

**PROTECTING AMERICAN SAVERS  
AND RETIREES FROM DOL'S  
REGULATORY OVERREACH**

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**HEARING**

BEFORE THE

SUBCOMMITTEE ON HEALTH,  
EMPLOYMENT, LABOR, AND PENSIONS  
OF THE

COMMITTEE ON EDUCATION AND THE  
WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTEENTH CONGRESS

SECOND SESSION

---

HEARING HELD IN WASHINGTON, DC, FEBRUARY 15, 2024

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**Serial No. 118-37**

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Printed for the use of the Committee on Education and the Workforce



Available via: *edworkforce.house.gov* or *www.govinfo.gov*



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U.S. GOVERNMENT PUBLISHING OFFICE

56-496 PDF

WASHINGTON : 2024

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## **PROTECTING AMERICAN SAVERS AND RETIREES FROM DOL'S REGULATORY OVERREACH**

**Thursday, February 15, 2024**

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND  
PENSIONS,  
COMMITTEE ON EDUCATION AND THE WORKFORCE,  
*Washington, DC.*

The subcommittee met, pursuant to notice, at 10:16 a.m., 2175 Rayburn House Office Building, Hon. Bob Good [Chairman of the Subcommittee] presiding.

Present: Representatives Good, Walberg, Allen, Banks, Burlison, Foxx, DeSaulnier, Courtney, Norcross, Wild, Hayes, Manning, and Scott.

Also present: Bonamici

Staff present: Cyrus Artz, Staff Director; Nick Barley, Deputy Communications Director; Mindy Barry, General Counsel; Jackson Berryman, Speechwriter; Michael Davis, Legislative Assistant; Isabel Foster, Press Assistant; Daniel Fuenzalida, Staff Assistant; Sheila Havenner, Director of Information Technology; Alex Knorr, Legislative Assistant; Marek Laco, Professional Staff Member; Georgie Littlefair, Clerk; John Martin, Deputy Director of Workforce Policy/Counsel; Hannah Matesic, Deputy Staff Director; Audra McGeorge, Communications Director; Rebecca Powell, Staff Assistant; Heather Wadyka, Professional Staff Member; Seth Waugh, Director of Workforce Policy; Joe Wheeler, Professional Staff Member; Maura Williams, Director of Operations; Jeanne Wilson, Retirement Counsel; Ilana Brunner, Minority General Counsel; Carrie Hughes, Minority Director of Health & Human Services Policy; Raiyana Malone, Minority Press Secretary; Kevin McDermott, Minority Director of Labor Policy; Kota Mizutani, Minority Deputy Communications Director; Veronique Pluviose, Minority Staff Director; Dhrtvan Sherman, Minority Committee Research Assistant; Nick Schiach, Minority Legal Intern; Clinton Spencer IV, Minority Staff Assistant; Adrianna Toma, Minority Intern; Melanie Kee, Minority Intern.

Chairman GOOD. The Subcommittee on Health, Employment, Labor and Pensions will come to order. I note that a quorum is present, and without objection the Chair is authorized to call a recess at any time.

When it comes to saving for retirement, one thing is certain, Americans should be able to retire in confidence. They should be

able to seek out investment advice from the investment professionals of their choosing, assess the wide variety of options in today's marketplace, and then make their own decisions on the best options for their retirement.

The Committee is meeting today to discuss the Department of Labor's newest plan to overregulate American retirement savings by imposing a costly, burdensome new rule. The so-called Retirement Security Rule expands the definition of investment advice fiduciary.

This could have far-reaching implications for retirement savings and affect critical access retirement products for millions of Americans. First, I want to point out that DOL has overstepped their authority on this issue. The Employee Retirement Income Security Act, or ERISA, gives the Department of Labor authority to regulate retirement plans sponsored by private employers.

However, the broad reaching new fiduciary rule regulates retirement accounts far beyond employer-sponsored benefits like IRAs. The rule is clearly outside the purview of the agency, yet they are trying to regulate it anyway. DOL's expansive rule is a blatant power grab, seeking to force more types of financial professionals under their control, but other regulatory bodies at the Federal and State level already exercise oversight over the retirement products and services that DOL is trying to bring within its jurisdiction.

The SEC Regulation Best Interest Rule requires broker dealers to act in their client's best interests. The National Association of Insurance Commissioners Best Interest Rule also requires State regulatory annuity sales to be in the client's best interest. If the DOL has a real concern about self-dealing, these issues have been addressed elsewhere.

Moreover, my main concern is that the fiduciary proposal will have a disastrous impact on the industry. Past versions of the DOL fiduciary rule created massive headaches for the retirement products and services industry. The last time the government tried to issue a similar rule financial institutions were forced to eliminate or limit brokerage advice services as a result.

A financial adviser in Virginia put it this way. The more layers of rules and regulations Congress and the White House add, the less likely it is that the average American will get the advice that they need. This rule will give too much latitude to the administrative State to go after anyone in the retirement business and will cause lawsuits to skyrocket.

The cost of implementing the fiduciary proposal, and the significant legal challenges that will follow are not fully reflected in DOL's regulatory analysis. Make no mistake, DOL is forcing retirees to be hit with the costs. Last, the DOL gave stakeholders insufficient time to respond to the proposal and has refused to extend the comment period.

This is a major departure from rulemaking norms. For example, a 2010 fiduciary rule allowed for a 90-day comment period and an extension. The new fiduciary proposal gave stakeholders a mere 39 working days. The DOL should be busy supporting implementation of secure 2.0 to encourage retirement savings, not proposing rules that will restrict access to financial advice and hurt our Nation's seniors.

Planning for retirement is already challenging enough, but the Biden administration's overreach will make that process much worse. My goal in this hearing is to be a voice for our Nation's seniors, and to protect those planning retirement from the heavy hand of the bureaucracy. With that, I yield to the Ranking Member for an opening statement.

[The prepared statement of Chairman Good follows:]





## COMMITTEE STATEMENT

**Opening Statement of Rep. Bob Good (R-VA), Chairman  
Subcommittee on Health, Employment, Labor, and Pensions  
Hearing: "Protecting American Savers and Retirees from DOL's Regulatory  
Overreach"  
February 15, 2024**

(As prepared for delivery)

When it comes to saving for retirement, one thing is certain: Americans should be able to retire in confidence. They should be able to seek out investment advice from the investment professional of their choosing, assess the wide variety of options in today's marketplace, and then make their own decision on the best options for their retirement.

The Committee is meeting today to discuss the Department of Labor's (DOL) newest plan to overregulate American retirement savings by imposing a costly, burdensome new rule.

The so-called "Retirement Security Rule" expands the definition of investment advice fiduciary. This could have far-reaching implications for retirement savings and affect critical access to retirement products for millions of Americans.

First, I want to point out that DOL has overstepped its authority on this issue. The Employee Retirement Income Security Act (ERISA) gives the Department of Labor authority to regulate retirement plans sponsored by private employers.

However, the broad-reaching new fiduciary rule regulates retirement accounts far beyond employer-sponsored benefits, like IRAs. The rule is clearly outside the purview of the agency, yet they are trying to regulate it anyway.

DOL's expansive rule is a blatant power grab, seeking to force more types of financial professionals under its control. But other regulatory bodies at the federal and state

levels already exercise oversight over the retirement products and services DOL is trying to bring within its jurisdiction. The SEC Regulation Best Interest rule requires broker-dealers to act in their clients' best interests. The National Association of Insurance Commissioners' Best Interest Rule also requires state-regulated annuity sales to be in the client's best interest. If the DOL has a real concern about self-dealing, those issues have been addressed elsewhere.

Moreover, my main concern is that the fiduciary proposal will have a disastrous impact on the industry. Past versions of the DOL fiduciary rule created massive headaches for the retirement products and services industry. The last time the government tried to issue a similar rule, financial institutions were forced to eliminate or limit brokerage advice services as a result.

A financial advisor in Virginia put it this way: "The more layers of rules and regulations Congress and the White House add, the less likely it is the average American will get the advice they need."

The rule will give too much latitude to the administrative state to go after anyone in the retirement business and will cause lawsuits to skyrocket.

The costs of implementing the fiduciary proposal and the significant legal challenges that will follow are not fully reflected in DOL's regulatory analysis. But make no mistake—DOL is forcing retirees to be hit with the costs.

Lastly, the DOL gave stakeholders insufficient time to respond to the proposal and has refused to extend the comment period. This is a major departure from rulemaking norms. For example, the 2010 fiduciary rule allowed for a 90-day comment period and an extension. The new fiduciary proposal gave stakeholders a mere 39 working days.

The DOL should be busy supporting implementation of SECURE 2.0 to encourage retirement savings—not proposing rules that will restrict access to financial advice and hurt our nation's seniors.

Planning for retirement is already scary enough, but the Biden administration's overreach will make that process much worse. My goal in this hearing is to be a voice

for our nation's seniors and to protect those planning retirement from the heavy hand of the bureaucracy.

Mr. DESAULNIER. Thank you, Mr. Chairman, and I want to thank the witnesses for being here as well. In 1975, I would like to say before I was born, but I am told, before staff was born who wrote this, Gerald Ford was President; my Golden State Warriors won the NBA Championship; 401K plans did not exist; and many Americans earned a traditional pension that provided guaranteed income for the rest of their lives once they retired.

The retirement savings landscape has changed a lot since then. Nowadays workers who participate in retirement savings plans, 401K's, are more likely to be in a defined contribution plan, such as a 401K. These workers are responsible for selecting and managing their investments, as well as paying attention to fees and market trends.

In today's do-it-yourself retirement savings world, it is up to the workers to ensure that they do not outlive what they save. Understandably, many workers seek professional advice when making retirement investment decisions, particularly as it relates to rolling over their assets from their employer-provided plan to an individual retirement account, an IRA.

Rollovers are often the biggest one-time financial decision workers and their families will make in their lives for their retirement. Many retirement advisers do right by their clients. Most, I would say. Unfortunately, there are those who do not. Those unscrupulous advisers steer their clients to a particular financial product with high fees that is profitable for the advisor, even if it is not in the best interest of the client.

That is called conflicted advice, and it has a devastating effect and consequences for retirement savers and their families, and everyone's trust in the financial system. According to the Obama administration, conflicted advice cost retirement savers up to 17 billion dollars in losses every year.

If a retiree spends down their retirement savings as normal but experiences a 100-basis point, 1 percent, reduction in investment performance because of conflicted advice, the retiree saver's savings would be completely depleted more than 5 years early. President Biden's Council on Economic Advisers estimated that conflicted advice in the sale of fixed index annuities, just one of the many products that could be affected, may cost workers as much as 5 billion dollars in retirement savings per year.

This is enormously harmful to workers and their families. We are very fortunate to have our witnesses, and our witness, Mr. Joseph Peiffer, President of the Public Investors Advocate Bar Association, as one of our witnesses today. Welcome. PIABA's attorneys have worked with tens of thousands of victims of conflicted advice.

These are often proud American workers who played by the rules, and earnestly saved their retirement nest egg, often on middle class salaries, and they ended up losing a substantial amount of their life savings because of bad advice. This is not fair, and it is heartbreaking for them and for Americans. Many of you may be wondering, how can this happen?

Well, bad actors can get away with providing conflicted advice because the primary Department of Labor regulation, which dates back to 1975, is riddled with loopholes, and neither the SEC's regulation Best Interest, nor the National Association of Insurance Commissioners Model Rule are sufficient to address the problem.

Fortunately, the Biden administration has proposed a common sense, narrowly defined, and not narrowly tailored rule that is aligned with the current do-it-yourself retirement savings landscape. The Biden administration's Retirement Security Rule levels the playing field, and will ensure that workers, retirees, and retirement plan sponsors receive advice that is in their best interest.

According to Morning Star, the Biden administration's Retirement Security Rule would have significant benefits for retirement savers. For instance, average costs of workers covered by a small plan would drop from 93 basis points down to 75 basis points, while there would be minimal charges for most other plans.

Retirement plan participants would save over 55 billion dollars in the first 10 years of the rule, and over 130 billion dollars in the subsequent 10 years. I strongly support the Biden administration's Retirement Security Rule. It will particularly help those with small account balances, and since those small savers are most vulnerable to conflicted advice.

By taking action, the Biden administration demonstrates that it understands what is at stake for American workers and families. As our witness will put in his testimony, "The difference between getting conflicted retirement advice and receiving advice in the investor's interest is sometimes the difference between the retiree being able to visit their grandkids or not, the difference between being able to afford a retirement home close to their children or living with them."

Those are the people who will be harmed by the broken status quo, and who will benefit the most from the Biden administration Retirement Security Rule that we will discuss today. I thank the Chair, and I yield back.

[The prepared statement of Ranking Member DeSaulnier follows:]



## OPENING STATEMENT

House Committee on Education and the Workforce  
Ranking Member Robert C. "Bobby" Scott

**Opening Statement of Ranking Member Mark DeSaulnier (CA-10)**  
Subcommittee on Health, Employment, Labor, and Pensions Hearing  
*"Protecting American Savers and Retirees from DOL's Regulatory Overreach"*  
2175 Rayburn House Office Building  
Thursday, February 15, 2024 | 10:15 a.m.

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Thank you, Mr. Chairman, and I want to thank the witnesses for being here today.

In 1975—I'd like to say before I was born, but before the staff who wrote this was born—Gerald Ford was President, my Golden State Warriors won the NBA championship, 401(k) plans did not exist, and many Americans earned a traditional pension that provided a guaranteed income for the rest of their lives once they retired.

The retirement savings landscape has changed a lot since then. Nowadays, workers who participate in a retirement savings plans, 401(k)s, are more likely to be in a defined contribution plan, such as a 401(k). These workers are responsible for selecting and managing their investments as well as paying attention to fees and market trends. In today's "do it yourself" retirement savings world, it is up to the workers to ensure that they do not outlive what they saved.

Understandably, many workers seek professional advice when making retirement investment decisions—particularly as it relates to "rolling over" their assets from their employer-provided plan to an Individual Retirement Account, or IRA. Rollovers are often the biggest one-time financial decision workers, and their families will make in their lives for their retirement.

Many retirement advisors do right by their clients—most I would say. Unfortunately, there are those who do not. Those unscrupulous advisors steer their clients to a particular financial product with high fees that is profitable for the advisor even if it is not in the best interest of the client. That is called "conflicted advice," and it has devastating consequences for retirement savers and their families—and everyone's trust in the financial system.

According to the Obama Administration, conflicted advice costs retirement savers up to \$17 billion in losses every year. If a retiree spends down their retirement savings as normal but experiences a 100-basis point (1%) reduction in investment performance because of conflicted advice, the retiree's savings would be completely depleted more than five years early. President Biden's Council on Economic Advisors estimated that conflicted advice in the sale of fixed index annuities, just one of many of the products that could be affected, may cost workers as much as \$5 billion in retirement savings per year.

This is enormously harmful to workers and their families. We are fortunate to have our witnesses, and our witness Mr. Joseph Peiffer, President of the Public Investors Advocate Bar Association, one of our witnesses today. Welcome.

PIABA's attorneys have seen tens of thousands of victims of conflicted advice. These are often proud workers who played by the rules and earnestly saved to build a retirement nest egg, often on middle class salaries—and

they ended up losing a substantial amount of their life savings because of bad advice. This is not fair, and it is heartbreaking for them and for Americans.

Many of you may be wondering—how can this happen? Well, bad actors can get away with providing conflicted advice because the primary Department of Labor regulation, which dates back to 1975, is riddled with loopholes. And neither the SEC’s Regulation Best Interest nor the National Association of Insurance Commissioners’ Model Rule are sufficient to address the problem.

Fortunately, the Biden Administration has proposed a common sense, narrowly defined, and narrowly tailored rule that is aligned with the current “do it yourself” retirement savings landscape. The Biden Administration’s retirement security rule levels the playing field and will ensure that workers, retirees, and retirement plan sponsors receive advice that is in their best interest.

According to Morningstar, the Biden Administration’s retirement security rule would have significant benefits for retirement savers. For instance, average costs for workers covered by a small plan would drop from 93 basis points down to 75 basis points, while there would be minimal charges for most other plans. And retirement plan participants would save over \$55 billion in the first 10 years of the rule and over \$130 billion in the subsequent 10 years.

I strongly support the Biden Administration’s retirement security rule. It will particularly help those with small account balances and since those small savers are most vulnerable to conflicted advice.

By taking action, the Biden Administration demonstrates that it understands what’s at stake for American workers and their families.

As our witness put it in his testimony—quote: “the difference between getting conflicted retirement advice and receiving advice in the investor’s interest is sometimes the difference between the retiree being able to visit their grandkids or not, the difference between being able to afford a retirement home close to their children or living with them.”

Those are the people who will be harmed by the broken status quo and who will benefit from the Biden Administration’s retirement security rule that we will discuss today.

I thank the Chair and yield back.

Chairman GOOD. Thank you, Mr. DeSaulnier. Pursuant to Committee Rule 8(c), all members who wish to insert written statements into the record may do so by submitting them to the Committee Clerk electronically in Microsoft Word format by 5 p.m., 14 days after the date of this hearing, which is February 29, 2024.

Without objection, the hearing record will remain open for 14 days to allow such statements, and other extraneous materials referenced during the hearing to be submitted for the official record. I will now turn to the introduction of our distinguished witnesses.

Our first witness is Mr. Doug Ommen, who serves as the Insurance Commissioner of the Ohio Insurance Division, and is located in Des Moines, Iowa. Mr. Ommen was appointed as Insurance Commissioner by the Governor of Iowa in 2017. He serves on the National Association of Insurance Commissioners Working Group that drafted the NAIC Best Interest Rule.

He previously served in the Missouri Attorney General's Office working on consumer fraud issues. He has a law degree from St. Louis University School of Law. Welcome.

Our second witness is Mr. Thomas Roberts, who is a Principal with the Groom Law Group, located in Washington, DC. Mr. Roberts has practiced law at Groom Law Group since 2011. Previously he served for over a decade as Chief Counsel of ING U.S. Legal.

Mr. Roberts has counseled clients for over 20 years on issues related to ERISA's fiduciary responsibility and prohibited transaction rules. He has an AB from Georgetown University, and a JD from the Georgetown University Law Center. Welcome Mr. Roberts.

Our third witness is Mr. Joseph Peiffer, who is the President of the Public Investors Advocate Bar Association, and is located in Norman, Oklahoma. PIABA is a trade association for Plaintiff attorneys who represent investors in disputes with the securities industry.

Mr. Peiffer is also a founding partner in a law firm, Peiffer, Wolf, Carr, Kane, Conway and Wise in New Orleans, Louisiana. His practice includes representing individuals and institutions that have been harmed by investment banks and brokerage firms, and prosecuting ERISA class actions.

