August 5, 2020

Office of Exemption Determinations
Employee Benefits Security Administration
United States Department of Labor

Submitted through Federal eRulemaking Portal
Docket ID number: EBSA–2020–0003
Application No. D–12011

RE: Improving Investment Advice for Workers & Retirees Proposal

To Whom it May Concern:

The Federation of Americans for Consumer Choice (FACC) wishes to express its deep concerns regarding the above proposal issued by the Employee Benefits Security Administration of the Department of Labor (herein the "Department" or "DOL").

FACC represents independent insurance agents and agencies that help distribute fixed insurance products including traditional fixed rate annuities and fixed indexed annuities. The primary purpose of FACC is to ensure that regulation affecting the sale of fixed products is fair and even-handed so consumers can continue to benefit from guaranteed rates of return, lifetime income benefits, and other protective features offered by fixed insurance products which have become especially valuable to those near or reaching retirement during these economically challenging times.

We are deeply concerned about the latest proposal issued by the Department which we believe has the potential to significantly disrupt the marketplace to the extent it would turn many traditional insurance agents into fiduciaries and create unworkable hurdles for insurance agents and companies with the establishment of onerous rules and regulations designed for the securities industry rather than the insurance industry. We urge the Department to slow down and reconsider its adoption of the current proposal which we believe has not been adequately vetted and will have harmful consequences for American consumers.

Below is a detailed discussion of our specific observations but our two biggest concerns at a high level are:

(i) the preamble to the proposed class exemption takes a novel and expansive view of elements of the 5-part test used to define a "fiduciary" in such a way that many insurance agents will suddenly be treated as fiduciaries contrary to the holding of the Fifth Circuit decision which struck down the prior 2016 Fiduciary Rule, and

(ii) the newly proposed class exemption fails to accord adequate deference to the National Association of Insurance Commissioner's (NAIC's) model best interest regulation which is contrary to harmonization of regulation and could prove highly detrimental to segments of the insurance industry – especially independent agents selling fixed products if deemed to be fiduciaries – who may be forced to meet standards and abide by procedures designed for the securities industry that do not comport with long-standing systems and practices used in the insurance industry.

Last December our organization met with Department staff in order to explain how any new rules issued by the Department affecting the sale of IRAs could be detrimental to the insurance industry if not designed to account for fundamental differences between insurance industry distribution models and those of the securities industry or other parts of the financial services marketplace. At the time we provided background information about emerging uniform regulation in the works at the NAIC and explained how independent insurance agents representing multiple carriers cannot be regulated in the same manner as securities brokers nor be subject to the same kinds of standards as investment advisers. We are disappointed that, based on the Department's latest release, these concerns are still overlooked and DOL seems to be proceeding without regard for how a new regulatory regime of this nature will impact fixed products, the agents who sell them, and consumers who rely upon them.

It is important to emphasize about half of all sales by annuity agents today involve tax-qualified products, mostly IRAs. We believe the vast majority of agents already abide by high standards of professionalism and do their utmost to provide clients with quality financial products. To the extent there is any need for a higher standard, the NAIC has adopted a new model regulation, and states are in the process of adopting such requirements. However, the Department's new interpretation of who is a fiduciary, combined with new standards and oversight requirements that are incongruous with the insurance industry, will operate to stifle availability of valuable guaranteed retirement products at a time when they are needed most, not to mention the harm that will be visited upon careers of many insurance agents who are struggling in the midst of a worldwide pandemic and enduring one of the worst economic downturns in modern history.

For these reasons, we urge the Department to withdraw its latest proposal and take the time necessary to evaluate these concerns and decide on a proper course of action. While we appreciate DOL fiduciary proposals have traveled a long path and DOL seeks resolution, unfortunately we believe the proposal is still fundamentally flawed and must be reconsidered to avoid creating unintended disruption in the financial service marketplace. At a minimum we urge DOL to consider changes in its release that would clarify insurance agents generally are not fiduciaries and modify its class exemption to create a safe harbor for compliance with comparable state insurance laws or otherwise provide for recognition of the NAIC model best interest regulation.

Below please find more specific comments for your consideration.

DOL Proposal

The primary concern of FACC is the Department proposal, as accompanied by commentary contained in the class exemption preamble, runs contrary to the stated objective of harmonization across existing regulatory regimes for a pluralistic financial services marketplace. Despite the claim by the Department that its approach with this proposal is to "align with other regulators" in order to "give Americans more choices for investment advice arrangements," at least with respect to the fixed annuity industry the proposal falls well short of this goal. Our specific comments focus on areas where FACC believes the Proposal does not align *and in fact conflicts* with existing regulation and well-established models of insurance product distribution.

