Insurance Agency Marketing Services, Inc.

Submitted Electronically via www.regulations.gov

January 2, 2024

Office of Regulations and Interpretations
Office of Exemption Determinations
Employee Benefit Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Re: *RIN 1210-AC02 Retirement Security Rule: Definition of an Investment Advice Fiduciary and related exemptions ("DOL Fiduciary Rule")*

Dear Sir or Madam:

This letter is on behalf of Insurance Agency Marketing Services, Inc. (IAMS), a national insurance marketing organization with over 8,000 contracted independent agents authorized to sell annuity and life insurance products, in regard to the Department of Labor EBSA notices cited above.

First, we want to voice our great disappointment with the Administration's mischaracterization that fixed index annuities are sold with conflicted advice implying these annuities represent "junk fees." This incendiary rhetoric is not only misplaced and unfounded but represents an insult to the hundreds of thousands financial professionals that sell these quality retirement products to Americans each year.

IAMS is vehemently opposed to the DOL Fiduciary Rule and the damaging impact it will have on both American savers and the hundreds of thousands of financial professionals that Americans rely upon for retirement advice. The proposed rule poses a real threat to many Americans' ability to save for their retirement. These additional federal government rules are an unfounded 500-page proposed rule in search of a problem. Consumers will lose access to financial advice, more diverse financial products, and suffer greater costs as a result of the proposed rule.

The current state insurance regulatory system provides a robust consumer protection regime that has worked and evolved. Under the regulatory regime established by the federal McCarran-Ferguson Act, insurers are subject to a vibrant, comprehensive state level system of insurance, consumer protections and antitrust enforcement. States have successfully regulated all aspects of insurance from licensing to market practices to financial solvency, and all insurance activity is subject to regulatory supervision. In addition, every state has an Unfair Trade Practices Act providing authority to investigate, and where

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appropriate, correct and punish a variety of unfair practices. In addition to many state law and regulatory protections which the DOL seems to have discounted, state insurance regulators have overseen the sale of annuities to ensure products sold to consumers are suitable for them, with the NAIC Suitability in Annuity Transactions Model Regulation (#275) as the regulatory framework. Congress has reconfirmed the states' regulatory responsibility over annuities in the 2010 Dodd-Frank Act.

Siginficantly, 40 states have now adopted (and the remainder will by the end of 2024) the NAIC's February 2020 updates to Model #275, which requires all recommendations by agents and insurers to be in the best interest of the consumer, and they may not place their financial interests ahead of the consumer's interest in making the recommendation. The states revised the annuity standards to establish best interest requirements creating a companion set of best interest rules to those adopted by the SEC for securities dealers in 2019. The NAIC's three-year review and revision process to Model #275 help promote greater consumer protection, disclosures such as conflicts of interest, and assured those selling these products placed their consumer's interests first. This regulatory update by the proper functional regulators, the states' insurance departments, illustrates the current state regulatory system works and indeed evolves to match the evolving retirement market and consumer protection.

On behalf of the thousands of independent agents that sell insurance products through the many different insurance carriers we represent, we adamantly oppose the rule and support all of the comments and testimony submitted by the National Association for Fixed Annuities as well as the Federation of Americans for Consumer Choice. Accordingly, IAMS recommends the DOL withdraw its proposed Fiduciary Rule in its entirety.

Sincerely,

Christopher S. Conroy
EVP & General Counsel

Attachments: NAFA Comment Letter 1-2-2024
FACC Comment Letter 1-2-2024

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Office of Regulations and Interpretations
Room BN-5655
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Suite 400
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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

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

[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.

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.

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).

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.

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

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

[10] *Id.*

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

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

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> 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

[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

[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).

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

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.

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

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).

> 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").

> 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

[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

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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.

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).

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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.

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.

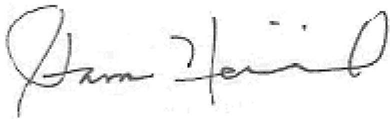
The series of unnecessary, and overly burdensome prohibited transaction exemption amendments contained in the Department's 2023 rulemaking proposal are inextricably intertwined with, and a reflection of, the underlying proposal to amend the definition of "investment advice fiduciary." As noted above, 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
National Association of Fixed Annuities



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January 2, 2023

Submitted Electronically via www.regulations.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
United States Department of Labor
Room N–5655
200 Constitution Avenue NW
Washington, DC 20210

RE: RIN 1210-AC02

Dear Sirs and Madams:

The Federation of Americans for Consumer Choice (FACC) strongly opposes the Department of Labor (DOL) rule-making package currently being rushed to adoption. Sadly, this is just the latest attempt by the DOL to create overreaching requirements that will be counterproductive, and consequently will intrude on regulatory authority of other agencies, disrupt a vibrant marketplace, and worst of all, harm the very retirement savers it purports to protect by restricting their spectrum of choices and creating excessive bureaucracy in pursuit of misguided public policy.

FACC sincerely hopes the DOL will reflect in earnest over our concerns about this ill-conceived package of rules and exemptions even though DOL and FACC are engaged in ongoing litigation relating to prior DOL pronouncements. FACC is driven primarily by its commitment to a strong marketplace in which independent agents can function effectively in delivering quality fixed annuity and insurance products to clients who, in turn, want choices for protecting their assets and achieving a secure retirement. It is FACC's hope that the DOL will reconsider and withdraw its proposed rulemaking, which will otherwise merely serve to unleash a new round of litigation and confusion for retirement savers at a time when those energies could be spent more productively working towards better education of consumers, improving coordination among regulators, and strengthening laws that govern America's retirement system.

Studies show, not surprisingly, that retirement savers are worried about their financial future and want freedom to choose products that come with guarantees that give them peace of mind. Much of this research is conducted by fellow trade organizations that no doubt will comment at greater length in this regard. A recent nationwide study commissioned by the American Council of Life Insurers, for example, showed that over 80% of respondents worry about having enough savings to last through retirement, over half are considering a guaranteed lifetime income product, and nearly three-quarters—most of whom do not already have a pension plan—would be interested in independently purchasing a

guaranteed lifetime income product that pays out like a pension.[1] Other studies by LIMRA indicate that those who know more about annuities have a more favorable opinion of them.[2] Obviously, annuities are not for everyone, but they certainly can play a vital role in the portfolio of many retirees provided that the DOL does not act to stifle the marketplace and unnecessarily hamper independent agents who are a primary source of information and sales of these valued products.

In this letter, FACC will explain in detail why we believe the DOL's proposed rule conflicts with existing law, is wrong headed as a matter of public policy, underestimates the costs and burdens that would substantially outweigh perceived benefits, and will have ruinous effects on the distribution of fixed annuities through independent agents. Our focus is on fixed annuity products sold through independent agents and thus our comments primarily pertain to the proposed expanded definition of fiduciary and revamping of PTE 84-24. FACC delves deeply especially into the amended PTE 84-24 proposal where we identify a series of flaws that in aggregate render that proposal unworkable and dictate it be withdrawn or at the very least reconstructed and republished for further public comment.

At the outset we wish to express our disappointment that the DOL is rushing this proposal to adoption without sufficient deliberation and public comment. The attempt to justify this accelerated public comment period by claiming these matters have been under review already for years reflects the very cynicism that has tripped up these kinds of proposals in the past. The fact is that the DOL's newly proposed definition of fiduciary again flies in the face of legal precedent and should be examined closely as both a legal and public policy matter. And the reality is that the proposed revisions to PTE 84-24 are extensive, untested, and potentially devastating for the insurance industry. The DOL decision to proceed with a comparatively short 60-day comment period – spanning three major holidays – further interrupted by two days of public hearings – is simply unfair to those involved in this process and irresponsible as a matter of public accountability.

Finally, as a prefatory matter, please note FACC incorporates by reference into our commentary the letter of FACC's counsel Figari and Davenport submitted to DOL on November 20, 2023 and our public hearing testimony which are both included herewith as attachments.

I. DOL's Proposed Fiduciary Definition

FACC believes the DOL's newly proposed rule defining who is a fiduciary is incompatible with ERISA and will be struck down in the courts upon challenge. FACC's position in this regard is represented by, and explained in, the Figari and Davenport letter submitted to the DOL and thus will not be rehashed here. However, we would emphasize a few points.

As suggested by our counsel's letter, it is a foregone conclusion that the DOL's new proposals will be challenged in court if the Department proceeds with adoption. We are confident the DOL knows this already and therefore it is disappointing that the DOL chooses to engage in calculated efforts to circumvent Congress and the courts. As stated by our counsel: "It is clear to FACC—as it surely must be to the Department—that these proposals are utterly irreconcilable with the holdings of the Fifth Circuit Court of Appeals' decision in *Chamber of Commerce* . . . . It is hard to state forcefully enough how the Department's proposals reflect a complete lack of deference to the *Chamber of Commerce* opinion."

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[1] Economic Climate Has Retirement Savers Eyeing Guaranteed Lifetime Income and Financial Planning Options, Morning Consult Survey Finds (acli.com), May 22, 2023.
[2] Secure Retirement Institute Study: Most Consumers Baffled by Annuities (limra.com), April 27,2020.

In FACC's testimony given at the DOL's public hearing, we focused on public policy considerations to highlight what we call the DOL's "false narrative" that ERISA protections are needed for rollovers and IRAs. Congress enacted ERISA to protect plan participants captive in employer and union sponsored plans where conflicts were historically common and harmful to participants. IRAs, on the other hand, are free of those constraints and today are part of a competitive marketplace offering countless choices in products and services, all of which is aptly regulated, like other retail products and services, by functional regulators including the SEC, state securities departments, FINRA, state insurance departments, and bank regulators. While the DOL may be on a self-declared mission to protect consumers, that is no basis for ignoring the will of Congress and the limitations of ERISA.

