 percent of the automobile/homeowners market and 31 percent of the business insurance market. Through our advocacy programs, we promote public policy solutions that benefit NAMIC companies and the consumers we serve.

Background

On April 14, 2015, the Department of Labor (DOL) released a proposal to re-define who is rendered a "fiduciary" of an employee benefit plan under the Employee Retirement Income Security Act (ERISA) by providing investment advice to a plan or its participants or beneficiaries.

The proposal by the DOL is billed as a new level of protection for investors in their dealings with brokers and other financial professionals who give advice on retirement accounts and defined-benefit pension plans. However, the proposal adopts a broad definition of fiduciary "investment advice" encompassing "sales" communications, certain educational materials, and other situations. In addition, the proposal broadly expands the Department's current regulatory authority over employer-provided retirement plans to all Individual Retirement Accounts (IRAs) as well as to all private sectors, employer-provided retirement plans. The DOL proposal would not apply to property casualty insurance contracts, but would affect traditional insurance products such as fixed index annuities in addition to variable annuities, which are regulated as a security.

The Proposed DOL Fiduciary Standard Rule is an Inappropriate Federal Regulation of Insurance

The primacy of the states in the regulation of insurance is well established. The McCarran-Ferguson Act in 1945 clarified that states should continue to regulate the business of insurance and affirmed that the continued regulation of the insurance industry by the states was in the public's best interest. The Financial Services Modernization Act of 1999, also known as the Gramm-Leach-Bliley Act, once again affirmed that states should regulate the business of insurance by declaring that the McCarran-Ferguson Act remained in effect. The Wall Street Reform and Consumer Protection Act of 2010, better known as the Dodd-Frank Act, recognized that the primary of state insurance regulatory functions remain as they have been since the enactment of McCarran-Ferguson.

But while the proposed DOL rule refers directly to insurance two dozen times, DOL nevertheless concludes that "[t]his proposed rule does not have federalism implications because it has no substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." To support this assertion, DOL notes that Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA. The breadth of this provision is clear in the definition of "state laws" which includes "all laws, decisions, rules, regulations, or other state actions having the effect of law, of any state." The ERISA preemption is widely viewed as one of the most comprehensive and inclusive preemptions in federal law; however, even ERISA includes a specific carve-out for the regulation of insurance. The ERISA savings clause under Section 514(b)(2)(A) provides that nothing in ERISA "shall be construed to exempt or relieve any person from any law of any state which regulates insurance, banking or securities."

It is true that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" under ERISA § 514(a), 29 U.S.C. § 1144(a), but the "saving clause" then provides that some state laws are not preempted: "nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A). In order for a state law to survive preemption by ERISA, the state law must be one that regulates insurance, as opposed to a state laws of general application that have some bearing on insurers. Kentucky Association of Health Plans, Inc. v. Miller, 538 U.S. 329, 123 S.Ct. 1471 (2003), citing ERISA, § 514(b)(2)(A), 29 U.S.C.A. § 1144(b)(2)(A).

In reserving the authority to regulate the business of insurance to the states, McCarran-Ferguson provides that "[n]o Act of Congress shall be construed to ... supersede any law enacted by any State for the purpose of regulating the business of insurance ... unless such Act *specifically relates* to the business of insurance." 15 U.S.C. § 1012(b). In *Unum Life Ins. Co. of America v. Ward* 526 U.S. 358 (1999), the Court noted that in interpreting the "business of insurance"

> the courts first ask whether, from a "common-sense view of the matter," the contested prescription regulates insurance. *Metropolitan Life Ins. Co.* v. *Massachusetts,* 471 U.S. 724, 740 (1985); see *Pilot Life,* 481 U.S., at 48. Second, we consider three factors employed to determine whether the regulation fits within the "business of insurance" as that phrase is used in the McCarran-Ferguson Act, 59 Stat. 33, as amended, 15 U.S.C. § 1011 *et seq.:* "first, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry." *Metropolitan Life*, 471 U. S., at 743 (emphasis, citations, and internal quotation marks omitted); see also *Pilot Life,* 481 U.S., at 48—49.

