LICAC
LIFE INSURANCE
CONSUMER ADVOCACY
CENTER

January 2, 2024

Lisa M. Gomez
Assistant Secretary for Employee Benefits Security
Office of Regulations and Interpretations
cc: Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC 20210

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

Dear Assistant Secretary Gomez:

The Life Insurance Consumer Advocacy Center (LICAC) writes to express its strong support for the Department of Labor's Retirement Security Proposal (RSP). LICAC is a non-profit social welfare organization that advocates for consumers of life insurance and annuities and works for adoption of public policies that will protect such consumers. LICAC's board includes consumer attorneys as well life insurance industry professionals who have over 100 years of experience from the producer and insurance company perspective. LICAC is thus well positioned to understand the competing interests that must be balanced for effective regulation of life insurance products, including their use as part of a consumer's retirement strategy. (Further information about LICAC can be found on our website -- https://www.lifeinsuranceconsumeradvocacycenter.org/)

LICAC is in full agreement with the comments submitted January 2, 2024, by a large coalition of consumer groups including the Consumer Federation of America and the Consumer Federation of California. LICAC writes separately to add additional perspective and reasons why the adoption of the RSP is so important.

Currently, life insurance agents have no obligation to act in the best interest of their customers in most states. This is true even when they are selling annuities and other life insurance products, such as universal life policies, that are designed and marketed as retirement savings vehicles. Likewise, agents generally have no obligation to disclose conflicts of interest with their customers, even though the agents often stand to gain many thousands of dollars in commissions if the customer accepts the agent's recommendation. Abuses abound, and many consumers come to regret their annuity or life insurance purchases.

State insurance regulators and the industry itself have observed that there is a serious problem and that consumers need greater protection. In 2020, the National Association of Insurance Commissioners (NAIC) adopted an update to the NAIC's Model Regulation No. 275-1 (Suitability in Annuity Transactions) to address the problem with respect to annuity sales (although the NAIC has failed to similarly regulate investment-oriented life insurance policies despite the many thousands of consumer complaints regulators receive concerning such policies).

As discussed below, the NAIC Model fails to protect annuity consumers; in fact, it harms them by misleading them into believing that they are protected by a "best interest" standard when they are not. Despite this, the Model Regulation was adopted by the NAIC with strong support from the insurance industry and has now been adopted in at least 43 states. New York has taken a different approach through its Department of Financial Services Regulation 187, which – like the RSP – imposes a true "best interest" standard on producers. Other states, such as California, continue to debate the issue.

Whatever the final count of states that adopt the NAIC Model, it is clear that most of the country will be subject to inadequate consumer protections covering sales of fixed annuities, which are not securities and are not governed by the stronger protections of the SEC's Regulation Best Interest. The failure of the NAIC Model to protect annuity investors, many of whom are trying to secure a retirement nest egg, demonstrates why the RSP is so badly needed.

The NAIC Model Does Not Require Producers to Act in the Best Interest of Their Customers

The NAIC Model imposes a "best interest" standard in name only. Under the Model, a producer is deemed to have met the "best interest" standard if they satisfy four component obligations, none of which includes an explicit requirement to act in the consumer's best interest. The key standard they must meet, "having a reasonable basis to believe the recommended option effectively addresses the consumer's financial situation, insurance needs, and financial objectives," is largely a restatement of the previous NAIC suitability rule and is a lower standard than the one Regulation BI places on broker-dealers. If this requirement and the other component obligations (regarding disclosure, conflict of interest, and documentation) are met, the obligation to act in the consumer's best interest effectively drops out of the statute. The producer has no obligation to act in the consumer's best interest and no obligation to disregard the producer's own financial interests in making a recommendation. Yet the producer is free to tell the consumer that the producer is obligated to act in the consumer's best interest. Moreover, the obligation to comply with the "best interest" standard is limited to the individual producer, as opposed to the insurer responsible for supervising the producer.

The NAIC Model Does Not Require Disclosure of Most Producer Conflicts of Interest

The NAIC's Model's treatment of producer conflicts of interest is positively Orwellian. The Model's definition of "material conflict of interest" begins sensibly, by including any "financial interest of the producer in the sale of an annuity that a reasonable person would expect to influence the impartiality of a recommendation." However, the next sentence of the definition ***expressly excludes both "cash and non-cash compensation" from the definition.*** This eliminates nearly all conflicts of interest from the scope of the NAIC Model because "cash or non-cash compensation" is responsible for nearly all the conflicts of interest that can exist between producers and consumers. About the only kind of conflict that remains to be disclosed under the NAIC Model is stock ownership (even with just one "share") in the annuity company being recommended. The NAIC Model does not even require the producer to tell the consumer that the producer is an agent of the insurance company.

Thus, a producer could lawfully say to a consumer: "Because I am obligated to disclose any conflicts of interest I may have, I must tell you that I own stock in the company whose annuity I am recommending," while NOT disclosing that the producer is the insurer's agent or that the producer will earn a commission of many thousands of dollars if the customer accepts the recommendation. As with the NAIC Model's "best interest" standard, the Model's conflict of interest provisions mislead consumers into thinking they are protected when they are not. Moreover, insurers and producers are not required to mitigate the compensation-related conflicts of interest that are often responsible when consumers are given bad advice and end up buying annuities that are not suitable for them.

In stark contrast, the RSP requires independent agents (those who sell for more than one insurance company) to disclose the compensation they will receive if their recommendation is accepted, expressed both in dollars and as a percentage of gross annual premium payments, if applicable, for the first and each succeeding year. Agents who sell for only one insurer must disclose such information upon request and must tell consumers that the information is available. Insurers must adopt policies to mitigate conflicts of interest and may not use quotas, bonuses, contests, differential compensation, or similar action or incentives that a reasonable person would conclude are likely to result in recommendations that are not in the consumer's best interest.

The NAIC Model Does Not Require That Producers Act with Prudence

The RSP protects consumers by requiring that producers give advice that "reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person" would use. The NAIC Model merely requires the producer to exercise "reasonable diligence, care, and skill," and holds producers only to "standards applicable to producers with similar authority and licensure." Given the largely absent consumer care obligations in most states and the many unsuitable annuity sales that take place currently – and that nominally spurred the adoption of the NAIC Model – the Model appears designed to perpetuate the low standards of care currently existing in the annuity marketplace.

Sales of Annuities Inside Retirement Accounts Merit Extra Scrutiny

While the scope of the RSP is limited to investments made with respect to retirement accounts, and thus does not protect consumers in all annuity transactions, the RSP would be a vital protection for this large and important group of transactions, which includes the approximately half of all individual annuity purchases that are made in IRA's. Indeed, recommendations for the purchase of annuities inside retirement accounts are especially in need of scrutiny because sales pitches for annuities are frequently based at least in part on the tax deferral advantages that annuities can generate. But investments made in retirement accounts often have tax advantages simply because they are made in a retirement account, so the consumer may not need to buy an annuity to obtain the tax advantages touted by the agent trying to sell the annuity.

We strongly support the RSP and urge the Department to finalize it without undue delay.

Respectfully Submitted,

Brian P. Brosnahan
Executive Director
Life Insurance Consumer Advocacy Center

Cc: Consumer Federation of America
Consumer Federation of California