He has a BA from Bowling Green State University, and a JD from Tulane University Law School.

Our final witness is Jason Berkowitz, who is the Chief Legal and Regulatory Affairs Officer for the Insured Retirement Institute in Washington, DC. IRI is the leading association for insured retirement strategies, including life insurers, asset managers, broker dealers, banks, marketing organizations and law firms.

Mr. Berkowitz joined IRI in 2012. He started his career as a corporate attorney at two national law firms before working in government affairs for the Hartford Life Insurance Company. We thank all of the witnesses for being here today, and we look forward to your testimony.

Pursuant to Committee Rules, we ask that you would each limit your oral presentation to a 5-minute summary of your written statement, and I would also like to remind the witnesses to be aware of their responsibility to provide accurate information to the Subcommittee. We will first recognize Mr. Ommen for 5 minutes.

**STATEMENT OF MR. DOUG OMMEN, INSURANCE COMMISSIONER, IOWA INSURANCE DIVISION, DES MOINES, IOWA**

Mr. OMMEN. Chairman Good, Ranking Member DeSaulnier, and esteemed members of the Subcommittee, thank you for having me here today. My name is Doug Ommen, and I serve as the Iowa Insurance Commissioner and have served in that capacity since 2017.

We regulate both insurance and security sales in Iowa. I appear today because of my concerns about the recent DOL fiduciary proposal. The proposal could have significant repercussions for the insurance regulatory framework, and negatively impact consumers.

Given the retirement savings gap, the Department of Labor should be encouraging, not limiting access to well-regulated retirement guidance and products, such as annuities. Iowa plays a significant role in protecting consumers who purchase life insurance and annuities.

We serve as a domiciliary State for approximately 40 life insurance companies, the ten largest of which hold nearly 90 billion in assets. First, I am disappointed with the DOL's lack of substantive engagement with State insurance regulators. I expect that the DOL would want to fully understand our authority under these new, Best Interest Rules before this recent expansion into the retail annuity market. That did not happen.

Further, I fundamentally disagree with the administration's characterization of State consumer protections around annuity sales as inadequate. Differences and regulatory philosophies should not be understood as a shortcoming. Over 150 years, the state-based regulatory approach has proven to be robust and responsive to the needs of our consumers.

The regulatory landscape for annuities has dramatically changed since the last fiduciary proposal, due to the diligent work of State regulators and State legislators. In 2020, the NAIC revised the suitability and annuity transaction model regulation, adopting a best interest standard of care. The NAIC's Best Interest Rules require producers, when making annuity recommendations, to act in the best interest of the consumer, without placing the producer's or insurer's financial interest ahead of the consumer's interest.

Currently, 42 states have implemented the Best Interest Rules. In this effort, I was significantly involved in every stage of the work leading up to the adoption of the Best Interest Rules. We gave serious time and thought to determining the appropriate standard of care for annuity sales.

While we did consider a fiduciary approach, we found that fiduciary only standard would restrict consumers from cost-effective access to the financial security products they need. In the 3-years since our adoption in Iowa, we have found consumer choice facilitates consumer access to retirement products.

Iowans can obtain professional financial advice through fee or commission arrangements based on their needs. Consumer protection is best achieved through consistent enforcement of the requirement that the recommendations must closely align with the consumer's best interest, not by limiting access to well-regulated retirement guidance.

I will now cover some specific objections. Our detailed objections are outlined in my written testimony, and the comment letters sub-



mitted by my department to the DOL on January the 2d. First, I am troubled by the DOL's inaccurate claims about the NAIC's Best Interest Rules. The DOL contends that the Best Interest Rules do not put the consumer first. This is wrong. The Best Interest Rules explicitly mandate producers act in the best interest of the consumer.

Additionally, the DOL claims the Best Interest Rules do not adequately restrict compensation related conflicts of interest. However, the standard expressly prohibits sales contests, sales quotas, bonuses and non-cash compensation based on specific sales of annuities within a limited timeframe.

The DOL also claims the Best Interest Rule permit producers to recommend products that are worse for the consumer because they are better for the producer insurer's bottom line. This is wrong. The Best Interest Rules require the consumers interest takes precedence.

Our regulatory philosophy is to focus on the requirement that the recommendation must be in the best interest, requiring the recommendations must closely align with the consumer's situation, needs and objectives. The consumer's best interest must be first. Last, the DOL claims the state's annuity's regulations vary from State to State.

This is wrong. Forty-two states have adopted the Best Interest Rules, and we anticipate broader adoption by the end of 2024. The DOL's proposal poses a substantial threat to the ability of Iowa and other states to regulate life insurance and annuity markets effectively. Thank you for the opportunity to present these concerns, and I do look forward to answering any questions that you may have.

[The Statement of Mr. Ommen follows:]

Written Testimony of  
Commissioner Doug Ommen  
On Behalf of the Iowa Insurance Division  
Before the United States House of Representatives  
Committee on Education & the Workforce,  
Subcommittee on Health, Employment, Labor, and  
Pensions  
Regarding:  
“Protecting American Savers and Retirees from DOL’s  
Regulatory Overreach”  
Thursday, February 15, 2024  
10:15 a.m.  
2175 Rayburn House Office Building

Chairman Good, Ranking Member DeSaulnier, and members of the Subcommittee, thank you for the invitation to testify today. My name is Doug Ommen, and I have had the pleasure of serving as Commissioner of the Iowa Insurance Division, the state's primary insurance and securities regulator, since 2017.

On behalf of my department, I appreciate the opportunity to speak with you today about the Department of Labor's (DOL) latest fiduciary proposal and its potential to undermine this country's robust state-based system of insurance regulation. If adopted, I fear the proposal would fundamentally limit state regulators' ability to effectively regulate the stability and solvency of their life insurance and annuity markets, to the detriment of consumers.

I would be remiss if I did not acknowledge, up front, that my fellow commissioners and I are not only concerned with the substance of the DOL's proposed rule and its potential impact on retirement savers, but also the DOL's lack of substantive coordination with its fellow regulators at the state level in developing the proposal. It was my expectation that DOL would seek to coordinate with its fellow regulators and understand existing authorities of the states in this space because of our overlapping impact on the same population of companies, industry participants, and consumers. That did not happen.

I am also disappointed in, and fundamentally disagree with, this administration's characterization of state consumer protections of annuity sales as "inadequate" and providing "misaligned incentives."<sup>1</sup> The rationale and justification for DOL's work should stand on its own as complementary to robust state efforts and should not mischaracterize differences in regulatory philosophy as an absence of regulatory competence or efficacy in this space.

I would like now to take a few minutes to briefly outline the most concerning aspects of the DOL's proposal, including its inaccurate claims about the NAIC's Best Interest Standard, and its likely implications for Iowa and the rest of the country. In addition to my written statement, I have also enclosed my department's comment letter to the DOL, dated January 2, 2024, which further details our concerns.

### **Background**

State regulation has a strong, 150-year plus, track record of evolving to meet the challenges posed by dynamic markets. For nearly 80 years, the McCarran-Ferguson Act has specifically allocated the responsibility of regulating the business of insurance to the states. The Iowa Insurance Division is responsible for supervising all insurance business transacted in the state and has statutory authority over many activities related to the sale of securities and other

<sup>1</sup> <https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/31/fact-sheet-president-biden-to-announce-new-actions-to-protect-retirement-security-by-cracking-down-on-junk-fees-in-retirement-investment-advice/>

regulated products. The Iowa Insurance Division's central focus is to support a stable, competitive, and fair regulatory environment that offers consumers security, transparency, and - key to this conversation - choice.

Iowa plays a significant role in protecting consumers who purchase life insurance and annuities. We serve as the domiciliary state for approximately 40 life insurance companies, the 10 largest of which hold nearly \$900 billion in assets. Through the National Association of Insurance Commissioners (NAIC), the Iowa Insurance Division, along with 55 other state and territorial insurance regulators, helps to establish national standards and best practices through the development of model laws and regulations as well as coordinate regulatory oversight to protect the interests of consumers, while ensuring a strong, viable insurance marketplace.

#### **National Association of Insurance Commissioners' (NAIC) Best Interest Standard**

In the seven years since the DOL last put forward a similar fiduciary rule proposal, the regulatory landscape for annuities has changed dramatically due, in large part, to the diligent work of state regulators and their legislative counterparts. While the DOL has shared jurisdiction with the states—with respect to insurance products sold through Employee Retirement Income Security Act of 1974 (ERISA) plans, such as annuities—states' regulatory responsibilities extend to the entire market for such products. This includes disclosure requirements, professional standards of conduct for agents, and supervisory controls. In short, state insurance regulations cover the sale of all annuity products, including those purchased within ERISA plans and those purchased outside such plans.

Key to that supervision is the NAIC's Best Interest Standard. In 2020, following extensive deliberations and input from state regulators, consumer representatives, and the insurance industry, the NAIC made significant revisions to its *Suitability in Annuity Transactions Model Regulation* (#275), adopting a best interest standard of care. The NAIC Best Interest Standard requires producers, when making annuity recommendations, to act in the best interest of the consumer, without placing the producer's or insurer's financial interest ahead of the consumer's interest.

To date, 42 states have implemented—and five states are actively pursuing adoption of—the NAIC's Best Interest Standard. To meet the new standard, states require that producers and insurers act with "reasonable diligence, care, and skill" in recommending an annuity. The recommended annuity must also appropriately address the specific consumer's "financial situation, insurance needs and financial objectives." These model revisions also include enhancements to supervision, to assist with compliance, and the development of additional guidance, to respond to common state implementation questions and promote consistency not just in text but in practice.

As a member of the NAIC's Annuity Suitability Working Group, I was significantly involved in every stage of this work leading up to the adoption of the Best Interest Standard and can attest that serious time and thought were given to determining the appropriate standard of care for annuity sales. From the outset, state regulators were united—and remain united—in the conviction that the interests of the consumer must always come before the financial interests of an insurer or producer. While we did consider a fiduciary approach, we worried that a fiduciary-only standard would restrict business models that many consumers rely on to gain cost-effective access to the financial security products they need. Like the SEC's decision with Regulation Best Interest (Reg. BI), we ultimately decided that a best interest standard would most appropriately serve the needs of consumers without stifling their access to financial advice or their choice of financial advisor.

Iowa is proud to be the first state that adopted the NAIC's enhanced consumer protections in 2020. Our experience with the Best Interest Standard over the past three years has shown that having varied service models facilitates consumer access by preserving consumer choice. Iowans can obtain professional financial advice either through fee arrangements or commission arrangements based on their needs and preferences. Consumers are best protected through smart, consistent, and sophisticated enforcement of standards, not by potentially limiting access to well-regulated retirement guidance and products such as annuities that are one of the only sources of lifetime income to ensure our aging retirees do not outlive their assets.

#### **DOL's Characterization of the NAIC's Best Interest Standard**

As part of the discussion of how best to effectuate consumer protection in this space, it is important to clarify any misconceptions the DOL may have about the NAIC's Best Interest Standard. The DOL makes several unsupported claims about the NAIC's Best Interest Standard in its proposal that I would like to address:

*First*, the DOL incorrectly asserts that the NAIC's Best Interest Standard does not put the consumer first. As discussed above, Section 6A of NAIC's updated annuity suitability model regulation requires a producer, when making annuity recommendations, to act in the best interest of the consumer, without placing the insurer's or producer's financial interest ahead of the consumer's interest.

*Second*, the DOL claims that the NAIC's Best Interest Standard does not restrict compensation-related conflicts of interest. This is inaccurate. In fact, it expressly prohibits sales contests, sales quotas, bonuses, and non-cash compensation based on the sale of specific annuities within a limited frame. While the model provides that cash and non-cash compensation are not conflicts *in of themselves*, it also makes clear that context matters and requires disclosure of cash and non-cash compensation and corrective action if a violation occurs.

*Third*, the DOL seems to suggest that the NAIC's Best Interest Standard permits producers to recommend products that are worse for the consumer because they are better for the producer's or insurer's bottom line. This characterization is patently false, which is clearly evident under Section 6A of the model.

*Fourth* and finally, the DOL claims that the NAIC's Best Interest Standard varies significantly from state to state. At present, 42 states have adopted the best interest amendments made to the NAIC *Suitability in Annuity Transactions Model Regulation* (#275), or those that are substantially similar. We are confident that the remaining states will follow by the end of 2024.

### **The Retirement Savings Gap**

Amid these ongoing state regulatory efforts to enhance consumer protections, the elderly population in the U.S. has continued to grow at an unprecedented rate, while the working-age population has contracted. This has placed an increased strain on public assistance programs like Social Security and exacerbating the retirement savings gap. Further, defined-benefit pension plans have been largely replaced by defined-contribution plans in the workplace, which offer less certainty to retirement savers. And nearly half of all workers do not have access to an employer-sponsored retirement plan.

Given these challenges, the DOL should be encouraging, not potentially limiting, access to well-regulated retirement guidance and products such as annuities, which could help to bridge the retirement savings gap. Save for annuities, few retirement security products protect consumers from their own longevity risk and provide lifetime income.

### **The Role of Congress**

I would be remiss if I did not also express my concerns that the DOL has overstepped its statutory authority in promulgating this proposed rule. The authority to impose a fiduciary standard ultimately rests with Congress, not the DOL, as is made clear in ERISA. Moreover, Congress has consistently reaffirmed the states' role as the primary regulators in this area.

Bipartisan Congressional efforts, such as the Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019, and the SECURE 2.0 Act in 2022, and multiple Administrations of both parties have consistently upheld the importance of lifetime income products. We view these federal efforts as complementary to our own and stand ready to assist lawmakers as they pursue policy initiatives to close the retirement gap.

### **Conclusion**

The DOL's proposal is likely to have a material impact on the ability of Iowa and other state regulators to manage their life insurance and annuity marketplaces.

In adopting the NAIC Best Interest Standard, Iowa and 41 other jurisdictions (and counting) acted purposefully and after carefully considering what is best for consumers and the market based on our experience as insurance regulators. When state and territorial regulators, all

dedicated to protecting consumer access and choice, join the SEC in rejecting a fiduciary-only standard, the DOL should listen.

Thank you again for the opportunity to be here. I look forward to your questions.



KIM REYNOLDS  
GOVERNOR

DOUG OMMEN  
COMMISSIONER OF INSURANCE

ADAM GREGG  
LT. GOVERNOR

January 2, 2024

The Honorable Lisa M. Gomez  
Assistant Secretary of Labor  
Employee Benefits Security Administration  
U. S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

**Re: Retirement Security Rule: Definition of an Investment Advice Fiduciary (RIN 121035-AC02); Proposed Amendment to Prohibited Transaction Exemption 84-24 (ZRIN 1210-ZA33, Application No. D-12060); and Proposed Amendment to Prohibited Transaction Exemption 2020-02 (ZRIN 1210-ZA32, Application No. D-12057)**

Assistant Secretary Gomez:

Thank you for the opportunity to comment on the Department's proposed regulation expanding the definition of fiduciary investment advice (the "Proposed Rule"); and on the Department's proposed amendments to Prohibited Transaction Exemptions 84-24 and 2020-02 ("Proposed PTE 84-24" and "Proposed PTE 2020-02") (collectively, the "Proposal").

For nearly eighty years, Federal law has specifically allocated the responsibility of regulating the business of insurance to the states.<sup>1</sup> But that consumer protection responsibility and the related insurance supervision in Iowa dates back to the earliest days of our history as a state. We have always prioritized that responsibility as a state. The same could be said of the other state regulators. The Iowa Insurance Division is the primary regulator supervising all insurance business transacted in the state of Iowa. The Iowa Insurance Division also has statutory authority over many activities related to the sale of securities and other regulated products in Iowa. Our primary focus is to protect consumers through robust and well-regulated state markets offering security and choice to consumers.

Iowa plays a significant role in protecting consumers purchasing life insurance and annuities. We serve as the domiciliary state for approximately 40 life insurance companies, the 10 largest of which hold nearly \$900 billion in assets.<sup>2</sup> As Iowa's insurance commissioner, I am privileged to

<sup>1</sup> See., McCarran-Ferguson Act, approved March 9, 1945 (15 U.S.C. 1011 et seq.).

<sup>2</sup> See., "10 Largest Iowa-Domiciled Life Insurance Companies," Iowa Division of Insurance, 2021, available at <https://iid.iowa.gov/media/3075/download?inline=report>.



lead a team with extensive expertise in all aspects of insurance regulation and consumer protection.

Our comments here express not only our significant concerns with the substance of the Proposal, but also our serious concerns about the Department's mischaracterization of state law in its attempts to justify federal intervention in the state regulation of insurance.

*The Proposal Would Materially Affect the State Regulation of Insurance:*

As explained in more detail below, the Proposal, as currently drafted, would have a material effect on the life insurance and annuity marketplace. The implications of the Proposal would also negatively impact the ability of the Iowa Insurance Division to regulate insurance carriers and producers in our state to protect the interests of policyholders in Iowa and around the United States who are financially protected by Iowa insurance companies.

While we recognize that the Department has responsibility to regulate retirement plans subject to the Employee Retirement Income Security Act of 1974 ("ERISA") and that the Department's responsibilities can apply simultaneously with State requirements with regard to such plans, we are concerned that the Proposal would fundamentally "re-draw" the traditional line between our respective responsibilities, and, in our view, in a manner well beyond Congressional intent.

*The Proposal is Premised on an Inaccurate Understanding of State Annuity Regulation:*

In developing the Proposal and seemingly in an attempt to justify its regulatory expansion, the Department engaged in an analysis of the state laws and regulations protecting consumers purchasing state-regulated annuity contracts. However, the mischaracterization of these state laws in the Proposal, and in statements made by officials in support of the Proposal, suggests that the Department does not accurately understand what state annuity regulation actually requires.

Given the Department's underlying confusion about the substance of state laws, we are concerned that the regulatory policies embodied in the Proposal will have a far greater effect on the states and on our regulation of insurance markets than the Department appreciates. Accordingly, in consideration of my comments below, we request that the Department reevaluate the Proposal's effect on the states, as required by the regulatory process under Executive Order 13132 regarding regulatory actions by agencies implicating principles of federalism.<sup>3</sup>

<sup>3</sup> See., E.O. 13132 of Aug 4, 1999: "'Policies that have federalism implications' refers to regulations...and other policy statements or actions that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government... Agencies shall closely examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and shall carefully assess the necessity for such action. To the extent practicable, State and local officials shall be consulted before any such action is implemented." 64 Fed. Reg. 43,255 (August 8, 1999).

Further, as the lack of material consultation by the Department with state insurance regulators may have contributed to the Department's misimpressions, we offer these comments as a starting point for meaningful and detailed consultations between the Department and the states. Such coordination is essential to promulgating federal and state rules that work in concert to protect consumers within our respective jurisdictions.

