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COMMISSIONER OF INSURANCE

January 2, 2024

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

Re: Retirement Security Rule: Definition of an Investment Advice Fiduciary (RIN 121035-AC02); Proposed Amendment to Prohibited Transaction Exemption 84-24 (ZRIN 1210-ZA33, Application No. D-12060); and Proposed Amendment to Prohibited Transaction Exemption 2020-02 (ZRIN 1210-ZA32, Application No. D-12057)

Assistant Secretary Gomez:

Thank you for the opportunity to comment on the Department's proposed regulation expanding the definition of fiduciary investment advice (the "Proposed Rule"); and on the Department's proposed amendments to Prohibited Transaction Exemptions 84-24 and 2020-02 ("Proposed PTE 84-24" and "Proposed PTE 2020-02") (collectively, the "Proposal").

For nearly eighty years, Federal law has specifically allocated the responsibility of regulating the business of insurance to the states.[1] But that consumer protection responsibility and the related insurance supervision in Iowa dates back to the earliest days of our history as a state. We have always prioritized that responsibility as a state. The same could be said of the other state regulators. The Iowa Insurance Division is the primary regulator supervising all insurance business transacted in the state of Iowa. The Iowa Insurance Division also has statutory authority over many activities related to the sale of securities and other regulated products in Iowa. Our primary focus is to protect consumers through robust and well-regulated state markets offering security <u>and</u> choice to consumers.

Iowa plays a significant role in protecting consumers purchasing life insurance and annuities. We serve as the domiciliary state for approximately 40 life insurance companies, the 10 largest of which hold nearly $900 billion in assets.[2] As Iowa's insurance commissioner, I am privileged to

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

[2] See., "10 Largest Iowa-Domiciled Life Insurance Companies," Iowa Division of Insurance, 2021, available at https://iid.iowa.gov/media/3075/download?inline=report.

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lead a team with extensive expertise in all aspects of insurance regulation and consumer protection.

Our comments here express not only our significant concerns with the substance of the Proposal, but also our serious concerns about the Department's mischaracterization of state law in its attempts to justify federal intervention in the state regulation of insurance.

The Proposal Would Materially Affect the State Regulation of Insurance:

As explained in more detail below, the Proposal, as currently drafted, would have a material effect on the life insurance and annuity marketplace. The implications of the Proposal would also negatively impact the ability of the Iowa Insurance Division to regulate insurance carriers and producers in our state to protect the interests of policyholders in Iowa and around the United States who are financially protected by Iowa insurance companies.

While we recognize that the Department has responsibility to regulate retirement plans subject to the Employee Retirement Income Security Act of 1974 ("ERISA") and that the Department's responsibilities can apply simultaneously with State requirements with regard to such plans, we are concerned that the Proposal would fundamentally "re-draw" the traditional line between our respective responsibilities, and, in our view, in a manner well beyond Congressional intent.

The Proposal is Premised on an Inaccurate Understanding of State Annuity Regulation:

In developing the Proposal and seemingly in an attempt to justify its regulatory expansion, the Department engaged in an analysis of the state laws and regulations protecting consumers purchasing state-regulated annuity contracts. However, the mischaracterization of these state laws in the Proposal, and in statements made by officials in support of the Proposal, suggests that the Department does not accurately understand what state annuity regulation actually requires.

Given the Department's underlying confusion about the substance of state laws, we are concerned that the regulatory policies embodied in the Proposal will have a far greater effect on the states and on our regulation of insurance markets than the Department appreciates. Accordingly, in consideration of my comments below, we request that the Department reevaluate the Proposal's effect on the states, as required by the regulatory process under Executive Order 13132 regarding regulatory actions by agencies implicating principles of federalism.[3]

[3] See., E.O. 13132 of Aug 4, 1999: *"'Policies that have federalism implications' refers to regulations…and other policy statements or actions that have substantial direct effects 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… Agencies shall closely examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and shall carefully assess the necessity for such action. To the extent practicable, State and local officials shall be consulted before any such action is implemented."* 64 Fed. Reg. 43,255 (August 8, 1999).