Section 514(b)(2)(A) provides that "nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." ERISA preemption analysis is no different than any other preemption analysis. *John Hancock Mutual Life Ins. Co. v. Harris Trust and Savings Bank*, 510 U.S. 86, 99 (1993) ("we discern no solid basis for believing that Congress, when it designed ERISA, intended fundamentally to alter traditional preemption analysis").

The clear language of Section 514(b)(2)(A) makes it clear that the DOL application of Section 514 to preempt state insurance regulation warrants at least an explanation, rather than a blanket dismissal. The application of the proposed rule would directly affect the policy relationship between the insurer and the insured in the case of state regulated products, including retirement annuities; and directly affect state regulated insurance companies and state licensed and regulated producers. The DOL proposed rule provides no explanation of why DOL believes the 24 insurance references in the proposed rule do not have any "substantial direct effect on the

States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." DOL's rule provides no reasonable grounds for its broad preemption and fails to provide any proper consideration of Section 514(b) or any attendant circumstances. It is imperative that DOL demonstrate that the application of the proposed rule to the sale of insurance products by licensed insurance producers does not "invalidate, impair or supersede" applicable state laws.

The sale of annuity products is directly regulated by the states. Almost all states have adopted standards to ensure that the agent – or insurer if no agent is involved – have reasonable grounds to believe that the product is suitable for the consumer. In complying with suitability standards, insurers and insurance producers focus on their client's specific financial situations and investment needs, and inform the client of features of the product, including market risk, returns, and fees. The existing standards for insurance products serve and protect Americans well. There is no statutory authority – or economic necessity – to attempt to displace well functioning state-based insurance regulatory authority over the sale of annuity or other insurance products.

Statutory Authority

The proposed rules are inconsistent with, and more expansive than, the underlying statutory authority provided by ERISA. The DOL has similarly failed to present evidence that it possesses the requisite authority to issue interpretative regulations. In enacting ERISA, Congress made a conscious choice to exclude IRAs from Title I. Instead, Congress applied the prohibited transactions rules of the Internal Revenue Code to IRAs. Congress has never extended Title 1's fiduciary duty rules to IRAs.

Despite clear congressional intent with respect to IRAs, the proposed rule's expanded definition of investment advice coupled with the requirements of the "Best Interest Contract Exemption" to adhere to the substantive fiduciary responsibility would expand the application of ERISA beyond Congressional intent. Such action would have the effect of amending, not just interpreting the statute – authority well beyond the administrative powers of the DOL.

DOL argues that it is appropriate to expand the definition of investment advise in light of the expanded use of 401(k) plans, IRAs and rollovers from ERISA employee plans. However, Congress has amended ERISA regularly, including recent revisions as part of the Pension Protection Act of 2006. The DOL cannot with any credibility argue that Congress was unaware of the widespread use of 401(k) plans and IRAs or the rollover of assets from ERISA plans. If the DOL believed changes were necessary the Administration should have sought a legislative change to the statute. Simply because Congress does not act to expand or amend a statute does not confer upon a department or agency the authority to unilaterally expand the breath and scope of its authority through regulatory edict.

The DOL Proposal is based Upon on Flawed Assumptions

The DOL relies on its Regulatory Impact Analysis to justify its proposed rule. But as the Investment Company Institute (ICI) explained at the Hearing on "Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees" before the House Subcommittee on Health, Employment, Labor, and Pensions, of the Committee on Education and the Workforce on June 17, 2015, the Regulatory Impact Analysis did not support DOL's assertion that there is a "substantial failure of the market for retirement advice." The Regulatory Impact Analysis did not consider how the proposal actually could limit retirement savers' access to guidance, products, and services, or how such limits could affect savers—particularly lower- and middle-income savers with smaller account balances.

As the ICI made clear the DOL argument in its Regulatory Impact Analysis that broker-sold funds "underperform" provided no benchmark for returns against which it measures this claim of "underperformance." The factual data provided by the ICI seriously challenged, if not disproved, the academic research that DOL cited as the foundation of its conclusions.

The proposed rule's cost-benefit analysis is equally flawed. The DOL grossly under estimates the time and expense that would be required to comply with the new requirements on a transitional - and ongoing - basis. The man-hours needed to make the substantial system changes necessary to provide individualized disclosures and restructure compensation systems alone are tremendous. The DOL should consult with all affected segments of industry to ascertain more realistic projections of the projected burdens.