FACC believes it is self-evident that the DOL's newly proposed definition of fiduciary misses the mark relative to ERISA and the Fifth Circuit decision. To begin with, the proposal is devoid of any meaningful discussion of what constitutes a "relationship of trust and confidence," instead disingenuously relying on superficial discourse on whether the client "places" trust and confidence in the agent. The DOL knows this dodges the common law standard which provides that a fiduciary relationship derives from a "special relationship of trust and confidence" which is a purposeful phrase with specific meaning developed over time by longstanding caselaw. Insurance agents are honorable businesspeople but that does not automatically turn them into fiduciaries.

Notably, the DOL eviscerates the time-honored five-part test which the Fifth Circuit specifically said captures the essence of this common law meaning of fiduciary - i.e., a special relationship of trust and confidence. DOL's new definition of fiduciary remarkably disposes with four of the five parts. Thus the DOL jettisons: (i) mutual agreement to establish a meeting of minds with the client that the provider is a fiduciary, (ii) regular basis to establish there is an ongoing relationship that is not merely transactional, (iii) primary basis to establish the client actually relies on the provider in making final decisions, and (iv) individualized advice on matters relating to the client portfolio to establish the client is not merely selecting a product. Moreover, the DOL makes no allowance or exception for advice incidental to sales, which is embedded within the common law definition of fiduciary as discussed at great length in the Fifth Circuit decision.

Instead, what the DOL now puts forward is obviously the equivalent of what was proposed in 2016 and rejected by the Fifth Circuit. The tightly constructed five-part test is replaced by purposely loose criteria merely looking at whether the provider is in the financial business, advice is individualized, and the client relies on the advice. In short, this sweeps in virtually every salesperson and every transaction in the financial services industry. It is impossible to reconcile this over-inclusive definition of fiduciary with the common law as explained by the Fifth Circuit. In short, every annuity salesperson is rendered a fiduciary under this proposed rule contrary to Congressional intent, the Fifth Circuit decision, and well-established jurisprudence.

FACC wishes to make two other important points with regard to DOL's legal analysis or lack thereof. First, FACC disagrees with the rule proposal to the extent it seeks to codify reversal of the Deseret Letter in order to include rollovers within the ERISA definition of investment advice. FACC believes advice or assistance given to plan participants merely to remove funds from a plan is not

investment advice unto itself.[3] Second, FACC disagrees with the rule proposal to the extent it defines "for a fee or other compensation" as sweeping in any and all commissions in connection with sales transactions. The Fifth Circuit made clear that commissions may be deemed a fee for advice only if all five parts of the five-part test are satisfied including among other things mutual understanding by the parties that commissions are intended to cover investment advice for strategies, portfolio composition, diversification, etc. Given this proposal abandons the five-part test, the attempt to define "for a fee or other compensation" without nexus to the elements of the existing five-part test violates ERISA.

In summary, with respect to the DOL's proposed definition of fiduciary, FACC contends the DOL is simply ignoring the Fifth Circuit decision. DOL's attempts in the preamble to distinguish its new sweeping definition from the 2016 rule are hollow and unpersuasive. FACC further contends the DOL is ignoring the import of the recent ASA decision prohibiting aggregation of plans to overcome ERISA barriers between Title I and Title II plans, accomplished stealthily through redefinition of "regular basis," only further exhibiting the DOL's disregard for controlling precedents.[4] FACC is confident there will be a vigorous challenge to the DOL's expanded definition of fiduciary - which in reality is the old 2016 proposal warmed over - and the legal challenge will prevail.

II. NAIC Model Regulation and Requirements

While FACC believes the DOL is precluded by ERISA from turning everyday insurance agents into fiduciaries, it is important to recognize that state insurance regulation works, contrary to DOL's efforts to portray state regulation in a bad light. It is narrow-minded for Washington-based federal agencies to believe they must intercede to protect consumers as though state insurance departments are helpless or incapable of addressing the needs of their citizens in regulation of financial products.

In fact, the National Association of Insurance Commissioners (NAIC) replied sharply to the unveiling of the DOL's proposal done with great fanfare from the White House. An NAIC press release[5] issued the next day pulled no punches, saying:

> We fundamentally disagree with the White House's characterization of state consumer protections for annuity products. The White House press statement that oversight of these products 'varies state by state' and 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.

The materials put out by the DOL in support of its rule proposal indeed reflect grievous misunderstandings of the breadth and depth of state insurance regulation. The "regulatory baseline"

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[3] Advisory Opinion 2005-23A, commonly known as the Deseret Letter, concluded merely advising a person to take a distribution from a plan is not investment advice or recommendation concerning a particular investment. A federal court reached the same conclusion in Beeson v. Fireman's Fund Ins. Co., No. C-09-2776 SC, 2009 WL 2761469.

[4] *American Securities Association vs. DOL* is a federal district court decision rendered in February 2023 vacating guidance regarding the regular basis part of the five part test yet the DOL has still not complied with the remand for further proceedings consistent with the court order.

[5] State Insurance Regulators Work to Protect Consumers Who Buy Annuities; NAIC Release Statement on DOL Fiduciary Rule Proposal (naic.org), November 1, 2023.

contained in the DOL release - including a slapdash chart of state insurance laws - utterly fails to capture the true scope of state insurance laws governing agent conduct that includes laws on unfair trade practices, truth in advertising, handling of replacements, suitability standards, and much more.

More recently the NAIC has adopted its updated Suitability in Annuity Transactions Model Regulation containing heightened market conduct standards including best interest obligations. The updated NAIC Model Regulation was promulgated in January 2020 with the expectation that individual states would adopt the model regulation over the ensuing five years and indeed at this point in late 2023 more than 40 states have adopted the updated regulation, and there is reason to believe all states will adopt it or some version thereof by 2025. Yet the DOL is unwilling to allow reasonable time for these laws to be instituted broadly and take effect to determine their impact on market conduct before embarking on an elaborate experiment in which insurance agents are turned universally into fiduciaries subject to complex PTE conditions under federal law promising to be highly disruptive and effectively supplanting a swath of state regulation.

FACC finds it particularly interesting - and contradictory - how the DOL uses these NAIC Model Regulation developments to justify its purported need for reform while at the same time seeking to discredit the NAIC Model Regulation as defective. After describing SEC Reg BI and the NAIC Model Regulation, the preamble says:

> These regulatory efforts reflect the understanding that broker-dealers and insurance agents commonly make recommendations to their customers for which they are compensated as a regular part of their business; that investors rely upon these recommendations; and that regulatory protections are important to ensure that the advice is in the best interest of the retail customer, in the case of broker-dealers, or consumers, in the case of insurance agents. After careful review of the existing regulatory landscape, the Department too has concluded that existing regulations should be revised to reflect current realities in light of the text and purposes of Title I of ERISA and the Code.

The DOL tries to have it both ways, on the one hand justifying its new proposals by implying it is just following suit vis-a-vis Reg BI and the NAIC Model Regulation, while on the other hand saying these enhanced regulations adopted by the SEC and NAIC are insufficient. At the public hearing, DOL staff asked questions belying this contradiction, inquiring how insurance agents can satisfy the updated NAIC Model Regulation requirements without being fiduciaries, implying that agents are misleading clients by professing to meet a “best interest” standard short of full-fledged fiduciary obligations under ERISA.

FACC’s answer is simple - insurance agents are not fiduciaries - rather they are producers subject to strict state laws governing sales practices. The NAIC Model Regulation enhances standards of care for agents but does not turn them into fiduciaries under ERISA. While the DOL seems unable or unwilling to grasp this distinction, differences between best interest obligations under the NAIC Model Regulation and ERISA fiduciary duties are substantial both legally and practically. It does not mean insurance agents operating in compliance with the NAIC Model Regulation are going to act in some manner that is adverse to their clients or otherwise unprofessional; it only means they are not forced to abide by obligations or operate under standards that are designed for trust officers rather than insurance agents which most likely would serve only to inhibit an otherwise healthy working relationship between agent and client.

The differences between NAIC model regulation best interest and ERISA fiduciary duties include: (i) ERISA has a duty of loyalty to act solely in the interest of the client different from the NAIC model regulation requirement for agents not to put their interests ahead of client interests, (ii) ERISA contains a prudence requirement not considered applicable to insurance producers, (iii) the NAIC model regulation establishes four specified obligations deemed to satisfy the best interest standard consisting of care, disclosure, conflict of interest, and documentation, all of which comport with the sales function of an agent, (iv) the NAIC model regulation requires neither ongoing monitoring nor diversification of assets which may need to be considered by ERISA fiduciaries, (v) the NAIC model regulation does not define conflicts of interest as broadly as ERISA instead relying on disclosure befitting insurance sales practices, (vi) the NAIC model regulation contains no reasonable compensation restrictions but limits certain forms of incentive compensation, and (vii) the NAIC model regulation does not expose agents to common law fiduciary liabilities, DOL oversight, or potential private right of action under ERISA.

Based on all of this, FACC doubts whether the DOL sufficiently understands state insurance regulation and gives enough credit to the updated NAIC model regulation. Given the NAIC's sharp response to the rule proposal, there also seems to be a question whether the DOL has adequately conferred with state insurance regulators. To the extent the DOL is motivated to proceed with its new rulemaking based on perceived weaknesses with existing state insurance regulation, FACC believes the DOL has failed in its rulemaking obligations to fully assess the operative regulatory environment and has failed as well to consult with key constituencies to justify proceeding with its far-reaching changes to the definition of fiduciary and related PTE 84-24 revisions.

III. DOL's Cost Benefit Analysis

Due to the compressed comment period, FACC has not had time to examine closely the DOL's supposed justifications and cited studies, but on the surface the DOL falls short of making a convincing case for the proposed rule. The DOL relies mostly on recycled or scrambled information hoping something will stick. This is particularly true of the allegations against fixed annuity products that apparently are central to DOL concerns but addressed by the agency with only oblique datapoints that are largely result-oriented rather than grounded in a genuine search for relevant facts.