5 Part Test

FACC is pleased to see DOL reinstate the 5-part test but we are troubled by Department commentary suggesting the 5-part test will now be construed differently in ways that will turn many if not most or even all insurance agents into fiduciaries. This alone would upend the insurance industry given about half the products sold by insurance agents are IRAs or tax-qualified products affected by this reinterpretation and would mean virtually all insurance agents being thrust suddenly into fiduciary status inconsistent with longstanding practices.

FACC believes such reinterpretation is at odds with the decision of the Fifth Circuit in which the prior 2016 Fiduciary Rule was vacated. FACC believes the 5-part test needs to be construed in a manner consistent with the mandate of the Fifth Circuit saying only relationships based on "trust and confidence" are fiduciary. The court made abundantly clear that the vast majority of insurance sales professionals are not fiduciaries and the Department should not distort the Fifth Circuit holding by ostensibly reinstating the 5-part test while at the same time expanding its scope by stretching elemental parts of "regular basis," "mutual agreement," and "primary basis" without regard for the underlying "fee for advice" concept emphasized by the Fifth Circuit.

Under the 5-part test, a person renders investment advice under ERISA and the Tax Code if the person (1) renders advice as to the value of securities or other property, or makes recommendations as to the advisability of investing in, purchasing, or selling securities or other property, (2) on a regular basis, (3) pursuant to a mutual agreement, arrangement, or understanding with the plan or a plan fiduciary that (4) the advice would serve as a primary basis for investment decisions with respect to plan assets, and that (5) the advice was individualized based on the particular needs of the plan.

While the Department purports to reinstate the pre-2016 test, the interpretive guidance offered by the Department in the class exemption preamble enunciates discreet but integral changes that will cast a far wider net ensnaring a board spectrum of financial services sales professionals including agents in the independent insurance distribution channel.

1. **On a regular basis** – FACC is concerned with discussion in the preamble regarding the "regular basis" prong of the 5-part test. The Department describes this prong in such

a way that virtually every interaction between an agent and consumer regarding financial services will be susceptible to being deemed part of a regular relationship.

The Department states this part of the test "would be satisfied when an entity with a pre-existing advice relationship with the Retirement Investor advises the Retirement Investor to roll over assets from a Plan to an IRA." The Department further says "for an investment advice provider who establishes a new relationship with a Plan participant and advises a rollover of assets from the Plan to an IRA, the rollover recommendation may be seen as the first step in an ongoing advice relationship that could satisfy the regular basis prong of the five-part test depending on the facts and circumstances." The import appears to be the regular basis prong will be satisfied when an entity or agent (i) has any type of pre-existing relationship with the retirement investor or (ii) where a "first step" is taken in establishing "an ongoing advice" relationship.

This seemingly low bar in determining what constitutes a relationship meeting the "regular basis" prong of the 5-part test seems wholly detached from the Fifth Circuit concept that such a relationship only exists when built on a foundation of "trust and confidence". This overly capacious application of the regular basis prong was found by the Fifth Circuit to be one of the central flaws with the 2016 Fiduciary Rule. The Department must correct or clarify its commentary to ensure the essence of the regular basis prong remains intact and is not eroded by interpretation inconsistent with the Fifth Circuit decision. This is important so financial services professionals who interact with clients or potential clients are not deemed to have satisfied this prong merely based on periodic, occasional, or contemplated business dealings but rather based on continuity of interaction that is indicative of and equates to a relationship built on trust and confidence.

2. **Pursuant to a mutual agreement** – FACC is concerned by how the Department in the newly proposed class exemption preamble seems to invite second guessing on whether there is agreement between agent and client to act as a trusted fiduciary. The Department states in the preamble that the mutual agreement prong can be satisfied if there is a "reasonable understanding of each of the parties" which is judged by facts and circumstances. Making a determination as to the "reasonable understanding of each of the parties" potentially months or likely years later rather than relying on a definitive written understanding of terms and conditions of the ongoing relationship will lead to rampant confusion by consumers and unmitigated opportunities for litigators. The preamble suggests the determinative factor in whether or not there was mutual agreement will be in the eye of the beholder and the Department even seems to dismiss the efficacy of an agreement between agent and client that disavows the agent is acting as a fiduciary.

