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Office of Regulations and Interpretations
Room BN-5655
Office of Exemption Determinations
Suite 400
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave. N.W.
Washington, D.C. 20210

Re: RIN 1210-AC02 – Definition of Fiduciary;
Application No. D-12060 – Proposed Amendment to PTE 84-24;
Application No. D-12057 – Proposed Amendment to PTE 2020-02

Dear Assistant Secretary Gomez:

The National Association for Fixed Annuities ("NAFA") is providing comments on the Department's proposed new regulatory definition of persons who render investment advice as fiduciaries for purposes of Title I of the Employee Retirement Income Security Act of 1974, as amended, ("ERISA") and the parallel regulations under section 4975 of the Internal Revenue Code of 1986, as amended (the "Code"). Comments are also provided concerning the Department's proposals to amend Prohibited Transaction Exemption 84-24 ("PTE 84-24") and Prohibited Transaction Exemption 2020-02 ("PTE 2020-02" and collectively with the proposals to amend the fiduciary investment advice definition and PTE 84-24, the "Proposal").

NAFA is a national trade association exclusively dedicated to promoting improved awareness and understanding of fixed annuities, including the vital role fixed annuities serve in supporting American workers' long-term retirement savings and income needs. NAFA is the only association whose sole purpose is to advocate for the beneficial retirement security mission served by the fixed annuity provider and distributor community. NAFA informs and educates legislators,

regulators and the American public about the unique benefits fixed annuities make available to those who are either planning for or have entered retirement.

Members of NAFA include more than 80 insurance carriers and independent marketing organizations that work with tens of thousands of individual producers who engage in the offer and sale of fixed annuities. Relying on the support of each and every one of them, NAFA helps protect consumers by guiding its members to adhere to applicable standards of market conduct and ethical behavior.

Whether someone needs income today or in the future, fixed annuities are the *only* products that protect consumers against the risks of investment losses associated with market fluctuations and the risk of outliving one's savings in retirement. NAFA is dedicated to promoting and safeguarding the unique value of fixed annuities and the role fixed annuity products serve in insuring working Americans' retirement savings and income.

For the reasons described more fully below, NAFA believes the Department's 2023 fiduciary advice Proposal, including proposed amendments to PTE 84-24 and PTE 2020-02, reflects fundamental misunderstandings of fact and law that would, if allowed to proceed, wreak havoc on consumer access to retirement products that are today readily available through well-regulated insurance distribution channels. NAFA believes that the Department's proposed rulemaking package is fatally flawed and should be withdrawn in its entirety.

I. Introduction: Correcting the Unfortunate and Misleading Characterizations of the Fixed Annuity Community that Accompanied the Department's Proposal.

As preface to the comments that follow, NAFA disputes in the strongest possible terms the pejorative and misleading descriptions of fixed and fixed index annuity sales practices that accompanied the Department's announcement of its 2023 fiduciary rulemaking initiative. By drawing baseless and false equivalencies between the professional mission of the fixed annuity producer community and so-called "junk fees," the announcement inappropriately disparaged a well-regulated segment of the financial services industry and impugned the integrity of hard-working insurance producers and intermediaries. Worse, by so inappropriately attacking the efforts of fixed annuity producers, the Department's announcement served to mislead and confuse

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American workers who seek the retirement savings and income guarantees that only the life insurance community can provide.

Making matters worse, the announcement accompanying the Department's fiduciary rulemaking Proposal implied that state insurance regulators are not up to the task of regulating sales of fixed annuity products merely because a state-based approach differs from one that is federalized.[1] The suggestion that state based regulation is inherently inferior to federal regulation is just plain wrong, ignores Congress' reservation over regulating the business of insurance to the states, and requires immediate correction.

NAFA vehemently disagrees with the Department's claim that its 2023 Proposal reflects a measured approach. In wholly unmeasured fashion, the Department has singled out "fixed index annuities" for special criticism delivered in a manner that betrays a fundamental misunderstanding of the vital role those products play in meeting consumer needs. NAFA also disputes the economic analysis reflected in the Proposal's preamble, as it relies heavily on selective pieces of outdated, non-peer reviewed academic research, much of which relates to foreign markets (e.g., India), and undisciplined cost calculations based on biased and wildly inaccurate factual assumptions. NAFA is deeply concerned that the Proposal's economic analysis has been inappropriately skewed in order to justify a pre-determined outcome.

The Proposal's economic analysis fails altogether to take into account any of the important economic benefits that a strategic product allocation to fixed index annuities may achieve for retirement savers. Indeed, to the extent that the Proposal is designed to steer retirement investors away from certain types of products (such as fixed index annuities), the Proposal fails to account for the profound benefits that such products bring for many retirement investors. On the basis of

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[1] *See* White House Fact Sheet: *President Biden to Announce New Actions to Protect Retirement Security by Cracking Down on Junk Fees in Retirement Investment Advice,* October 31, 2023, available 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/.
("However, the SEC's authority and [Regulation Best Interest] does not generally cover commodities or insurance products like fixed index annuities, which are often recommended to retirement savers. Instead, advice to purchase these insurance products is governed by state law, which often varies state by state. These inadequate protections and misaligned incentives have helped drive sales of fixed annuities up….")

its flawed economic analysis alone, the Proposal should not advance further through the rulemaking process and needs to be withdrawn in its entirety.

For some unfathomable reason, the Department has become enamored of the fee-based advice model of delivering investment recommendations to the exclusion of the transaction-based (i.e., commissioned sales) model. NAFA has no issue with the fee-based model, which is a fit for the needs of certain consumers. Some NAFA member insurance companies have developed fixed and fixed index annuity products with features designed to fit within the fee-based model. But the vast majority of fixed and fixed index products are distributed by producers who earn compensation on a transaction basis. Those producers largely serve the needs of consumers for whom the fee-based advice model is not attractive and not a fit. In large measure the fee-based advice model is oriented to meet the needs of the most affluent retirement savers.

By contrast, fixed and fixed index annuities sold under a transaction-based model are generally responsive to the needs of average Americans. A recent Committee of Annuity Insurers survey (the "CAI Survey") of individual, non-qualified annuity contract owners reported that 70% of individual annuity owners have annual household incomes that of less $100,000 and 25% with less than $50,000.[2] The results of a recent NAFA survey of fixed and fixed index annuity owners, including IRA and other tax-advantaged purchasers, (the "NAFA Survey") produced similar findings.[3] The NAFA Survey indicates that only 2% of surveyed contract owners reported pre-tax household income of $250,000 or more, with the largest cohort of surveyed contract owners (25%) reporting annual pre-tax income of between $75,000 and $99,999.

These facts underlie the important truth that annuity professionals are most directly focused on helping working class consumers save and prepare for their retirement by providing a vital source of financial security that those consumers rely upon to sleep soundly at night. The CAI Survey reported that nine in ten annuity owners purchased annuities primarily to provide peace of

[2]The Committee of Annuity Insurers Survey of Owners of Individual Annuity Contracts, 8 (The Gallup Organization and Mathew Greenwald & Associates, 2022) available at:
https://www.annuity-insurers.org/wp-content/uploads/2023/07/Gallup-Survey-of-Owners-of-Individual-Annuity-Contracts-2022.pdf

[3] The NAFA Survey of Fixed Annuity Owners was conducted by Greenwald Research and will be published during the first quarter of 2024.