*The Department's Traditional Scope of Fiduciary Duty Did Not Broadly Affect State Insurance Regulation and Markets:*

As noted above, the Department is the primary regulator of ERISA-covered plans. Thus, even though ERISA expressly does not preempt state insurance regulation under ERISA Sec. 514(b)(2)(A), the Department does govern the conduct of fiduciaries under ERISA Title I plans, for which the ERISA statute provides a specific fiduciary standard of care and a legal cause of action for breach of fiduciary duty.<sup>4</sup> Thus, if an insurance professional recommending an in-plan annuity to an ERISA plan met the requirements of the Department's fiduciary regulation adopted in 1975, the ERISA fiduciary standard of care would apply in addition to the state insurance standard applicable to that sale. The current overlap between ERISA and state insurance law is reasonably well-defined, and most annuity sales related to retirement savings are governed by state insurance law, or state and federal securities law, not ERISA.

*The Vacated 2016 Fiduciary Rule Would Have Materially Affected State Insurance Regulation:*

In 2016, the Department promulgated a rule providing a new definition of fiduciary advice and associated class exemptions (collectively, the "2016 Rule")<sup>5</sup> that sought to dramatically expand the Department's fiduciary authority. The 2016 Rule would have broadly encompassed recommendations made to retirement savings vehicles covered by ERISA Title II as well as ERISA Title I. These Title II vehicles include Individual Retirement Accounts and Annuities ("IRA"), and the 2016 Rule would have applied fiduciary status to virtually all recommendations regarding rollovers, transfers and distributions to or from plans and IRAs by virtually all financial professionals. The result of the 2016 Rule would have been to make most annuity recommendations—those involving assets in or related to plans or IRAs—fiduciary advice under ERISA. While state insurance regulations would have technically applied, state law, as a practical matter, would have been displaced by ERISA.

This would have had a material effect on the state of Iowa's life insurance and annuity marketplace, and on the practical ability of the Iowa Insurance Division to regulate insurance carriers and producers in our state. However, the 5<sup>th</sup> Circuit Court of Appeals vacated the Department's 2016 Rule on several grounds, including a finding that the Rule's broad definition of fiduciary advice was inconsistent with the statutory definition, and that portions of the Rule were arbitrary and capricious.<sup>6</sup> The court ruled that fiduciary advice under ERISA was not

<sup>4</sup> See., ERISA Secs. 404 and 502.

<sup>5</sup> See., 81 Fed. Reg. 20,946 – 21,221 (April 8, 2016).

<sup>6</sup> U.S. Chamber of Commerce v. U.S. Department of Labor, 885 F.3d 360 (5th Cir. 2018).

intended to apply to sales recommendations of annuities and other investments absent a special relationship of trust with the consumer;<sup>7</sup> that Title II of ERISA did not authorize the Department to establish a standard of care governing recommendations to IRAs,<sup>8</sup> and that exemptions could not impose new and extensive duties on Title II fiduciaries.<sup>9</sup> Thus, the broad expansion of the Department's fiduciary standards into state insurance regulation did not occur in 2016. We do not agree that the Department is authorized to use the rulemaking in the Proposal to expansively and dramatically reinterpret ERISA without Congressional authorization. Further, although the Proposal may not be directly in conflict with the McCarran-Ferguson Act, the Proposal has the practical effect of displacing a large portion of state regulatory responsibility over annuities, a policy outcome that we believe should not be pursued without Congressional authorization.

*The Current Proposal Would Significantly Expand the Department's Fiduciary Reach, Effectively Displacing Much of the State Annuity Regulation:*

The new fiduciary definition in the current Proposal would appear to dramatically expand the scope of the Department's fiduciary authority, much as the 2016 Proposal would have done, though using a differently worded fiduciary test. The Department states that the Proposal is "...intended to be responsive to the Fifth Circuit's emphasis on relationships of trust and confidence. The current proposal is more narrowly tailored than the 2016 Final Rule."<sup>10</sup> While in this comment letter we do not venture into an opinion on the application of the *Chamber* decision to the current rule, we do have serious concerns that the Proposal would effectively displace the States' role in regulating most annuity sales. As we read the Proposal, it appears that normal sales activity under the NAIC Best Interest Rule would meet the Proposal's definition of fiduciary advice if the annuity is sold in connection with a plan or IRA, or a rollover, transfer or distribution related to a plan or IRA.<sup>11</sup>

*The Department's Authority to Impose 10-Year Bans on Insurance Carriers and Producers Serving Retirement Investors Would Undermine the Iowa Insurance Division's Financial Solvency Responsibility:*

Both the Proposed PTE 84-24 and 2020-02 contain new eligibility provisions. The effect of becoming ineligible is that a producer or insurance company can no longer sell annuities or other

<sup>7</sup> "Had Congress intended to abrogate both the cornerstone of fiduciary status—the relationship of trust and confidence—and the widely shared understanding that financial salespeople are not fiduciaries absent that special relationship, one would reasonably expect Congress to say so." *Chamber* at 376.

<sup>8</sup> "Moreover, DOL's principal policy concern about the lack of fiduciary safeguards in Title II was present when the statute was enacted, but Congress chose not to require advisers to individual retirement plans to bear the duties of loyalty and prudence required of Title I ERISA plan fiduciaries. That times have changed, the financial market has become more complex, and IRA accounts have assumed enormous importance are arguments for Congress to make adjustments in the law, or for other appropriate federal or state regulators to act within their authority. A perceived 'need' does not empower DOL to craft *de facto* statutory amendments or to act beyond its expressly defined authority." *Id.* at 378-379.

<sup>9</sup> "The grafting of novel and extensive duties and liabilities on parties otherwise subject only to the prohibited transactions penalties is unreasonable and arbitrary and capricious." *Id.* at 384.

<sup>10</sup> 88 Fed. Reg. 75,901.

<sup>11</sup> See., Proposal §2510.3-21(c).

covered products to any retirement investor covered under the Proposal. Under these provisions, the Department can declare an insurance carrier or producer ineligible for 10 years based on a pattern of non-compliance, though the affected entities have some limited rights to be heard by the Department to contest or cure these failures.

We are concerned about the impact this provision could have on the financial stability and solvency of carriers domiciled in Iowa. Such a ban on a major insurance carrier could cause instability in the annuity market over which the Iowa Insurance Division would have little control. As we read the Proposal, if the Department concluded that an insurance carrier was found to have been involved in “a pattern of non-compliance” or that a foreign affiliate of one of Iowa’s largest carriers was convicted of certain crimes under foreign law—even though it was not related to investment advice—the Iowa carrier could become ineligible for either exemption for 10 years. Given the fact that roughly \$26 trillion<sup>12</sup> is held by retirement investors as that term is defined under the Proposal, a ten-year ban on participating in that market could financially ruin an insurance carrier, significantly impacting Iowa. The Proposal does not provide for coordination or notice with state regulators in such a case.

*The Department’s Proposal Would Limit Service Models and Compensation Reducing Availability of Annuities:*

One of the key goals of the NAIC and Iowa in adopting a Best Interest standard (as we discuss in more detail below) would be undone if the Proposal were to be adopted. Instead of preserving consumer choice in service models, the Proposal would impose a uniform fiduciary standard and new restrictions on forms of compensation permitted to insurance producers. For example, under the Proposed PTE 84-24, insurance producers would be divided into two new types—-independent producers who are not employees of any carrier (including statutory employees) and other producers and agents. The non-employee independent producers would be eligible to use Proposed PTE 84-24, the others must use Proposed PTE 2020-02.

Proposed PTE 84-24 does not permit an insurance producer to receive any compensation other than an up-front, renewal or trail commission. No other form of compensation would be permitted. These are very rigid standards regarding business models limiting consumer choice and access, and are inconsistent with the approach the NAIC and Iowa have taken.

*The Department’s Proposal Would Effectively Displace the States’ Annuity Best Interest Rule:*

Virtually all of the requirements of the current Best Interest Rule would be displaced by different standards required by the Proposed PTEs 84-24 and 2020-02. While the Iowa and other states’ rules would technically remain, insurers would have to implement and maintain two different sets of supervisory requirements.

<sup>12</sup> “By the first quarter of 2022...IRAs held \$13.2 trillion in assets, private defined contribution plans held \$9.2 trillion, and private defined benefit plans held \$3.7 trillion in assets.” 88 Fed. Reg. 75,915.

*The Department's Proposal is Not Limited to Annuities:*

Further, the Proposal provides that “investment property” covered by the new definition likely includes other life insurance products with an “investment component.” It would not apply to “...health insurance policies, disability insurance policies, term life insurance policies, or other property to the extent the policies or property do not contain an investment component.” Thus, other state regulations governing life insurance could also be displaced by the Proposal.

We are concerned that the Proposal would fundamentally limit Iowa’s ability to regulate its own insurance markets or the conduct of companies domiciled in Iowa, and we are doubly concerned as the Proposal appears to be premised on an inaccurate understanding of how the Best Interest annuity regulation actually applies.

*The NAIC Model Rule Provides a Best Interest Standard that Puts Consumers First While Preserving Choice of Service Models for Consumer with Different Needs:*

I served on the NAIC’s Annuity Suitability (A) Working Group established in 2017 to revise the NAIC’s *Suitability in Annuity Transactions Model Regulation* (#275) (the “NAIC Best Interest Rule”). We worked in an open and cooperative manner for two years to develop the NAIC Best Interest Rule. Our process relied on extensive input from consumer groups, regulators, insurers and insurance professionals, examining in detail all of the issues presented by changing the standard of care governing annuity recommendations.

One of the options under serious consideration by the Working Group was to adopt a fiduciary standard of care for annuity sales. There were a variety of opinions within the Working Group and within the NAIC regarding the advisability of a fiduciary standard. The NAIC represents a wide array of elected and appointed officials from across the political spectrum. As regulators whose primary duty is to protect our citizens, however, we were united in our conviction that the interests of the consumer must come before the interests of the insurance professional or adviser. The issue was how best to achieve this goal. After extensive discussions, we were able to reach consensus, and affirmatively decided not to adopt a fiduciary standard of care, but to adopt a best interest standard of care.

We did not make this decision lightly. We did so because a fiduciary standard inherently restricts business models that many of our residents rely on to gain cost-effective access to the financial security products they need. As noted above, I serve as Iowa’s regulator for both insurance and securities. In this dual role, I regulate state laws applicable to fiduciary investment advisers as well as state laws applicable to insurance professionals. Yet my experience in these service models dates back to my work on securities and annuities sales practices during my 25+ years of service as a Missouri Assistant Attorney General, Securities Commissioner and Insurance Director. My extensive consumer protection law enforcement service has informed my understanding and left me very familiar with the advantages and disadvantages of both service models.

Our experience in Iowa has proven that having varied service models offers valuable consumer access by preserving consumer choice. Iowans choose professional financial services either through fee arrangements or through transactional commission arrangements based on their particular needs. Requiring high quality financial advice that fits the particular needs, objectives

and situation of the individual Iowan is best achieved by the coexistence of the fiduciary and the best interest standards of care. Consumer protection is achieved through smart, consistent and sophisticated enforcement of consumer protection standards, not by the Department's approach of restricting consumer access to high quality annuity products.

As a regulator of the securities investment advisers who are fiduciaries, I have found that the fiduciary service model is not immune to bad actors—some fiduciary advisers make recommendations that are not in the consumer's best interests and are made with misplaced loyalties. Fiduciary standards are not a panacea. It is my view that the Departments' fiduciary approach, with its emphasis on limiting and micromanaging business models and services, will increase costs and reduce access, resulting in less security for Iowans than our own rules provide.

The reasoning behind our decision at the NAIC was essentially the same as that of the Securities and Exchange Commission ("SEC") as we chose to develop and approve for state adoption a model best interest standard rather than a fiduciary standard. Having been authorized by Congress to evaluate the issues and to select a fiduciary standard if warranted, the SEC decided to adopt a best interest standard, explaining, "We have declined to subject broker-dealers to a wholesale and complete application of the existing fiduciary standard...we believe (and our experience indicates), that this [fiduciary] approach would significantly reduce retail investor access to differing types of investment services and products, reduce retail investor choice in how to pay for those products and services, and increase costs for retail investors of obtaining investment recommendations."<sup>13</sup> In our collective view, we state regulators agreed with the SEC that a best interest standard was in fact, collectively, in the best interest of American annuity consumers, and set about the effort to make it the law of the land. Over 40 states have concurred with this view and adopted the NAIC Best Interest Rule.

*The Department Mischaracterizes the Protections of the NAIC Best Interest Rule:*

The NAIC membership approved revisions to the NAIC Best Interest Rule in February of 2020, clarifying that all recommendations by agents and insurers must be in the best interest of the consumer and that agents and carriers may not place their financial interest ahead of the consumers' interest in making a recommendation. We chose to immediately bring these consumer protections to the market and Iowa was the first state to adopt the NAIC Model Rule on May 11, 2020. The rule has been in effect for several years, protecting Iowans in a robust insurance marketplace since January 1, 2021.<sup>14</sup>

Unfortunately, the Department mischaracterized these protections in the Proposal. Here are several specific misconceptions reflected in the Proposal and public statements:

<sup>13</sup> 84 Fed. Reg. at 33,322 (July 12, 2019).

<sup>14</sup> Iowa Admin. Code r. 191-15.72 – 15.78 (2020).



1. The Department Inaccurately Claims that NAIC Best Interest Rule Doesn't Put the Consumer First:

Sec. 6(A) of the NAIC Rule states, "A producer, when making a recommendation of an annuity, shall act in the best interest of the consumer under the circumstances known at the time the recommendation is made, without placing the producer's or the insurer's financial interest ahead of the consumer's interest." Sec. 6(A)(1-4) then lists the care, disclosure, conflict of interest and disclosure requirements.

Despite this clear statement prohibiting the producer from placing his own interest ahead of the consumer's interest, the Department effectively "reads out" the requirement from Iowa's Best Interest Rule without giving any amount of time or serious consideration to how the regulation is already being enforced. Instead, the Department rather conclusively asserts that "...the specific care, disclosure, conflict of interest, and documentation requirements do not expressly incorporate the obligation not to put the producer's or insurer's interests before the customer's interests, even though compliance with their terms is treated as meeting the 'best interest' standard."<sup>15</sup>

As we are now enforcing these provisions, we can conclude that the Department is not only uninformed, but surprisingly disinterested in actually considering any reasonable analysis of Iowa's regulatory efforts.<sup>16</sup> To be frank, some of us state regulators were shocked by the attack leveled against our organization by the Department. It is incredibly troubling that a federal agency would willfully disregard and dismiss the valuable work that the states have undertaken to protect consumers. The Department leveled its broad criticism of the NAIC without any sincere consideration of the benefits to consumers as a result of the NAIC's Best Interest Rule.

2. The Department Inaccurately Claims that the NAIC Best Interest Rule Doesn't Restrict Compensation-Related Conflicts of Interest:

The Department states that the NAIC Model Rule "disregard[s] compensation as a source of conflicts of interest" because it, "...carves out 'cash compensation or non-cash compensation' from treatment as sources of conflicts of interest."<sup>17</sup>

The NAIC Model rule does not disregard compensation as a source of conflicts of interest. In fact, Sec. 6(C)(2)(h) expressly prohibits sales contests, sales quotas, bonuses and non-cash compensation based on sales of specific annuities within a limited time frame due to the conflicts

<sup>15</sup> 88 Fed. Reg. at 75,898.

<sup>16</sup> "State Insurance Regulators Work to Protect Consumers Who Buy Annuities," National Association of Insurance Commissioners press statement, November 1, 2023: *"We fundamentally disagree with the...characterization of state consumer protections for annuity products. The...press statement that oversight...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."* available at <https://content.naic.org/article/state-insurance-regulators-work-protect-consumers-who-buy-annuities-naic-releases-statement-dol/>

<sup>17</sup> Id.

they present. The Model Rule does provide that cash and non-cash compensation are not per se conflicts, but context dependent, coupling disclosure of the compensation with any mitigation requirements applicable.

3. The Department Inaccurately Claims that the NAIC Best Interest Rule Allows the Producer to Recommend a “Worse” Option:

Building on its inaccurate dismissal of NAIC Best Interest Rule’s requirement to put the client first, DOL explains that it includes its own best interest standard as a condition of Proposed PTEs 84-24 and 2020-02 to clarify “that it is impermissible for the Investment Professional to recommend a product that is worse for the Retirement Investor because it is better for the Investment Professional’s or the Financial Institution’s bottom line... The Department notes this standard is consistent with the SEC’s standards for both registered investment advisers and broker-dealers.”<sup>18</sup> This reference noticeably omits the NAIC Best Interest Rule.

Department officials echoed this inaccurate notion during the public hearing on the Proposals. During questions about the disclosure of standards of care, an EBSA official stated:

“Are people told hey, you really do need to think of me as a sales person? *I’m just here to sell you this product and I have an obligation to make sure it’s good enough. But I could actually sell you a worst [sic] product because it’s better for me financially.*” [emphasis added]<sup>19</sup>

This is a simply inaccurate statement reflecting an incorrect understanding of the NAIC Best Interest Rule. Sec. 6(A) expressly prohibits such conduct.

4. The Department Inaccurately Claims that the NAIC’s Best Interest Annuity Rule “Varies Significantly” from State to State:

A consistent theme in the Department’s analysis is that Federal securities laws are uniform in their application to annuity recommendations, but state laws vary widely. For example, the Department writes, “Variable annuities and some indexed annuities are considered securities and are subject to securities laws, while fixed annuities, including fixed indexed annuities, are subject to state law. As discussed in the Regulatory Baseline section, these laws vary significantly from state to state...[under] regulations that potentially hold those selling such insurance products to a lower standard”<sup>20</sup>

This is also not correct. At present, more than 40 states have adopted the NAIC Best Interest Rule, and New York has adopted its own Best Interest Rule. It is anticipated that the remaining

<sup>18</sup> Id at 75,983.

<sup>19</sup> Transcript of “Public Comment Hearing, Retirement Security Rule: Definition of an Investment Advice Fiduciary,” question by EBSA Deputy Assistant Secretary Hauser, pg. 46, December 13, 2023.

<sup>20</sup> 88 Fed. Reg. 75,920.



states will adopt the NAIC Model Rule by the end of 2024. When nearly all states have already adopted the same standard, that standard does not “vary significantly” from state to state.

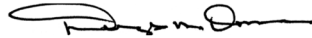
Conclusion:

The Proposal is likely to have a material impact on the ability of Iowa and other state regulators to manage their life insurance and annuity marketplaces. The effect would be much greater than the Department appreciates, as the Proposal effectively displaces not only the direct regulatory standards applicable to annuity recommendations, but also could affect indirectly the health and solvency of the state market as a whole.