   FACC believes DOL should be doing the exact opposite. DOL should be encouraging and enabling parties to define the intended relationship so there is no doubt whether the relationship is fiduciary. That is what insurance regulators – led by the NAIC – are doing with the newly created Insurance Agent Disclosure for Annuities form which is incorporated into the NAIC model best interest regulation. The newly introduced form requires clear and concise information about the agent's relationship to the client, what products are offered and sold by the agent, the nature of the agent's compensation arrangements, and whether the agent is either independent representing multiple carriers or captive representing one or two carriers. The SEC's new regulations similarly require a Customer Relationship Summary.

DOL should be clear that as a general rule there can be no fiduciary relationship in the absence of a concrete agreement to that effect. DOL should also acknowledge in the case of insurance agents, this kind of understanding can be achieved by using the NAIC model disclosure form so as to remove any doubt where the agent is acting only as an insurance sales professional and not otherwise acting as a fiduciary. What is needed are brighter lines rather than fuzzier lines between who is and is not a fiduciary.

3. **"The" primary basis** – FACC believes the Department strays from the import of the Fifth Circuit decision with its dicta on the dichotomy between "the" and "a" primary basis. What a difference a word makes. The Department states in the class exemption preamble that the 5-part test does not look at whether the advice serves as 'the' primary basis of investment decisions but whether it serves as 'a' primary basis. While the word 'a' is used in the regulation itself, the prong has always been construed to mean the advice is being relied upon – *primarily* – by the recipient of the advice. The word "primarily" connotes the advice being given is what drives the investment decision rather than just being another consideration that may or may not be the principal basis for investment decisions. Diluting the prong in this manner results in attaching little significance to it and effectively reading it out of the 5-part test.

   The true reach of DOL's commentary is reflected in footnote 41 where the Department goes so far as to say an insurance agent's mere receipt of trail commission on the sale of an annuity could evidence an ongoing relationship. This presumably is because the recommendation was *a* basis for the consumer decision to purchase the annuity and the agent will be paid over a period of time to service the product. The notion that an agent who sells one annuity to a consumer is considered to have a fiduciary relationship with that consumer based on rendering future annuity services shows how the DOL analysis has veered far away from the Fifth Circuit decision turning virtually every insurance agent into a fiduciary and turning the 5-part test on its head in ways clearly not intended by the Fifth Circuit.

By expanding all these prongs individually beyond what had been their accepted meaning for nearly half a century, the Department performs a sleight of hand, creating the illusion the 5-part test is restored but altering its meaning element-by-element to the point that it looks much like the definition proffered with the 2016 Fiduciary Rule. The fiduciary net is now potentially so wide that it will leave insurance agents with no choice but to assume every recommendation is at risk for being characterized as evidence of a fiduciary relationship.

Rollovers

FACC believes DOL's new position on rollovers threatens to upset the status quo in ways that could have long term adverse consequences in the absence of further clarification. FACC is concerned DOL's withdrawal of the Deseret advisory opinion without clarification on what that exactly means will result in massive expansion of the scope of ERISA over the IRA retail marketplace. The proposed withdrawal of Deseret could usher in a significant broadening of DOL jurisdiction over providers of rollover IRAs and subject those providers to risk of ERISA statutory rights of action. Clarification is also needed to ensure the availability of PTE 84-24 is not jeopardized by inadvertently mandating notice and approval of IRA rollover transactions by ERISA-plan fiduciaries.

FACC is concerned withdrawal of Deseret could subject retail insurance agents to ERISA. Whether a fiduciary or not – which is a separate question – an agent selling IRA products should not be covered by ERISA unless the agent affirmatively crosses the line into making recommendations specific to a ERISA-based participant account as opposed to recommending an IRA alternative. The Department does not draw this distinction between advice to roll assets out of an employer plan from assistance in establishing an IRA. The generic discussion within the preamble about advice relating to "taking of a distribution of assets from an ERISA-covered plan," without elaboration, could encompass any situation where the participant undertakes a rollover even if no advice is given beyond availability of IRA alternatives for participant funds held in an ERISA-covered plan. This is especially relevant where a plan participant separates from an employer and wishes to explore annuity options with lifetime payouts that are often unavailable under an employer plan. Insurance agents routinely assist clients in this manner so consumers can select from a wider menu of products, but such activity could be unnecessarily deterred if agents suddenly find themselves running the risk of being covered by ERISA.