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mind during retirement; over 80% intend to use annuity distributions for income during retirement.[4]

The Department's 2023 Proposal reflects a misguided cookie cutter approach that would tend to encourage the fee-based advice delivery model while sharply suppressing the transaction-based model. Although the Department purports to be "levelling the playing field," in actuality it is tilting the playing field in favor of fee-based advisers and against insurance producers and others who sell value-added, risk-reducing products like fixed index annuities to retirement investors on a transaction fee basis. This policy approach is particularly misguided because it fosters a migration of all retirement investors toward the one-size-fits-all default that tends to prevail in the fee-based adviser community, generally featuring a 60% equity to 40% fixed income asset allocation model utilizing low-cost ETFs or, as a variation of that model, an age-weighted fund. That model simply does not address the specific risks that play out when retirement investors age out of the accumulation stage of their investment lifecycle to the de-cumulation stage of sustaining retirement income in retirement.

The Proposal also reflects a complete absence of any appreciation for the value consumers associate with being relieved of the risks that insurance providers assume when providing fixed and fixed index products. Insurers relieve annuity purchasers of investment volatility risks by providing principal protection guarantees. Similarly, through fixed and fixed index annuity products insurers relieve consumers of sequence of return and longevity risks that they would otherwise be left alone to face. Our recent NAFA Survey indicates that 78% of fixed and fixed index annuity contract owners surveyed either strongly agreed or somewhat agreed that their annuity product was an important source of their retirement security. And consumers surveyed by NAFA overwhelmingly reported high rates of satisfaction with their annuity product, with 76% of surveyed fixed index annuity owners indicating they are either glad or very glad with their product purchase decision and 79% of surveyed fixed annuity product owners providing the same level of satisfaction.

Unfortunately, the guarantees available to retirement investors through fixed and fixed index annuity products are typically unavailable in employer-sponsored plans. And, while NAFA

[4] CAI Survey at 9.

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remains optimistic that the products will gain higher rates of utilization among fee-based advisers in the future, at present fixed and fixed index annuity products are typically not utilized under strategies recommended by the fee-based adviser community. The Department's continued efforts to undermine the insurance provider and distributor community through regulations that stack the deck in favor of fee-based advisers will have tragic consequences for retirement investors. Consider, for example, the 4% of savings spending rule – a bastion of "income planning" for many in the fee-based adviser community – that leaves the consumer fully exposed to the risk of outliving their savings. The earliest cohort of the Baby Boomer generation attained the age of 62 in 2008. Those who entered retirement in that year using a traditional 60% equity to 40% fixed income portfolio experienced a loss of over 20% in the value of their investment holdings in a single year.

Many such retirees are unprepared to live with the risks associated with that sort of volatility, which may be avoided – or at least mitigated – where investors allocate some portion of their portfolios to risk-reducing fixed and fixed index annuity products. Just last year 60/40 investors would have experienced a similarly shocking loss of 18.19% in the value of their holdings. In 2024, when the United States will reach "peak 65," the year in which the largest cohort of Baby Boomers are expected to attain retirement age, the need to assure access to fixed and fixed index annuities to improve outcomes will become more important than ever.[5]

The Department's 2023 Proposal incorrectly estimates the number of independent producers who would be affected as 4,000 individuals. NAFA estimates the actual number to be at least 20 times greater than that. Dedicated, professional insurance producers who would be adversely affected by the Department's Proposal are working today to meet the growing demand on the part of American workers for retirement security. Those efforts occur at the local level, in the communities where producers and consumers live. Annity product sales activities are regulated by state insurance regulators under standards that typically reflect the National Association of Insurance Commissioners ("NAIC") Suitability in Annuity Transactions Model Regulation, which has been adopted by more than 40 states with another half dozen poised to follow shortly. State-based regulation on the part of insurance departments is consistent with the

[5] According to U.S. Census Bureau population projections, every day in 2024 approximately 12,000 people will turn 65. And by 2030, all Baby Boomers — those born from 1946 through 1964 — will be 65 or older. This means one in every five Americans will have reached the traditional retirement age by that date.

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authority that Congress in 1945 reserved to the states in the McCarran Ferguson Act.[6] In the 2010 Dodd-Frank Act, Congress reconfirmed the states' regulatory responsibility over annuities.[7] Inexplicably, the Department now asserts broad powers to regulate the business of insurance in a manner that would usurp state regulatory powers.

NAFA is concerned by the fundamental disconnect inherent in the Department's 2023 rulemaking with respect to the statutory obligations imposed on fiduciaries to IRAs under the Internal Revenue Code, on the one hand, and the far broader set of obligations imposed on fiduciaries to ERISA Title I plans. By gerrymandering its authority to grant prohibited transaction relief under both ERISA and the Code, the Department is inappropriately engaging in legislative action reserved to Congress by imposing ERISA standards of conduct on those who act as fiduciaries to IRAs when recommending rollover transactions. Had Congress wished to assign ERISA Title I standards of conduct to IRA fiduciaries it clearly could have done so. Yet Congress opted for a different result by differentiating between the fiduciary standards owed by ERISA Title I and IRA fiduciaries, respectively. The Department's inappropriate assertion of legislative authority under the guise of administrative rulemaking threatens to interfere with plan participant decision making, including decisions to engage in IRA rollover transactions when they believe doing so will advance their own personal retirement savings and income needs.

The Department also advances the mistaken view that sales of fixed products are driven only by sales incentives and reflect a lax regulatory regime. In fact, sales of fixed products are driven by market demand, which is only increasing as retirees seek protection from volatile investment markets. 2022 sales of multi-year guaranteed fixed annuity products (MYGA) increased by 43% over the prior year, which is almost entirely attributable to the difficult markets of 2022 and significant increases in interest rates. As of the date of this comment letter submission, fixed annuity sales are again up over the prior year by approximately 43%. Fixed index annuity sales last year saw a 25% increase in sales with a similar increase in 2023. These increases are a reflection of the value consumers place in the product.

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[6] 15 U.S.C. §§ 1011–15.

[7] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, § 989J, 124 Stat. 1949 (2010).

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This is why annuity sales are up – not because of unregulated sales practices – but because people want, need, and are attracted to risk-reducing fixed and fixed index annuity products as indicated by our recent NAFA survey. In seeking financial security, Americans value and require the freedom to choose the forms of financial advice and the retirement products that are a fit for their individual needs. Implementing this unnecessary rule will only hurt low-to-middle income workers, retirees, and their families.

To be clear, NAFA strongly supports the NAIC Model best interest standard for annuity transactions. Under the NAIC Model, insurance producers and other annuity professionals are required to act in the best interest of their clients when making recommendations to purchase an annuity. The NAIC Model requires an assessment of the consumer's needs and that insurance products only be recommended if they are a fit with those needs.[8] NAFA and its membership worked in close cooperation with the NAIC as it worked to develop the model regulation through a deliberative process that reflected input from a wide variety of regulatory, industry, and consumer stakeholders.

NAFA believes the NAIC standard strikes a proper balance between an enhanced standard of care for annuity professionals that requires responsible and informed sales conduct and a workable regulatory framework that allows consumer access to essential retirement advice and products. The continued availability to such access is essential to ensure a safe and predictable retirement for the millions of Americans who need and value annuities as part of their retirement plan.

NAFA is troubled by the exceedingly hasty and unnecessarily time-constrained nature of the Department's rulemaking process. In particular, the Department's decision to hold its public hearing on the Proposal *prior* to the close of the comment period, and before any written comments had been posted to the Department's website, appears directly at odds with the proper regulatory objective of a considered and informed rulemaking process. The Department's refusal to grant extensions to the 60-day public comment period, despite numerous expressions of concern from

[8] NAIC Suitability in Annuity Transactions Model Regulation § 6.A.

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the regulated community that 60 days is an insufficiently short period of time to fully analyze and comment on the Proposal is deeply concerning.