In adopting the NAIC Best Interest standard of care, we in Iowa and more than 40 other states acted purposefully, after careful consideration of what is best for consumers and the market based on our experience as insurance regulators. When 50 state regulators, all dedicated to protecting consumers, are joined by the SEC in rejecting a uniform fiduciary standard in order to protect our consumers’ access to services and products, the Department should listen.

I urge you to reach out to me and to my fellow state regulators for meaningful coordination before you proceed further with the Proposal.

Sincerely,



Doug Ommen  
Commissioner of Insurance

Chairman GOOD. Thank you, Mr. Ommen. I will now recognize Mr. Roberts for 5 minutes.

**STATEMENT OF MR. THOMAS ROBERTS, PRINCIPAL, GROOM LAW GROUP, WASHINGTON, D.C.**

Mr. ROBERTS. Good morning. I would like to thank Chairman Good, Ranking Member DeSaulnier, Chairwoman Foxx, and Ranking Member Scott for inviting me to testify today. I also thank all of the members of the Subcommittee for their dedication to improving the retirement security of American workers.

I am a Principal with the Groom Law Group in Washington, DC. I concentrate my practice on ERISA related matters involving retirement plans. I have counseled on issues relating to ERISA's fiduciary responsibility in prohibiting transaction rules for more than 30 years.

My testimony this morning reflects my own personal views, and not those of any client, my firm, or my colleagues. I am not testifying on behalf of a client, or any other party, and I am not being paid in connection with my testimony today. The topic of this hearing is the U.S. Department of Labor's overreaching 2023 proposal to redefine persons who function as investment advice fiduciaries for purposes of ERISA and the Internal Revenue Code.

The DOL proposal exemplifies the proverbial warning that even when an action is undertaken with the very best of intentions, it may nonetheless lead to harmful results. In this case, the Department's motivation in advancing the proposal undoubtedly was with the best of intentions, and with the objective of improving retirements safer outcomes.

The effects of implementing this proposal would be disastrous. The proposal would do harm to the retirement investor community by depriving it of access to much needed information, products, and services. The proposal would impose numerous, additional, regulatory compliance burdens on investment professionals who serve the needs of retirement investors, and in particular, on those who serve the needs of lower and moderate-income investors.

The effect of those added burdens would be to leave large segments of the retirement saver community either unserved altogether, or underserved. I would like to briefly explain why this is the case. The DOL proposal would sweepingly confer ERISA fiduciary status on virtually all financial professionals and salespeople, including broker dealer representatives and insurance agents.

ERISA fiduciary status is not something to be assigned lightly, nor should be assigned in context where it would be inappropriate. This is because ERISA imposes a high standard of conduct, the highest known to law, on persons responsible as fiduciaries to ERISA plans.

The ERISA fiduciary standard of conduct does not require merely acting in the best interest of plan participants and beneficiaries, it requires acting prudently and solely in the interest, layered on top of that general standard of conduct are ERISA's prohibited transaction rules.

Those rules disallow fiduciaries from acting in transactions where they have a financial interest, and from receiving compensation from third parties in connection with the transaction unless

No. 1, an exemption is available, and No. 2, the fiduciary complies with the conditions of that exemption.

Under the DOL proposal, otherwise ordinary sales commissions and other traditional forms of transaction-based compensation earned by insurance agents and brokering representatives would automatically be transformed by the prohibited transaction rules.

Those commissions would give rise to an illegal kickback each time an investment professional makes a sale to an ERISA plan participant, or IRA owner, unless that investment professional adheres to the Department's exemption conditions. Here is a key watch out.

The Department's prohibited transaction exemptions afford no relief, none, from the general standards of fiduciary responsibility under ERISA. An ERISA fiduciary, even when complying with an exemption, remains obligated at all times to act not just in the best interest, but solely in the interest of plan participants and beneficiaries.

In many contexts, the application of ERISA's fiduciary standard of conduct is entirely appropriate and is protective of participant interests. When fiduciary status is not appropriately assigned, it can have the opposite effect. This is the case with the DOL's proposal.

Inappropriately assigning fiduciary status to investment professionals, such as broker dealer representatives, and insurance agents, who are compensated on a transaction basis, and receive sales commissions, will produce tragic results. It will curtail retirement saver's access to much needed financial assistance, and the proposal is not needed.

Federal securities and State insurance regulators have separately adopted best interest standards for sales conduct for their respective industries. Thank you for the opportunity to appear this morning, and I look forward to taking your questions.

[The Statement of Mr. Roberts follows:]

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**WRITTEN STATEMENT OF**  
**THOMAS ROBERTS**  
**PRINCIPAL, GROOM LAW GROUP**  
**FOR THE HEARING**  
**“PROTECTING AMERICAN SAVERS AND RETIREES FROM DOL’S REGULATORY OVERREACH”**  
**BEFORE THE**  
**SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS**  
**OF THE**  
**U.S. HOUSE OF REPRESENTATIVES**  
**COMMITTEE ON EDUCATION AND THE WORKFORCE**

**FEBRUARY 15, 2024**

Good morning. I would like to thank Chairman Good and Ranking Member DeSaulnier for inviting me to testify today and all of the members of the Subcommittee for their dedication to improving retirement security for all Americans. The topic of this hearing is the U.S. Department of Labor's ("Department" or "DOL") overreaching 2023 proposal to re-define persons who function as investment advice fiduciaries for purposes of the Employee Retirement Income Security Act of 1974 ("ERISA") and the Internal Revenue Code ("Code") (the "Proposal").

I am a Principal with Groom Law Group in Washington, D.C. I concentrate my practice on ERISA-related matters involving retirement plans. I assist retirement plans, plan sponsors and plan fiduciaries on matters related to the investment of plan assets and plan administration. I also work with financial institutions and investment professionals that offer products and services to ERISA plans and to individual retirement accounts ("IRAs"). I have counseled on issues related to ERISA's fiduciary responsibility and prohibited transaction rules for more than 30 years.

My testimony this morning reflects my own personal views and not those of any client, my firm or my colleagues. I am not testifying on behalf of a client or any other party and I am not being paid in connection with my testimony today.

ERISA fiduciary status is not something to be lightly assigned or to be assigned in inappropriate contexts. ERISA imposes a high standard of conduct - the "highest known to law" on persons who are responsible as fiduciaries to ERISA plans.<sup>1</sup> The ERISA fiduciary standard of conduct does not merely require acting in the *best interest* of plan participants and beneficiaries. It requires acting prudently and "*solely in the interest*."<sup>2</sup> ERISA's prohibited transaction restrictions supplement that standard of conduct by disallowing fiduciaries from acting in self-interested transactions, or receiving compensation from third-parties in connection with a transaction for which they are responsible unless a statutory or administrative exemption is available and the fiduciary complies with the conditions of that exemption.<sup>3</sup>

The Proposal's fundamental flaw is that it would sweepingly confer fiduciary status on virtually *all* financial professionals and sales people, including broker-dealer representatives and insurance agents, who today are available to provide much needed assistance to retirement investors, including plan participants and IRA owners. Many of those investment professionals are compensated for their work by receiving transaction-based compensation (*i.e.*, commissions) for completed sales. If ERISA fiduciary status were to be assigned to those same financial professionals, the commissions that they earn on completed sales would automatically be re-classified as illegal kickbacks, absent compliance with a series of complex, highly burdensome, prohibited transaction exemptive relief conditions prescribed by the DOL.

The significance of such an outcome cannot be overstated: under the DOL's Proposal, otherwise ordinary sales commissions and other traditional forms of transaction-based compensation would be transformed into illegal "kickbacks" when an investment professional makes a recommendation to an ERISA plan, plan participant or IRA owner, unless that investment professional adheres to the Department's prohibited transaction exemption

<sup>1</sup> *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8, (2d Cir.), *cert. denied*, 459 U.S. 1069 (1982).

<sup>2</sup> ERISA section 404(a)(1).

<sup>3</sup> ERISA section 406(b).

conditions. But compliance with the Department’s exemptions affords no relief from the general standards of fiduciary responsibility under ERISA. An ERISA fiduciary remains obligated to act prudently and not merely in the best interest, but “solely in the interest” of the plan’s participants and beneficiaries.

In many contexts, the application of ERISA’s fiduciary standard of conduct is entirely appropriate and is protective of the interests of participants and beneficiaries. But when fiduciary status is inappropriately assigned, it can have the opposite effect. Such is the case with the DOL’s Proposal. The inappropriate assignment of fiduciary status to investment professionals such as broker-dealer representatives and insurance agents who earn transaction-based compensation for completed sales will sharply curtail retirement savers’ access to financial assistance and to the products and services those investment professionals make available. That would be a tragic outcome. American workers need professional financial assistance and require access to the financial products and services that investment professionals who are compensated on a transaction basis make available.

The Department’s Proposal is overreaching as matter of law. The Proposal is in conflict with the 5th Circuit Court of Appeals’ holding in *Chamber of Commerce v. United States Department of Labor* that ERISA’s statutory text “necessarily implies a special relationship beyond that of an ordinary buyer and seller” and “preserves [t]he important distinction” between “[s]tockbrokers and insurance agents [who] are compensated only for completed sales” and “[i]nvestment advisers” who are “paid fees because they ‘render advice.’”<sup>4</sup> The Department’s Proposal contravenes the 5th Circuit’s holding by “reject[ing] the purported dichotomy between a mere ‘sales’ recommendation to a counterparty, on the one hand, and [fiduciary investment] advice, on the other, in the context of the retail market for investment products.”<sup>5</sup>

The Proposal also reflects the Department’s incorrect view that it holds the authority to comprehensively regulate standards of conduct applicable to broker-dealers, registered investment advisers, and insurance agents. It does not. This point was specifically addressed by the *Chamber of Commerce* decision wherein the 5th Circuit concluded that the Department’s similar 2016 fiduciary rule usurped and violated “two Congressional initiatives” enacted as part of the Dodd-Frank Act.<sup>6</sup> Specifically, the 5th Circuit pointed out that under Dodd-Frank, Congress authorized the SEC and not the Department “to promulgate enhanced, uniform standards of conduct for broker-dealers and investment advisers who render ‘personalized investment advice about securities to a retail customer.’”<sup>7</sup> The same decision held that Section 989J of Dodd-Frank deferred regulation of fixed indexed annuities “to the states, which have traditionally and under federal law borne responsibility for thoroughgoing supervision of the insurance business.”<sup>8</sup>

The 5th Circuit explained this point as follows –

The Fiduciary Rule conflicts with both of these efforts. The SEC has the expertise and authority to regulate brokers and dealers

<sup>4</sup> 885 F.3d 360, 373 (5th Cir. 2018)

<sup>5</sup> 88 Fed. Reg. 75890, 75907 (Nov. 3, 2023)

<sup>6</sup> *Chamber of Commerce*, at 385.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

uniformly. DOL has no such statutory warrant, but far from confining the Fiduciary Rule to IRA investors' transactions, DOL's regulations effect dramatic industry-wide changes because it is impractical to separate IRA transactions from non-IRA securities advice and brokerage. Rather than infringing on SEC turf, DOL ought to have deferred to Congress's very specific Dodd-Frank delegations and conferred with and supported SEC practices to assist IRA and all other individual investors. By presumptively outlawing transaction-based compensation as "conflicted," the Fiduciary Rule also undercuts the Dodd-Frank provision that instructed SEC not to prohibit such standard forms of broker-dealers' compensation. And in direct conflict with Congress's approach to fixed indexed annuities, DOL's regulatory strategy not only deprives sellers of those products of the enhanced PTE 84-24 exemption but it also subjects them to the stark alternatives of using the BIC Exemption, creating entirely new compensation schemes, or withdrawing from the market. While Congress exhibited confidence in the states' insurance regulation, DOL criticizes the Dodd-Frank provisions as "insufficient" to protect the "subset" of retirement related fixed-indexed annuities transactions within DOL's purview. Certainly, however, most such products are sold to retirement investors, so DOL is occupying the Dodd-Frank turf.<sup>9</sup>

Through the Proposal, the Department re-commits prior missteps that resulted in the vacatur of its 2016 rulemaking. It again ignores the clear distinctions between the statutory duties owed by investment advice fiduciaries under Title I of ERISA and those owed by investment advice fiduciaries under the Code. In *Chamber of Commerce*, the 5th Circuit noted the distinction Congress made between the duties owed by fiduciaries to Title I plans, which include the duties of prudence and loyalty (*i.e.*, to act solely in the interest) under ERISA section 404 in addition to prohibited avoidance responsibilities under ERISA section 406, and the duties applicable to Title II plan fiduciaries under Code section 4975, which are confined solely to prohibited transaction avoidance and contain no ERISA section 404 counterparts.

In subsequent cases, including the 2023 *American Securities Association*<sup>10</sup> and *Federation of Americans for Consumer Choice*<sup>11</sup> cases, District Courts have similarly emphasized those same statutory distinctions, and have vacated or recommended vacatur of Department interpretations that inappropriately overlook the distinction. The Department's new Proposal once again conflates the distinction between the separate statutory duties owed by fiduciaries to Title I plans and those owed by fiduciaries to Title II plans. As an example, the Department indicates in its new Proposal that ERISA's fiduciary obligations apply to "considerations of how . . . money might be invested after [a] rollover" from a Title I plan to a Title II plan.<sup>12</sup>

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<sup>9</sup> *Id.*, at 386.

<sup>10</sup> 2023 WL 1967573 (M.D. Fla. 2023)

<sup>11</sup> 2023 WL 5682411 (N.D. Tex. 2023)

<sup>12</sup> 88 Fed. Reg. 75890, 75905 (Nov. 3, 2023)

The five-part test for determining fiduciary status as set forth in the Department’s longstanding 1975 regulation provides that persons act as investment advice fiduciaries if, for a fee or other compensation, they: (1) render advice or make recommendations as to the advisability of investing in, purchasing, or selling securities, or other property; (2) on a regular basis; (3) pursuant to a mutual agreement between such person and the plan; where the advice; (4) serves as a primary basis for investment decisions with respect to plan assets; and (5) is individualized based on the particular needs of the plan.<sup>13</sup>

The Department’s 2023 Proposal jettisons the “primary basis” prong of the test altogether and employs a regulatory sleight of hand to give the appearance that the “regular basis” prong has been retained while re-framing that prong as a description of whether the recommendation provider is engaged in the business of providing advice on a regular basis to other investors. Whether or not a recommendation provider regularly engages in the business of selling to others has no bearing on the nature of the relationship with any one recommendation recipient.

The Proposal would also sweepingly attach fiduciary status to otherwise ordinary course communications conducted by or on behalf of financial institutions if they contain any covered recommendations, even in the absence of any consideration of a retirement investor’s particular needs or individual circumstances. Under proposed section 3-21(c)(1)(i), fiduciary status would attach to any recommendation made by a person if that person has an affiliate relationship with another entity who has discretionary authority or control over any property for the retirement investor, including property held outside of a plan or an IRA. Hence, in the situation where a financial institution’s asset management business has a discretionary management relationship with a retirement investor in any capacity, any recommendation made by any of its affiliates – including recommendations delivered through generalized marketing materials – would be deemed to be fiduciary in nature no matter how distant the affiliate relationship. This sort of attribution of fiduciary status through affiliate relationships exemplifies the unreasonable and random nature of the Proposal’s fiduciary status assignments.

The major questions doctrine, which requires that when an agency seeks to regulate a “significant portion of the economy,” it must point to “clear congressional authorization” to do so is implicated by the Proposal.<sup>14</sup> The Proposal would clearly affect significant portions of the economy. In this regard, as the Department states in the preamble to the Proposal, IRAs collectively hold approximately \$13.2 trillion, defined contribution plans hold \$9.2 trillion, and defined benefit plans hold \$3.7 trillion, and the Department expects \$4.5 trillion to rollover from defined contribution plans to IRAs from 2022 through 2027.<sup>15</sup>

The Proposal would regulate pure sales activity in connection with these plans, including rollover sales recommendations, as fiduciary investment advice. The Department indicates that its Proposal is prompted by the “the shift toward individual control over retirement investing”—not by any Congressional command to update the fiduciary investment advice definition.<sup>16</sup> Although Congress has amended ERISA a number of times over the time period that this shift was

<sup>13</sup> ERISA section 3(21)(A)(ii); 29 CFR section 2510.3-21(c).

<sup>14</sup> See, e.g., *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014).

<sup>15</sup> 88 Fed. Reg. 75890, 75915 (Nov. 3, 2023).

<sup>16</sup> *Id.* at 75892.



occurring, it has left the fiduciary investment advice definition under ERISA section 3(21)(A)(ii) untouched since 1974. There is therefore no clear Congressional authorization for the Proposal.

The Proposal would inappropriately confer investment advice fiduciary status under ERISA and the Code to broad segments of the financial services provider community when engaged in the sale and marketing of investment products and services. Such a sweeping assignment of fiduciary status both contravenes the Department's statutory authority and would work a hardship on individual retirement savers by depriving them of access to information, products, and services.

Thank you for the opportunity to testify today. I look forward to taking your questions.

Chairman GOOD. Thank you, Mr. Roberts. We will now recognize Mr. Peiffer for 5 minutes.

**STATEMENT OF MR. JOSEPH C. PEIFFER, PRESIDENT, PUBLIC INVESTORS ADVOCATE BAR ASSOCIATION, NORMAL, OKLAHOMA**

Mr. PEIFFER. Thank you. There we go. I am here on behalf of the investors, myself, and my colleagues that PIABA have represented. PIABA, the Public Investor Advocate Bar Association, is a bar association of hundreds of attorneys around the country that have dedicated their lives to representing investors that have been the victim of financial advisor misconduct.

I have represented thousands of investors in my 25-year career, and collectively PIABA members have represented hundreds of thousands of investors. Our clients are people who, invariably, trusted their financial professional.

After all, the vast majority of these investors gave their entire life savings to their advisor. None of the people that I have ever represented realized that their advisor might be held to a standard anything below that of a doctor, or an attorney.

It is not like people come out of the womb believing brokers have a fiduciary duty to their clients. No. It is because the financial services industry has been marketing and advertising that their advisors live up to a fiduciary duty.

The industry often refers to financial advisors as "trusted advisors" or compare themselves to doctors. As one company puts it, "As doctors take care of physical health, good financial professionals help take care of financial health. Just as you consult a doctor for a range of health questions, you can work with a financial professional on a host of different options regarding your plan for retirement."

Academic studies that have looked at this issue conclude what is obvious to anyone who has ever met an investor who has been the victim of conflicted advice. That is, investors do not know the duties their financial professionals owe them. One thing is clear: right now, the very same advisors that advertise like fiduciaries, routinely dispute that they owe a fiduciary duty to their client.

Firms advertise like they have duties of doctors but litigate like they owe no more duty than that of a used car salesman. The Department of Labor Rule would go a long way toward holding firms accountable in the retirement accounts for the duty they already say they have and that investors already believe they have.