The DOL's opening salvo in introducing the rule was a high-profile Presidential announcement contending annuities have "junk fees" which was illustrated on the White House website by pointing to hedging costs contained within fixed indexed annuities.[6] Aside from being offensive, the contention that these costs built into the pricing structure of annuities constitute "junk fees" is a non sequitur, for hedging costs are not fees in the first place and they certainly are not junk given such costs are an integral component necessary to provide guarantees against market losses. The proposed rule does not even address such arcane matters nor use the term "junk fees" so the entire approach taken by the White House – in concert with the DOL – is fragmented and casts doubt over its purported justifications beyond political sound bites.

To be sure, annuities typically have surrender charges if an annuity is surrendered early and some have fees for added benefits contained in riders usually providing income or death benefits. But none of these fees are "junk," all are cost justified by company actuaries, and all are disclosed prominently. To the extent the DOL contends that hedging costs within annuities are too high, its analysis on the White

[6] The Retirement Security Rule – Strengthening Protections for Americans Saving for Retirement (whitehouse.gov), October 31, 2023.

House site is seemingly obtuse and highly theoretical, failing to acknowledge the costs reflect market forces and it would be completely impractical for individual consumers to replicate a comparable portfolio purchasing their own options. All these concerns seem disconnected from the rule itself, detached from reality, and call into question the DOL justification for its attack on indexed annuities.

Turning to the actual Regulatory Impact Analysis, FACC finds that the DOL mostly regurgitates the same studies and information used to justify its original 2016 proposal, serving up mostly stale research and patchwork analysis that has little or nothing to do with fixed annuities even though the DOL has trained its regulatory sights on fixed indexed annuities. The DOL admits itself that “this RIA provides a mainly qualitative discussion” because the DOL knows the data unto itself is thin and indefinite. Almost all the cited studies deal with mutual funds (e.g. 2015 Counsel of Economic Advisers), variable annuities (e.g., Egan, Ge, and Tang post 2016 rule), or other products like convertible bonds (Egan cited in White House blog). Of course, the inherent problem with all these studies is they are focused on maximizing return when fixed indexed annuities are purchased for more nuanced reasons including peace of mind that requires more intricate analysis to account for returns together with financial guarantees.

Perhaps the one study cited that has relevance to fixed indexed annuities is Bhattacharya. But from what FACC can tell, that esoteric study is mostly outdated looking at information from the 2013 to 2015 period, mixes variable and fixed annuities in ways that cloud the meaning of its results as pertains fixed indexed annuities, relies on arcane formulae, and perhaps most intriguingly actually extols the virtues of fixed indexed annuities. Contrary to DOL’s thesis, this study says:

> An adviser with fiduciary duty may be drawn to FIAs for a variety of reasons. First, FSP’s FIAs tend to have higher risk-adjusted returns for the population of clients we observe during our sample period. Second, FIAs are simpler to explain: they do not include income and contract bases, or complex riders . . . . Finally, given that FIAs cannot generate negative unadjusted returns while VAs can, this effect could reflect advisers better informing clients of the potential realizations of an investment vehicle.[7]

The dated information used in the Bhattacharya study also highlights a fatal flaw in all the research cited by the DOL. None of the research accounts for the phenomenon that best interest requirements under SEC Reg BI and the NAIC model regulation are phasing in nationwide. While the DOL tries tenuously to adjust for this factor in one case – assuming fifty percent of the broker market may be using best interest – the fact is that soon virtually every transaction in the marketplace will be subject to best interest requirements. While those requirements are not the same as DOL’s fiduciary duty, studies are inherently obsolete unless they measure the difference in sales behavior under a best interest standard versus fiduciary duty. None of the DOL research meaningfully measures that difference – at least not as to fixed indexed annuities during the ongoing rollout of the NAIC model regulation – and thus the DOL’s impact analysis is stuck in a regulatory time warp.

On the other side of the cost benefit equation, the Regulatory Impact Analysis is way off the mark with its assumption there are only 4000 independent agents affected by this proposal, which in turn means the DOL cost estimates are absurdly low. That number is so removed from reality that it again calls into question whether the DOL has any grasp on the far-reaching implications of its regulatory proposal. FACC estimates there are at least 80,000 independent insurance producers – some

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[7] Fiduciary Duty and the Market for Financial Advice, Bhattacharya, Illanes, and Padi (nber.org), May 2019 Revised November 2023, pp. 49-50.

information suggests that number could be over 100,000 – who would be impacted by DOL's regulation which includes any independent agent selling annuities who would be rendered a fiduciary when selling tax-qualified products.[8] The DOL data was apparently taken from a property casualty trade group which raises serious doubts whether the DOL has done its homework to proceed with this rulemaking.

The figure of 80,000 independent insurance agents means the DOL cost estimates are automatically wrong by at least twenty-fold. Beyond that, FACC contends the discrete cost components estimated by the DOL for compliance with each aspect of the rule are preposterously low. The DOL estimates ten minutes of legal time to prepare written acknowledgements, thirty minutes on standard of care, thirty minutes of staff time on written descriptions of service and products, one hour on conflicts, and ten or five hours for companies to prepare policies and procedures depending on size of the company. None of this is remotely credible when insurers and agents are under heavy pressure to ensure compliance materials are accurate and complete or face serious consequences. Also completely missing from the cost analysis are added expenses associated with E&O, revised business practices, and adapting to potentially onerous supervisory systems established under PTE 84-24.

FACC believes the DOL needs to go back to the drawing board with its feeble regulatory impact analysis. As the DOL acknowledges, this proposed rule is a Significant Regulatory Action which requires the agency to quantify costs and benefits, and to seek ways to reduce cost, harmonize rules, and promote flexibility. The Regulatory Impact Analysis – at least with respect to fixed annuities and sales through independent agents - fails on all counts. Additionally, it bears mention the Federalism Statement claiming there are no federalism implications because the rule has "no effect on the States . . . or on distribution of power and responsibilities among the various levels of government" is palpably false. All of this underscores the DOL rule and rulemaking process would not pass muster under APA review.

IV. Revised PTE 84-24 Issues and Concerns

FACC believes the DOL's proposed overhaul of PTE 84-24 is ill-conceived and deeply troublesome because it is vague, onerous, and ultimately unworkable. While the DOL purports to create this new class exemption to provide a level playing field for independent agents, it does the exact opposite by establishing burdensome and unrealistic requirements for independent agents and insurers that would severely disadvantage them compared to other financial providers in the retirement services marketplace and likely drive many or all out of the independent channel.

FACC believes this proposed overhaul of PTE 84-24 reflects the DOL's lack of knowledge and perhaps lack of concern for how the independent producer system operates in delivering products to consumers. The proposal suffers from deficiencies reflecting bureaucratic thinking rather than appreciation for what is practicable and reasonable for independent agents and insurers operating in the real world. Although the DOL seeks to address one concern, which is the inability of insurers to serve as fiduciaries in oversight of independent agents, the proposal overcompensates with unworkable burdens and unrealistic expectations. What emerges is a proposal that can only be characterized as arbitrary and capricious.

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[8] FACC is aware of IMOs and insurers that contract with independent agents totaling 80,000 or more. FACC has researched databases compiled by vendors indicating the total number could be high as 112,000.

More broadly speaking, FACC believes this proposed overhaul of PTE 84-24 is problematic for these reasons, which are expanded upon below in greater detail:

- It is unacceptably vague in its requirements - too much is subjective or open to interpretation - which is unreasonable for an exemption upon which an industry depends and upon which billions of dollars in sales are at stake.

- It creates excessive burdens and expectations upon agents and insurers without any meaningful cost justification nor any tolerance for unintentional or immaterial transgressions.

- It is self-contradictory in many instances where preamble commentary does not agree with text of the proposed rule such as inconsistencies in scope of the rule, whether commissions can include certain fees, and whether compensation to agents can include commissions received from certain third parties.

- It violates ERISA directly or indirectly through its attempts to import and apply ERISA Title I fiduciary duties upon agents selling IRA products.

- It discriminates against agents and insurers in the independent channel by restricting the types of compensation that may be paid and creating extra burdens and expectations that do not apply under PTE 2020-02.

- It is ultimately self-defeating to the extent the proposal turns insurers into quasi-fiduciaries by forcing them to guarantee in effect that agents are satisfying fiduciary requirements which will potentially create strict vicarious liability.

FACC believes the historical record shows the DOL has continuously struggled with its handling of independent insurance agents. This emanates mostly from DOL's decision not to recognize insurance agencies as Financial Institutions nor accept the NAIC Model as a safe harbor for purposes of broader class exemptions. In its place the DOL now offers this latest overhaul of PTE 84-24, which evidences yet again the DOL's continuing challenge to understand and properly accommodate the independent agency system for purposes of PTE compliance. FACC believes that is a byproduct of the DOL's errant efforts in the first place to force ERISA fiduciary compliance upon insurance sales agents. Regardless, the point here is that the DOL is trying to fast track this far-reaching proposal without adequate analysis and vetting which would create a wholly new untested regulatory regime that could have disastrous consequences.

What follows here is a series of concerns and issues compiled by FACC identifying fundamental problems with the DOL's overhaul of PTE 84-24. This is by no means a comprehensive list. The DOL's accelerated comment period simply has not allowed FACC and its membership to fully digest and analyze this complex proposal. Within this compressed timeframe, however, FACC has itemized a myriad of problems that in aggregate point to an inescapable conclusion that DOL should abandon this ill-conceived initiative. While FACC identifies discrete issues and in some cases offers suggestions for improvement, it should not be lost on DOL that FACC believes this proposal is deeply flawed and should ultimately be withdrawn.

With those caveats and background in mind, here is a list of concerns and issues with DOL's proposed amendments to PTE 84-24 and its accompanying preamble:

- The preamble is inconsistent and confusing in its description of the scope of PTE 84-24. In one place the preamble says:

  > Thus, proposed Section VI would limit the transactions described in proposed Section III(g) to the narrow category of transactions in which an independent, insurance only agent provides investment advice to a Retirement Investor regarding a non-securities annuity or insurance contract.