II. Comments on RIN 1210-AC02 – Definition of Fiduciary

Through its Proposal to re-define persons who function as investment advice fiduciaries for purposes of ERISA and the Code, the Department indicates it has chosen to intentionally "reject 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."[9] Having so rejected the dichotomy between sales recommendations and advice in the retail market, the Proposal makes the leap that when retirement investors speak with investment representatives "they commonly pay for, and receive, advice within the meaning of [ERISA's] statutory definition [of fiduciary investment advice]."[10]

There are numerous and profoundly disturbing problems with the Department's framing, which completely ignores the fact that professional sales representatives who interact with retirement investors more often than not receive *no* payment for their efforts. Unlike fee-based advisers, who receive payments for advice irrespective of whether that advice is accepted or rejected, salespersons receive no compensation for recommendations that are not accepted; compensation is earned on the basis of successful sales efforts (i.e., recommendations that are accepted). In short, professional sales representatives provide information, guidance, and recommendations that are all incidental to their primary activity of selling. That selling activity is already carefully regulated by the states to ensure that recommended products are a fit for consumer needs. But the Department's conclusion that responsibly delivered sales recommendations, simply by virtue of being furnished in compliance with applicable insurance regulatory best interest standards, are converted automatically into advice that the consumer has agreed to pay for in its own right and thus transforming the communication into an ERISA fiduciary relationship of trust and confidence, is mistaken. The Department's proposal amounts

[9] 88 Fed. Reg. 75890, 75907 (Nov. 3, 2023).

[10] *Id.*

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to an exercise in regulatory alchemy by attempting to convert all selling recommendations into fiduciary investment advice.

Even more troubling -- the Department's reasoning flies in the face of the Fifth Circuit's holding in *Chamber of Commerce v. United States Department of Labor* that ERISA's statutory text "necessarily implies a special relationship beyond that of an ordinary buyer and seller" and "preserves [t]he important distinction" between "[s]tockbrokers and insurance agents [who] are compensated only for completed sales" and "[i]investment advisers" who are "paid fees because they 'render advice.'"[11] Under the Department's misdirected Proposal, stockbrokers and insurance agents who are compensated only for completed sales are treated in a manner that it is indistinguishable from the treatment of the fee-based adviser community.

The Proposal reflects a false assumption on the part of the Department that it holds the authority to comprehensively regulate standards of conduct applicable to broker-dealers, registered investment advisers, and insurance agents. It does not. This was one of the points specifically addressed by the *Chamber of Commerce* decision wherein the Fifth Circuit concluded that the Department's 2016 fiduciary rule usurped and violated "two Congressional initiatives" enacted as part of the Dodd-Frank Act. Specifically, the Fifth Circuit pointed out that under Dodd-Frank, Congress had authorized the SEC and not the Department "to promulgate enhanced, uniform standards of conduct for broker-dealers and investment advisers who render "personalized investment advice about securities to a retail customer." The same decision held that Section 989J of Dodd-Frank deferred regulation of fixed indexed annuities "to the states, which have traditionally and under federal law borne responsibility for thoroughgoing supervision of the insurance business."

The Fifth Circuit explained this point as follows:

> The Fiduciary Rule conflicts with both of these efforts. The SEC has the expertise and authority to regulate brokers and dealers uniformly. DOL has no such statutory warrant, but far from confining the Fiduciary Rule to IRA investors' transactions, DOL's

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[11] 885 F.3d 360, 373 (Fifth Cir. 2018).

> regulations effect dramatic industry-wide changes because it is impractical to separate IRA transactions from non-IRA securities advice and brokerage. Rather than infringing on SEC turf, DOL ought to have deferred to Congress's very specific Dodd-Frank delegations and conferred with and supported SEC practices to assist IRA and all other individual investors. By presumptively outlawing transaction-based compensation as "conflicted," the Fiduciary Rule also undercuts the Dodd Frank provision that instructed SEC not to prohibit such standard forms of broker-dealers' compensation. And in direct conflict with Congress's approach to fixed indexed annuities, DOL's regulatory strategy not only deprives sellers of those products of the enhanced PTE 84-24 exemption but it also subjects them to the stark alternatives of using the BIC Exemption, creating entirely new compensation schemes, or withdrawing from the market. While Congress exhibited confidence in the states' insurance regulation, DOL criticizes the Dodd-Frank provisions as "insufficient" to protect the "subset" of retirement related fixed-indexed annuities transactions within DOL's purview. Certainly, however, most such products are sold to retirement investors, so DOL is occupying the Dodd-Frank turf.[12]

The Proposal also re-commits other previous Department missteps by again ignoring the clear distinctions between the statutory duties owed by investment advice fiduciaries under Title I of ERISA and those owed by investment advice fiduciaries under the Code. In *Chamber of Commerce*, the Fifth Circuit noted the distinction Congress made between the duties owed by fiduciaries to Title I plans, which include the duties of prudence and loyalty under ERISA section 404 in addition to prohibited avoidance responsibilities under ERISA section 406, and the duties

[12] *Chamber of Commerce,* 885 F.3d 360, 385 (internal footnote omitted).

applicable to fiduciaries under Code section 4975, which are confined solely to prohibited transaction avoidance and contain no section 404 counterparts.[13]

In subsequent cases, including the *American Securities Association*, and *Federation of Americans for Consumer Choice* cases, federal district courts have similarly emphasized those same statutory distinctions, and have vacated or recommended vacatur of Department interpretations that inappropriately overlook the distinction.[14] The Department's new Proposal once again conflates the distinction between the separate statutory duties owed by fiduciaries to Title I plans and those owed by fiduciaries to Title II plans. As an example, the Department indicates in its new Proposal that ERISA's fiduciary obligations apply to "considerations of how . . . money might be invested after [a] rollover" from a Title I plan to a Title II.[15]

The five-part test for determining fiduciary status as set forth in the Department's longstanding 1975 regulation provides that persons act as investment advice fiduciaries if, for a fee or other compensation, they: (1) render advice or make recommendations as to the advisability of investing in, purchasing, or selling securities, or other property; (2) on a regular basis; (3) pursuant to a mutual agreement between such person and the plan; where the advice; (4) serves as a primary basis for investment decisions with respect to plan assets; and (5) is individualized based on the particular needs of the plan.[16]

The Department's 2023 Proposal jettisons the "primary basis" prong of the test altogether and employs a regulatory sleight of hand to give the appearance that the "regular basis" prong has been retained while re-framing that prong as a description of whether the recommendation provider is engaged in the business of providing advice on a regular basis to other investors. Whether or

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[13] *Id*. at 379 ("…Congress chose not to require advisers to individual retirement plans to bear the duties of loyalty and prudence required of Title I ERISA plan fiduciaries. That times have changed, the financial market has become more complex, and IRA accounts have assumed enormous importance are arguments for Congress to make adjustments in the law, or for other appropriate federal or state regulators to act within their authority. A perceived ''need'' does not empower the Department to craft de facto statutory amendments or to act beyond its expressly defined authority.").

[14] *Fedn. of Americans for Consumer Choice, Inc. v. U.S. Dept. of Lab.*, No. 3:22-CV-00243-K-BT, 2023 WL 5682411, at *29 (N.D. Tex. June 30, 2023); *Am. Securities Assn. v. U.S. Dept. of Lab.*, No. 8:22-CV-330-VMC-CPT, 2023 WL 1967573, at *19 (M.D. Fla. Feb. 13, 2023).

[15] 88 Fed. Reg. at 75907.

[16] 29 C.F.R. § 2510.3-21(c)(1)(ii)(B)
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not a recommendation provider regularly engages in the business of selling to others has no bearing on the nature of the relationship with any one recommendation recipient.