What does this mean on an individual level to investors? For some, the difference between receiving conflicted advice, or receiving advice solely in their interest, is a difference between being able to afford to visit their grandkids or not. Being able to afford a retirement home near their children or living with their children. The difference between being able to retire in their 60's or in their 70's.

For others, it is the difference between being able to live out their golden years with dignity, knowing that their hard work and savings has paid off, or being shattered by the reality that by trusting their advisor, who gave conflicted advice, they are left with nothing to show for 30 or 40 years of hard work and savings.

Almost every week we see a retiree come into our office who has lost a substantial amount of their life savings. These are often proud, strong workers, that if they go on vacation at all, they travel in a car, like I did when I was growing up. They have saved to pay off their house, put their children through college, and build a nest egg, all on middle class salaries.

Now these proud, strong Americans, they breakdown in my office when I explain to them how their investment was lost to conflicted advice, and that their advisor did not owe them a fiduciary duty. I have had clients live with me because they could not afford the gas and lodging to drive back and forth to a long trial.

I have had clients that ran out of money and had to rent a room from their ex-spouse, and I have even, unfortunately, had clients attempt suicide. I know the devastation that losing your life savings can have on hard working Americans. This rule will make this better.

The members of PIABA and myself see the effect of this conflicted advice on an individual level every day. One of my clients worked at a chemical plant for a major corporation, making \$80,000.00 a year, until he got the conflicted advice that he should cash out his retirement account and rollover his entire savings to the financial advisor.

He was out of money before he was eligible for social security, and he had to go back to work at that same plant stocking vending machines for \$10.00 an hour. Now this rule does not just help investors, it also helps ethical advisors. I think that most advisors are good, ethical people that try to do right by their clients.

I use a financial advisor. My best friend Mark Bailey is a financial advisor, and he is here behind me today. This rule would help ethical advisors by clarifying that when advising folks on their retirement money, investors must always come first. It evens the playing field for advisors who are already doing the right thing and acting in their client's best interest.

I appreciate the opportunity to talk to the Subcommittee about this important issue, and I urge the DOL to promptly finalize this rule, so that workers and retirees across the country get the fiduciary advice that they deserve, and they believe they are already getting. Thank you very much. I look forward to your questions.

[The Statement of Mr. Peiffer follows:]

United States House of Representatives  
House Committee on Education and the Workforce  
Subcommittee on Health, Employment, Labor and Pensions

Hearing entitled:  
“Protecting American Savers and Retirees From DOL’s Regulatory Overreach”

Testimony for the Record  
of  
Joseph C. Peiffer  
President, Public Investors Advocate Bar Association

February 15, 2024  
10:15 AM ET

### **Introduction**

Thank you for allowing me to testify on the Department of Labor Retirement Security Rule. I have first-hand, real-world experience with the devastation that happens when advisors are not held to a fiduciary standard. I am the founder of Peiffer Wolf Carr Kane Conway & Wise, LLP. I am also the President of PIABA – the Public Investors Advocate Bar Association. PIABA is an international bar association comprised of attorneys who represent investors in securities litigation. Since its formation in 1990, PIABA has promoted the interests of the public investor in all securities and commodities arbitration forums, while also advocating for public education regarding investment fraud and industry misconduct. I have represented thousands of investors in my career, and the members of PIABA have collectively represented hundreds of thousands of investors.

At the beginning of my career, I represented hundreds of Exxon retirees. We tried a very long, hard fought case for 32 of these retirees. They were all chemical and refinery plant workers. Good, solid men and women, who were hard-working, remarkable Americans. They were told by the advisor that they should retire early, roll their 401(k) accounts over to the advisor's care, and that they could withdraw 10-14% of their money every year with nothing to worry about. The advisor encouraged the Exxon retirees to go enjoy their retirement and let him worry about the details of their accounts. Unfortunately, the advisor put them into high-cost insurance and mutual fund products that paid him on average about \$50,000 on the day these folks agreed to give him their retirement money.

Within just a couple of years of their retirement, due to their advisor's conflicted advice, these retirees were out of money. Their nest egg was cracked open by their advisor for commissions leaving them with nothing. One of them, who gave up his \$80,000 a year job at the plant because the advisor told him he had "more than enough money to retire," ran out of money and was stocking vending machines at that same plant for \$10 an hour. Several of them attempted suicide. Almost all of them contemplated it.

I got to know these folks very well because several of them did not have gas money to drive the three hours round trip to the trial against the advisor and his firm. So, on a rotating basis, around a dozen of them stayed with me in my 1,000 square foot apartment. I would come home from the office around 11:00 each night and these folks would be up – usually recapping what happened that day at trial. We'd have a beer and talk about life, their kids, and I'd listen to them beat themselves up for trusting someone that they thought was a professional like a doctor or a lawyer. But, in the trial of the case, the advisor and his firm said he just had the duty of a salesman. And, I would hear them contemplate how their advisor could take advantage of them and evaporate thirty years of hard work and savings. They felt like failures to themselves and to their families.

The fact of the matter is that these folks did the right thing. They went to an advisor, who held himself out as an expert and told them that he had their best interest at heart. Their advisor did not. And when called to account for his behavior, their advisor argued he had no duty to put their interest in a long and happy retirement ahead of his interest in making huge commissions.

Department of Labor Retirement Security Rule ("DOL Rule") would settle the duty that advisors have when dealing with retirement money. Retiring and investing your nest egg is the most important financial decision that anyone will make. Retirees and potential retirees deserve nothing less than a rule that requires advisors to give unconflicted advice. Most retirees put their families and their future first when they forwent vacations, new cars and dining out so that they

could save money for retirement. These retirees deserve to have their retirement funds and best interest put first by their chosen advisor.

### **The Scope of the Conflicted-Advice Problem is Huge and Getting Bigger**

The numbers surrounding this problem are so big that it is hard to get your mind around. According to the Obama Era Council of Economic Advisers, conflicted advice costs retirement savers at least \$17 billion per year.<sup>1</sup>

In 1975, 27.2 million people participated in defined benefit plans and 11.2 million in defined contribution plans (the latter being the category 401(k)s fall into); by 2019 those figures had changed to 12.6 million and 85.5 million, respectively.<sup>2</sup> With the drastic decline of traditional pensions and the rise of 401(k)'s, most people do not have a monthly pension check to rely on. Instead, they are forced to either learn to manage their nest egg on their own or get management advice. Indeed, investors are anticipated to move \$4.5 trillion from such plans into IRAs in the next 3-4 years.<sup>3</sup> As of now, this problem is made worse because without the DOL Rule in effect, advice to 401(k) sponsors and advice regarding the sales of fixed-indexed annuities is typically not held to a fiduciary standard.<sup>4</sup>

These costs are particularly acute when retirees roll over their employer 401(k) plan to an individual retirement account ("IRA") because advice related to one-time rollovers is exempt from ERISA's fiduciary obligations. This problem is compounded by the fact that advice to 401(k) sponsors and advice regarding the sale of fixed-indexed annuities and certain other non-securities is also not covered by ERISA's protections. Retirement savers will have an improved quality of life as a result of the savings they will gain from the loopholes the Rule closes related to conflicted advice.<sup>5</sup>

The numbers are almost so big that it tends to boggle the mind. But, let me put it to you this way: the difference between getting conflicted retirement advice and receiving advice in the investor's interest is sometimes the difference between the retiree being able to visit their grandkids or not, the difference between being able to afford a retirement home close to their children or living with them, or the difference between being able to retire in their 60s or having to wait until their 70s to retire. Other times, as will be detailed below, it is the difference between being able to live out their golden years with dignity knowing that their hard work and savings paid off or being shattered by the reality that by trusting their advisor, who gave conflicted advice, and left them with nothing to show for thirty or forty years of hard work and savings.

### **How the DOL Rule Helps Mainstreet Investors**

As it stands, financial advisors who sell would-be retirees on either liquidating or rolling over their 401(k)s into complex financial products are not always held to a fiduciary standard.<sup>6</sup> In

<sup>1</sup> Council of Economic Advisers, [Report on the Effects of Conflicted Investment Advice on Retirement Savings](#) (Feb. 2015)

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 11.

<sup>4</sup> *Id.* at 3, 11.

<sup>5</sup> *Id.* at 10.

<sup>6</sup> CFP Board, [Letter to DOL Assistant Secretary Gomez re: DOL's Retirement Security Rule](#) (Jan. 2, 2024), at 4.

other words, advisors do not have to always put investors' interest in having enough money to live a long and happy retirement ahead of their interest in making a huge payday.

The DOL Rule would put investors' interest first by requiring advice on the roll-over or liquidation of a 401(k) to be up to ERISA standards, which is a fiduciary standard. This change is long overdue. When ERISA was enacted in 1974, 401(k)s did not even exist; most Americans had defined benefit plans like pensions, which are afforded strong ERISA protections.<sup>7</sup>

Morningstar identified rollovers to fixed-indexed annuities as an area where the DOL Rule was likely to yield large benefits to investors, estimating that "the proposed rule would save retirement investors approximately \$3.25 billion per year, with a low-end estimate of \$1.77 billion and a high-end estimate of \$3.84 billion per year" based on its analysis of the benefits with respect to this single category of investment. Accordingly, it estimated, on an undiscounted basis, that these retirement investors would save over \$32.5 billion in the first 10 years, were the rule finalized.<sup>8</sup>

The DOL Rule doesn't just help investors. It also helps ethical advisors. In fact, I believe that most advisors are ethical, good people that try to do right by their clients. I use a financial advisor. My best friend is a financial advisor. This rule would help ethical advisors by clarifying that investors need to always come first.

This problem is getting bigger. The investment advice fiduciary definition was previously drafted to only apply to advice given on a "regular basis," which does not account for current trends in which many people seek one-time advice to receive guidance on how to roll over a 401(k) into an IRA or annuities.<sup>9</sup> As the AARP says the decision to roll over a 401(k) is "often the single most important financial decision a plan participant makes, involving a lifetime of retirement savings and the fact [is] that these recommendations carry with them an inherent conflict of interest."<sup>10</sup> The DOL Rule closes this loophole.

#### **Retirees in Every State and District Have Been Harmed by Conflicted Advice**

Behind the huge numbers illustrating the problem are real people, who have been severely impacted by the current lack of a fiduciary requirement. These people exist throughout the United States, in every state, and in every congressional district. I have gathered some examples below. Some of these folks were represented by my office and others were represented by PIABA members. All of these individuals would have benefited from a strong fiduciary duty being imposed on advisors who give guidance on 401(k) rollovers or liquidation.

First, I'd like to talk about a group of approximately hundreds of investors across the country that myself along with Rikard & Protopapis represented. Our clients lived in in California, Utah, Illinois, Missouri, Kansas, Texas, South Carolina, North Carolina, Louisiana, Florida, Ohio, Arizona and Idaho. But, these investors exist all over the country.

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<sup>7</sup> *Id.* at 3.

<sup>8</sup> Morningstar, [Letter to DOL Assistant Secretary Gomez re: DOL's Retirement Security Rule](#) (Jan. 2, 2024).

<sup>9</sup> AARP, [Letter to DOL Assistant Secretary Liza M. Gomez re: Proposed Retirement Security Rule](#) (Jan. 2, 2024), at 6.

<sup>10</sup> *Id.*

These investors, the vast majority of whom were either retired or in their 60s, were told they should undergo an “IRA Reboot” that would “turbocharge their IRA” or “turbocharge their 401(k)” by liquidating their retirement account and purchasing a complex insurance product along with premium financing. Many of our Utah clients were also advised that in addition to liquidating their 401(k)s, they should mortgage their homes. They were lured in by “seminars” that purported to give objective, fiduciary advice, but in reality, were just sales sessions used by these advisors, sometimes called “Wealth Architects,” to line their pockets with huge commissions. It is telling that while the marketing material to my clients talked about “turbocharging their 401(k)s” the marketing material aimed at the advisors talked about “turbocharging [the agent’s] commission.”

The impact on these hard-working people was severe. Many were forced to go back to work, cut back on necessities, lost their homes or worse. All suffered a loss of dignity and trust. I have attached a small sample of the impact on some these clients in their own words as **Exhibit “A”** to this testimony.

Another example is Virginia retiree, represented by one of our PIABA members, who met her “financial advisor” at a free seminar. The advisor convinced this retiree to rollover her government retirement plan into several fixed annuity products. These products paid a large commission to the advisor, but ultimately the retiree lost her entire life savings through the advisor’s malfeasance. She has even had to mortgage her house to pay the tax bill resulting from the advisor’s advice to withdraw her retirement savings. And, despite having very serious health problems, she’s back to work to try to pay her bills.

Or take a husband and wife in California, who lost nearly all of their retirement money to conflicted advice from their insurance agent who claims he owed them no fiduciary duty. The husband spent his life as an aerospace mechanic and served in the national guard. He retired at the age of 64. His wife worked as an administrative secretary until she became disabled. The husband had managed to save a little over \$500,000 in his 401(k). He met the advisor through their church pastor and the advisor convinced him that he had more than enough money to retire earlier than he had planned. He claimed he would put their interests first and take care of them. Instead, he bought high-risk products that paid the agent handsomely but left this couple without enough money to fund their retirement.

Another California couple that fell victim to conflicted advice were born in Philippines but emigrated to the United States to work as nurses. After a long career, the husband became disabled. The vast majority of his life savings was in his retirement accounts, which his advisor invested in complex insurance products among other things that paid the advisor big commission but left the retiree without enough money to have the retirement he was promised.

Finally, Sally, a California woman who was approaching retirement age when she was convinced by an “investment seminar” to invest in a precious metals program. Her “advisor” convinced her to liquidate her 401(k) and roll that money into a leveraged precious metals program with promises that her money would grow. Two years after investing, Sally lost everything having paid almost nearly as much as she invested in commissions and costs. She has lost her house and is back to work in her 70s. The advisor, relying on boilerplate disclosures, says they don’t owe



Sally any duty let alone a fiduciary duty. In fact, relying on these disclosures, the advisor claims that the duties owed to Sally are more akin to a pawn shop owner than a fiduciary.

These are just a few examples that I have been able to gather over the past few weeks. Without the DOL Rule this problem will continue to grow.

### **The DOL Rule Brings Regulation into Line with Investor Expectations**

All of my clients over my nearly 25 years of experience, like nearly all investors, thought that their advisors were their fiduciaries. This is not unusual. According to the Certified Financial Planner Board of Standards (“CFP Board”), a nonprofit organization that sets and upholds standards for financial planners, investors now overwhelmingly expect that financial professionals always provide them advice in the investors’ best interests.<sup>11</sup> Several studies that illustrate this trend; for example, the Center for Capital Markets Competitiveness indicated 97% of investors already believed their financial professionals had their best interests in mind, and a recent AARP study revealed 89% of investors over the age of 50 felt the same.<sup>12</sup>

Investors’ beliefs that their financial professional have their best interest in mind is due at least in part to these advisors and their trade associations marketing that way. Investment professionals routinely use titles, such as “financial advisors,” “financial consultants,” or “wealth managers,” or even “wealth architects.” I have never heard a financial professional refer to themselves simply as a salesman.

Here is a sample of what investment professionals, firms and their trade associations say now to position themselves as providing advice that is in investors’ best interest:

- In a blog on the National Association of Insurance and Financial Advisors (NAIFA’s) website by NAIFA’s marketing partner, titled “4 Strategies Financial Advisors Use to Build Trust,” it states, “Consider just how much trust someone needs to have in their financial advisor to give them continuous access to, and nearly complete control of, their life’s savings, their retirement income, and their future security and dreams. That degree of trust ranks right up there with entrusting your life to a surgeon, your children’s wellbeing to a nanny, and your heart to your spouse.”<sup>13</sup> Among its recommendations, the blog suggests, “Beyond knowing their financial goals, trusted advisors take the time to get to know their clients on a more intimate level. They get to know their clients’ likes and dislikes, hobbies, hot button issues, families, and history.”<sup>14</sup>

<sup>11</sup> CFP Board, [Letter to DOL Assistant Secretary Gomez re: DOL’s Retirement Security Rule](#) (Jan. 2, 2024).

<sup>12</sup> *Id.* at 2, citing Working with Financial Professionals: Opinions of American Investors, Center for Capital Markets Competitiveness (2018) (available at [https://www.centerforcapitalmarkets.com/wp-content/uploads/2018/04/CCMC\\_InvestorPolling\\_v5-1.pdf](https://www.centerforcapitalmarkets.com/wp-content/uploads/2018/04/CCMC_InvestorPolling_v5-1.pdf)) and AARP Research, “Unbiased Financial Advice about Retirement: Importance to Adults 50+,” (Jan. 2024) (available at <https://www.aarp.org/pri/topics/work-finances-retirement/financial-security-retirement/fiduciary-duty-retirement/>).

<sup>13</sup> Luke Acree, *4 Strategies Financial Advisors Use to Build Trust*, NAIFA (December 27, 2021), <https://bit.ly/48T2Lu3>.

<sup>14</sup> *Id.*

- Redbird Advisors, an insurance marketing services company, states in the “Ultimate Guide to Selling Fixed Annuities,” “The idea is when you’re in a meeting and the fact-finding process starts, your main objective is getting to a place of trust as soon as possible. People want to do business with people they like and trust.”<sup>15</sup>
- The Insurance Pro Shop, which provides marketing and sales training to insurance agents, runs a “Trusted Advisor Success Training Workshop” showing insurance agents how they “can have endless streams of new, repeat, and referral business” by “mak[ing] the move from a salesperson to a ‘Trusted Advisor!’ So that you are the one person that people will want to see!”<sup>16</sup>
- Commenting on a survey F&G conducted to learn how Americans over 50 are thinking about their retirement realities, F&G’s president and CEO stated on their website that, “Leveraging the expertise of a trusted financial advisor can often make people more confident and better equipped to navigate the challenges of retirement planning with conviction and clarity.”<sup>17</sup>
- The senior vice president at Nationwide Annuity Distribution recently wrote a blog about common misconceptions about annuities, stating, “It’s healthy for clients to have questions, concerns or even reservations about costs, flexibility or the type of annuity that may best fit their needs. However, as their trusted advisor, you can work with them to address misperceptions they may bring to the table with facts, options and a clear understanding of your client’s specific retirement goals.”<sup>18</sup>
- In another blog, the senior vice president of individual annuities at The Standard stated that, “Many clients think of the new year as a time to evaluate and expand their financial portfolio, and even more clients are looking for a safe and effective way to protect their money and help it grow. This means you, their trusted advisor, may be asked to help them rethink their financial plans.”<sup>19</sup>
- A company that offers continuing education courses for insurance professionals states on its website titled “Selling Annuities: The Key to Unlocking Success,” that “By offering annuities, you position yourself as a trusted advisor in the realm of retirement planning, ensuring your clients’ long-term financial security and peace of mind.”<sup>20</sup>
- On its website touting the benefits of working with an investment professional, Brighthouse provides the following analogy: “As doctors help take care of physical health, good

<sup>15</sup> Drew Gurley, *Ultimate Guide to Selling Fixed Annuities*, Redbird Advisors (January 4, 2022), <https://bit.ly/3vq484D>.