  In another place the preamble says:

  > As discussed in detail above, PTE 84-24, as amended, would exclude investment advice fiduciaries from the existing relief provided in Section II, which would be redesignated as Section II(a) and add new Sections VI-VIII, which would provide relief for investment advice limited to the narrow category of transactions in which an independent, insurance-only agent, or Independent Producer, provides investment advice to a Retirement Investor regarding an annuity or insurance contract.

  These two passages do not make sense. The rule itself defines Independent Producer in a manner that contains no restriction to insurance-only agents. Indeed, discussion elsewhere in the preamble affirms agents may be covered by both PTE 2020-02 and PTE 84-24 for different kinds of products, thus seeming to confirm it is not limited to insurance-only agents. Even the phrase "independent, insurance-only agent, or Independent Producer" is confusing by implying that independent or insurance-only agents are not subsumed by the definition of Independent Producer. While these may appear to be semantics, they reflect at a minimum inexact drafting that seeps into many parts of this proposed PTE 84-24. More seriously, if these are purposeful ambiguities, then they would create added risks and liabilities for industry seeking to rely on this exemption. Any limitation in scope to insurance-only agents would make the PTE proposal impractical so it is critical that this be clarified and any restrictions on the scope of the rule or vestiges within the preamble to insurance-only agents be removed.

- The definition of an insurance company in PTE 84-24 is unnecessarily restrictive and could operate to limit the availability of the class exemption. While the definition appears to be that which is contained in PTE 2020-02, FACC questions why the definition of insurance company goes beyond a certificate of authority or proper licensure from states in which the insurer operates. PTE 84-24 defines an insurance company as follows:

  > An insurance company qualified to do business under the laws of a state, that: (A) Has obtained a Certificate of Authority from the insurance commissioner of its domiciliary state which has neither been revoked nor suspended; (B) has undergone and shall continue to undergo an examination by an independent certified public accountant for its last completed taxable year or has undergone a financial examination (within the meaning of the law of its domiciliary state) by the state's insurance commissioner within the preceding five years, and (C) is

> domiciled in a state whose law requires that an actuarial review of reserves be conducted annually and reported to the appropriate regulatory authority.

By contrast, PTE 2020-02 defines banks, BDs, and RIAs based purely on licensure. Given that PTE 84-24 is not a financial regulation in which the financial condition and reserves of the insurer are the object of regulation, it is perplexing why the DOL proposes these extra conditions upon insurers that do not apply to other financial institutions relying on parallel class exemptions. FACC believes this definition should be modified unless the DOL can provide rationale for this more complex set of requirements for insurers under revised PTE 84-24.

- The definition of "Independent Producer" is unclear and open to interpretation. PTE 84-24 defines an Independent Producer as follows:

> A person or entity that is licensed under the laws of a state to sell, solicit, or negotiate insurance contracts, including annuities, and that sells to Retirement Investors products of multiple unaffiliated insurance companies but is not an employee of an insurance company (including a statutory employee under Code section 3121).

This definition should state explicitly that "multiple" means two or more insurers - assuming that is the intent - to remove doubt in that regard. It must also be clarified whether "sells" means the producer literally sells products for multiple insurers or is *authorized* to sell for multiple insurers. Actual sales versus authority to sell are of course different with the former being more difficult to define and impractical to administer. If the DOL intends to require actual sales as a condition under this definition, then it must be clarified what period of time that covers and any other factors or limitations that give operational meaning to this condition. Separately there is the question of how insurers would be able to verify that Independent Producers in fact sell for multiple insurers. While in general Independent Producers are easily identified by insurers because they hold themselves out as independent agents, the PTE needs precision in order that agents and insurers can comply with confidence that its conditions are being met and will not be subject to second guessing.

- As a general matter, insurance agencies including independent marketing organizations (IMOs) and other field marketing organizations (FMOs) are not recognized by PTE 84-24 or any other class exemption. Aside from the inherent unfairness that DOL's class exemptions fail to treat with parity those agencies and intermediary organizations in the insurance industry hierarchy that are comparable to brokerage and advisory firms in the securities industry, the absence of any discussion of IMOs and similar intermediary entities results in ambiguities and uncertainty. IMOs, FMOs, and other entities in the insurance delivery system typically have no direct consumer interaction but play an important role as liaisons in connecting insurers with agents which generally replaces the kind of agent services available to captive or career agents directly from insurers. As a result, these intermediary entities often provide various services to agents, which may include pass-through commissions and other forms of compensation or services that may need the protections of PTE 84-24 in order for the exemption to be workable. PTE 84-24 contains a footnote saying: "Insurance Sales Commission may be paid directly to an intermediary such as an intermediary marketing organization (IMO) or field market organization) FMO, which then compensates the individual Independent Producer who has

provided investment advice." That is helpful insofar as clarifying that IMOs may pay commissions to agents, but it deserves additional attention and expansion to ensure that IMOs can continue to play a vital role in providing necessary services to agents without running afoul of this revamped PTE 84-24.

- The proposed revisions to PTE 84-24 limit producers to receiving only Insurance Sales Commissions without providing any rationale for why such a limitation is placed on insurance producers when no such limitation is placed on other providers of financial products under PTE 2020-02. While the DOL purports to create a level playing field as between the insurance and securities industry, the overhaul of PTE 84-24, on its face, puts the insurance industry at a disadvantage by restricting forms of compensation payable under these PTE 84-24 conditions to the narrowly circumscribed definition of Insurance Sales Commission. Nowhere does the DOL explain this seemingly arbitrary and unequal treatment that may prohibit historically common forms of compensation as well as future innovative forms of compensation.

- The exclusion of statutory employees covered by Code section 3121 from the definition of "independent producer" is a matter that FACC is still studying to understand its full import. However, the determination that an agent is a statutory employee should be prospective only for purposes of applying conditions of PTE 84-24 to the extent any reclassification would operate to deprive commission payments of protections under PTE 84-24. That is, this provision should be clarified so denial of PTE 84-24 protection would only apply to the insurer and agent after being put on adequate notice that re-classification to employee status has been made by applicable regulatory authorities.

- A significant practical concern is how revamped PTE 84-24 and PTE 2020-02 would operate side by side for those agents selling both securities and non-securities. It is important there be proper rules and structure in place for integration of different supervisory systems for agents selling different products - sometimes to the same client - to avoid uncertainty as to which PTE applies in any given situation. More specifically, amended PTE 84-24 and PTE 2020-02 should allow for a formalized process similar to "outside business activities" used in the securities industry for agents to advise financial institutions under PTE 2020-02 or supervisory entities under PTE 84-24 that sale of certain products are subject to and covered by another applicable PTE and thus obviate the need and avoid any liability for a financial institution or supervising entity under the other PTE. Absent formal recognition or a process deemed acceptable to the DOL, it is unclear whether these PTEs could operate side by side with enough certainty and confidence that various financial institutions and supervising entities could operate within their spheres in reliance on their respective PTEs.

- The critical definition of "Insurance Sales Commission" is poorly developed and prompts numerous questions including but not limited to the following:

    - The meaning of "commission" itself is undefined in any way and thus it is unclear what exactly the term encompasses or excludes in the eyes of the DOL. Ordinarily it would be assumed the term is expansive but that seems unclear from the tenor of the preamble. Based on elementary research, the IRS and DOL generally view compensation as wages (hourly), salary (job based), and commission (payment for services based on percentage of sales or fixed amount per sale). Bonuses are another category covering payments

made at the discretion of the employer. Commission is thus a wide term that should encompass all kinds of incentive-based compensation unless specifically prohibited. However, no definition is provided, and thus the precise parameters are unclear.

- The preamble contends the term was "crafted with simple commissions" in mind. It is unknown what the DOL exactly means by this and whether that might mean "straight commission" or something else. These are all terms being thrown around without any definition or specificity. The Department points to no meaningful history to support its contention that the original concept underlying the term "commissions" was that it be interpreted restrictively in some way. The better view is that PTE 84-24 was designed to cover all customary forms of agent compensation - at the time PTE 84-24 was conceived - contrary to the latest revisionist DOL perspective.

- The term Insurance Sales Commission excludes three specific categories of payment that are elusive and not self-defining - those terms being "revenue sharing," "administrative fees," and "marketing payments." The DOL fails to ascribe any specific meaning to these terms which are not customary in the insurance industry. To the extent those may be terms of art used in other parts of the financial services industry (e.g., mutual funds), they are not used in the ordinary course by insurance agents and companies. Perhaps they are intended in combination to limit compensation that may be paid by insurers to agents to "straight commission" but none of that is discussed or clarified in any meaningful way in the preamble. The DOL should clarify these terms and provide explicit examples of what is allowed or not allowed so insurers and agents relying on PTE 84-24 know exactly what restrictions apply to compensation practices.

- The term Insurance Sales Commission ostensibly prevents payment "from parties other than the insurance company or its affiliates." However, the rule contradicts itself to the extent the preamble in footnote 10 indicates third party IMOs may compensate insurance producers. Presumably, IMOs are not to be considered third parties for such purposes, but such inconsistency is confusing and only highlights how the rule itself does not agree with the preamble. Such inconsistencies are confusing and lead to doubts about the rule's overall coherence. It is also important - for this revamped PTE 84-24 to be workable = to provide that IMOs and other marketing organizations have latitude to pay commissions and other forms of compensation, cash, and non-cash, that are customary and otherwise permissible for insurers to pay without running afoul of PTE 84-24's exemptive relief.