In *Chamber of Commerce,* the Fifth Circuit explained that "[t]he 1975 regulation captured the essence of a fiduciary relationship known to the common law as a special relationship of trust and confidence," which "Congress codified" when it enacted ERISA.[17] The Court faulted the Department's 2016 rulemaking, which would have replaced the five-part test by imposing ERISA fiduciary status on "salespeople and insurance brokers" who lacked an "underlying relationship of trust and confidence" and who did not have any "authority" or "responsibility" to "render investment advice" to an ERISA plan, as violative of "the plain text" of ERISA. The Fifth Circuit further held that the 2016 Fiduciary Rule improperly "treat[ed] IRA financial service providers in tandem with ERISA employer-sponsored plan fiduciaries," even though Congress did not subject fiduciaries to IRAs (governed by Title II of ERISA) to the "statutory duties of loyalty and prudence" applicable to ERISA plan fiduciaries (governed by Title I of ERISA). The Fifth Circuit concluded that the Department had "abused [its] power" to issue prohibited transaction exemptions, by using that power to "subject newly regulated actors and transactions to a raft of affirmative obligations," including ERISA fiduciary duties that Congress decided were not applicable in the IRA context. The Department did not ask the Supreme Court to review the Fifth Circuit's decision.

Inexplicably, the Department's 2023 Proposal repeats all of the same errors that proved fatal to its 2016 rulemaking. If anything, it enlarges the problem by assigning fiduciary status on an even grander scale than before, inasmuch as the 2023 Proposal contains none of the carve-outs from fiduciary status of the vacated 2016 rule. The regulated community is deeply concerned that the Proposal is so sweeping in nature that it calls into question where the dividing line lies to distinguish non-fiduciary sales activity from fiduciary investment advice. The Proposal is likely to limit accessibility to investment products and services by virtue of the lack of any clear lines for parties to use for purposes of structuring their relationship as non-fiduciary when there is a desire

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[17] 885 F.3d at 369.

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to do so. Examples of activities that should clearly be regarded as non-fiduciary in nature include, without limitation, the following:

- *Investment Platforms.* Offering, marketing or making available a plan servicing platform which includes access to a platform of investment options that a plan fiduciary may select from among in constructing a plan investment option menu;

- *RFP Responses.* Delivering a response in connection with a plan's competitive vendor selection request for proposals process, which may include proposing a plan investment lineup;

- *"Hire Me" Communications.* Communications related to the process of being engaged as a service provider to the plan, including as a provider of investment management services, should not be regarded as involving the provision of investment advice simply because the communications include past performance, discussions of available strategies or suggestions of one or more strategies that would appear to be a fit for the plan's needs;

- *Routine Plan Enrollment.* Participant plan enrollment activities, including suggestions that enrollment in the plan would help advance an employee's attainment of retirement savings goals, if unaccompanied by specific recommendations about how to invest among the plan's available investment options, should not be considered fiduciary investment advice;

- *Communications with Sophisticated Retirement Investors.* The Proposal makes no distinction among Retirement Investors responsible for the investment of sizeable portfolios, who may be presumed to be sophisticated and who are unlikely to mistake sales pitches or similar hiring discussions as involving the provision of investment advice, from small balance investors; and

- *Marketing Efforts by Wholesalers and Call Center Personnel Assistance.* Wholesalers market products to intermediaries who may themselves be fiduciaries to plan. Within that context, there is no reasonable expectation that the wholesalers' recommendations may be relied upon as fiduciary investment advice. Yet, the Proposal calls the status of those activities into question. Similarly, call center personnel who merely inquire as to whether a plan participant or IRA holder would like to be placed in touch with an investment adviser and who assist participants who express interest by making a referral, should not themselves be regarded as fiduciary investment advisers.

The Proposal would sweepingly attach fiduciary status to otherwise ordinary course communications conducted by or on behalf of financial institutions if they contain recommendations even in the absence of any consideration of a retirement investor's particular needs or individual circumstances. Under proposed section 3-21(c)(1)(i), fiduciary status would attach to any recommendation made by a person if that person has an affiliate relationship with another entity who has discretionary authority or control over any property for the retirement investor, including property held outside of a plan or an IRA. Hence, in the situation where a financial institution's asset management business has a discretionary management relationship with a retirement investor in any capacity, any recommendation made by any of its affiliates – including recommendations delivered through generalized marketing materials – would be deemed to be fiduciary in nature no matter how distant the affiliate relationship. This sort of attribution of fiduciary status through affiliate relationships exemplifies the unreasonable and random nature of the Proposal's fiduciary status assignments.

Moreover, the Proposal implicates the major questions doctrine, which requires that when an agency seeks to regulate a "significant portion of the economy," it must point to "clear Congressional authorization" to do so.[18] The Proposal would clearly affect significant portions of the economy. In this regard, as the Department states in the preamble to the Proposal, IRAs collectively hold approximately $13.2 trillion, defined contribution plans hold $9.2 trillion, and

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[18] *W. Virginia v. Envtl. Protec. Agency*, 142 S. Ct. 2587, 2608 (2022) (*quoting Util. Air Reg. Group v. E.P.A.*, 573 U.S. 302, 324 (2014)).

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defined benefit plans hold $3.7 trillion, and the Department expects $4.5 trillion to rollover from defined contribution plans to IRAs from 2022 through 2027.[19] The Proposal would regulate pure sales activity in connection with these accounts, including with rollovers, as fiduciary investment advice. The Fifth Circuit found that the similar 2016 rulemaking purported to "regulate a significant portion of the American economy."[20] Further, as described above, the Fifth Circuit has also explained that Congress did not intend for the Department to obtain this regulatory authority.[21] Even if the Department disagrees with the Fifth Circuit decision, the Department admits that Proposal is prompted by the "the shift toward individual control over retirement investing"— not by any Congressional command to update the fiduciary investment advice definition.[22] In fact, Congress amended ERISA many times while this "shift" was apparent, including in 2006 to promulgate the statutory prohibited transaction exemption for investment advice set forth in section 408(b)(14) of ERISA and most recently in 2019 and 2022.[23] But Congress has left section 3(21)(A)(ii) of ERISA untouched since 1974. There is therefore no clear Congressional authorization for the Proposal, and the Department does not have the requisite authority to issue it.

For the foregoing reasons, NAFA urges the Department to withdraw its proposed regulation to re-define persons who act as fiduciary investment advisers under ERISA and the Code in its entirety.

III. Comments on Application No. D-12060 – Proposed Amendment to PTE 84-24

The proposed amendment of PTE 84-24 is sweeping in nature. It would overturn the settled expectations of the life insurance and annuity provider community – formed over a period of more than 40 years – with respect to the availability of broad-based relief for the receipt of compensation by insurance producers who may be functioning as advice fiduciaries under ERISA and the Code

[19] 88 Fed. Reg. at 75915.

[20] 885 F.3d at 387.

[21] 885 F.3d at 373.

[22] 88 Fed. Reg. at 75892.

[23] SECURE 2.0 Act of 2022, Pub. L. No. 117-328, Div. T (2022); SECURE Act, Pub. L. No. 116, Div. O (2019); Pension Protection Act of 2006, Pub. L. No. 109-280 (2006).