<sup>16</sup> Insurance Pro Shop, *The Best Life Insurance and Annuity Trusted Advisor Success Training Workshop* (2023), <https://bit.ly/3tzPdEE>.

<sup>17</sup> F&G Annuities & Life, *Retirement Reconsidered* (2023), <https://bit.ly/4aGBFbg>.

<sup>18</sup> Rona Guymon, *Common Misconceptions About Annuities*, FA Mag (December 11, 2023), <https://bit.ly/3vjYGR2>.

<sup>19</sup> Chris Conklin, *New Year, New Annuity Options For Your Clients*, InsuranceNewsNet (December 26, 2018), <https://bit.ly/3S0ITzt>.

<sup>20</sup> SuccessCE, *Selling Annuities: The Key to Unlocking Success* (May 10, 2023), <https://bit.ly/3RJkIUy>.

financial professionals help take care of financial health. Just as you consult a doctor for a range of health questions, you can work with a financial professional on a host of different options regarding your plans for retirement.”<sup>21</sup>

- On New York Life’s homepage, the company states, “Working with us means never having to make financial decisions alone.” We connect you with an agent in your community—someone who understands your needs and priorities. Together, you’ll find the right approach to protect your family and help them prosper.”<sup>22</sup> On the company’s “About Us” page, it states: “Putting your needs first...focused on fulfilling our promises and doing what’s best for policy owners, not on delivering profits for others.”<sup>23</sup> On the company’s annuities page, it states that, “by working with a trusted financial professional, you can discuss your unique circumstances and how best to prepare for the challenges that may lie ahead.”<sup>24</sup> On the company’s “Find a New York Life Agent” page, it touts the benefits of working with a New York Life professional, stating that the company provides “One-on-one guidance customized to your needs and goals.”<sup>25</sup>
- A few years ago, NAIFA launched a consumer advertising campaign called “Trust a NAIFA Advisor,” and their website carried the heading “Advisors You Can Trust.”<sup>26</sup> The homepage of the website featured the following statement in large capital letters and bold font: “TRUST YOUR FUTURE WITH A NAIFA ADVISOR.”<sup>27</sup> There was a video advertisement on the website, with voiceover stating: “Contact a NAIFA member for advice you can trust. NAIFA members adhere to a code of ethics that is about honesty and integrity. They’re committed to working with you and guiding you with a financial plan that will lead you to a secure future and a retirement you’ll enjoy.”<sup>28</sup>

Yet, when we attempt to make advisors account for the advice that investors liquidate or roll over their retirement accounts, the advisors and the companies they work for claimed that these advisors owed these investors no duty for the advice. The DOL Rule would simply bring the legal standard up to the standard that nearly all investors expect when dealing with a financial professional in their retirement account.

### **The DOL Rule will Close the Disclaimer Loophole**

Under ERISA’s current fiduciary definition, an adviser qualifies as a fiduciary so long as there is a “mutual agreement, arrangement, or understanding” that the advice will serve as the “primary basis” for the investment decision. As a result, many firms have historically evaded this definition by including a fine-print disclaimer stating the investor should not rely on the firm’s advice as the

<sup>21</sup> Brighthouse Financial, *5 Ways to Help Improve Your Financial Health* (November 5, 2019), <https://bit.ly/4IHogeX>.

<sup>22</sup> New York Life, *Trusted Guidance and Protection: New York Life Insurance*, <https://bit.ly/3RC2jt3> (last visited December 29, 2023).

<sup>23</sup> New York Life, *About New York Life*, <https://bit.ly/3vdVdDj> (last visited December 29, 2023).

<sup>24</sup> New York Life, *Financial Risks in Retirement*, <https://bit.ly/3twFUFx> (last visited December 29, 2023).

<sup>25</sup> New York Life, *Find a New York Life Agent*, <https://bit.ly/3RFQNWd> (last visited December 29, 2023).

<sup>26</sup> See Micah Hauptman & Barbara Roper, Consumer Federation of America, *Financial Advisor or Investment Salesperson? Brokers and Insurers Want to Have it Both Ways* at 13 (January 18, 2017), <http://bit.ly/2jKUbFD>.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

primary basis for their decision despite the implication that the effect of the advice is to induce reliance.<sup>29</sup> The DOL Rule will significantly limit the impact of fine-print disclaimers by preventing them from automatically controlling an investment advice fiduciary's status where it is inconsistent with the investor's oral communications or interactions with the financial professional.<sup>30</sup>

### **Small Savers will be Helped, not Harmed, by The DOL Rule**

Fundamentally, the argument that small savers will be harmed by the implementation of the DOL Rule is flawed. At heart, this argument is saying that if advisors cannot give small savers conflicted advice that pays them outsized commissions then these advisors will simply refuse to provide advice to these investors at all. Putting aside whether these small savers would actually be better with no advice than with conflicted advice, there is no persuasive evidence that other regulatory regimes requiring a fiduciary standard for financial professionals have meaningfully reduced retirement savers' ability to obtain quality, affordable financial advice.<sup>31</sup>

This is best illustrated by the market reaction to the 2016 conflict of interest rulemaking. It differed from what had been expected by industry-generated white papers created in opposition to the 2016 rule's development and implementation. In a survey conducted in September 2017, 82% of broker-dealers had not made changes to their handling of smaller, retail retirement accounts.<sup>32</sup> In examining the effects of the 2016 final rule, another survey found that while variable annuity sales had decreased, there is no evidence that the change affected investors with less wealth more than others.<sup>33</sup>

### **The DOL Rule Provides Investors Protection that Reg BI does not.**

First, the SEC's Reg. BI does not apply to advice to purchase anything other than securities. This excludes investments such as certain insurance products, bank products, commodities, real estate and cryptocurrency. These are large and emerging areas of investments that are still subject to conflicted advice without the DOL Rule.

Second, Reg. BI does not cover advice to retirement plan sponsors such as small employers. According to Reg. BI's adopting release, workplace retirement plans or their representatives and service providers generally would fall outside this definition.<sup>34</sup>

<sup>29</sup> AARP, [Letter to DOL Assistant Secretary Liza M. Gomez re: Proposed Retirement Security Rule](#) (Jan. 2, 2024), at 7.

<sup>30</sup> *Id.* at 8.

<sup>31</sup> Better Markets, [Comment Letter Submitted Re: DOL Retirement Security Rule](#) (Jan. 2, 2023), at 4.

<sup>32</sup> See [International Financial Law Review survey](#) (October 2017).

<sup>33</sup> See Mark Egan, Shan Ge, Johnny Tang, [Conflicting Interests and the Effect of Fiduciary Duty: Evidence from Variable Annuities](#), *The Review of Financial Studies*, Volume 35, Issue 12, December 2022, Pages 5334–5386.

<sup>34</sup> See U.S. Securities & Exchange Commission, *Regulation Best Interest: The Broker-Dealer Standard of Conduct* at 33344 (“The Commission does not believe that workplace retirement plans or their representatives and service providers generally fall within the definition of retail customer for purposes of Regulation Best Interest because the workplace retirement plan is not a natural person, and therefore the workplace retirement plan representatives are not a non-professional representative of a natural person that is receiving a recommendation directly from a broker-dealer for ‘personal, family, or household purposes.’”).

This creates a strange and uneven regulatory environment, where retail investors, who only have their investments to consider, receive stronger protections than retirement plan sponsors, who are choosing investments for all their employees.

In some cases, the retail investor and plan sponsor could be the same person, dealing with the same investment professional. For example, if Sarah, a small business employer, seeks recommendations from Barry, who works for a broker-dealer, about the menu of mutual fund options to offer her employees in her company's 401(k), those recommendations would not receive Reg. BI's protections. As a result, Barry could recommend that Sarah include high-cost, low-quality funds that maximize Barry's and his firm's revenue. In that same conversation, if Sarah asked Barry for recommendations on what options she should personally invest in, those recommendations would receive Reg. BI's protections. In my experience, these distinctions are lost on nearly all small business owners.

#### **The NAIC Standard is Best Interest in Name Only**

The NAIC Model Rule states that an insurance professional "has met" their best interest obligation 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 have to 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 suitability rule. That's not a true best interest standard.

Indeed, the NAIC Model Rule excludes a huge source of conflicts – the advisor's commissions and other non-cash compensation – from its definition of conflicts of interest. This makes for a strange, fractured environment for investment advice that no investor I've met understands. Under this rule, securities such as variable annuities are regulated by Reg. BI, but fixed indexed annuities, alternative investment products and other insurance products are just subject to the weaker NAIC Model Rule.

Additionally, only not all states have adopted the NAIC Model Rule. And, even in the states that have adopted this rule it does not cover annuity recommendations in 401(k)s and therefore plan sponsors, and therefore, investors in these plans, do not qualify for protection under this rule.

#### **Conclusion**

I appreciate the opportunity to talk to the Subcommittee about this important issue and urge the DOL to promptly finalize this rule so that workers and retirees across the country get the fiduciary advice that they deserve and believe they are already getting. This rule cannot prevent the harm that has already been done to investors from conflicted advice. However, it can and should stop the immense amount of future harm that is coming as millions of Americans move into retirement and contemplate how to invest their 401(k)s.

## Exhibit "A"


FULL NAME	How has this loss affected your retirement plan?
<p data-bbox="391 468 462 489">Dolores</p> 	<p data-bbox="797 468 1224 926">I invested approximately one third of my retirement IRA funds into this investment. Because I have had cancer, I am not able to purchase my own life insurance. This policy was recommended to me by my my advisor because it could be purchased for my children and it would provide both life insurance and an option to take the funds as supplemental income when they reached retirement age. My goal was to leave something enduring for my children, and I have no other funds to use now to accomplish that goal. I did not understand that these funds were going to be used for anything else other than paying premiums for Minnesota Life. I asked about the role of Gold Star and was told they were the "holding" company and would keep the funds in interest-earning accounts and would manage the funds and payments to Minnesota Life for four years or until the funds were gone. My advisor needs to be held accountable for his role in these losses. He misrepresented the policies that were sold to me.</p>
<p data-bbox="391 926 446 947">John</p> 	<p data-bbox="797 926 1224 1514">COMPLETELY DEVASTATED! Currently have only pension and social security. Just enough to pay bills and have a "little" fun. We were planning on the dollars from this investment which My advisor predicted would be \$2,000 to \$3,000 per month. That was to be a substantial amount of dollars to add to our small income. During retirement, our plans were to travel, visit out-of-state friends and family which now must be cut out. The only time these things can be done is in extreme emergencies. Living on such a reduced income, has totally eliminated our retirement expectations. Even going out to dinner is now something that must be budgeted and done very infrequently. Our saving during our younger years with four children was difficult to say the least. To have someone rob us of our future is something no one ever plans for. When we learned of this robbery, our feelings cannot be fully expressed. Physically it has affected our nightly loss of sleep; ALWAYS on our mind whenever financial responsibilities come into day to day life; worry over how to finance if large financial responsibility pops up (i.e. new car needed/repairs to car/home repair needed). Getting up in years, we also worry about medical responsibilities. We currently are in good health but that is not to say how we could financially cope with</p>



## Exhibit "A"

	<p>large medical/dental bills if need would arise. There just are no extra dollars to provide for unexpected expenses. That is what our "retirement" funds were to take care of. Since we can basically kiss that good buy, our financial future looks bleak. We anticipate these feelings of despair will grow as we age. Since we cannot depend on our social security to increase, our finances can and will only go backwards.</p>
<p>Michael</p> 	<p>The bogus Pac Life accounts will set me back quite a few years unless money is recovered. Right now, I have \$181,000 into both of these policies and was recently told by the company that since last year was a bad stock year and they only yielded 1% the accounts will be broke in 7 years</p>
<p>Elizabeth</p> 	<p>I retired early based on careful calculations on the income from all sources. My company froze our Pensions in leu of contributing more to our 401K, so my pension is minimal. If this money is not recovered, we will get by, but we certainly will not be able to take the vacations we planned and we will have to be much more careful with our spending. I had hoped not to have to worry so much about our budget each month. This matter is almost always on my mind. Will I need to go back to work? How can I make up for the lost money? I know the Lord will take care of us, but I still worry. We cut back our travel plans for this year and are delaying replacing my husband's car. The worst thing for me is to think that my money was used to extract abusive interest charges from military and other pensioners. This is repulsive and it makes me sick.</p>

## Exhibit "A"

<p>Earl</p> 	<p>The loss has put our retirement plan in the toilet. I have had to go out and obtain an additional life insurance policy at a considerable expense with funds that were being used to cover monthly expenses. We have had to cut out all non-essential expenses. This situation has caused myself and my wife undue physical and emotional distress. We have lost countless hours of sleep due to worry. We have argued and blamed each other for this catastrophic episode in our life. We have spent untold hours trying to find a solution to provide a reasonable standard of living for my wife in the event of my death. We thought we had found a reasonable solution only to have it disappear. As far as our financial well-being we have had to cut out all our non-essential expenses. You can only imagine the problems that are caused when 2/3 of your retirement savings just disappear. The stress involved in attempting to replace \$600,000 in life insurance at my age and then trying to pay for it was just about enough to give a normal healthy man a heart attack.</p>
<p>Bobby</p> 	<p>I have lost a lot of sleep worrying about this mess! I cannot believe I was so stupid to fall for this! My advisor is a master salesman and bull-shitter! I find myself cutting corners on expenses that I thought I had planned for. \$ 400,000 is a huge loss. Some arguments with my wife regarding finances that we should not be having!! I worked too hard planning for retirement. This sounded too good to be true! I was an idiot!! Loss of self-respect and confidence!!</p>



## Exhibit "A"

<p>Alan</p> 	<p>I was counting on the security of extra income later and having some long-term care insurance with this. I generally am not a worrier. However, this loss has caused worry for myself and my wife. I trusted the adviser to be honest and to work in my best interest. I know now that he was solely interested in his own interests. I am far more skeptical of things now. I am really angry with my advisor. I was let down and feel that he should not have recommended this product (IUL) and that the use of FIP is especially galling. When I found out that FIP was banned in other states and that information about its true nature was able to be easily discovered online at the time and before I made the investment, I was shocked. Due diligence in this case was not done.</p>
<p>Diane</p> 	<p>This was money for a cushion for my retirement. If My advisor had been honest about this investment, I would never have put my money in this "investment." At the very least he was deceitful, and at worst down right lied at times.</p>
<p>Paul and Susan</p> 	<p>This has been an extremely stressful situation. It has caused us to lose sleep, argue, be distracted at work, put other planned expenses on hold. We were planning to purchase a retirement home but have put this on hold. Paul was planning to retire this year (2019) but am continuing to work to recoup losses. This has changed the timeframe in which we plan to retire. We are still working and plan to work a few additional years beyond original retirement plan. Susan recalls a conversation in which my advisor noted that he had been given a Pac Life award for being a top seller. He was flown to California and had box seats to an NBA game. Therefore, Pac Life should have known that something was unusual with large sales in a small South Carolina town. In initial discussions with My advisor, he said it was his responsibility as a fiduciary to use the utmost care when investing our money. He also said that he would give us the Good, the Bad and the Ugly about any investment that he recommended. There was no Bad or Ugly given when he recommended FIP or Pac Life.</p>



## Exhibit "A"

	<p>He told us about all of his accomplishments, giving us many reasons to trust him - named Southeast Financial Leader in Forbes magazine; was 2015 Top 5 Finalist for "Advisor of the Year" by Retirement Advisor Magazine; elected to Board of Directors of International Association of Registered Financial Consultants (IAFRC) at end of 2017.</p>
<p>Mary</p> 	<p>I lost approximately 1/3 of my retirement funds. I feel that I will now need to work several more years. Overall, the stress that comes from the sudden loss of money that I struggled and sacrificed for years to save, has diminished my daily peace of mind and elevated the fear I inherited from seeing my elders struggle to receive adequate care on their own journey of aging gracefully. I come from family stock that tends to spend the last 2 years of their life in nursing care. If I follow my family genes, that kind of care is expensive and I fear that I will not have enough to be in a decent place of care.</p>
<p>Jerome</p> 	<p>I have had to rethink my retirement plans, push back retirement, accept that we may not have the quality of life we planned. We were both in great health at the time. We are still in good physical health; however, I am now breaking out in hives, and experiencing eyes swelling and lips swelling. I think about this almost constantly due to the fact that I am getting closer to what was my planned retirement age. We have both gone through an emotional roller coaster. I am embarrassed that I was taken in and upset that I lost almost half of my retirement savings. I am very angry that this happened, both with myself and the advisors and companies involved. My wife is extremely upset and we are worried that we may not be able to retire to the quality of life we had worked so hard for.</p>


## Exhibit "A"

<p>Jane</p> 	<p>It has been detrimental in my plan as I had \$82,000 in investments and now, I have \$2,000. This has been an emotional roller coaster and has devastated my husband and I. It is in the forefront of my daily thoughts and I have lost sleep over this. My blood pressure is now high and this is a constant emotional battle. I wonder how we will survive on our limited income if and when I am able to retire. I have a very strong worth ethic which was passed down to me by my parents, but they also told me if I worked hard, I would be rewarded and now here we are. Although this amount may seem small in the grand scheme of things, it was supposed to be mine to enjoy in retirement. Now, My advisor and parties have robbed me of this. My siblings are very concerned about my well-being as they know how hard I have worked towards my retirement. They live approximately 10 hours away and I was planning on using some of the funds to be able to visit them on a more frequent basis when I retire. My sons also live a great distance and would like to be able to visit them frequently. Now the future remains uncertain since I am unsure if these funds will be accessible to me.</p>
<p>Stanley</p> 	<p>It has caused me quite a deal of anxiety related to the unknown of what the outcome of this litigation will be and the thought of losing my entire investment and having to re-plan my retirement and possible continued working duration based on that outcome. It has put my retirement planning on "HOLD" and I am continuing to save for retirement in the wake of this questionable outcome. I will have to make another retirement plan to offset the expected "tax-free income" that this UIL plan had promised. Mr. My advisor never mentioned FIP investments to me in any of my discussions with him leading up to and after my decision to go with this UIL plan. The first time that he mentioned FIP to me was when he called me to his office for a meeting to inform me of the FIP financial situation. He turned this meeting into an explanation and display of his defense for doing what he considered his "fiduciary duty" and "due diligence" in this matter.</p>