In assessing the economic benefits of the proposed rule, DOL also over-emphasizes the benefits of so-called robo-advice. Insurers often service the needs of middle-market consumers and non-affluent investors. These customers and policyholders value the ability to receive and discuss advice and recommendations from trusted professionals, persons with whom they often have a long-standing relationship and who understand their personal situation well. The imposition of new fiduciary requirements as envisioned under the proposed rule is likely to have the effect of reducing the supply of advice available to these consumers. Insurers provide well-tailored products and are able to provide services to a broad cross-section of Americans. Inappropriate expansion of ERISA and encroachment into state-regulatory authority in relation to insurance products could have the unintended effect of significantly reducing the availability and variety of high quality products for many consumers.

Proprietary Products

A bedrock principal for NAMIC is fair competition in which all market participants compete on a level-playing field. As drafted, the proposed rule is not neutral in terms of choice of business model, nor does it place products on an equal footing. Many insurers offer products through exclusive independent contractor arrangements. In addition, many offer proprietary products. These structures often allow for low minimum investment amounts and provide investment options for consumers will small account balances. The use of these products serves a unique and necessary role within the retirement and savings planning system. Proprietary products are just as appropriate for large segments of the market as non-proprietary products and any public policy should not discriminate against a particular product or business structure.

The proposed rule also inappropriately targets specific fee structures. The DOL should not through rule attempt to structure well functioning fee arrangements that have and continue to serve consumers well. A variety of fee structures are appropriate in the retirement space to account for costs, complexity, benefits and risk of various products. Just as one size does not fit all in shoes it does fit in retirement planning needs and accordingly in associated fee structures.

NAMIC is concerned that the rule as outlined would inappropriately discriminate against many insurer business models, insurance products and compensation structures. Such an outcome would decrease both the number of available investment products, as well as market participants – ultimately reducing competition and consumer choice.

There are More Appropriate Alternatives to DOL's Proposal

It is by no means clear that federal jurisdiction is appropriate for the application of a fiduciary standard for securities that are insurance products, but it is certain that the appropriate federal regulator for securities is and should be the Securities and Exchange Commission (SEC). Under section 913(g) of The Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), the SEC was ordered to study whether to impose a uniform fiduciary duty on both investment advisers and broker-dealers and was given the authority to craft such a proposal. Presently, broker-dealers are held to a standard that requires the products they sell investors to be suitable, whereas investment advisers must put their clients' interests ahead of their own.

There are regulatory efforts are underway by the SEC regarding the standard of care under the securities laws for broker-dealers and investment advisers that provide personalized investment advice about securities to retail customers. On January 21, 2011, the SEC issued a study on broker-dealers and investment advisers and in 2013 released a request for information on whether it should pursue a uniform rule for advisers and brokers. In April of this year, SEC Chair Mary Jo White in testimony before the House Appropriations Financial Services Subcommittee that the agency will forge ahead with a rule to create a uniform fiduciary standard for broker-dealers. She told lawmakers the SEC will still seek to create a protective rule without limiting the ability of small and mid-size investors to access "reliable, reasonably priced advice."

It is important that the SEC and DOL efforts lead to rules that are complimentary in nature. The DOL's present push to revive plans for a fiduciary duty on those who advise retirement savers appears to ignore decades of effective SEC regulations and could cost low- and middle-income households investment opportunities.

The SEC has continually evidenced an appreciation and respect for the appropriate role of the states in the regulation of insurance products and services. We urge the DOL defer to the expertise of the SEC in this area, or at the very least to afford the public sufficient opportunity to consider the SEC's regulatory efforts.

Conclusion

Accordingly, NAMIC believes that the DOL rule is an improper preemption of state insurance regulation, is not supported by a factual basis and addresses regulatory questions that are outside the expertise and purview of the DOL. We respectfully request that the DOL provide: (1) reasonable grounds and proper consideration of its preemption of established and recognized state insurance jurisdiction; (2) a revised Regulatory Impact Analysis based on more objective and verifiable data and analysis; (3) a recognition of the appropriateness of proprietary products, alternate fee structures and business models; and, (4) deference to the SEC to conclude its work in this area.

If you have questions or comments, please feel free to contact me at 202-628-1558, tkarol@namic.org.

Respectfully submitted,

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