January 2, 2024

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

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

the extent the DOL contends that hedging costs within annuities are too high, its analysis on the White 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

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

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 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

[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.

unrealistic expectations. What emerges is a proposal that can only be characterized as arbitrary and capricious.

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 reasonable period - possibly 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 and Davenport Comment Letter 11-20-2023
FACC Public Hearing Testimony 12-13-2023

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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

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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.