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Further, as the lack of material consultation by the Department with state insurance regulators may have contributed to the Department's misimpressions, we offer these comments as a starting point for meaningful and detailed consultations between the Department and the states. Such coordination is essential to promulgating federal and state rules that work in concert to protect consumers within our respective jurisdictions.

The Department's Traditional Scope of Fiduciary Duty Did Not Broadly Affect State Insurance Regulation and Markets:

As noted above, the Department is the primary regulator of ERISA-covered plans. Thus, even though ERISA expressly does not preempt state insurance regulation under ERISA Sec. 514(b)(2)(A), the Department does govern the conduct of fiduciaries under ERISA Title I plans, for which the ERISA statute provides a specific fiduciary standard of care and a legal cause of action for breach of fiduciary duty.[4] Thus, if an insurance professional recommending an in-plan annuity to an ERISA plan met the requirements of the Department's fiduciary regulation adopted in 1975, the ERISA fiduciary standard of care would apply in addition to the state insurance standard applicable to that sale. The current overlap between ERISA and state insurance law is reasonably well-defined, and most annuity sales related to retirement savings are governed by state insurance law, or state and federal securities law, not ERISA.

The Vacated 2016 Fiduciary Rule Would Have Materially Affected State Insurance Regulation:

In 2016, the Department promulgated a rule providing a new definition of fiduciary advice and associated class exemptions (collectively, the "2016 Rule")[5] that sought to dramatically expand the Department's fiduciary authority. The 2016 Rule would have broadly encompassed recommendations made to retirement savings vehicles covered by ERISA Title II as well as ERISA Title I. These Title II vehicles include Individual Retirement Accounts and Annuities ("IRA"), and the 2016 Rule would have applied fiduciary status to virtually all recommendations regarding rollovers, transfers and distributions to or from plans and IRAs by virtually all financial professionals. The result of the 2016 Rule would have been to make most annuity recommendations—those involving assets in or related to plans or IRAs—fiduciary advice under ERISA. While state insurance regulations would have technically applied, state law, as a practical matter, would have been displaced by ERISA.

This would have had a material effect on the state of Iowa's life insurance and annuity marketplace, and on the practical ability of the Iowa Insurance Division to regulate insurance carriers and producers in our state. However, the 5th Circuit Court of Appeals vacated the Department's 2016 Rule on several grounds, including a finding that the Rule's broad definition of fiduciary advice was inconsistent with the statutory definition, and that portions of the Rule were arbitrary and capricious.[6] The court ruled that fiduciary advice under ERISA was not

[4] See., ERISA Secs. 404 and 502.

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

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

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intended to apply to sales recommendations of annuities and other investments absent a special relationship of trust with the consumer;[7] that Title II of ERISA did not authorize the Department to establish a standard of care governing recommendations to IRAs,[8] and that exemptions could not impose new and extensive duties on Title II fiduciaries.[9] Thus, the broad expansion of the Department's fiduciary standards into state insurance regulation did not occur in 2016. We do not agree that the Department is authorized to use the rulemaking in the Proposal to expansively and dramatically reinterpret ERISA without Congressional authorization. Further, although the Proposal may not be directly in conflict with the McCarran-Ferguson Act, the Proposal has the practical effect of displacing a large portion of state regulatory responsibility over annuities, a policy outcome that we believe should not be pursued without Congressional authorization.