## Exhibit "A"

<p>Debra</p> 	<p>My plan was to retire at age 64 or 65 but now because of this loss I will have to work several years beyond age 65 in to order retire. Upon receiving the information that all my money that I had worked very hard for 16 years was gone I had to take a few days off of work because it made me ill. I cried for days wondering how I was ever going to be able to retire and have some quality time with my husband who suffers from a rare leukemia cancer. My plan was to retire before age 65 as I do not know how long my husband will be with me. I have worked for Daymon for 16 years and it is not a 40 hour a week job and requires an average of 50 to 60 hours a week in a very intense environment. But I did this because of the ESOP plan they provided for their employees which enticed me to take a position with Daymon. They do not offer this ESOP plan anymore and when it was dissolved, I did receive it because of Bain Capital purchasing Daymon and in the offer they paid out the ESOP. I remember My advisor making the statement he was so glad he finally got his hands on this money and we need to invest in this program. Several meetings before I received ESOP payout My advisor asked me several times to make sure I could not withdraw this money. My husband retired at age 62 with a reduced amount of social security but we were not too concerned because we thought we had my ESOP investment. Our whole lives have changed not only because of my husband's cancer but now this had added an additional burden to our situation. I pray that by the grace of God we can get through all of this.</p>
<p>Devon Jr &amp; Barbara</p> 	<p>We started receiving Social Security in January 2019. It was always our plan to use personal funds from my Retirement Accounts for 3-4 years until the Minnesota Life IUL tax free payments would kick in. Social Security was estimated to only cover roughly 55% of our required income to live on. Without Tax Free Cash from IUL's, this makes us run out of money sooner than planned. Although I personally have been devastated, my wife has been the one that really took this incident the hardest. My wife and I have been together for over 42 years, and she realized that after having sacrificed to save and so many times postpone and even do with-out planning for our future retirement and have someone like My advisor come along and outright lie and deceive us without one ounce of consciousness just don't seem real.</p>

## Exhibit "A"

	<p>The physical effect will "not" be noticeable for years to come, but the impact on us emotionally and the effect on our financial well-being is totally unrecoverable at our ages.</p>
Glenn & Gudrun	<p>The \$250,000 fip investment was to get us through from age 65 to 70, when the iul was supposed to start paying and to help pay our tax burden for the iul. Now have to pay tax burden out of the existing money. We had to cut back on our travel plans, restrict dining out. It has deeply affected both of us. We try to live without dwelling on it too much, as it is too disturbing. We both now fully understand why people committed suicide when they lost a lot of their money due to bad investment. Of course, we are ashamed to even discuss this with anyone, since we have been so naive to be conned into the iul and fip investment.</p>
<p>Kurt</p> 	<p>We have to keep working longer than we anticipated. We have had to reduce spending, which caused a change of lifestyle.</p> <p>Had to cancel vacation because I am still working, had to put off home repairs. My wife loses a lot of sleep because of worries of lost money. The Minnesota Life policy was sold to us as an investment with great tax-free income. We did not need Life insurance. My advisor spent a lot of time selling this policy to us. He is a great salesman, made many dishonest promises, like cost of the policy and future returns. There was no discussion about risk, he presented it as absolutely safe, never mentioned FIP. He did not give us a copy of the sales contract. I feel really stupid, that I trusted him.</p>

## Exhibit "A"

<p>Dennis</p> 	<p>This has severely affected by retirement plan, as it reduced my IRA by about 34%! I have a lot of emotional stress. Waking up all during the night sweating with this on my mind. And it's on our mind all during the day and getting in arguments with each other. We can't stop thinking about how much Insurance Advisor lied to us and others.</p>
<p>Christine</p> 	<p>Since I'm currently retired, I'm tightening the purse strings, maintaining my yard myself, no longer traveling. The stress and anxiety have caused sleepless nights, emotional turmoil and sinking feeling of doom. Being divorced, I have no one else to rely on. I have been saving for retirement since 1986. This was not an easy thing to do while being divorced and raising two little children on my own, receiving minimal child support. There were times when I had only a few dollars to my name and had to make an agonizing choice between buying milk and bread for the children or putting gas in the car to get to work, which won out. This is what responsibility and accountability is about. The parties involved in this scam had none of that, only GREED, GREED, GREED.</p>
<p>Debbie</p>	<p>It is certainly a cause for concern. While I do have a small teacher pension, my husband will not have a pension from his work, so we are depending on the money that we have saved/invested to carry us through our retirement years.</p>
<p>Steven</p>	<p>I went from having a plan to not having a plan. I originally planned to retire at 66 but without the funds I mistakenly entrusted to My advisor I do not see retirement in my future. 70% of my retirement was in this account. I planned to retire at age 66 but unless funds are recovered, I don't see retirement in my future. A significant strain has been placed on my marriage as it was my wife's family that recommended my advisor so my wife feels a heavy burden on this decision. My wife started seeing a therapist regarding the guilt she feels. The added stress has affected my health and caused many sleepless nights. I've had a heart murmur since</p>



## Exhibit "A"

	<p>childhood which is why the Minnesota Life policy was put in my wife's name however, I had never had any physical problems associated with it. Since this loss I've had to see my cardiologist frequently because of the stress. I can't tell you how mad this entire thing has made me. My wife and I took about 6 months making the decision to trust my advisor with our investment. The decision didn't come easily and with did it with such caution but to no avail. My wife researched all the companies (Gold Star and Minnesota Life) as well as UL policies and it all seemed legitimate. Unfortunately, we never heard My advisor mention FIP because if we had just Googled that company, we would have known to stay away from it. There were already multiple states in lawsuits against FIP at the time we were entrusting our money with My advisor and he HAD to have known this at the time. An easy Google search tells all and he knowingly put our money there only to benefit his back pocket.</p>
<p>Suzanne</p> 	<p>Since I have less than half of the money on which I had planned to use in retirement, my plans are dramatically altered. I have countless sleepless nights; nauseated (whenever I think about this). I am depressed about losing IRA money saved over 36 years; self-doubt- how could I have trusted My advisor and been so wrong? Financial- half of my retirement savings are gone; The comfortable, safe retirement plan which I tried to build is not my current reality. Budgets and spreadsheets galore. I have to figure out a new plan that will work. I am disgusted with this entire situation.</p>
<p>Florence</p>	<p>There will be no retirement plan for me until I am closer to 70. The Pacific Life account was also supposed to give me Long Term Care and that is now not a possibility. There is no financial well-being. I am stressed over finances. If something were to happen to Larry, I would not be able to pay the mortgage and all the bills on my income alone nor on his social security death benefit income. I do not sleep well without a sleep aid. I work very hard to keep to a tight budget so that Larry does not have to return to work. This added stress has harmed our marriage. This has turned from a retirement of having enough to one of a retirement existence. We are both too old to rebuild finances but can only work to keep from going under. I am always looking for ways to bring in extra cash. Because I cannot</p>

## Exhibit "A"


	<p>afford medical insurance, I have gone without doctor's care for well over two years. I do as much holistic medicine as I can research online myself. Larry needs extensive dental work but we cannot afford the cost. We are living in our house with no flooring or carpets because we cannot afford them at this time. In April of 2018 Larry was diagnosed with a potentially serious bacterial skin infection called Cellulitis. As we could not afford hospital care we went to a clinic where I was instructed how to care for him. I had to monitor the condition, provide medication every 4 hours, all while working 40 hours a week. The clinic Doctor warned us that any advancement of the infection would require a hospital stay. All of this happening while learning about the loss of our retirement money. My advisor told us several times that he liked to help the little guy have the money to retire as much as he liked to help the millionaires. He made us believe that this scheme was the fastest and best way for us to increase our chance of having a great retirement where money was not going to be a problem and we could retire comfortably. This scheme he sold us was also supposed to include Long Term Care for me and now that is no longer a possibility. This was a major selling point and one of the reasons we signed up for this was because of my very vast past medical issues which included preventative cancer treatments (very extensive history in her family of cancer's). We would like My advisor to pay us for using us in his scam to obtain new clients. My advisor would host these fancy dinners at Ruth's Chris Steakhouse and invite newly signed up clients to sit at tables with potential clients or those on the fence. Without being told it was clear that those of us who had already signed up were selected to enjoy this 'free dinner' in order to talk others into investing with him. If that wasn't the case, he would have sat all of those who had already invested together at one table. This event took place before we knew about the FIP scandal and so we nicely returned the favor for the free meal and told those at our table what a great guy my advisor was and how we invested. I hope none of those people signed up but we feel used and we think he should pay us for using our good name in his scheme.</p>
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## Exhibit "A"

Thomas	<p>Our retirement plans are now uncertain. I am still working full time and will continue to do so until we have what we consider sufficient savings to maintain our normal lifestyle. Emotionally this is a very stressful situation. I think of this error in judgement constantly and I believe it affects the way I now view and interact with others. I have become very distrustful toward those I do not know well. My wife Susie and I have been married since 1972 and this period in our lives has not turned out the way we had planned. We should be retired, enjoying life, but I am still working full time trying to save for a secure although uncertain future. I served in the US Navy for 22 years and being in the military can cause some very stressful times, especially during a deployment, however, that is nothing compared to the amount of stress this has caused. During a deployment you can see a light at the end of the tunnel, but so far there is no light shining on this problem. Not knowing when or how this will end up causes me to stress over many small details of daily life that otherwise would cause no concern. I am now in a situation where I have to rely on someone, I have never met to solve this problem. I find it disturbing that the culprits in this, namely my advisor and others at his firm and other such advisors may still be taking advantage of others. We will not be able to have the retirement we wanted.</p>
David	<p>This issue has caused significant emotional and mental stress in our relationship over the past couple of years. My wife was most reticent for me to purchase an IUL policy due to my age. She felt this was a risky move so late in life but my advisor convinced me I would be in good shape in a few years to withdraw money tax free for retirement financial security. We both trusted My advisor after many conversations on how hard we had both worked to save for our future after both of us went through divorces after long marriages. We trusted his financial guidance after many conversations and trusted him to help us determine what we needed. He was well aware of our situation and that we were financially okay, but not overly wealthy by any means. Our financial well-being is now in question and our plans for a happy retirement now have a cloudy future, we have already canceled some future plans for travel and sightseeing. We are both rather upset that we made these recommended poor</p>


## Exhibit "A"

	choices that put our plans for our retirement in jeopardy. The stress has affected my wife's health more than mine, she has been having more health issues and recently been diagnosed with Atrial Fibrillation and severe high blood pressure which increases our financial burden and concern due to the medical issues involved and the already very expensive medication. We will need to reduce spending and eliminate most of our travel plans and large purchases.
Robert 	This is the only time in my life that I have been a victim of fraud. The magnitude of the fraud and the misrepresentation of the investment has angered me and destroyed my trust in professional financial advisors. My initial goal was to switch my traditional IRA into a Roth IRA before my 70th birthday. My advisor fraudulently convinced me the IUL products were a vastly superior product to accomplish the same goal of tax-free income. I no longer have the opportunity to take advantage of the Roth IRA benefits due to my current age.
Frederick	We were looking forward to traveling and enjoying our retirement. After the reality of losing our investment set in, I can say our wellbeing is certainly not good. I have spent many a sleepless night worrying about this and a day does not go by that I think about how this has negatively impacted our lives. After careful planning we thought we had the correct conservative investment program to have a great retirement and to do many of the things we diligently saved and sacrificed for. Unfortunately, we have had to make depressing changes in our lives to deal with this loss of income. This is certainly not how we expected to spend our "Golden Years".
Dennis & Maxine	Physically the biggest impact has been increased stress in our life related to how we handle financial items now and in the future. The biggest impact emotionally is our attitude turning significantly negative towards our advisor whom we had trusted. We had not trusted a third party based on others' experiences and our experience financially 30 plus years ago which was negative. My advisor was the first we had trusted, not sure we can do it again. Concern for the future, is not having a trusted


## Exhibit "A"



	<p>advisor to help us when some of the investment products. The financial impact has been requiring us to change our plans such as; delaying by years both a bathroom remodel &amp; replacing our deck now that the wood is failing, 2 to 5 years, moving dollars out of stock investments to savings to be able to cover the cash requirements for IULs we have purchased (multiple year commitments) while maintaining enough of a cash reserve, moving up our plans to when Dennis will take Social Security from planned late 60's - 70 to now, age 66. My advisor told us FIP was a safe investment. At a minimum he should have been checking up on the investment making sure it was a sound investment on at least a quarterly basis. If he would have been doing this, he would have not recommended any further FIP investments as of early 2017. By that time, there were multiple items on the internet that would have alerted him (or if he did see them, it is much worst).</p>
David	<p>This issue has caused significant emotional and mental stress in our relationship over the past couple of years. My wife was most reticent for me to purchase an IUL policy due to my age. My advisor convinced me I would be in good shape in a few years to withdraw money tax free for retirement financial security. We both trusted My advisor after many conversations on how hard we had both worked to save for our future after both of us went through divorces after long marriages. We trusted his financial guidance after many conversations and trusted him to help us determine what we needed. He was well aware of our situation and that we were financially okay but not overly wealthy by any means. Our financial well-being is now in question and our plans for a happy retirement now have a cloudy future, we have already canceled some future plans for travel and sightseeing. We are both rather upset that we made these recommended poor choices that put our plans for our retirement in jeopardy. The stress has affected my wife's health more than mine, she has been having more health issues and recently been diagnosed with Atrial Fibrillation and severe high blood pressure which increases our financial burden and concern due to the medical issues involved and the already very expensive medication. We will need to reduce</p>

## Exhibit "A"

	<p>spending and eliminate most of our travel plans and large purchases.</p>
Virginia	<p>I have a lot of sleepless nights, crying spells, and anger. I have less funds now for retirement and enjoying life. I have no funds for any level of long-term care.</p>
<p>Vandy</p> 	<p>The loss is 60% of my life saving while I can no longer make it up. This is quite a shock. When I think about this, sometimes my heart is racing, I get sick or dizzy, I can't sleep. My blood pressure went up. My diabetes got worse with high A1c. I was given more medicines. Financially we have to cut everything, but the necessities. It gets me crazy. I feel I have significant memory loss. The loss affects my retirement plan so much. I took the Social Security benefit last year. I did not travel around the US as planned. There would be no visit to my home country Cambodia. There would be no eating out. I am prepared for the worst.</p>
Kelley	<p>This loss has been devastating. I was trying to make the right decisions with this money and invest it intelligently. I think and stress about what has happened daily. My husband and I had plans for this money to help pay for our future children's college as well as grow to help us retire sooner. I feel betrayed and hurt by people I thought were helping me and promised this money was being invested for my benefit. I am so scarred and feel so stupid for trusting these people with my money. I still wish daily that I had never met anyone at this company. My Grandparents worked so hard to leave me the amount they did and I am so upset that this happened. I had planned to retire early, but now will be working until 65+</p>

## Exhibit "A"

<p>Samuel</p> 	<p>This loss has caused us so much emotional stress that my wife and I have both suffered physically. We are on more medication for high blood pressure. We are financially strapped to the point that we cannot live according to what we had planned and had expected to live upon our retirement. We are actually preparing our home to sell it and move to something smaller so that we can be assured of having some money for health issues which are coming on as we get older. We are trying our best to keep believing and having faith in our Lord and Savior to get us through, but it is very discouraging at times that we are having issues come between us. This has been one of the most difficult things we have gone through in 2018 aside from losing our 15-year-old grandson in a car accident on January 6, 2018. This has resulted in a reduction of our total retirement income by 50%</p>

<p>Sara</p> 	<p>I am depressed and it is hard to focus at work because of what I have lost. I was counting on retiring in the next 2 years, but I may have to reconsider that now because of this loss. This loss has changed my lifestyle, and I know that I will not have the funds to accomplish my retirement goals. I am so upset now because of all that has happened, and I will probably have to work much longer than I had planned.</p>
<p>Pam</p> 	<p>I taught for 30 years and saved my money. This is the money I counted on for my retirement, and it is now gone.</p>
<p>Robert</p>	<p>This experience has made me rethink how I place trust in others. Losing this money will mean I am unable to assist my granddaughter with college; will affect monies I had hoped to be able to give my son. I do worry about the significance of mis-placed trust and lost money that had taken years to save. I am upset that the money that would have helped pay for grandchild's, college is lost, and the plans to travel are gone, changing how I planned to enjoy retirement.</p>

<p>Walter</p>	<p>As far as my well-being, I am stressed all the time because of the loss of my retirement that I worked my whole life to be able to retire, and now that is gone. I have become short tempered and very irritable. My wife comments about how bad I have become all the time, and this causes a lot of issues between my wife and me. I'm concerned about even trying to get a job because of being short tempered and irritable all the time. I doubt any supervisor would want me to be an employee with my bad attitude and short temper. I try to control it around my family, but often I just cannot stop myself in time to control my behavior. I was never like this prior to finding out about the loss of my retirement. I was a supervisor and manager at work and everyone always complimented me on how easy going and understanding I was and did not get mad but would work things out calmly. Those days are sadly over, now I just stay at home by myself. I was looking forward to going on trips with my wife and enjoying our retirement together, now that is all gone!! All I can look forward to is my wife continuing to work as long as she can, and if I can get a job, then I can work as long as I can to be able to pay the bills and hope to retire someday in the future again. Physically I have gained a lot of weight because of my bad attitude and irritability due to this situation, and I have started drinking a lot more than I should. I know this is bad for my health. My wife was supposed to retire but at this time we cannot afford her too, so she will need to continue working. So instead of being able to enjoy our retirement years together traveling and visiting family, we stay home.</p>
<p>William</p> 	<p>Due to the significant amount of this investment (\$500,000) there has been a tremendous amount of emotional stress added since April 2018 when this problem came to life. There have been many sleepless nights due to worry. I have had to rethink retirement and have postponed retirement for at least 1 year. I have lost approximately 25 lbs. but weight fluctuates due to stress eating. There have been added marital tension due to my emotional roller coaster and delays in retirement plans. My wife has had to have both knee and hip replacements, and due to additional work extension and emotional stress, I have not been there for her as I needed to be. I have lost all</p>

	<p>confidence in my financial decision-making ability due to this investment decision. In addition, I have to live with the situation that had I left the \$500,000 in the \$401K, it would have increased to well over \$650,000. Due to the significant losses with FIP, I was "forced" to rescind the IUL policy to try to minimize losses which has added more stress due to uncertainty this has created. This has also been a terrible emotional burden and embarrassment when I had to share with our adult children the financial mess I go into. I am good at technical engineering issues but have very limited financial knowledge. For that reason, I have only put money into my 401K until this. Nearing retirement, I was very concerned that I had not done enough financial planning heading into retirement so I put my TRUST in my advisor and his firm. I cannot express the amount of anger, hurt, stress, depression this has put myself, wife and family through.</p>
Jeffrey	<p>This has significantly affected my retirement plan. This was a huge chunk of our retirement nest egg. I would say about 75%. This has been a very emotional toll on our financial well-being. This money constituted a very large sum of our overall retirement nest egg that we have been slowly building for over 20 years and the thought of losing what we have worked so long and hard for is very disheartening. We currently have one daughter in college and the other will be in college soon, so we are financially strapped for the next several years, and will not be able to add additional money to our retirement accounts to replace what we have potentially lost. I basically told my wife that I guess retirement for me is even further down the road or not at all which is very depressing to think about.</p>
Gloria	<p>The IUL policy was purchased intending to reduce taxes during retirement and to fund tuition for my 2 children. I worry, and I didn't believe it at first. How could that happen to one of "best advisors in the business?" But after searching on line I realized that it was true. I have been really angry, using my heavy bag and speed punching bags to get rid of anger and frustration. That is good upper body and cardio exercise and it helps me feel better when I want to hit something. Financially, there isn't that savings to help my daughters thru the last 2 years of college. That is something that I really would still</p>



Exhibit "A"

	like to do. I have applied to teach at 2 universities with not much optimism that I'll get much of a job, given my age. I am actively looking for technical jobs, etc. We are considering applying for loans to help fund tuition. Early on, I resolved to never take out a loan that didn't have real collateral. But now, that resolve won't do me much good.
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Chairman GOOD. Thank you, Mr. Peiffer. Finally, we will recognize Mr. Berkowitz for 5 minutes.