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when recommending products, subject to satisfying a straightforward sales commission and relationship disclosure. The proposed amendment seeks to dramatically cut back the scope of the relief available under the exemption in three ways:

- First, PTE 84-24 would cease to be available as a source of relief for sales of variable products registered under the federal securities laws. Instead, the exemption would be limited to recommendations only of "a non-security annuity contract or other insurance product not regulated by the Securities and Exchange Commission."[24]

- Second, the universe of insurance producers eligible for relief would be carved back dramatically. Today, the exemption is available to all insurance producers. Under the Department's Proposal, access to relief under PTE 84-24 would be available to only a limited universe of "Independent Producers" (such term is defined so as to include persons or entities licensed to sell, solicit or negotiate annuity contracts that sell products of multiple, unaffiliated insurance companies, but excluding any insurance company employee, including any career agent statutory employees under Code section 3121).[25]

- Third, and most problematically of all, the proposed amendment would limit the compensation available to be received by Independent Producers in connection with fixed annuity recommendations to "Insurance Sales Commissions."[26] Such term is defined to include amounts paid by an insurer directly to an Independent Producer – and according to the Department's preamble would include amounts paid through an independent marketing organization ("IMO") or field marketing organization ("FMO") – on behalf of an insurance company, but excluding any and all other forms of compensation including other forms of traditional insurance producer compensation including marketing payments, payments from parties other than the insurance company and other similar fees.[27] As discussed below, this limitation is likely so inconsistent with compensation practices that have long

[24] 88 Fed. Reg. 76004, 76026 (Nov. 3, 2023).

[25] 88 Fed. Reg. at 76031.

[26] 88 Fed. Reg. at 76025–26.

[27] 88 Fed. Reg. at 76031.

been in widespread use within in the industry as to completely undermine, disrupt and threaten the continued existence of the independent producer distribution channel.

In addition, the proposed amendment would also replace the straightforward and administratively feasible disclosure conditions that are in place today with dual sets of complex, burdensome and costly conditions that would separately apply both to individual insurance producers and to the insurance companies that distribute annuity products through the Independent Producer channel. Some of those new disclosure conditions are so vague and open-ended in nature that it is unlikely a reasonable, compliance-minded Independent Producer or insurance carrier would ever be able to safely conclude the conditions have been satisfied.

The Department's Proposal indicates the agency's strong regulatory preference for PTE 2020-02 as the sole source of prohibited transaction exemptive relief for investment product recommendations, while allowing for the continuation of a much diminished version of PTE 84-24 onto which a series of exceedingly complex compliance conditions have been added. The preservation of this diminished form of PTE 84-24 is attributed by the Department to feedback received from the insurance and annuity provider community that the conditions of PTE 2020-02, which are largely based on a broker-dealer supervisory distribution model, simply cannot be made to fit the non-securities based distribution models that prevail in the distribution of fixed annuity and other non-securities products.[28] While refusing to fully accept that feedback – since the Department nonetheless continues to insist that PTE 2020-02 is indeed a fit for the life insurance industry – it grudgingly proposes to retain some version of PTE 84-24 as an alternative exemptive relief pathway to PTE 2020-02.

NAFA reminds the Department that in connection with its original proposal of PTE 2020-02, just three short years ago, assurances were provided to the insurance community that "[e]ligible parties can also continue to use relief under the existing exemption for insurance transactions, PTE 84–24, as an alternative [to PTE 2020-02 as a source of exemptive relief.]"[29] Based on that reassurance, many within the regulated community of annuity providers and distributors either opted not to comment on the PTE 2020-20 proposal or provided comments within the framework

[28] 88 Fed. Reg. at 76005.

[29] 85 Fed. Reg. 40834, 40837 (July 7, 2020).

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of the assumption that PTE 84-24 would continue to be available. That assumption was a reasonable one, since the Department's proposal at that time positioned PTE 2020-02 as an *additional* source of exemptive relief that was to sit alongside PTE 84-24. Unfortunately, the industry's reliance appears to have been misplaced. Since the promulgation of PTE 2020-02, the Department has repeatedly expressed a perceived need to "level the playing field" in favor of that new exemption by doing violence to other longstanding exemptions, including PTE 84-24. Far from levelling the playing field, the Department proposes to tilt the field in a manner that unfairly disfavors the insurance producer and product provider community.

PTE 2020-02 is largely designed around a broker-dealer distribution model, which has a pronounced focus on broker-dealer control over the shelf of products available to be recommended by a representative of the firm, and on the supervision of those sales. The fixed and fixed index annuity industry generally does not follow the broker-dealer distribution model. Insurance producer sales conduct is regulated by the states and, within that body of regulation, insurance producers are afforded a degree of freedom to establish their own shelf of products and are directly responsible for conforming their sales recommendations to applicable state regulatory standards. By so markedly expressing a preference for the broker-dealer model, and disdain for the independent producer model, the Department is unfairly tilting the playing field against the fixed and fixed index provider community, which is largely comprised of entrepreneurial business men and women seeking to grow their practices within their local communities.

The fact that different segments of the industry are subject to differing bodies of law and regulatory oversight is well known and up to now had been taken into account by the Department when engaged in the process of administrative exemption rulemaking. Both ERISA's statutory exemptions and the existing body of administrative regulations respected those differences through rules tailored to fit the approach of each such financial industry segment. PTE 84-24 as it exists today is a classic example of that tailored approach. Unfortunately, the Department appears to now have embarked on a mission to force fit the entire financial services industry into a model that was designed to fit broker-dealers.

Moreover, the degree to which the Department's Proposal would position it to regulate the business operations of all members of the financial services industry when offering their products

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to retirement investors far exceeds the Department's statutory authority to regulate the operation and administration of employer-sponsored benefit plans. The Department seeks to position itself as the one supreme uber-regulator of the entire financial services industry at the federal level by superseding the authority of other federal and state regulators who are separately authorized to police the financial services industries. Again, the Department's approach does not level the playing field -- it tilts it steeply against the fixed and fixed index community.

NAFA urges the Department to withdraw its proposed PTE 84-24 amendment in its entirety. Below, we offer additional observations on specific elements under the PTE 84-24 amendment Proposal that are problematic.

1. *Non-Security Annuity Contracts or Other Insurance Products Not Regulated by the Securities and Exchange Commission.*

The proposed limitations on the types of insurance and annuity products available for relief under PTE 84-24 are inappropriate and frustrate the original purpose of the exemption, which was to cover recommendations of *all* insurance and annuity products. NAFA notes the Department's request for comment on choice of the phrase "other insurance products not regulated by the Securities and Exchange Commission."[30] The federal securities laws distinguish between insurance products that are not securities and that are therefore excluded from regulation as such under section 3(a)(8) of the Securities Act of 1933 (the "'33 Act") and insurance products that are securities but that are exempted from registration. The latter category includes annuity products offered to qualified plans and certain other categories of purchasers under the '33 Act's section 3(a)(2) exemption as well as products offered in private placement transactions. While insurance products that are securities are not registered under the '33 Act, it is not clear that such products are entirely unregulated by the Securities and Exchange Commission, which retains regulatory authority over the applicable transaction exemptions. Irrespective of those differences, NAFA strongly objects to the Department's attempt to finely slice and dice the broad universe of insurance products into discrete sub-components for purposes of covering recommendations of insurance and annuity products under PTE 84-24. To underscore our point – *all* insurance and annuity

[30] 88 Fed. Reg. at 76026.

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product recommendations should continue to have access to exemptive relief under PTE 84-24 just as is the case today.