The Current Proposal Would Significantly Expand the Department's Fiduciary Reach, Effectively Displacing Much of the State Annuity Regulation:

The new fiduciary definition in the current Proposal would appear to dramatically expand the scope of the Department's fiduciary authority, much as the 2016 Proposal would have done, though using a differently worded fiduciary test. The Department states that the Proposal is "…intended to be responsive to the Fifth Circuit's emphasis on relationships of trust and confidence. The current proposal is more narrowly tailored than the 2016 Final Rule."[10] While in this comment letter we do not venture into an opinion on the application of the *Chamber* decision to the current rule, we do have serious concerns that the Proposal would effectively displace the States' role in regulating most annuity sales. As we read the Proposal, it appears that normal sales activity under the NAIC Best Interest Rule would meet the Proposal's definition of fiduciary advice if the annuity is sold in connection with a plan or IRA, or a rollover, transfer or distribution related to a plan or IRA.[11]

The Department's Authority to Impose 10-Year Bans on Insurance Carriers and Producers Serving Retirement Investors Would Undermine the Iowa Insurance Division's Financial Solvency Responsibility:

Both the Proposed PTE 84-24 and 2020-02 contain new eligibility provisions. The effect of becoming ineligible is that a producer or insurance company can no longer sell annuities or other

[7] "Had Congress intended to abrogate both the cornerstone of fiduciary status—the relationship of trust and confidence—and the widely shared understanding that financial salespeople are not fiduciaries absent that special relationship, one would reasonably expect Congress to say so." Chamber at 376.

[8] "Moreover, DOL's principal policy concern about the lack of fiduciary safeguards in Title II was present when the statute was enacted, but 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 DOL to craft *de facto* statutory amendments or to act beyond its expressly defined authority." Id at 378-379.

[9] "The grafting of novel and extensive duties and liabilities on parties otherwise subject only to the prohibited transactions penalties is unreasonable and arbitrary and capricious." Id at 384.

[10] 88 Fed. Reg. 75,901.

[11] See., Proposal §2510.3-21(c).

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covered products to any retirement investor covered under the Proposal. Under these provisions, the Department can declare an insurance carrier or producer ineligible for 10 years based on a pattern of non-compliance, though the affected entities have some limited rights to be heard by the Department to contest or cure these failures.

We are concerned about the impact this provision could have on the financial stability and solvency of carriers domiciled in Iowa. Such a ban on a major insurance carrier could cause instability in the annuity market over which the Iowa Insurance Division would have little control. As we read the Proposal, if the Department concluded that an insurance carrier was found to have been involved in "a pattern of non-compliance" or that a foreign affiliate of one of Iowa's largest carriers was convicted of certain crimes under foreign law—even though it was not related to investment advice—the Iowa carrier could become ineligible for either exemption for 10 years. Given the fact that roughly $26 trillion[12] is held by retirement investors as that term is defined under the Proposal, a ten-year ban on participating in that market could financially ruin an insurance carrier, significantly impacting Iowa. The Proposal does not provide for coordination or notice with state regulators in such a case.

The Department's Proposal Would Limit Service Models and Compensation Reducing Availability of Annuities:

One of the key goals of the NAIC and Iowa in adopting a Best Interest standard (as we discuss in more detail below) would be undone if the Proposal were to be adopted. Instead of preserving consumer choice in service models, the Proposal would impose a uniform fiduciary standard and new restrictions on forms of compensation permitted to insurance producers. For example, under the Proposed PTE 84-24, insurance producers would be divided into two new types—independent producers who are not employees of any carrier (including statutory employees) and other producers and agents. The non-employee independent producers would be eligible to use Proposed PTE 84-24, the others must use Proposed PTE 2020-02.

Proposed PTE 84-24 does not permit an insurance producer to receive any compensation other than an up-front, renewal or trail commission. No other form of compensation would be permitted. These are very rigid standards regarding business models limiting consumer choice and access, and are inconsistent with the approach the NAIC and Iowa have taken.

The Department's Proposal Would Effectively Displace the States' Annuity Best Interest Rule:

Virtually all of the requirements of the current Best Interest Rule would be displaced by different standards required by the Proposed PTEs 84-24 and 2020-02. While the Iowa and other states' rules would technically remain, insurers would have to implement and maintain two different sets of supervisory requirements.

