EQUITABLE

January 2, 2024

Submitted electronically via www.regulations.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N–5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210
Attention: Definition of Fiduciary—RIN 1210–AC02

Re: Retirement Security Rule: Definition of an Investment Advice Fiduciary (RIN 1210-AC02)
Proposed Amendment to PTE 2020-02 (Application No. D-12057)
Proposed Amendment to PTE 84-24 (Application No. D-12060)

Dear Sir or Madam,

I am the Chief Legal Officer and Corporate Secretary at Equitable[1] ("Equitable") and a member of the company's Management Committee. We appreciate the opportunity to provide comments to the Department of Labor ("DOL" or "Department") on the proposed amendments to the Definition of "Fiduciary" and Prohibited Transaction Exemptions 84-24 and 2020-02 (collectively, the "Proposal").

Equitable is one of the country's largest life insurance and retirement savings companies with over 2.8 million customers nationwide. In comments we provided to the Department on its 2015 fiduciary redefinition proposal (the "2015 Rule"), we expressed our support for a standard of care that ensures financial professionals act in the best interest of American retirement savers. Notwithstanding the subsequent *vacatur* of the 2015 Rule by the 5th Circuit Court of Appeals, our commitment to adhering to a best interest standard of care remains steadfast and ongoing – buttressed by a significantly more robust and harmonized regulatory framework governing the retirement savings marketplace that has emerged in the intervening period and includes:

- **Regulation Best Interest ("Reg BI")** promulgated by the Securities and Exchange Commission in 2019
- **Suitability and Best Interests in Life Insurance and Annuity Transactions Regulation** finalized by the New York Department of Financial Services in 2019
- **Suitability in Annuity Transactions Model Regulation** finalized by the National Association of Insurance Commissioners ("NAIC") in 2020[2]
- **Prohibited Transaction Exemption 2020-02 ("PTE 2020-02")** issued by the DOL itself in 2020.

[1] Equitable is the brand name of the retirement and protection subsidiaries of Equitable Holdings, Inc. including Equitable Financial Life Insurance Company (NY, NY), Equitable Financial Life Insurance Company of America (an AZ stock company), and Equitable Distributors, LLC. Equitable Advisors is the brand name of Equitable Advisors, LLC (member FINRA, SIPC) (Equitable Financial Advisors in MI and TN).

[2] In encouraging state adoption of its update model regulation, the NAIC recognizes that "harmonization [of standards] across regulatory platforms would be beneficial to consumers and the industry." See https://content.naic.org/cipr-topics/annuity-suitability-best-interest-standard.

Over the past eight years,[3] Equitable has devoted substantial time and resources to training our personnel, building compliance systems and developing policies and procedures to ensure that the investment recommendations made by our financial professionals to our retirement investor clients are in their best interest and satisfy these multiple new or enhanced regulatory regimes under which we operate today. Any objective assessment of the current retirement services marketplace would conclude that the DOL's stated goal for the 2015 Rule - ensuring that "retirement savers get investment advice in their best interest, so they can grow their nest egg and be better prepared for retirement"[4] – has assuredly been achieved.

Accordingly, we wholeheartedly agree with the American Council of Life Insurers and the Insured Retirement Institute that this Proposal is unnecessary, ill-advised and will prove harmful to the retirement savers we serve and should therefore be withdrawn. We fully endorse their comments on the Proposal, including that:

- The Proposal unjustifiably blurs the distinction between sales and fiduciary investment advice, thereby reducing retirement investors' choice as to who they receive advice from and the range of products they may be offered; and

- The DOL is acting beyond its jurisdictional authority by extending ERISA fiduciary status to one-time sales recommendations that (as held by the 5th Circuit) objectively do not give rise to a "special relationship of trust and confidence".[5]

While the Proposal, if finalized, will needlessly disrupt the retirement savings marketplace by generating significant uncertainty for participants, one outcome is certain: the cost of the products and services offered by retirement services providers will almost surely increase due to the added compliance costs and heightened legal liability associated with near-universal fiduciary status, leaving a fragmented, less competitive market in which:

- Wealthy investors will retain access to the same advice and products they utilize today, as they are able to afford fee-based, fiduciary-level services;

- Self-directed, sophisticated savers will seek out low-cost direct to consumer offerings with no advice component, which suits their inclination to perform independent research; and

- First-time or younger retirement savers and savers with modest means – for whom the availability and accessibility of appropriate investment advice and retirement products is often a critical motivator – will essentially be left out; they will likely face a marketplace in which (1) fewer affordable retirement products are available, (2) the only affordable investment advice available will be automated investment services, or robo-advisers, that cannot possibly meet their individualized goals, and (3) access to comprehensive financial planning which takes into account both retirement and non-retirement assets will be unavailable to them because they cannot afford to hire a fiduciary.