2. Definition of Independent Producers.

The proposed definition of "Independent Producers" would exclude the career agent channel, which is comprised of statutory employees under Code section 3121 who are eligible for coverage under employee benefit plans sponsored by the insurance company for whom career agents concentrate their sales and marketing efforts. Career agents typically are free to contract with other, unaffiliated insurance companies for purposes of conducting sales activities on behalf of those other companies. The exception would be in the case of so-called "captive" career agents, who are generally limited by contract to offering only the products of a single insurer or those of a single group of affiliated insurers. But for the fact that non-captive career agents are eligible to participate in insurance company sponsored employee benefit plans as Code section 3121 statutory employees, their annuity product sales and marketing activities are indistinguishable from those of non-career agents and are similarly not a fit for coverage under PTE 2020-02 which requires a fiduciary acknowledgement on the part of a supervising financial institution for each covered recommendation. The Department's Proposal places all career agents in the same category and appears to assume that all career agents are captives. That premise is mistaken. Insurance companies that cover non-captive career agents under benefit plans are no better suited to supervise such agents' sales of other companies' products than they are the sales of other companies' products conducted by non-career agents. The proposed limitation within the definition of Insurance Producer again is an indicator of the unreasonable approach the Department is taking in its PTE 84-24 proposed amendment.

3. "Simple" Insurance Commissions – Limitations on Covered Compensation.

The proposed limitations on the types of compensation available for exemptive relief under PTE 84-24 would be so disruptive and injurious to the functioning of fixed annuity product distribution channels as to call the continued availability of that channel into question. Retirement investors, who rely upon fixed annuities as a source of protection against the risks associated with market volatility and outliving one's assets, will be poorly served by being deprived of access to these products. The Department's Proposal jeopardizes that access by covering only one of several

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traditional and widely relied upon sources of compensation received by independent producers who distribute these products. While the preamble language accompanying the proposed amendment of PTE 84-24 acknowledges the presence and vital role served by IMOs and FMOs in the training and support of Independent Producers, the exemption as it is proposed to be amended would provide no relief for any compensation received in connection with the sale of a recommended product other than so-called "simple" insurance commissions, directly paid by or on behalf of the insurance company.[31]

The problem is that a core function of IMOs and FMOs is to support independent producer success and productivity through a variety of cash and non-cash compensation structures. Cash compensation includes forms of revenue sharing and marketing allowances. Non-cash compensation frequently includes the provision of value-added support including website construction and maintenance, sales leads, various forms of commercial advertising and computer software. Eligibility to receive such compensation is calibrated – at least to some extent – on independent producer productivity and on that basis is likely to be deemed by the Department under its new fiduciary definition as compensation received by an independent producer in connection with covered recommendations, necessitating prohibited transaction exemptive relief. But no such relief would be available under PTE 84-24 as it is proposed to be amended.

In support of these stringent limitations, the Department explains in footnote 11 of the amendment Proposal that PTE 84-24 as properly interpreted never provided relief for forms of compensation other than simple commissions.[32] But the administrative record underlying PTE 84-24 squarely contradicts that view. And, based on the administrative record, the insurance provider community has for more than 40 years relied upon PTE 84-24 to relieve the receipt of *all* compensation received by advice fiduciaries in connection with the recommendation of insurance and annuity products, including but not limited to simple commissions. It would be an arbitrary and capricious act for the Department to now withdraw the availability of that exemptive relief notwithstanding the administrative record and given the longstanding nature of the industry's

[31] 88 Fed. Reg. at 76007.

[32] 88 Fed. Reg. at 76007 n.11.

reliance. Most tellingly, as originally proposed, the exemption that is now PTE 84-24 would have required, as condition to relief, the disclosure of:

> The amount of any sales commissions that will be received, directly or indirectly, by the soliciting agent in connection with the purchase of any insurance contract or annuities … [and] if the soliciting agent has a *special incentive arrangement (other than the receipt of sales commissions)* in connection with the sale of such insurance contracts or annuities … a statement that the soliciting agent has such an arrangement and, if requested by the aforementioned fiduciary, a description of such arrangement. [33] (emphasis added)

Hence the administrative record is clear that the Department was well aware, at the time of the exemption's proposal, of the presence of insurance sales incentive arrangements other than simple sales commissions that required exemptive relief if received in connection with a recommendation made by an insurance producer acting in an investment adviser fiduciary capacity. Moreover, in the original grant of the exemption that is now PTE 84-24, the Department modified the proposed disclosure condition referenced above to remove the condition requiring disclosure of the "special incentive arrangement[s]" other than simple sales commissions described in the proposal. The Department described the basis for that change as follows:

> The provisions of the proposal respecting disclosure of … special incentive arrangements … have been deleted. Comments indicated a great deal of uncertainty as to the meaning of these terms and questioned their relevance to the information needed by the approving fiduciary. In addition [the Department] believe[s] that the other disclosure requirements of the exemption will be sufficient

[33] 41 Fed. Reg. 56760, 56764 (Dec. 29, 1976).

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> to alert an approving fiduciary to the extent of the potential conflict of interest of the person recommending the purchase.[34]

The Department at that time did not indicate that compensation provided under special incentive arrangements in addition to simple sales commissions would not be relieved by the exemption; it indicated only that the disclosure of simple sales commissions would be sufficient to alert an approving fiduciary of the potential conflict and the magnitude of that conflict. Subsequently, and within six months of the original exemption's grant date, the Department offered further clarifications on the topic of the exemption's disclosure conditions and on the scope of compensation arrangements available for relief in an information letter addressed to a number of insurance industry representatives.[35] In that letter, the Department indicated as follows:

> [T]he focus of the disclosure requirement … of the exemption is upon the entire commission paid by the insurance company in connection with the transaction for the purchase by the plan of the insurance or annuity contract. However, *it is also the view of [the Department] that additional compensation beyond the usual commission paid by an insurance company to an agent, broker or consultant pursuant to bonus, contingency, override or similar arrangement (sic) is not subject to the disclosure requirements [of the Exemption] where such payments do not relate to and are not received in connection with any particular transaction.* The [Department] caution[s], however, that compensation paid by an insurance company pursuant to a bonus, contingency, override or other similar arrangement which is disproportionately large compared to the basic commission being paid or which is otherwise not in accordance with industry-wide practice may be considered the principal reason for effecting the sale of the insurance or annuity

[34] 42 Fed. Reg. 32395, 32397 (June 24, 1977).

[35] Department of Labor Information Letter to Cardon, Groom, *et al.* (Oct. 31, 1977) (the "Cardon, Groom Letter").

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> contract and, accordingly, would be subject to disclosure under [the Exemption]. (emphasis added)

PTE 84-24 in its current form explicitly relieves the receipt by an insurance producer, directly or indirectly, of a sales commission in connection with the sale of an insurance product or annuity subject to satisfaction of the exemption's conditions. Most significantly, the conditions of the current exemption require that the insurance producer provide a written disclosure to an independent fiduciary of the sales commission, expressed as a percentage of gross annual premium payments for the first year and for each of the succeeding renewal years, that will be paid by the insurance company to the agent, broker or consultant in connection with the purchase of the recommended contract. The terms of the exemption also cover the insurance producer's "effecting" of an annuity purchase, subject to an overarching condition that the combined total of all fees, commissions and other consideration received not exceed "reasonable compensation" levels. Importantly, the exemption relieves *all fees and other consideration* received by the producer, *including but not limited to simple sales commissions*.

NAFA notes that, in connection with its vacated 2016 rulemaking, the Department expressed a similar view to the one expressed by the Proposal as to the properly interpreted scope of the compensation relief afforded under PTE 84-24. Those 2016 statements indicated that the Department had *always* viewed the compensation covered by PTE 84-24 as limited to the receipt of "sales commissions" as opposed to "any related or alternative forms of compensation" and that PTE 84-24 and its conditions were originally crafted with "simple commissions" in mind.[36] As noted above, those 2016 statements directly contradict the contemporaneous administrative record associated with the original exemption, which clearly indicate that the Department was not only well aware that various other forms of compensation, in addition to simple commissions, flow to insurance agents who recommend the sale of products, but also that the Department chose to provide exemptive relief for the receipt of such other forms of compensation while opting not to require their express disclosure. The Department's thinking at that time was that additional disclosures were not needed because disclosure of simple commissions would typically be sufficient to alert authorizing fiduciaries of the magnitude of producer conflicts associated with

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[36] 81 Fed. Reg. at 21165.

the recommendation of an insurance or annuity product. The 1977 Cardon, Groom Information Letter re-confirmed that point to the industry while cautioning that compensation in addition to the "basic commission" when paid pursuant to a bonus, contingency, override or other similar arrangement and that may be considered the principal reason for producer's effecting the sale of the insurance or annuity contract and, accordingly, would be subject to disclosure.