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[12] "By the first quarter of 2022…IRAs held $13.2 trillion in assets, private defined contribution plans held $9.2 trillion, and private defined benefit plans held $3.7 trillion in assets." 88 Fed. Reg. 75,915.

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The Department's Proposal is Not Limited to Annuities:

Further, the Proposal provides that ''investment property'' covered by the new definition likely includes other life insurance products with an "investment component." It would not apply to "…health insurance policies, disability insurance policies, term life insurance policies, or other property to the extent the policies or property do not contain an investment component." Thus, other state regulations governing life insurance could also be displaced by the Proposal.

We are concerned that the Proposal would fundamentally limit Iowa's ability to regulate its own insurance markets or the conduct of companies domiciled in Iowa, and we are doubly concerned as the Proposal appears to be premised on an inaccurate understanding of how the Best Interest annuity regulation actually applies.

The NAIC Model Rule Provides a Best Interest Standard that Puts Consumers First While Preserving Choice of Service Models for Consumer with Different Needs:

I served on the NAIC's Annuity Suitability (A) Working Group established in 2017 to revise the NAIC's *Suitability in Annuity Transactions Model Regulation* (#275) (the "NAIC Best Interest Rule"). We worked in an open and cooperative manner for two years to develop the NAIC Best Interest Rule. Our process relied on extensive input from consumer groups, regulators, insurers and insurance professionals, examining in detail all of the issues presented by changing the standard of care governing annuity recommendations.

One of the options under serious consideration by the Working Group was to adopt a fiduciary standard of care for annuity sales. There were a variety of opinions within the Working Group and within the NAIC regarding the advisability of a fiduciary standard. The NAIC represents a wide array of elected and appointed officials from across the political spectrum. As regulators whose primary duty is to protect our citizens, however, we were united in our conviction that the interests of the consumer must come before the interests of the insurance professional or adviser. The issue was how best to achieve this goal. After extensive discussions, we were able to reach consensus, and affirmatively decided not to adopt a fiduciary standard of care, but to adopt a best interest standard of care.

We did not make this decision lightly. We did so because a fiduciary standard inherently restricts business models that many of our residents rely on to gain cost-effective access to the financial security products they need. As noted above, I serve as Iowa's regulator for both insurance and securities. In this dual role, I regulate state laws applicable to fiduciary investment advisers as well as state laws applicable to insurance professionals. Yet my experience in these service models dates back to my work on securities and annuities sales practices during my 25+ years of service as a Missouri Assistant Attorney General, Securities Commissioner and Insurance Director. My extensive consumer protection law enforcement service has informed my understanding and left me very familiar with the advantages and disadvantages of both service models.

Our experience in Iowa has proven that having varied service models offers valuable consumer access by preserving consumer choice. Iowans choose professional financial services either through fee arrangements or through transactional commission arrangements based on their particular needs. Requiring high quality financial advice that fits the particular needs, objectives

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and situation of the individual Iowan is best achieved by the coexistence of the fiduciary and the best interest standards of care. Consumer protection is achieved through smart, consistent and sophisticated enforcement of consumer protection standards, not by the Department's approach of restricting consumer access to high quality annuity products.

As a regulator of the securities investment advisers who are fiduciaries, I have found that the fiduciary service model is not immune to bad actors—some fiduciary advisers make recommendations that are not in the consumer's best interests and are made with misplaced loyalties. Fiduciary standards are not a panacea. It is my view that the Departments' fiduciary approach, with its emphasis on limiting and micromanaging business models and services, will increase costs and reduce access, resulting in less security for Iowans than our own rules provide.