FACC urges the Department to clarify in these rollover situations that (i) consumers can make these decisions on their own, i.e. the decision to withdraw funds from an employer plan distinct from the decision to purchase a rollover IRA, and (ii) insurance agents are able to assist consumers in finding the right IRA product that meets their financial objectives without being thrust under ERISA. As part of this clarification, the Department could stipulate that agents avoid ERISA if the consumer is advised at time of sale that the agent is not recommending liquidation of employer plan assets, that any such decision concerning liquidation must be made by the consumer on his or her own, and the consumer may wish to consult with the plan sponsor or other fiduciary about the decision to liquidate an account within the employer plan. This "safe harbor" would ensure the market for IRA rollovers remains vibrant for the benefit of consumers and is not unduly stymied by uncertainty that might interfere with the ability of agents to help consumers access necessary products for retirement.

FACC is also concerned that withdrawal of the Desert advisory opinion will have the further unintended effect of rendering PTE 84-24 ineffectual in cases where the agent is a fiduciary. PTE 84-24 contains conditions that an agent provide notice of required information to a plan fiduciary and the transaction be approved by the plan fiduciary. With respect to an IRA, the plan fiduciary is typically the IRA owner, but Deseret potentially puts that in question such that assets involved in the rollover transaction are deemed assets of the ERISA-covered plan. The effect of Deseret's withdrawal, absent clarification from

DOL, is an agent could not avail himself or herself of the prohibited transaction exemption under PTE 84-24 needed to receive commission unless the employer-plan gives approval which would likely be insurmountable assuming employer plan fiduciaries would not be prone to assume fiduciary responsibility for a rollover transaction. FACC urges DOL to address this concern to ensure PTE 84-24 is not inadvertently crippled by the Deseret withdrawal relative to IRA rollovers.

Harmonization of DOL's Proposal with Insurance Regulation

FACC believes the DOL rule does not adequately consider unique characteristics of the insurance industry and thus suffers from the same problems identified and litigated with respect to 2016 Fiduciary Rule. It is particularly concerning that DOL's new class exemption accords little if any deference to the NAIC model best interest regulation which only serves to undermine the stated objective of harmonization across different regulatory regimes. This will prove highly detrimental to segments of the insurance industry – especially independent agents selling fixed products if deemed to be fiduciaries – who would then be forced to meet standards and abide by procedures designed for the securities industry that do not comport with established systems and practices used in the insurance industry.

The NAIC worked hard for almost two years to develop best interest standards and regulatory requirements that are workable and efficacious for the insurance industry to elevate sales standards without unduly interfering with well-established industry distribution models and long-standing compliance practices. The 2020 NAIC Suitability in Annuity Transactions Model provides a strong regulatory framework that thoughtfully incorporates a best interest standard of conduct while respecting diverse distribution systems used by insurance carriers today. The NAIC best interest regulation's standard of conduct, supervision, documentation and disclosure obligations were molded by state regulators to fit the insurance industry in ways that parallel - but are different from - standards and requirements established by the SEC's Reg BI and the Impartial Conduct Standards contained in the DOL class exemption.

Harmonization should not mean one regulatory regime usurps another; rather that each regime operates separately using comparable but not necessarily the same requirements within their respective spheres. Notably, the NAIC model contains a safe harbor for securities brokers who comply with Reg BI and brokers and advisers who comply with DOL fiduciary standards; DOL should reciprocate with a parallel safe harbor or something equivalent for insurance industry professionals who comply with NAIC standards and protocols. By doing so, DOL would avoid unnecessary regulatory overlap and ensure any new requirements elevating market conduct standards are workable and fair for all participants in the financial services industry, rather than creating artificial winners and losers by imposing one industry's requirements upon another.

While the NAIC model best interest regulation is relatively new, it has already been adopted or is in the process of being adopted in several states, and there is considerable momentum for passage in years to come. State insurance departments are highly motivated to adopt best interest amendments to the NAIC model suitability regulation because the so-called Harkin Amendment (which was part of the Dodd Frank Act) requires adoption of model regulation amendments within 5 years to maintain exclusive state regulation of fixed annuity and insurance products. It is also be possible (as done by the Harkin Amendment) for DOL to permit insurers and agents to commit to abide by the standards and requirements established by the model regulation, and accept regulatory oversight based on those standards and requirements, in order to satisfy any comparable requirements under the DOL proposal.