- The term Insurance Sales Commission is narrowly written to cover only "the service of recommending and/or effecting the purchase or sale of" an annuity. However, insurance sales commissions can be paid in actual practice more broadly to cover sales and servicing of policies by the agent over the life of an annuity while the agent is appointed with the company. In other words, the definition should apply to recommending, effecting, *and servicing* the annuity. There is reference in the definition to "renewal fees" and "trailing fees" but that only adds to the overall confusion surrounding this definition for in most cases insurers and agents refer to any company-paid compensation as commission rather than fees and thus deferred commission is usually referred to as "trail commission." As for renewal compensation, typically

annuities do not provide for "renewal" compensation because annuities do not renew like CDs or other kinds of financial products. These sorts of basic nomenclature issues cast doubt over the DOL's understanding of the insurance business and amended PTE 84-24's general coherence.

- The preamble in footnote 14 provides that fee-based annuities are covered by the revised PTE 84-24 exemption even though there is no commission paid to the agent. This is yet another case where the rule and preamble do not agree. It is unclear whether this should be taken to mean the term Insurance Sales Commission has flexibility beyond what is evident from its own text or whether this is a deviation from the rule itself being exercised by the DOL by fiat. Either way, it seems inconsistent on its face and again chips away at the soundness of the definition put forward by the DOL.

- The revisions to PTE 84-24 call for agents to comply with Impartial Conduct Standards and forces agents to declare themselves to be fiduciaries to clients in order to avail themselves of the protections of PTE 84-24. These new requirements under an overhauled PTE 84-24 are unacceptable to the extent they violate inherent constraints contained in ERISA. The DOL lacks authority to delineate and impose duties arising out of Title I upon fiduciaries in the sale of IRAs under Title II. While framed as a PTE, it is obvious that the DOL is seeking to impose substantive requirements under PTE 84-24 upon insurance agents acting under Title II and outside of Title I, which is beyond DOL's jurisdiction. By foisting upon insurance agents various standards and requirements, most of which arise out of and relate back to Title I such as "prudence" and "loyalty," the DOL is overreaching and violating ERISA under any reasonable reading of the law as supported by the decision of the Fifth Circuit in the *Chamber of Commerce* lawsuit. Beyond that, the DOL seems to engage in purposeful obfuscation by forcing agents to declare themselves to be fiduciaries and state they comply with best interest standards under *ERISA or the tax code, as applicable*, when the DOL knows the requirements under Title I and Title II are very different. By doing so, the DOL is entrapping agents, while confusing consumers in spite of the DOL's proclaimed desire to enlighten consumers on agent sales standards. These are serious matters which should cause the DOL to reexamine the very foundation for its amendments to PTE 84-24.

- The disclosure requirements imposed upon insurance producers under this revamped PTE 84-24 are impractical because they contemplate that agents on their own will come up with extensive disclosures about their product offerings and related compensation. These requirements seem excessively burdensome and inconsistent with the framework of PTE 84-24 that otherwise recognizes that individual agents operate without oversight by any single entity because of the very fact they are independent producers representing multiple carriers and a range of products. Agents and any up-line agencies will be on their own in developing and providing such information to clients because individual insurers - as recognized by PTE 84-24 - will only provide supervision relative to their own products and compensation. This prompts two separate but related questions, i.e., whether individual producers will have the wherewithal to come up with such disclosures that satisfy the DOL's strict completeness and accuracy standards for disclosure, and whether such disclosure forced upon producers will directly or indirectly undermine the ability of supervising insurers to avoid responsibility and liability for representations relating to products and compensation offered by other insurers. While the proposal is somewhat cryptic, it seems the revisions to PTE 84-24 contemplate that, upon

request by clients, agents will be required to provide such information in order to address what the rule describes as "significance and severity" of conflicts of interest. Whether such information is required to be disclosed at point of sale seems unclear but certainly it is required if requested by the client. It is unclear how these requirements would be fulfilled and what role would be played by insurers who lack scope of review and control over agents relative to other carrier products. This aspect of the proposal is untenable and should be reconsidered by the DOL to come up with less onerous and more practical ways to address any need for consumer information concerning the fact that agents may receive differing compensation on different products from different insurers. An important question to be answered is whether standardized disclosure would suffice rather than burdening clients with details on agent compensation that are difficult to produce, unhelpful to clients, breed distrust, and serve little purpose other than to add to the pile of paperwork surrounding important decision-making that could be better focused on which products actually best serve the client's needs.

- The proposed revisions to PTE 84-24 create new rollover disclosure requirements parallel to those required in PTE 2020-02. However, the value and utility of such disclosures is doubtful for insurance producers selling fixed annuities which will invariably entail "apples and oranges" comparisons such as annuities versus mutual funds. Moreover, insurance agents typically are not trained nor in a position to obtain and interpret such information about employer retirement plans–i.e., comparative fees and expenses, whether an employer pays administrative expenses, and levels of fiduciary protection, services, and investments available under such plans. While an insurance agent certainly should ensure an annuity fits the needs of the client and inform clients to take into consideration options available within any existing pension or retirement plan, the proposal put forward by the DOL creates unnecessary burdens on insurance agents that are cumbersome and add little value to the client who otherwise has direct access to such information from their benefits plans. Typically, the retirement investor in question will have left employment and be considering options for transferring funds held in their retirement plan consisting of mutual funds, stable value funds, company stock, and the like to purchase an annuity. This is different from the comparisons that securities brokers or advisers undertake when offering individual stocks, bonds, and mutual funds to replace institutional class funds or other comparable options available under 401k or pension plans. In the case of brokers and advisers, such comparison information is likely relevant; most of the required information will be of little value when comparing retirement plan options to annuity products which offer other attributes including fixed guarantees and potential lifetime income. Instead, the DOL should consider how to shape PTE 84-24 rollover disclosures to fit the circumstances involving sales of annuities which include documenting the basis for recommendation, encouraging the client to access information about their current plan, and ensuring the agent and client have considered available options for meeting retirement needs including retaining funds in existing retirement plans or purchasing an annuity. The current rollover disclosure requirements in proposed PTE 84-24 are unnecessarily complicated and miss the larger opportunity to create disclosures that are more fitting and helpful to the client in making important long-term retirement security decisions.

- A point that is emphasized in the preamble is that insurers are not fiduciaries just by virtue of supervising agents but, at the same time, cautions that insurers would not be covered by PTE 84-24 to the extent they did anything that turned them into fiduciaries. The preamble warns:

> As stated in proposed Section VI(b), the Insurer would not become an investment advice fiduciary under ERISA and/or the Code merely by complying with the applicable exemption conditions and providing the required supervision. *However, the Department cautions that Insurers selling insurance and annuity products through Independent Producers could become an investment advice fiduciary under ERISA and/or the Code through other actions they take*.

This admonition has an ominous tone to the extent there is no explanation what is intended by the DOL as to what actions might turn an insurer into a fiduciary. The revisions to PTE 84-24 create expansive obligations and expectations for insurance companies relative to their supervisory role, but the boundaries between supervision and other activities performed by insurers in their capacity as product manufacturers could be fluid and subject to second guessing or creative fiduciary theories. Among other things, insurers need assurance that customer service and agent support in connection with sales would not turn insurers into fiduciaries. Beyond that, the DOL should provide guidance on what specific actions could turn insurers into fiduciaries and provide assurances that immunity in connection with their supervisory role will be construed liberally to shield insurers from allegations they have assumed fiduciary status vis-à-vis clients of the agents for whom they provide supervision.

- The Policies and Procedures section of revised PTE 84-24, establishing supervisory requirements for insurers, is problematic in many ways including but not limited to:

    - The preamble asserts the Policies and Procedures are “consistent with” but “more protective” than supervisory requirements under the NAIC model regulation. This is concerning unto itself given that NAIC supervision requirements are already designed by regulators to establish thorough oversight procedures and standards for insurer supervision. The requirements under revised PTE 84-24 indeed go further but are unreasonable to the extent they force insurers to virtually guarantee agent compliance with PTE 84-24 requirements. The preamble also vacillates as to what extent insurers may rely on existing supervisory systems set up already to comply with the NAIC model regulation, an issue on which the exemption itself is silent, leaving companies to guess what exactly is required to satisfy exemption conditions. By contrast, NAIC requirements are specific, actionable, and proportional to the relationship between insurer and agent. The degree to which insurers must provide oversight under PTE 84-24 is ill-defined and goes beyond what is reasonable compared to other regulatory regimes.

    - The stated standard for oversight prescribed by revised PTE 84-24 is unworkable because it amounts to a warranty. The rule provides as follows:

        > The Insurer establishes, maintains, and enforces written policies and procedures for the review of each recommendation before an annuity is issued to a Retirement Investor pursuant to an Independent Producer’s recommendation *that are prudently designed to ensure compliance with the Impartial Conduct Standards and other exemption conditions*.

Use of the term “ensure” is unacceptable because insurers as unaffiliated parties do not control independent agents and therefore cannot guarantee compliance. Likewise, senior executive officers are not in a position to certify that company policies and procedures *ensure* that independent producers achieve compliance with impartial conduct standards. Use of the term “ensure” creates potential vicarious and strict liability on the part of the insurer for actions of agents. By contrast, the NAIC model provides that insurer supervisory systems must be “reasonably designed to *achieve* the insurer’s and its producers’ compliance” which is an appropriate standard befitting such obligations. Unless the standard is changed to remove warranty-laden terms such as “ensure” it is unlikely insurers would be able to operate under amended PTE 84-24.

- The proposed revisions to PTE 84-24 do not adequately incorporate the NAIC scope-of-supervision limitations. While the preamble purports to adopt and abide by these scope-of-supervision limitations, the exemption fails to set forth the limitations in full and thus is left unacceptably ambiguous. Under Policies and Procedures, paragraph 1, the exemption states:

  > An Insurer is not required to supervise an Independent Producer’s recommendations to Retirement Investors of products other than annuities offered by the Insurer.

  In the preamble, the DOL purports to clarify “that the exemption would not require the Insurer to consider or compare the specific annuities that an Independent Producer sells or the compensation relating to those annuities, unless they are annuities the Insurer offers.” Given its paramount importance, it is not satisfactory for the DOL to provide such clarification merely in the preamble, failing to incorporate this crucial element in the exemption itself. The description is also not stated properly, in that it is insurer supervision that is not required to include agent consideration and comparison to other company’s products. It is not just that the insurer is relieved from considering and comparing recommended products to other company’s products; rather, the insurer is relieved from supervising whether and how *the agent* is satisfying the obligation to consider and compare other company’s products and compensation related thereto.