Given the administrative record that so clearly indicates that PTE 84-24 since inception has provided relief for all forms of compensation received by insurance producers, subject to meeting applicable disclosure and compensation reasonableness, and the industry's more than four decades long reliance on that relief, NAFA urges the Department to correct its 2016 and 2023 assertions that PTE 84-24 covers only the receipt of simple commissions. PTE 84-24 has always covered the receipt of not just simple commissions but all other forms of insurance industry producer compensation arrangements.

4. *Proposed PTE 84-24 Relief Conditions Applicable to Independent Producers.*

In addition to limiting the scope of PTE 84-24 in an unduly restrictive manner, the Proposal would add unreasonable and unworkable conditions for compliance. We provide comments on the proposed new conditions that would be applicable to Independent Producers below:

- <u>Impartial Conduct Standards – Reasonable Compensation</u>. As noted above in our comments on the unduly narrow limitations on compensation eligible for relief under the proposed amendment, section VII(a)(2) of the Proposal – which limits the compensation an Independent Producer may receive in connection with a transaction to Insurance Sales Commissions is inappropriately restrictive. Insurance producers who provide recommendations that require relief under PTE 84-24 should be free to continue receiving all traditional forms of compensation including revenue, sharing payments, administrative fees and marketing payments, including by IMOs and FMOs.

- <u>Disclosures</u>. The written compensation disclosure described by section VII(b) would replace the straightforward disclosure framework that is today required with a litany of complex, highly technical, disclosures customized for use by each retirement investor. The

burdens placed on the individual insurance producers under the Department's Proposal are unreasonably burdensome and administratively unfeasible. In particular, the disclosure requirement reflected by section VII(b)(5), which would require the provision of an open-ended commitment by individual Independent Producers to provide virtually unlimited amounts of information concerning the significance of Conflicts of Interest in such various formats as may be demanded by any individual investor, and subject to each individual investor's subjective judgments as to responsiveness and adequacy, is unreasonably burdensome, costly, and likely to exceed the administrative capabilities of individual Independent Producers. Please keep in mind that Independent Producers are generally entrepreneurial professionals and small business owners who cannot be expected to produce, on demand, customized, data-intensive written disclosures as contemplated by the Proposal. Section VII(b)(5) is prone to abuse in the form of unreasonable and unlimited demands. It is yet another example of the fundamental problems inherent in the Department's Proposal that require its immediate withdrawal.

- Rollover Disclosure. Section VII(b)(7) requires an in-depth consideration by an Independent Producer of the comparative fees and expenses and the different levels of investments, fiduciary services and investments available to Retirement Investors in connection with a rollover recommendation, including an analysis of the relative merits of leaving money in a plan, where applicable, while Section VII(b)(8) notes that such disclosures are not required if "otherwise prohibited by law." Independent Producers are fully licensed to recommend fixed annuity products, are educated on the features of the products and are knowledgeable on identifying customer needs and the appropriate alignment of products with those needs. Many of those same producers are not licensed to provide advice on securities products, raising the question of whether the analysis required under Section VIII(b)(8) of the proposed amendment would require a comparative analysis of securities products available in-plan. These portions of the Proposal again evidence its inappropriately sweeping nature and unworkable premise. Independent producers who are not licensed to recommend securities products to provide any advice or recommendations on such products should not be forced to do so as a condition of exemptive relief for the sale of their product.

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5. *Proposed PTE 84-24 Relief Conditions Applicable to Insurance Companies.*

We provide comments on the proposed new conditions that would be applicable to Insurers below:

- Policies and Procedures. Section VII(c)(1) of the proposed amendment would require insurers to conduct a "prudent" review of Independent Producer recommendations and to do so "without regard" to the insurer's own interest. Such stringent standards of review inappropriately infer that the Insurer is acting in a fiduciary capacity when conducting the review, which is not the case. Unlike PTE 2020-02, PTE 84-24 does not require a Financial Institution to acknowledge or otherwise act as a fiduciary in connection with an Independent Producer's recommendation of its annuity product. The "prudent" and "without regard" language echo the standards applicable to a fiduciary under ERISA section 404 and have no applicability in this context.

- Differential Compensation, *etc*. Section VII(c)(2) of the proposed amendment strongly implies that differential compensation and a broad category of other actions, including a new category of undefined "personnel actions" must be eliminated by the insurance company since they may result in recommendations not in a Retirement Investor's Best Interest or that subordinate the interests of the Retirement Investor to those of the Independent Producer. Here again, the proposed provision mistakenly infers that the insurance company is functioning in a fiduciary capacity, which is simply not the case. The courts have long recognized that decisions regarding product design and related compensation are non-fiduciary in nature.[37] As a non-fiduciary, an insurance company may maintain differential compensation arrangements and it may incent the sale of products should it choose to do so. The company's supervision of Independent Producer fiduciary recommendations is for purposes of identifying instances where fiduciary standards applicable at the producer-level only may have been breached. The implication that differential compensation structures and other incentives are *per se* problematic is

[37] *Leimkuehler v. Am. United Life Ins. Co.*, 713 F.3d 905, 913-14 (7th Cir. 2013); *Zang v. Paychex, Inc.*, 728 F.Supp.2d 261, 270 (W.D.N.Y. 2010).

mistaken, and the language containing that implication should be removed from the proposed amendment.

- Retrospective Review. Section VII(d) of the proposed amendment appears to require not just one single retrospective review not just of the insurer's prior year's sales activities as a whole, but a series of hundreds or perhaps thousands of retrospective reviews focused on the prior year's recommendations of each individual Independent Producer. In this regard, Section VII(d)(3) requires the insurer to provide each Independent Producer with a copy of the results of the retrospective review. The preamble explanation of this provision indicates that the Department "understands that Insurers will conduct [retrospective] reviews for many different Independent Producers and confirms that Independent Producers only have the right to information about their own sales" while acknowledging that "Independent Producers only have the right to information about their own sales."[38] Conducting hundreds or thousands of individualized retrospective reviews – each customized to a single Individual Producer – is far too costly and administratively burdensome to reasonably impose. The requirement to review each Individual Producer stands in contrast to the retrospective review required under PTE 2020-02, which does not require a Financial Institution to conduct review of each supervised Investment Professional. The Department acknowledged that Financial Institutions may use sampling in connection with PTE 2020-02's retrospective review.[39] These disparate compliance requirements belie the Department's claims to have leveled the playing field between PTE 84-24 and PTE 2020-02.

6. *Proposed PTE 84-24 Eligibility Conditions.*

The PTE 84-24 amendment Proposal would impose unreasonably harsh sets of conditions on both Independent Producers and on insurers under which both would be under constant threat of loss of the exemption for a period of 10 years.[40] In the case of insurers, loss of the exemption could be triggered by events involving other parties over which the insurer has no direct

[38] 88 Fed. Reg. at 76012.

[39] 88 Fed. Reg. at 75988.

[40] 88 Fed. Reg. at 76029–30.