As mentioned above, DOL recognition of the NAIC Model Regulation is critical to the independent distribution channel. Within that channel there are approximately 130 Independent Marketing Organizations across the country (known as IMOs or sometimes referred to as Field Marketing Organizations and National Marketing Organizations) whose business is primarily focused on annuity products. Almost all are small or medium-size businesses that support over 1.3 million insurance professionals operating their own small businesses. FACC research data indicates insurance professionals work with on average 3 IMOs, and each IMO represents 7-12 insurance companies for whom they provide marketing and training services to their respective independent agents. Almost 90% of these IMOs are categorized as small businesses by the Small Business Administration employing on average 10-40 employees.

While the NAIC Model Regulation carefully makes accommodation for independent distribution, the DOL proposal glosses over differences between insurance and securities distribution systems. The DOL proposal casually states insurance companies can “adopt strategies similar to those” of other financial institutions and insurers “would be responsible only for” recommendations and sales of their own products” without explaining how any of that works especially when IMOs have no clear path to status as their own financial institutions. The fact is the DOL rule is designed based on a securities industry supervisory paradigm without meaningfully accounting for distribution models used in the insurance industry where insurance companies typically do not control non-captive agents and are not in a position to serve as financial institutions supervising satisfaction of fiduciary duties of agents representing multiple carriers, multiple products, and receiving compensation from multiple sources not under the control of insurers.

It must be emphasized one distribution system is not better than another; each evolved differently over decades and are simply different. Whereas insurance agents sell guaranteed products backed by an insurance carrier (which in turn is backed by a state guaranty fund system), brokers typically sell non-guaranteed investments requiring a different level of supervision. IMOs provide wholesaling services which involve recruitment of agents and providing various intermediary services for both agents and insurers but historically played only a limited role in compliance. The NAIC model regulation, taking these factors into consideration, recognizes not all insurance agents are securities licensed, insurance agents should be compared only to other insurance agents, consumer disclosures should be tailored to unique considerations applicable to delivery of insurance products, and insurer supervision should be limited only to the insurer’s products which expressly excludes consideration of products or compensation available to the agent for recommendation but are outside the scope of review of the insurer.

FACC urges DOL to reconsider its proposal or at a minimum address these concerns of independent distribution by establishing a safe harbor so, for any agents deemed fiduciaries, compliance with the NAIC model regulation would satisfy conditions of the class exemption. Otherwise FACC believes the Department is headed down the same ill-fated path traveled with the 2016 Fiduciary Rule resulting in marketplace confusion and disruption. The director of annuity research at the LIMRA Secure Retirement Institute has observed “the implementation of the DOL fiduciary rule in 2017 had a significant impact on the individual annuity market [and] the impact to IRA annuity sales was much more pronounced than nonqualified annuity sales.” DOL must take seriously that it may be devising rules and requirements that do not fit the insurance industry, which hurts not only agents and agencies, but consumers who will be deprived of quality retirement-oriented products.

Summary and FACC Recommendation

While FACC appreciates the Department perceives itself to be under pressure to come up with a revised fiduciary rule in the wake of the Fifth Circuit decision, FACC submits the present proposal is flawed and not in keeping with the holding of the Fifth Circuit decision. With all due respect, FACC believes the DOL proposal needs further work and should not be adopted hastily based on a faulty assumption that it will be easily implemented and in harmony with other financial services regulation. It must be emphasized any impetus for the proposal has largely been rendered moot today now that functional regulators have adopted best interest requirements including the SEC Reg BI and NAIC model regulation. FACC is concerned the Department proposal, rather than harmonizing with other regulatory requirements, will blur lines across regulatory regimes and prove disruptive in the financial services marketplace.

In closing, it must be recognized these are anxious times and the last thing this country needs is more uncertainty. As the country tries to cope with a pandemic and economic hardships not seen in a lifetime, regulatory agencies should be especially careful about adopting any regulation that could exacerbate tensions being felt across our economy including pressures felt by small businesses as well as anxieties being felt by consumers trying to save for or stretch limited savings during retirement. FACC urges DOL to withdraw this proposal so more work can be done to ensure any fiduciary rule, if indeed a rule is needed, will serve to improve the delivery of financial products and services in a manner that is fair to all segments of industry and achieves meaningful consumer protection.

Respectfully Submitted,

Kim O’Brien
CEO