- It is imperative the scope-of-supervision limitation discussed above apply across all supervisory responsibilities - the entire spectrum of Policies and Procedures - imposed upon the insurer under Section VII Investment Advice Arrangements. For example, to have its intended effect, the scope-of-supervision limitation must apply to mitigation of conflicts and not merely the supervision of recommendations. To the extent the insurer must ensure compensation incentives do not encourage agents to put their interests ahead of client interests, it is critical this requirement only apply to the insurer’s own products in recognition the insurer lacks knowledge or control over agent compensation beyond its own products. Thus, the scope-of-limitation provision must be set forth as a separate paragraph making clear that it applies across the entire scope of Policies and Procedures specifying supervisory duties relative to compliance of agents.

- The provisions of revised PTE 84-24 concerning insurer authorization of independent agents are draconian and unrealistic. With respect to appointing and reviewing agents,

the Policies and Procedures dictate an insurer must create a prudent process for "taking action against agents who have failed or are likely to fail to adhere to the Impartial Conduct Standards, or who lack the necessary education, training, or skill." The Policies and Procedures further demand an insurer document the "determination that it can rely on the Independent Producer to adhere to the Impartial Conduct Standards." These conditions are stated in such a way that they border on or constitute warranties that insurers cannot provide when on-boarding new agents or monitoring existing agents. These are loaded directives implying insurers should be able to foresee which agents are "likely to fail" or lack necessary "skill" or cannot be "relied on." These criteria are all subjective and susceptible to second guessing. Instead, these terms must be replaced with reasonable representations, and stated requirements should be reduced to objectively identifiable screening procedures in terms of licensure, continuing education, product training, standard background checks, and compliance history. In this regard, there should be prescribed minimum standards or safe harbors so insurers have confidence they are satisfying their obligations upon which exemptive relief is conditioned. Without such revisions, the producer appointment and review process turn into a regulatory "gotcha" for any agent who might later commit an alleged violation or otherwise fail to comply with impartial conduct standards.

  - The preamble of revised PTE 84-24 provides that insurers must refrain from appointing agents who have "been barred by any regulator from selling insurance or annuity contracts." However, it is uncertain how insurers would operationalize this command and what it exactly means. That is, it is unclear whether insurers have timely access to information from all regulators in all jurisdictions to administer and enforce such a requirement. It is also unclear what exactly constitutes a "bar" for these purposes. For example, does this mean that the agent had his or her license taken away or would lesser enforcement actions placing any sales restrictions on an agent amount to such a bar. Would action by a regulator against an agent in one state require this bar be applied nationwide. Generally, a blanket bar can cause unreasonable outcomes where agents may have legitimate defenses or other extenuating factors may apply such as passage of time. A rigid bar of this nature should allow some degree of flexibility - possibly an appeals process - to avoid turning every regulatory action into the equivalent of a capital offense.

- The duty to mitigate conflicts and restrictions on compensation proposed in overhauled PTE 84-24 are ambiguous and arbitrary in certain respects. These highly consequential requirements deserve further scrutiny but two concerns are identified here.

  - It is unclear from the exemption and preamble whether the prohibition on differential compensation implies there can be no differences in compensation across different kinds of products or products that are similar but have different features or terms. If so, that would be unreasonable. It is notable that BICE in the 2016 PTE rule package would have restricted differential compensation but allowed differential compensation if justified by neutral factors. BICE said:

    > Notwithstanding the foregoing, the contractual warranty set forth in this Section II(d)(4) does not prevent the Financial Institution or its Affiliates and

> Related Entities from providing Advisers with differential compensation based on investments by Plans, participant or beneficiary accounts, or IRAs, to the extent such compensation would not encourage advice that runs counter to the Best Interest of the Retirement Investor (e.g., differential compensation based on such neutral factors as the difference in time and analysis necessary to provide prudent advice with respect to different types of investments would be permissible).

That neutral factor exception is not reflected in newly proposed PTE 84-24. It is critical that the DOL clarify to what extent compensation may vary among products and what factors may be reasonably considered by insurers in determining compensation. Absent such guidance, PTE 84-24 on its face is too restrictive and too vague to be operational.

- The preamble to revised PTE 84-24 decrees an insurer could not offer incentive vacations, trips, or even educational conferences if "qualification for the vacation, trip, or conference is based on sales volume or satisfaction of sales quotas." It is unclear how the DOL derives this restriction from the text of the exemption itself which only prohibits incentives that "are intended, or a reasonable person would conclude are likely, to result in recommendations that are not in the Retirement Investor's Best Interest." The lack of definitions and general vagueness of exemption provisions leave unclear how the DOL determined that trip and conference incentives based on total production would violate terms of the exemption. The preamble demands all such opportunities be offered equally to all agents which seems impractical and operates to reduce training or education for agents most in need of such instruction. Put simply, insurers pay agents commissions - which are sales incentives - to sell products so why should other incentives based on total production untethered to specific products be restricted. This appears arbitrary and creates confusion on how the DOL interprets the conflict-of-interest provisions.

- The Retrospective Review process in revised PTE 84-24 raises numerous concerns including but not limited to:

  - The review contains elements that are excessive and incommensurate with purported value. In particular, the requirement that the insurer annually perform "a review of Independent Producers' rollover recommendations and the required rollover disclosure" seems to contemplate that every rollover transaction must be re-reviewed every year. No allowance is made for rollover recommendations that may already have received adequate front-end review nor is there any acknowledgement that insurers may rely on automated review procedures designed to escalate select transactions for heightened review. Rather it appears as a sweeping requirement that seems excessive, redundant, and inefficient.

  - The review requires insurers to provide each agent with "the methodology and results of the retrospective review." The preamble adds:

    > The Department understands that Insurers will conduct reviews for many different Independent Producers and confirms that Independent Producers only

have the right to information about their own sales. There is no obligation to inform any Independent Producers of an unrelated Independent Producer's failure.

These casually stated requirements venture into potentially delicate matters involving what information must be shared by an insurer with an independent agent relative to compliance. It is unclear what exactly must be provided and to what extent confidential information concerning the insurer's methodologies or findings may be protected to avoid unnecessary or inadvertent disclosures of sensitive or potentially harmful information. While the concept of sharing results of a compliance review with an agent is reasonable, the lack of parameters and safeguards here is unacceptable.

- The senior executive officer certification - as noted above - hints at or amounts to a warranty outside the bounds of comparable certifications for analogous regulatory purposes. NAIC, FINRA, SEC, and other regulatory bodies typically require that certifications provide assurance that company systems or procedures are "reasonably designed to achieve compliance." The certification contained in PTE 84-24 - while analogous to PTE 2020-02 - is different in that the insurer obligations relate to oversight of independent agents beyond control of the insurer. It is thus unreasonable for a company executive to certify the company "has established policies and procedures prudently designed to ensure that Independent Producers achieve compliance with the conditions of this exemption." Such attestation must be properly calibrated so the thrust of certification - in line with similar regulatory certifications - is assurance the company has reasonable systems in place, those systems have been tested, corrections made, and violations reported, rather than warranting agent compliance.

- The Self-Correction provisions of revised PTE 84-24 raise questions. It is unclear what is exactly meant by a "mis-sold" annuity and what is supposed to happen if an agent and insurer disagree in that regard. No examples are provided - nor any meaningful guidance - thus it is unclear how the agent or insurer in the case of retrospective review would even discover any "non-exempt prohibited transaction." Questions include whether all non-exempt prohibited transactions require rescission or whether there is a materiality threshold. Nor does the exemption or commentary address the common situation where an insurer rescinds an annuity as a matter of customer service without determining or admitting any violation of laws or in this case noncompliance with impartial conduct standards. In these situations, would tax penalties be assessed. And how would situations be handled where agents and insurers disagree on the need for correction under PTE 84-24. While these concerns to some extent might be seen as practical questions to be ironed out in time, their resolution could carry major consequences and deserve serious vetting and analysis with industry input prior to promulgation of such rules.

- The short comment period allowed by the DOL has not allowed for adequate review and analysis of the proposed Eligibility provisions contained in revised PTE 84-24. However, on their face, the due process mechanics and safeguards contained in the Eligibility provisions are insufficient especially in view of the extraordinary power held by the DOL to decimate a producer or insurer. An adverse decision by the DOL in these circumstances would effectively deprive a producer of his or her livelihood and destroy the viability of an insurance company. The proposed due process merely contemplates a notice, six-month cure period, and single

hearing with no explicit appeal rights within the agency nor stated appeal rights under the APA nor any path to review by a court of law. Whether those additional safeguards are self-executing under applicable laws is not known at this time, but there is no mention or intimation in the preamble. Such due process considerations are too important to be left unclear and unstated. At this time, there is also an open question whether the DOL has authority to take action against producers or insurers with respect to any allegations pertaining to IRAs rather than Title I retirement plans. While the Reorganization Plan No. 4 of 1978 transferred authority to the DOL to grant prohibited transaction exemptions under ERISA and the tax code, matters of enforcement must be analyzed separately. In short, until time allows for closer analysis, the due process procedures provided for in the Eligibility provisions appear inadequate and objectionable.