The reasoning behind our decision at the NAIC was essentially the same as that of the Securities and Exchange Commission ("SEC") as we chose to develop and approve for state adoption a model best interest standard rather than a fiduciary standard. Having been authorized by Congress to evaluate the issues and to select a fiduciary standard if warranted, the SEC decided to adopt a best interest standard, explaining, "We have declined to subject broker- dealers to a wholesale and complete application of the existing fiduciary standard…we believe (and our experience indicates), that this [fiduciary] approach would significantly reduce retail investor access to differing types of investment services and products, reduce retail investor choice in how to pay for those products and services, and increase costs for retail investors of obtaining investment recommendations."[13] In our collective view, we state regulators agreed with the SEC that a best interest standard was in fact, collectively, in the best interest of American annuity consumers, and set about the effort to make it the law of the land. Over 40 states have concurred with this view and adopted the NAIC Best Interest Rule.

The Department Mischaracterizes the Protections of the NAIC Best Interest Rule:

The NAIC membership approved revisions to the NAIC Best Interest Rule in February of 2020, clarifying that all recommendations by agents and insurers must be in the best interest of the consumer and that agents and carriers may not place their financial interest ahead of the consumers' interest in making a recommendation. We chose to immediately bring these consumer protections to the market and Iowa was the first state to adopt the NAIC Model Rule on May 11, 2020. The rule has been in effect for several years, protecting Iowans in a robust insurance marketplace since January 1, 2021.[14]

Unfortunately, the Department mischaracterized these protections in the Proposal. Here are several specific misconceptions reflected in the Proposal and public statements:

[13] 84 Fed. Reg. at 33,322 (July 12, 2019).

[14] Iowa Admin. Code r. 191-15.72 – 15.78 (2020).

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1. <u>The Department Inaccurately Claims that NAIC Best Interest Rule Doesn't Put the Consumer First:</u>

Sec. 6(A) of the NAIC Rule states, "A producer, when making a recommendation of an annuity, shall act in the best interest of the consumer under the circumstances known at the time the recommendation is made, without placing the producer's or the insurer's financial interest ahead of the consumer's interest." Sec. 6(A)(1-4) then lists the care, disclosure, conflict of interest and disclosure requirements.

Despite this clear statement prohibiting the producer from placing his own interest ahead of the consumer's interest, the Department effectively "reads out" the requirement from Iowa's Best Interest Rule without giving any amount of time or serious consideration to how the regulation is already being enforced. Instead, the Department rather conclusively asserts that "…the specific care, disclosure, conflict of interest, and documentation requirements do not expressly incorporate the obligation not to put the producer's or insurer's interests before the customer's interests, even though compliance with their terms is treated as meeting the 'best interest' standard." [15]

As we are now enforcing these provisions, we can conclude that the Department is not only uninformed, but surprisingly disinterested in actually considering any reasonable analysis of Iowa's regulatory efforts.[16] To be frank, some of us state regulators were shocked by the attack leveled against our organization by the Department. It is incredibly troubling that a federal agency would willfully disregard and dismiss the valuable work that the states have undertaken to protect consumers. The Department leveled its broad criticism of the NAIC without any sincere consideration of the benefits to consumers as a result of the NAIC's Best Interest Rule.

2. <u>The Department Inaccurately Claims that the NAIC Best Interest Rule Doesn't Restrict Compensation-Related Conflicts of Interest:</u>

The Department states that the NAIC Model Rule "disregard[s] compensation as a source of conflicts of interest" because it, "…carves out 'cash compensation or non-cash compensation' from treatment as sources of conflicts of interest."[17]

The NAIC Model rule does not disregard compensation as a source of conflicts of interest. In fact, Sec. 6(C)(2)(h) expressly prohibits sales contests, sales quotas, bonuses and non-cash compensation based on sales of specific annuities within a limited time frame due to the conflicts

[15] 88 Fed. Reg. at 75,898.