In addition to these overarching concerns, we wish to draw your attention to the following three aspects of the Proposal that are particularly problematic from Equitable's perspective.

---

[3] We spent significant resources ensuring our company was compliant with the 2015 Rule, which was in effect for over a year before being paused by the Trump administration and ultimately vacated by the 5th Circuit Court of Appeals.

[4] See https://www.dol.gov/newsroom/releases/ebsa/ebsa20160406-0.

[5] See *Chamber of Commerce v. United States Department of Labor*, 885 F.3d 360 (5th Cir. 2018).

1. **Mitigation of conflicts of interest requirement could preclude payment of certain health and welfare benefits.**

We are concerned that the Proposal could be construed to conflict with tax laws under the Internal Revenue Code (the "Code") governing "Full-Time Life Insurance Salesman" (FTLIS) status.

Equitable and other life insurers with an affiliated sales force rely on the FTLIS rules, which have been in place for over 65 years, to provide health, welfare, and retirement benefits to their affiliated agents and families, and our affiliated agents rely on the FTLIS rules to receive such benefits. Affiliated agents are eligible for these benefits despite the fact that they are independent contractors for employment law purposes and would not otherwise be permitted to participate in these employee benefit programs. Congress established the FTLIS rules in recognition of the unique relationship between affiliated agents and their associated insurance companies, and in furtherance of a strong public policy in favor of providing health and welfare benefits to American workers.

We worry that the amended requirements under PTE 2020-02, Section II(c) to establish policies and procedures to mitigate conflicts of interest could be interpreted as requiring mitigation or elimination of the provision of FTLIS-related benefits, for which our affiliated financial professionals are typically eligible upon meeting certain annual sales/ production requirements that qualify them as full-time life insurance salespersons of a carrier under the Code. To prevent this negative outcome, we urge the Department to affirmatively clarify that compliance with PTE 2020-2 is not inconsistent with the provision of benefits to affiliated agents.[6]

2. **Bias against proprietary sales**

We appreciate that the Proposal explicitly confirms that recommendations of proprietary products are not prohibited, insofar as PTE 2020-02 does not "foreclose investment advice on proprietary products … or advice based on investment menus that are limited to such products, in part or whole." Yet even as the proposed amendments to PTE 2020-02 incorporate an expanded affirmation of fiduciary status and adherence to the Impartial Conduct Standards, these are somehow deemed insufficient to ensure compliance with the exemption by the many sellers of proprietary product sellers such as Equitable. Instead, we are singled out for prescription of a plethora of additional and unnecessary documentation and disclosure conditions that must be complied with for the Department to view proprietary product sales as satisfying the requirements of the exemption. This approach casts proprietary sales in an inherently negative light.

We strongly believe that the proprietary sales model should be supported and not merely tolerated. We are very proud of our affiliated sales force, which consists of over 4,000 agents located throughout the U.S. and has addressed the financial needs of Americans since the mid-1800s. Our agents are typically heavily engaged in their communities and build long lasting relationships with their clients to whom they are committed to serve. They receive rigorous and regular training in all aspects of our products and services while being subject to robust compliance oversight, and as a result develop a deep and thorough understanding of how those products and services can best meet their clients' needs. In return and as discussed above, we are able to offer our agents and their families health and retirement benefits that are not available to employees of the independent agencies with which we also work.

Accordingly, we urge the Department to acknowledge the unique value that affiliated agents offer their clients and their dedication to serving the best interest of their clients that long predates this Proposal. Retirement investors should be able to choose the type of financial professional with whom to engage,

[6] For reference, the preamble to Reg BI contains the following language: "We do not intend to prohibit the receipt of certain employee benefits by statutory employees, and do not believe this provision [relating to elimination of conflicts of interest] would apply, as we do not consider these benefits to be non-cash compensation for purposes of Regulation Best Interest."

whether independent or affiliated. As long as the status of the agent is disclosed at the outset and conflicts of interest are dealt with in compliance with PTE 2020-02 and other applicable laws – and these conflicts can be present whether financial professionals are affiliated or independent – proprietary and third-party sales should be subject to the same level of scrutiny by regulators. The Department's regulations should make this principle clear by explicitly dispelling the notion that proprietary sales are more suspicious than other transactions.