- With respect to the provisions on Recordkeeping in revised PTE 84-24, the open-ended requirement that an unspecified spectrum of records must be made available to various parties beyond the DOL is objectionable. The proposed revisions to PTE 84-24 would require that the agent or insurer keep "records necessary" to enable DOL, other agencies, and clients to determine whether the exemption's conditions have been satisfied. Such a sweeping mandate without any establishment of what constitutes proper books and records for such purposes is reckless. It must be clarified what records exactly would need to be produced to prove an agent satisfied the exemption conditions which can involve highly complex matters such as conflicts of interest and comparison of products. Similarly, there must be clarification of what records would need to be produced by insurers where compliance entailing complex supervisory duties is more appropriately reviewed by the DOL as necessary for compliance purposes. What is clearly missing from this rulemaking is specification of what records must be maintained and which specific records should be made available to consumers for their purposes as opposed to the DOL for its purposes as the enforcement agency. There is also no justification or rationale for requiring that records be provided to other regulatory agencies beyond the DOL that should exercise their own authority in accessing records relevant to their own respective enforcement domains. These recordkeeping requirements - as proposed - are woefully deficient and reflect the underdeveloped nature of this rulemaking.

- The proposed effective date for the DOL's expanded definition of fiduciary and corresponding applicability date for PTE 84-24 stating the new requirements would all take effect 60 days after publication in the federal register is utterly preposterous. If – despite all the profound problems and workability issues identified by FACC – the DOL were to proceed towards adoption of these proposals, or any variation thereof, then two months is an outlandishly short timetable for compliance. Bearing in mind many of the duties required are imposed on individual agents and require complicated coordination with insurers who face unprecedented supervisory responsibilities, the expectation these requirements could be up and running in 60 days defies reality. This proposed timetable sharply contrasts with the 2016 fiduciary rule which had a one year delay in applicability and provided two years for full transition to the then proposed BICE. This contrast between the 2016 transition period and the currently proposed 60-day timetable reveals flagrant bias against insurance agents and companies that would be suddenly swept into this newly proposed regime. Fairness dictates there be a minimum of one to two years to accommodate such dramatically new requirements. This proposed applicability date unto itself is arbitrary and capricious and calls into question whether the DOL understands and

respects the impact of its proposal upon the independent distribution channel through which fixed annuities are sold.

As noted above, these various concerns and issues, while extensive, are not intended to be comprehensive. Rather they represent a series of problems identified by FACC in the short time allowed by the DOL's accelerated rulemaking process. We believe they demonstrate vividly why the DOL must stop this rush to adoption and instead engage in proper deliberation to ensure that any revised class exemptions are in fact administratively feasible and protective of the interests and rights of all parties. Failure to do so will cause massive disruption in a vital segment of the financial services industry – i.e., fixed annuities sold through independent agents on behalf of major insurance companies.

V. Conclusion

FACC believes the DOL is making a mistake rushing these proposals into law. The DOL has turned these matters into a persistent and never-ending legal tug of war that is detrimental for consumers at a time when they need help and encouragement to save for a secure retirement. The ongoing attempt to manufacture a crisis is disappointing and counterproductive to our collective interest in promoting financial retirement planning. Much can be done to educate consumers and help them make beneficial long-term decisions and promote a stronger retirement system. FACC is always ready to work with regulators on constructive efforts to educate consumers about product options and help them make wise choices to meet retirement needs. FACC believes consumer choice is the key to consumer satisfaction and urges the DOL to reconsider its priorities and bring renewed focus to helping promote consumer awareness, choice, and security.

Thank you for affording us this opportunity to comment.

Sincerely,

Kim O'Brien, CEO

Attachments: Figari + Davenport Comment Letter 11-20-2023
FACC Public Hearing Testimony 12-13-2023

don.colleluori@figdav.com
(214) 939-2007

November 20, 2023

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC 20210

Attention: Definition of Fiduciary – RIN 1210-AC02

Dear Sir/Madam:

Our firm represents the Federation of Americans for Consumer Choice, Inc. (FACC) in a lawsuit against the Department of Labor currently pending in the United States District Court for the Northern District of Texas, No. 3:22-cv-0243, *Federation of Americans for Consumer Choice, Inc., et al. v. United States Department of Labor, et al.*

FACC intends during the comment period to submit a detailed letter identifying various specific and technical concerns with the above-referenced proposals, which are intended to redefine who is an investment advice fiduciary under the Employee Retirement Income Security Act of 1974 (ERISA) and amend Prohibited Transaction Exemption (PTE) 84-24.

As an initial matter, however, as counsel to FACC we submit this letter to point out what should be obvious to the Department, *i.e.*, these proposals will be vigorously challenged in court should the Department proceed to adopt them. It is clear to FACC—as it surely must be to the Department—that these proposals are utterly irreconcilable with the holdings of the Fifth Circuit Court of Appeals' decision in *Chamber of Commerce of United States of Am. v. United States Dep't of Labor*, 885 F.3d 360, 363 (5th Cir. 2018).

In *Chamber of Commerce*, the Fifth Circuit vacated the Department's 2016 fiduciary rule as being unauthorized and inconsistent with ERISA. Like the current proposal, the 2016 fiduciary rule displaced the Department's time-honored 1975 rule setting forth a five-part test for determining who is an investment advice fiduciary under the statute. After the 2016 fiduciary rule was vacated—a decision the Department chose not to appeal—the Department reinstated the five-part test but proposed a radical reinterpretation of how it should be applied in the preamble of PTE 2020-02. FACC's current lawsuit challenges that reinterpretation on the ground that while it pays lip service to the *Chamber of Commerce* opinion, in reality the Department merely repackaged elements of the 2016 fiduciary rule that the Fifth Circuit held were fundamentally inconsistent with ERISA.

With the unveiling of its newest proposals to redefine investment advice fiduciary and amend PTE 84-24, the Department unabashedly drops any pretense of abiding by the Fifth Circuit's holdings as to the meaning of fiduciary as Congress used that term in ERISA. The new proposed definition of investment advice fiduciary is virtually indistinguishable from the 2016 fiduciary rule that was struck down. Other than token references to critical terms like trust and confidence, the Department completely disregards the Fifth Circuit's analysis and decision. And, other than replacing a bilateral contract requirement with unilateral acknowledgements that would have virtually the same legal effect, the proposed amendments to PTE 84-24 suffer from many of the same defects the Fifth Circuit condemned in *Chamber of Commerce*.

It is hard to state forcefully enough how the Department's proposals reflect a complete lack of deference to the *Chamber of Commerce* opinion. The Department seems to believe it is unencumbered by the Fifth Circuit decision, which it tries to reduce to mere criticism of the Best Interest Contract (BIC) Exemption. In fact, however, that decision represented a complete repudiation of the Department's approach to the definition of investment advice fiduciary, which the Department now returns to again without any acknowledgement that it is exactly what the Fifth Circuit already considered and rejected.

The purpose of this letter is to highlight just a few of the most glaring instances of the foregoing, starting with the Department's disregard of the central holding of *Chamber of Commerce*, namely that Congress's use of the word "fiduciary" in ERISA incorporated the common law meaning of that term, which turns on the existence of a special relationship of trust and confidence between parties that is "the *sine qua non*" of a fiduciary relationship. The Fifth Circuit explained that the Department's 1975 rule, establishing a conjunctive, five-part test for investment advice fiduciary, captured the essence of the common-law definition. While that does not mean the 1975 rule is necessarily immutable, it does mean any replacement of the 1975 rule must likewise conform to ERISA's exacting concept of fiduciary as informed by longstanding common law. The Department's dismissal of the five-part test as a mere regulatory obstacle, claiming it "narrowed the plain and expansive language" of ERISA's definition of investment advice fiduciary, is impossible to square with the Fifth Circuit's embrace of the five-part test as a proper reflection of both common law and Congress's intent in enacting ERISA.

The Department's newly proposed definition proceeds to blatantly defy the holdings in *Chamber of Commerce* with the absence of any recognition or discussion of what constitutes a relationship of trust and confidence under common law. Remarkably, it skips over such analysis and replaces it with an assumption that a relationship of trust and confidence routinely exists in common commercial dealings between a financial professional and client. The proposed guidance looks only at whether an investor expects that he or she can "place their trust and confidence" in a professional to recommend an investment that is in the investor's best interest—a far cry from the rigorous elements demanded by courts in order to find a fiduciary relationship under

common law. Where the Fifth Circuit held that it would ordinarily be "inconceivable that financial salespeople or insurance agents will have an intimate relationship of trust and confidence with prospective purchasers," the proposed rule indefensibly provides that even one-time recommendations will be treated as fiduciary investment advice if "the circumstances indicate that the recommendation is based on the retiree's particular needs and circumstances and may be relied upon for making an investment decision that is in the investor's best interest."

The Department's disregard for the Fifth Circuit's rulings perhaps reaches its pinnacle with the assertion that "[m]ore fundamentally, the Department rejects the purported dichotomy between a mere 'sales' recommendation to a counterparty, on the one hand, and advice, on the other, in the context of the retail market for investment products." Notably, the Department took the same position, using almost identical language, when it promulgated the 2016 fiduciary rule. The Fifth Circuit, however, categorically rejected the Department's thesis, holding that the 2016 fiduciary rule was at odds with the settled understanding of the term investment advice for a fee used in ERISA, which recognizes the "dichotomy between mere sales conduct, which does not usually create a fiduciary relationship under ERISA, and investment advice for a fee, which does."

The Department's proposed amendments to PTE 84-24 also fly in the face of *Chamber of Commerce*, which rebuffed the Department's attempt to use its PTE granting authority to extend Title I fiduciary duties to financial professionals involved in the sale of investments to IRAs governed by Title II. Among other problems that led the Fifth Circuit to vacate the then proposed BIC Exemption along with the rest of the 2016 fiduciary rule, the Court held that the Department improperly failed to distinguish between its authority over employer-sponsored plans and IRAs. Specifically, the Court explained that ERISA Title I requires plan fiduciaries to adhere to statutory duties of loyalty and prudence, but the Internal Revenue Code imposes no such duties with respect to IRA accounts. This same problem infects the proposed amended PTE 84-24, where once again the Department has cast a wide net turning all financial professionals into fiduciaries and then requiring any insurance agent wishing protection under the revised PTE to acknowledge and accept liability as a fiduciary bound by duties of loyalty and prudence when making investment recommendations. This is inconsistent with the express choice made by Congress that such duties of prudence and loyalty exist only in Title I and not Title II.