[16] "State Insurance Regulators Work to Protect Consumers Who Buy Annuities," National Association of Insurance Commissioners press statement, November 1, 2023: *"We fundamentally disagree with the…characterization of state consumer protections for annuity products. The…press statement that oversight…provides 'inadequate protections and misaligned incentives' suggests either ignorance of, or willful disregard for, the hard work of the 40 states and counting that have worked diligently to enhance protections for consumers by adopting the NAIC's Suitability in Annuity Transactions Model Regulation."* available at https://content.naic.org/article/state--isurance-regulators-work-protect-consumers-who-buy-annuities-naic-releases-statement-dol/

[17] Id.

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they present. The Model Rule does provide that cash and non-cash compensation are not per se conflicts, but context dependent, coupling disclosure of the compensation with any mitigation requirements applicable.

3. The Department Inaccurately Claims that the NAIC Best Interest Rule Allows the Producer to Recommend a "Worse" Option:

Building on its inaccurate dismissal of NAIC Best Interest Rule's requirement to put the client first, DOL explains that it includes its own best interest standard as a condition of Proposed PTEs 84-24 and 2020-02 to clarify "that it is impermissible for the Investment Professional to recommend a product that is worse for the Retirement Investor because it is better for the Investment Professional's or the Financial Institution's bottom line…The Department notes this standard is consistent with the SEC's standards for both registered investment advisers and broker-dealers."[18] This reference noticeably omits the NAIC Best Interest Rule.

Department officials echoed this inaccurate notion during the public hearing on the Proposals. During questions about the disclosure of standards of care, an EBSA official stated:

> "Are people told hey, you really do need to think of me as a sales person? ***I'm just here to sell you this product and I have an obligation to make sure it's good enough. But I could actually sell you a worst [sic] product because it's better for me financially.***" [emphasis added][19]

This is a simply inaccurate statement reflecting an incorrect understanding of the NAIC Best Interest Rule. Sec. 6(A) expressly prohibits such conduct.

4. The Department Inaccurately Claims that the NAIC's Best Interest Annuity Rule "Varies Significantly" from State to State:

A consistent theme in the Department's analysis is that Federal securities laws are uniform in their application to annuity recommendations, but state laws vary widely. For example, the Department writes, "Variable annuities and some indexed annuities are considered securities and are subject to securities laws, while fixed annuities, including fixed indexed annuities, are subject to state law. As discussed in the Regulatory Baseline section, these laws vary significantly from state to state…[under] regulations that potentially hold those selling such insurance products to a lower standard"[20]

This is also not correct. At present, more than 40 states have adopted the NAIC Best Interest Rule, and New York has adopted its own Best Interest Rule. It is anticipated that the remaining

[18] Id at 75,983.

[19] Transcript of "Public Comment Hearing, Retirement Security Rule: Definition of an Investment Advice Fiduciary," question by EBSA Deputy Assistant Secretary Hauser, pg. 46, December 13, 2023.

[20] 88 Fed. Reg. 75,920.

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states will adopt the NAIC Model Rule by the end of 2024. When nearly all states have already adopted the same standard, that standard does not "vary significantly" from state to state.

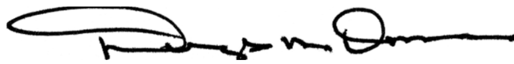
Conclusion:

The Proposal is likely to have a material impact on the ability of Iowa and other state regulators to manage their life insurance and annuity marketplaces. The effect would be much greater than the Department appreciates, as the Proposal effectively displaces not only the direct regulatory standards applicable to annuity recommendations, but also could affect indirectly the health and solvency of the state market as a whole.

In adopting the NAIC Best Interest standard of care, we in Iowa and more than 40 other states acted purposefully, after careful consideration of what is best for consumers and the market based on our experience as insurance regulators. When 50 state regulators, all dedicated to protecting consumers, are joined by the SEC in rejecting a uniform fiduciary standard in order to protect our consumers' access to services and products, the Department should listen.

I urge you to reach out to me and to my fellow state regulators for meaningful coordination before you proceed further with the Proposal.

Sincerely,



Doug Ommen
Commissioner of Insurance

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