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involvement (e.g., the conviction of an affiliate company of any one of a number of specified crimes under the laws of a foreign country). In the case of both Independent Producers and insurance companies, loss of the exemption could result from Departmental findings under an administrative process that would provide minimal due process rights (i.e., a single opportunity to be heard by the Department during a one-time conference). Incredibly, the Department asserts that one basis for its reserved power to render an Independent Producer ineligible to use the exemption would be a finding that the Independent Producer has failed to notify the Internal Revenue Service of excise tax obligations that are the responsibility of the Independent Producer, and the Independent Producer's failure to pay excise taxes. Although the Department has absolutely no authority to enforce the prohibited transaction excise tax provisions under Code section 4975(a) and (b), it is nonetheless granting itself the authority to enforce Independent Producers' compliance with these tax provisions.[41] The Department's attempt to seize this enforcement authority is exactly the kind of unwarranted action with which the Fifth Circuit found fault when it vacated the 2016 rulemaking.[42]

IV. Comments on Application No. D-12057 – Proposed Amendment to PTE 2020-02

NAFA's concerns with the proposed changes to PTE 2020-02 echo those expressed with respect to parallel changes proposed to PTE 84-24. More specifically:

- *The New Disclosure Conditions Are Problematic.* The proposed additions to the PTE 2020-02 disclosure conditions, which are proposed to be reflected through changes to Section II of the exemption, are unnecessary, administratively burdensome and would expose the Financial Institution utilizing the exemption to new sources of liability risk by introducing a basis for breach of contract claims under applicable state law in connection with IRA sales activity. In particular, the proposal to add a new sub-paragraph (b)(4) to Section II requiring the delivery of a written statement to provide each Retirement Investor, containing an unconditional,

[41] Enforcement of the excise tax provisions of Code section 4975 is expressly reserved to the Treasury Department. President's Reorganization Plan No. 4 of 1978, §§ 102, 105, 43 Fed. Reg. 47713 (Oct. 17, 1978).

[42] 885 F.3d at 386 ("Congress does not ordinarily specifically delegate power to one agency while knowing that another federal agency stands poised to assert the very same power.").

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open-ended commitment to furnish additional information, upon request and free of charge, about costs, fees and compensation that is sufficiently detailed to allow each requesting Retirement Investor to make its own judgment as to costs and as to the significance and severity of Conflicts of Interest is prone to abuse and subjects the Financial Institution to satisfying an exceedingly vague burden of disclosure. Equally troubling is the new requirement to furnish a written statement of the Best Interest standard of care to all Retirement Investors, including Retirement Investors under Title II plans (e.g., IRAs) where no such standard of care is provided for under the Code and where no private right of action is provided for in case of an alleged breach of the Code's prohibited transaction provisions. By requiring Financial Institutions to deliver a written Best Interest statement to Title II plan Retirement Investors as a condition of prohibited transaction relief, the Department is creating conditions that would provide the basis for claims that a contract enforceable under state law is created where an investor can claim reliance on the Best Interest disclosure promise. This produces the same flawed result – requiring entry into a privately enforceable contract to fill a gap in the statutory structure as perceived by the Department, that was cited by the Fifth Circuit as a basis for its vacatur of the Department's 2016 rulemaking package in *Chamber of Commerce.*[43]

- *The Addition of New Prescriptive Limitations on Compensation Are Unduly Restrictive and Disruptive of Commercial Business Practices.* The Department proposes to include new language in Section II(c) of PTE 2020-02 indicating that Financial Institutions "may not use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other similar actions that are intended *or that a reasonable person could conclude* are likely to result in recommendations that are not in a Retirement Investor's Best Interest." (emphasis added). The Department will no doubt seek to support this new prescriptive limitation by arguing that that none of the listed practices are *per se* prohibited. While that may be so, by listing the practices in the manner proposed, the Department is creating an inference that each such practice is likely

[43] *Chamber of Commerce,* 885 F.3d at 383-384.

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problematic, while leaving the ultimate determination of whether a practice violates the exemption conditions in the hands of what a hypothetical reasonable investor – presumably one not knowledgeable about financial services industry matters – *could* conclude. Consider, for example, a Financial Institution that elects to terminate the employment of a sales professional for lack of production – a practice that must be available to the institution if it is to survive as a going business concern. Presumably, that firing would fall within the category of implicitly problematic "personnel actions" identified under the proposed amendment language. A reasonable investor *could,* it would seem, conclude that any terminations of employment for lack of sales production is likely to result in recommendations not in a Retirement Investor's Best Interest. Such a conclusion could be entirely incorrect, depending on the facts and circumstances, but is nonetheless one that a hypothetical investor *could* reach. The Department's proposed additional language would place Financial Institutions in a regulatory straight jacket by depriving them of the ability to make decisions essential to the operation of their businesses through subjection to the judgments of hypothetical reasonable investors on what the outcome *could* be expected to be.

- *The Addition of New Eligibility Conditions, Including Conditions Based on Foreign Convictions of Affiliates, and Form 5330 Filing and Excise Tax Payments Are Unreasonable.* NAFA repeats the objections reflected in its comments to the parallel eligibility condition amendments the Department proposes to add to PTE 84-24, as stated above, to those proposed to be added to PTE 2020-02 Section III. There is no basis for the Department to withdraw a Financial Institution's eligibility to utilize the exemption based on foreign activities of an affiliate or based on the Department's perceptions over the Financial Institution's satisfaction of Code section 4975 excise tax filing and payment obligations – an area over which the Department has absolutely no statutory or regulatory enforcement authority.

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NAFA urges the Department to withdraw its proposed amendment to PTE 2020-02 in its entirety.

V. Conclusion

NAFA and its membership are dedicated to making risk-reducing fixed and fixed annuity products widely available to America's retirement investors. Our NAFA survey results indicate that retirement investors seek out and rely upon these products as a safe haven against the investment volatility and longevity risks they would otherwise be left to confront alone. The fixed and fixed index annuity community adheres to high standards of conduct under applicable state law when engaged in product distribution efforts to make sure that a recommended product is a fit for and serves the best interest of the retirement investor. The Proposal would disrupt the operation of the fixed and fixed annuity marketplace by throwing up an array of new regulatory impediments that are poorly suited to the structures of the fixed product provider community, and that would tilt the playing field against independent producers.

The series of unnecessary, and overly burdensome prohibited transaction exemption amendments contained in the Department's 2023 rulemaking proposal are inextricably intertwined with, and a reflection of, the underlying proposal to amend the definition of "investment advice fiduciary." As noted above, that underlying proposal exceeds the Department's statutory authority, directly contradicts the Fifth Circuit's *Chamber of Commerce* decision and inappropriately seeks to confer fiduciary status on financial services professionals and providers who interact with retirement investors in blanket fashion. The Department's preamble explanation that it "generally intends discreet aspects of this regulatory package to be severable" ignores the comprehensive nature of the proposal, which is clearly not amenable to severance.

NAFA reiterates that the Department's 2023 fiduciary advice Proposal, including proposed amendments to PTE 84-24 and PTE 2020-02, reflects fundamental misunderstandings of fact and law that would, if allowed to proceed, wreak havoc on consumer access to retirement products that are today readily available through well-regulated insurance distribution channels. NAFA believes that the Department's proposed rulemaking package is fatally flawed, not amendable to severance, and should be withdrawn in its entirety.

We appreciate the opportunity to comment on this critical matter. Please feel free to contact the undersigned at cdj@nafa.com or pam@nafa.com if you should have any questions or if we could provide additional information.

Sincerely,

Charles J. DiVencenzo, Jr.
President & Chief Executive Officer
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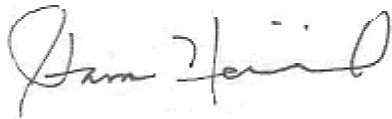

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