With respect to the use of incentive travel for affiliated agents, we are concerned that the Department's blanket proscription against awarding such travel when the "desirability of the destination is based on sales volume and satisfaction of sales quotas" is both unduly vague and punitive. We recommend that the Department instead consider adoption of the Reg BI formulation which permits such travel incentives when they are not based on the sale of specific products or type of products within a limited time period.

3. **Less accessibility to lifetime income options for American workers**

We agree completely with the Department that decisions to "engage in rollover transactions are among the most, if not the most, important financial decisions that plan participants and beneficiaries and IRA owners and beneficiaries are called upon to make". In particular, workers nearing or at retirement are confronted with complex and profound choices about how they should invest what is often a substantial amount of retiring savings accumulated over their working career to ensure those savings will last for the rest of their lives and provide them with a dignified, financially secure retirement. The availability of professional, high quality and personalized investment advice to assist with these decisions is critical.

Yet both in tone and language, the Proposal casts aspersions on the activities of "investment advice providers" who have "a strong economic incentive to recommend that investors roll over assets into one of their institutions' IRAs" where "both good and bad investment choices are more numerous, and providers "often operate under conflicts of interest." By contrast, the Department contends that for "participant[s] in a workplace retirement plan, their employer or other plan sponsor has both the incentive and the fiduciary duty to facilitate sound investment choices."

Retirement savers have some common objectives when deciding how to allocate their savings upon leaving the workforce. They typically want to be able to live comfortably and leave a financial legacy for their families – while not having to worry that their savings may run out some day. The reality is that the vast majority of retirees are not equipped with the tools or knowledge necessary to accomplish these goals without professional assistance and advice. With the decline of access to corporate pension plans, the question of how to maintain a steady stream of lifetime income has grown more acute in recent decades.

Annuities sold by insurers such as Equitable are the only private sector retirement savings solution that can provide retirees with guaranteed income for life. Equitable enthusiastically supported passage of the SECURE Act and SECURE 2.0, which include numerous provisions intended to facilitate access to annuities in retirement plans. We believe that in-plan annuities play an important role in helping participants achieving a secure retirement. However, in-plan annuities appropriately have a primary savings focus and tend to lack the rich suite of features of guaranteed lifetime income products available in the retail market. Rolling over a portion of a retirement account balance into a retail annuity product represents an informed, common-sense decision by a retirement investor to address the longevity risk that is front and center for today's retirees, who are often living longer, and healthier post-retirement lives than their predecessors.

EQUITABLE

But to our dismay, the Proposal is geared towards thwarting rollovers of retirement plan assets into retail annuities in the following ways:

- In implicitly favoring retention of retirement savings in employer plans, the DOL ignores important benefits, features and options that are available by rolling over into an annuity IRA – such as customized withdrawal options, guaranteed lifetime income, death benefits and personalized advice – that employer plans generally don't provide.

- The (i) imposition of fiduciary status on virtually all rollovers, (ii) attendant expanded burdens for complying with a PTE to permit rollovers to an IRA, and (iii) heightened risk of private claims against annuity providers introduced by the Proposal will all serve to chill the rollovers market, as "low cost" / "remain in plan," typically without the benefit of professional advice, will be viewed as the "safe" option that will often not be in the retirement investor's best interest.

- The additional disclosures & documentation in PTEs 2020-02 and 84-24 required for rollover transactions will increase the cost of offering annuities, making them less accessible for many retirements savers – an outcome that was evident in the immediate aftermath of the finalization of the 2015 Rule when a Deloitte study showed that more than half of participating financial institutions limited or eliminated access to their advised brokerage services for retirement investors, impacting 10.2 million accounts with an aggregate of $900 billion in savings.[7]

Equitable shares the Department's goal that our financial professionals "adhere to high standards of care and loyalty when they make investment recommendations and avoid recommendations that favor their financial and other interests at the expense of retirement savers."[8] The fact is, that with the transformative strengthening and expansion of the regulatory framework underpinning the retirement savings market that has occurred since the finalization of the 2015 Rule, this goal has been realized. While well-intentioned, the Proposal is simply unnecessary at best and at worst will cause millions of Americans to lose access to professional investment advice at the moments in their lives when they need it most. We urge the Department to withdraw the Proposal.

Respectfully Submitted,

José Ramón González

[7] See *The DOL Fiduciary Rule: A study on how financial institutions have responded and the resulting impacts on retirement investors*, August 9, 2017 (Deloitte).
[8] See https://www.dol.gov/newsroom/releases/ebsa/ebsa20231031.