The Department's proposed amendments to PTE 84-24 also lead back to another strong concern expressed by the Fifth Circuit relative to Congressional intent. The Fifth Circuit took issue with the "DOL's regulatory strategy" in the 2016 rule of forcing sellers of fixed-indexed annuities (FIAs) into compliance with the more stringent BIC Exemption as opposed to PTE 84-24. The Fifth Circuit explained that this operated as an end-run around Congress, which in adopting the Dodd-Frank legislation had rejected an SEC initiative to regulate FIAs, choosing instead to defer to state insurance regulation. In particular, the Fifth Circuit expressed concern that the Department was

subjecting insurance agents to "stark alternatives" that threatened to create "entirely new compensation schemes" or be faced with "withdrawing from the market." The Fifth Circuit characterized what the Department was doing as "occupying the Dodd-Frank turf" which seems to be again what the Department is doing in 2023. While PTE 84-24 is nominally retained in the 2023 rulemaking package, its overhaul purposely seeks to supplant state insurance regulation with the Department's own regulatory regime in the same manner as the 2016 rule, only this time with respect to all annuities, not just FIAs.

This comment letter is not intended to be an exhaustive catalogue of the problems with the Department's latest proposals. It is, instead, a preview of the legal challenge that awaits the new rule and exemption if and when they are promulgated by the Department. FACC wishes to make clear on the record that which is obvious from any objective reading of the latest proposal: the Department is transparently ignoring the clear dictates of *Chamber of Commerce* and once again attempting to circumvent Congress's intent in ERISA. The Fifth Circuit flatly rejected the Department's first effort in 2016; FACC has no doubt the courts will do the same if these proposals proceed.

If the Department is truly open to consideration of the multiple ways in which the proposed rule departs from ERISA and the other industry and regulatory developments that obviate the need for further rulemaking—which FACC finds doubtful at this stage—we would urge these proposals be withdrawn in their entirety. This would spare the Department and industry unnecessary controversy and litigation, as well unnecessary confusion for investors as these repeated rulemaking efforts drag on incessantly. The Department itself seems to recognize that the SEC and state insurance departments are already addressing similar issues, and the Department's 2023 rulemaking package will therefore contribute little beyond a fresh round of legal actions.

Sincerely,

Don Colleluori

FACC Testimony
Department of Labor Public Hearing
Retirement Security Rule
December 12, 2023

Delivered by Kim O'Brien

The Federation of Americans for Consumer Choice, FACC, appreciates the opportunity to testify today. FACC represents independent agents, independent insurance marketing organizations and insurance agencies who provide consumers with guaranteed insurance products, including fixed annuities.

I am Kim O'Brien and have spent my career in the insurance industry most recently advocating for independent insurance professionals and marketing organizations.

With me today is FACC's counsel Don Colleluori, a Principal at Figari and Davenport, who represents FACC.

I am here today – once again – because the Department of Labor is proposing regulatory requirements that will not work for independent insurance agents and will ultimately harm consumers – especially middle and low income consumers - who seek to protect their hard-earned retirement savings with guaranteed insurance products.

FACC's opposition should of course come as no surprise. You have received already a letter from our counsel expressing our strong view that the rule proposal is incompatible with ERISA.

FACC believes the DOL is trying to turn 50 years of ERISA history upside down – which we think is wrong – both legally and as a matter of public policy. Putting aside the legal issues for a moment – those will have their day if this proposal goes forward – we believe the DOL has created a "false narrative" – for lack of a better phrase – suggesting there is a need to bring Title I regulation for employer plans to IRAs sold to individual consumers covered by Title II.

DOL argues the world has changed and thus rollovers and IRAs need the protections afforded to Title I plans. We could not disagree more – because that ignores the very purpose of Title I – which is to protect employees captive in employer and union sponsored plans. Under such plans - employees are captive – caught in a discrete plan – giving them limited options – at the mercy of inhouse committees who may have conflicting interests.

When Congress created ERISA – it knew what it was doing – and IRAs were not put under Title I because they do not need the protections of Title I. The IRA market has grown over the years into an extraordinarily competitive marketplace with nearly unlimited options – all controlled by nobody other than the consumer.

We think it is patronizing and ultimately counterproductive to assume consumers in a competitive marketplace are incapable of making choices that are best for themselves. Some may choose to work with a fiduciary investment adviser. However, there is no justification for turning insurance sales agents

into fiduciaries – which defies decades of history – and serves no real purposes in an industry that is vibrant, competitive, and filled with excellent options for consumers to meet their retirement needs.

In addition to rejecting this underpinning narrative – FACC rejects the disinformation being used all the way up to the White House – to say that our products contain "junk fees". We are not even sure what that means. However, with its political overtones, it strikes us as a ploy to turn the public against our agents and our products. We think that's unfortunate – but more importantly – untrue. Fixed annuities and fixed indexed annuities contain nothing that could seriously be labeled junk fees.

While time does not permit for a full rebuttal here – we think the Department knows that fixed annuities contain various costs such as expenses, commissions, and the cost of hedges for indexed products – but all of that is intrinsic to the value of the product and none of it is "junk." We think the "junk fee" accusation is simply unjustified and reflects a thought process on the part of the Department and other supporters of these rules that could be characterized as prejudicial or arbitrary and capricious.

There are many other misstatements and innuendo in the rule proposal's narrative which we will try to address in our written remarks – though it will be hard to unpack and address all of them – given the 500 some pages in these releases – and given the limited time allowed by DOL for our review.

Among them, for example, is the DOL's wrongful assumption there are only 4000 independent agents serving the retirement marketplace. We think the assumptions used by the Department – including the starting point of 40,000 independent agents and the arbitrary assumption that 10% of those service retirement products – is just flat out wrong and illustrates a lack of understanding of our industry. While we are still gathering information, using data sources such as LIMRA and the National Insurance Producer Registry, as well as information from insurers and IMOs, we know there are probably no less than 80,000 independent insurance agents - twenty times more than DOL's estimate.

Another flimsy suggestion is that annuity buyers are losing 1.2% of investment return per year due to supposed conflicts of interest. We are unclear how the DOL comes up with these numbers and in any event we do not agree with them. This estimate seems to imply that consumers could somehow replicate the value of a fixed indexed annuity on their own which we believe is completely unrealistic. Other DOL estimates try to extrapolate experiences from other products to fixed annuities and fixed indexed annuities which we think is illogical and unconvincing.

The one thing we know for certain is that fixed annuity buyers who hold the contract for its duration receive the full value of their premium plus interest together with the promise that they will not risk losing any money. It is important to remember consumers buy annuities for the same reason they purchase other kinds of insurance – to protect their most important assets from loss.

I also want to spend a few minutes talking about the overhaul of PTE 84-24. Time does not permit us to delve deep here but overall we think the revised PTE 84-24 proposal is confusing, in places contradictory, and raises many questions and concerns. This is a critical class exemption which therefore must be clear and workable – but we fear as proposed it is not. This revised PTE 84-24 is also represented as creating a level playing field – but we do not see it that way – instead what we see is an onerous set of requirements that threaten to cause disruption and could ultimately drive many agents out of the marketplace.

In our written comments we will lay out many questions and concerns but allow me to give you a few examples to help illustrate the point – showing how this proposal is confusing, onerous, and leaves far too many unanswered questions for it to be the foundation for exemptive relief.

One is an obvious contradiction whether this applies to any independent agent or only to those who are insurance-only agents. The preamble has it both ways. One place says it is limited to insurance-only agents; another place says it is limited to independent producers. The text of the rule reflects the latter and we contend this rule only works if it applies to all independent agents. Nonetheless, this is contradictory, and must be corrected.

Another is the ambiguous limitations on compensation where terms are thrown around loosely with no definition – key words such as "commission" itself, the phrase "simple commission", and other terms like 'revenue sharing" that have no obvious meaning in the context of annuity sales. Other concepts too are wide open to interpretation like "differential compensation" which comes with no explanation or examples of what is permitted or not permitted. None of this is self-defining and yet an entire industry would depend on its clarity for protections.

Another example is the recordkeeping requirement that contemplates information must be shared with clients to "enable" them "to determine whether the conditions of the exemption have been met". This requirement flies in the face of common sense. It is devoid of any clarity as to what exactly must be shared – with no exceptions for information that may be confidential - or trade secret - or otherwise difficult to obtain or provide. Such open ended books and records requirements are unrealistic and inappropriate.

Finally – let me mention one other example – which is the critical provision on supervision that limits the duties of an insurer to oversee only its own products. We think what is proposed here is too limited and ambiguous. While the preamble purports to have adopted the same limitations as the NAIC model regulation, the rule itself does not contain the same limitations, which is confusing unto itself. Beyond that, it must be made much clearer that the entirety of the insurer's supervisory system – as it relates to recommendations and compensation and all other aspects of supervision – does not include other companies' products nor does it include an agent's consideration, comparison, or compensation as to those other companies' products. We submit the proposed rule is oblique in this regard which makes it potentially unworkable for insurers and agents operating in the independent channel.

We will have much more to say on each of these points – and many other points – in our comment letter. In the meantime, these are just a few examples – touching on issues that go to the very question of how our industry would comply with this exemption. Absent clarity and certainty, there can be reasonable confidence that these requirements are being met and the exemption will be rendered of no use.

Finally – we are disappointed that the Department is fast tracking this proposal without proper debate and discussion. While fiduciary issues in general have been around a while – what is being proposed here especially with respect to PTE 84-24 is unprecedented and untested. We submit It should not be rushed forward without much more analysis. Accelerating this hearing and allowing only 60 days for comments is not adequate.

We sincerely hope the DOL will consider reversing course – see that this proposal is unnecessary – and see that it is mostly going to produce more litigation, disruption, and confusion – thereby hurting the very people it is intended help – the American consumers. Thank you for this opportunity to be heard.