**STATEMENT OF MR. JASON BERKOWITZ, CHIEF LEGAL AND REGULATORY AFFAIRS OFFICER, INSURED RETIREMENT INSTITUTE, WASHINGTON, D.C.**

Mr. BERKOWITZ. Good morning, Chairman Good, Ranking Member DeSaulnier, Chairwoman Foxx, and Ranking Member Scott, and members of the Committee—Subcommittee. My name is Jason Berkowitz, and I am the Chief Legal and Regulatory Affairs Officer for the Insured Retirement Institute.

IRI represents the entire supply chain of the insured retirement industry, including insurers, distributors, asset managers, and solution providers. I would like to begin by thanking Chairwoman Foxx, and many other Subcommittee members for your long-standing commitment to enhancing retirement security for all Americans, without impairing access to valuable products and services.

Thank you for the opportunity to share our views about the DOL's latest fiduciary proposal. Let me start with one very clear statement. I am not here today to oppose a best interest standard. IRI wholeheartedly believes that all consumers should be able to trust that advice they receive from financial professionals is in their best interest.

Our industry is full of good, hard-working financial professionals, who share this perspective. I am here today to oppose the DOL's proposal, which goes far beyond a best interest standard, and would harm those who most need the guidance and assistance of financial professionals.

Retirement savers face many risks as they strive for financial security, including the risk of running out of money. Protected lifetime income products helps savers manage this risk, and professional guidance helps them acquire and use these products appropriately.

Congress recognized this when it enacted the Secure Act and the Secure 2.0 Act, bipartisan laws designed to strengthen our retirement system by expanding access to these valuable products and services. Conversely, the DOL proposal, which is functionally equivalent to the now vacated 2016 fiduciary rule will foster widespread retirement insecurity, just as that predecessor rule did.

Millions of low-and middle-income workers, especially those most impacted by the wealth gap, will find it nearly impossible to access the products and services they need to achieve a secure and dignified retirement. By contrast, the Best Interest Rules adopted by the SEC and 42 states and counting, are working to protect consumers without putting unnecessary roadblocks between consumers and the products and services they need.

IRI supports those measures, which provide regulators with the tools they need to protect retirement savers, and appropriately address the conduct of bad actors. With these rules in place, the DOL's proposal is a solution in search of a problem. The DOL has hypothesized that regulatory gaps exist, and are being exploited to

harm retirement savers, but it has produced no evidence to support that theory.

If bad actors are exploited regulatory gaps to harm retirement savers, those gaps should be addressed through targeted rule-making. A targeted approach is impossible without clear evidence of a problem, so instead, the DOL wants to completely upend the existing regulatory framework.

They have characterized this proposal as a Best Interest Rule, even going so far as to assert that anyone complying with the SEC's regulation best interest should have no problem operating under this proposal. This is simply not true. Under ERISA, the Department can only regulate the conduct of those who trigger fiduciary status, so the proposal would shoe horn nearly all financial professionals into that status.

You may be wondering why is that a problem given our support for a best interest standard? It is a problem because ERISA fiduciaries must act "solely in the interest of participants and beneficiaries, for the exclusive purpose of providing benefits to participants and their beneficiaries."

Merely acting in the client's best interest is not enough to satisfy this standard. As a Federal Appeals Court recognized when it rejected the 2016 Rule, fiduciary status should apply only when there is a special relationship of trust and confidence. DOL has tried to circumvent that decision by asserting that that sort of relationship exists whenever a financial professional makes a recommendation to a retirement saver. We disagree.

A special relationship of trust and confidence cannot spring into existence spontaneously. Rather, it must be intentionally cultivated over time. Pretending otherwise, will deepen the Nation's retirement crisis, and further exacerbate retirement insecurity among your constituents.

Instead, the DOL should recognize the limits of its jurisdiction, and let the SEC and the State Insurance Department do their jobs as Congress intended. This proposal is not fixable. It is not needed, and it must be withdrawn. Thank you, and I look forward to answering your questions.

[The prepared statement of Mr. Berkowitz follows:]

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U.S. House of Representatives  
House Committee on Education and the Workforce  
Subcommittee on Health, Employment, Labor and Pensions

Hearing:  
"Protecting American Savers and Retirees from DOL's Regulatory Overreach"

Testimony for the Record  
of  
Jason Berkowitz  
Chief Legal and Regulatory Affairs Officer



February 15, 2024  
10:15 AM ET  
2175 Rayburn House Office Building

Chairman Good and Ranking Member DeSaulnier, Chairwoman Foxx, and Ranking Member Scott and Members of the United States House of Representatives Committee on Education & the Workforce Subcommittee on Health, Employment, Labor, and Pension, my name is Jason Berkowitz, Chief Legal and Regulatory Affairs Officer of the Insured Retirement Institute (IRI). On behalf of our members, I want to express our appreciation for this opportunity to provide testimony to the Subcommittee regarding the DOL Fiduciary Rule and its implications for retirement savings and access as part of today's hearing.

#### **About IRI**

The Insured Retirement Institute (IRI) is the leading association for the entire supply chain of insured retirement strategies, including life insurers, asset managers, broker-dealers, banks, marketing organizations, law firms, and solution providers. IRI members account for 90 percent of annuity assets in the U.S., including the foremost distributors of protected lifetime income solutions, and are represented by financial professionals serving millions of Americans. IRI champions retirement security for all through leadership in advocacy, awareness, research, and the advancement of digital solutions within a collaborative industry community.

Our members support and advocate for common sense, bipartisan policies to help America's workers and retirees achieve their retirement goals by expanding access to professional financial guidance and lifetime income products within an appropriate and effective consumer protection framework.

#### **Summary of Testimony**

My testimony will address the U.S. Department of Labor's (DOL) proposal titled, "Retirement Security Rule: Definition of an Investment Advice Fiduciary," and the associated proposals to amend certain prohibited transaction exemptions (collectively, the "Proposal"). IRI believes the Proposal must be withdrawn for numerous reasons, including but not limited to the following:

1. The DOL has impermissibly disregarded and exceeded the limitations on its authority under ERISA by seeking to impose ERISA fiduciary status on nearly every type of interaction between a financial professional and a retirement saver. As explained by the federal appeals court that rejected the DOL's 2016 fiduciary rule, ERISA only permits fiduciary status – and the obligation to act "solely" in their clients' interests – to be imposed when there is a special relationship of trust and confidence.
2. The Proposal is functionally equivalent to the now-vacated 2016 rule and, like that rule, will harm millions of low- and middle-income retirement savers – especially those in communities most impacted by the wealth gap – by depriving them of access to the products and services they need to achieve a secure and dignified retirement.
3. The DOL has provided no objective evidence of actual harm to retirement savers that cannot be effectively addressed under current rules. The regulatory framework has significantly evolved in recent years, with the SEC's adoption of Regulation Best Interest and the annuity best interest rules adopted by 42 states and counting. The robust federal and state regulatory framework imposes a tough but fair and workable best-interest standard on the industry that effectively protects retirement savers without depriving them of access to much-needed products and services. Any further rulemaking is redundant and unneeded.

4. The Proposal is preempted, to the extent it would apply to annuities, under the McCarran-Ferguson Act, a 1945 federal law that expressly reserves authority over the business of insurance to the states.
5. The DOL's unprecedented and rushed approach to the rulemaking process for the Proposal violates the letter and spirit of the Administrative Procedure Act.
6. The Proposal is inconsistent and incompatible with bipartisan legislation enacted by Congress in recent years to expand access to retirement savings opportunities and protected lifetime income products. The Proposal will significantly impair the value of the SECURE Act and SECURE 2.0 by depriving retirement savers of access to financial professionals who can help them determine whether and how to most effectively leverage the many valuable changes made by these laws.

For these reasons and many others described in the written comments we submitted to the DOL regarding the Proposal, the DOL should discontinue its efforts to change the definition of fiduciary investment advice and the existing exemptions relied upon by investment advice fiduciaries. Instead, the Department should direct its time and resources to initiatives that will improve retirement security for workers and retirees, such as enforcement of existing rules and implementation of the SECURE Act of 2019 and the SECURE 2.0 Act of 2022.

The remainder of IRI's written testimony for today's hearing consists of the following documents, which we have listed below. These documents more fully explain why IRI believes the DOL should withdraw the Proposal and discontinue this rulemaking project.

1. IRI's January 2, 2024, Comment Letter was submitted to the DOL EBSA regarding the Proposal titled "Retirement Security Rule: Definition of an Investment Advice Fiduciary" and the associated proposals to amend certain prohibited transaction exemptions. – Page 5
  - a. Excerpt from IRI's 2023 Fact Book Chapter 4 – Annuities 101 – Page 67
  - b. IRI's 2023 "The Retirement Saving and Income Handbook: A Basic Guide to Annuity and Non-Annuity Solutions for Accumulating and Preserving Wealth, and Generating Retirement Income" – Page 97
2. IRI's 2023 DOL Fiduciary Rule Proposal: Overview and Analysis of Potential Impact – Page 125
3. IRI's 2023 DOL Fiduciary Rule Proposal: Key Issues of Concern for IRI Members – Page 131
4. Summary of Key Points from Letters Submitted to DOL From Members of Congress – Page 133
  - a. 2015 Letter from 93 House Democrats – Page 138
  - b. 2023 Letter from Rep. Panetta (D-CA) - Page 148
  - c. 2023 Letter from 11 House Republican Members of the Committee on Education and the Workforce – Page 151
  - d. 2023 Letter from 4 House Republican Members of the Committee on Small Business – Page 157
  - e. 2023 Letter from 8 Senate Democrats and Independents – Page 161
  - f. 2023 Letter from 11 Senate Republicans – Page 165
5. Summary of Key Points from Letters Submitted to DOL from State Insurance Regulators – Page 169
  - a. Iowa Insurance Division – Page 172
  - b. North Dakota Insurance Department – Page 183
  - c. National Association of Insurance Commissioners (NAIC) – Page 186
6. NAIC State Legislative Brief: The NAIC Annuity Suitability "Best Interest" Model Regulation – Page 191

7. November 2, 2023: Statement from IRI President and CEO Wayne Chopus: "We Do This Work Proudly, Mr. President." – Page 194
8. November 2023 IRI List: "What They Are Saying About President Biden's DOL Fiduciary Rule Proposal" – Page 196

*Page numbers listed refer to the page in the total document, not necessarily the number listed at the bottom of a page.*



**ATTACHMENT 1**

Insured Retirement Institute  
January 2, 2024 Comment Letter  
Submitted to the DOL EBSA  
Regarding the Proposal Titled  
"Retirement Security Rule: Definition of An Investment Advice Fiduciary"  
and  
The Associated Proposals to Amend Certain Prohibited Transaction Exemptions





**Submitted Through the Federal eRulemaking Portal**

January 2, 2024

Office of Regulations and Interpretations	Office of Exemption Determinations
Employee Benefits Security Administration	Employee Benefits Security Administration
Room N-5655	Suite 400
U.S. Department of Labor	U.S. Department of Labor
200 Constitution Avenue NW	200 Constitution Avenue NW
Washington, D.C. 20210	Washington, D.C. 20210
Attn: Definition of Fiduciary-RIN 1210-AC02	Attn: D-12057, D-12060, and D-12094

Re: Retirement Security Rule: Definition of an Investment Advice Fiduciary  
RIN 1210-AC02

Proposed Amendment to Prohibited Transaction Exemption 2020-02  
Application No. D-12057, RIN 1210-ZA32

Proposed Amendment to Prohibited Transaction Exemption 84-24  
Application No. D-12060, RIN 1210-ZA33

Proposed Amendment to Prohibited Transaction Exemptions 75-1, 77-4, 80-83,  
83-1, and 86-128  
Application No. D-12094, RIN 1210-ZA34

To Whom it May Concern:

On behalf of our members, the Insured Retirement Institute (“IRI”)<sup>1</sup> appreciates the opportunity to provide these written comments to the Employee Benefits Security Administration (“EBSA”) of the U.S. Department of Labor (the “Department”) regarding the proposal titled, Retirement Security Rule: Definition of an Investment Advice Fiduciary, and the associated proposals to amend certain prohibited transaction exemptions (collectively, the “Proposal”).

***For the reasons presented below, IRI urges the Department to withdraw the Proposal and to discontinue this rulemaking project unless and until there is objective data and evidence of actual harm to retirement savers that cannot be effectively addressed under current rules.***

<sup>1</sup>The Insured Retirement Institute (IRI) is the leading association for the entire supply chain of insured retirement strategies, including life insurers, asset managers, broker-dealers, banks, marketing organizations, law firms, and solution providers. IRI members account for 90 percent of annuity assets in the U.S., include the foremost distributors of protected lifetime income solutions, and are represented by financial professionals serving millions of Americans. IRI champions retirement security for all through leadership in advocacy, awareness, research, and the advancement of digital solutions within a collaborative industry community.

From the outset, we want to be clear that we are not requesting, recommending, or proposing modifications to any of the components of the Proposal.<sup>2</sup> We do not believe the Proposal can or should be “fixed,” and nothing in this letter should be read to suggest or imply that IRI would support a modified version of the Proposal. Instead, our comments are intended to explain the myriad reasons why the Department should withdraw the Proposal and discontinue this regulatory project.

Rules that deprive retirement savers of access to protected lifetime income products and the professional guidance they need to knowledgeably acquire and use those products run counter to the best interests of American workers. There is extensive evidence that the regulatory package adopted by the Department in 2016 (the “2016 Rule”)<sup>3</sup> and vacated by the Fifth Circuit Court of Appeals in 2018 (the “Chamber Decision”)<sup>4</sup> resulted in significant harm to retirement savers<sup>5</sup> and that the adoption of similar rules will have the same result, if not worse – especially for lower- and middle-income savers and underserved communities.<sup>6</sup> IRI’s opposition to the

<sup>2</sup> The Proposal is comprised of four components: (i) Retirement Security Rule: Definition of an Investment Advice Fiduciary (RIN 1210-AC02) (the “Fiduciary Definition Proposal”); (ii) Proposed Amendment to Prohibited Transaction Exemption 2020-02 (Application No. D–12057, RIN 1210-ZA32) (the “2020-02 Proposal”); (iii) Proposed Amendment to Prohibited Transaction Exemption 84-24 (Application No. D–12060, RIN 1210-ZA33) (the “84-24 Proposal”); and (iv) Proposed Amendment to Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, and 86-128 (Application No. D–12094, RIN 1210-ZA34) (the “Other PTEs Proposal” and together with the 2020-02 Proposal and the 84-24 Proposal, the “PTE Proposals”). References to the “Proposal” in this letter are intended to refer to the Fiduciary Definition Proposal and the PTE Proposals collectively.

<sup>3</sup> The 2016 Rule was comprised of: (i) amendments to the definition of “investment advice fiduciary” under the *Employee Retirement Income Security Act of 1974*, Pub. L. No. 93-406, 88 Stat. 829, codified as amended at 29 U.S.C. § 1001 et seq (“ERISA”), and the *Internal Revenue Code*, 26 U.S.C. § 4975 (the “Tax Code”), (ii) amendments to six existing administrative exemptions from the prohibited transaction rules imposed under ERISA and the Tax Code (“PTEs”); and (iii) two new PTEs. See 81 FR 20946, 81 FR 21002, 81 FR 21089, 81 FR 21139, 81 FR 21147, 81 FR 21181, and 81 FR 21208.

<sup>4</sup> *Chamber of Com. of U.S. of Am. v. U.S. Dept. of Lab.*, 885 F.3d 360 (5th Cir. 2018) (“Chamber Decision”).

<sup>5</sup> U.S. Chamber of Commerce, *The Data Is In: The Fiduciary Rule will Harm Small Retirement Savers* (Spring 2017), [https://www.uschamber.com/assets/archived/images/ccmc\\_fiduciaryrule\\_harms\\_smallbusiness.pdf](https://www.uschamber.com/assets/archived/images/ccmc_fiduciaryrule_harms_smallbusiness.pdf) (a compilation of survey statistics and other data showing that the 2016 Rule would limit or restrict investment products for some 11 million households and affect up to 7 million IRA owners, with the greatest impact on retirement savers with lower account balances) (the “Chamber Report”); Deloitte, *The DOL Fiduciary Rule: A study on how financial institutions have responded and the resulting impacts on retirement investors* (August 9, 2017), <https://www.sifma.org/wp-content/uploads/2017/08/Deloitte-White-Paper-on-the-DOL-Fiduciary-Rule-August-2017.pdf> (a study of institutions representing 43 percent of U.S. financial advisers and 27 percent of the retirement savings assets in the market, finding that 53 percent of firms limited or eliminated access to brokerage advice for smaller retirement accounts in response to the 2016 Rule, impacting an estimated 10.2 million accounts and \$900 billion in savings) (the “Deloitte Report”).

<sup>6</sup> Hispanic Leadership Fund, *Analysis of the Effects of the 2016 Department of Labor Fiduciary Regulation on Retirement Savings and Estimate of the Effects of Reinstatement* (November 8, 2021), [https://hispanicleadershipfund.org/wp-content/uploads/2021/11/FINAL\\_HLF-Quantria\\_FiduciaryRule\\_08Nov21.pdf](https://hispanicleadershipfund.org/wp-content/uploads/2021/11/FINAL_HLF-Quantria_FiduciaryRule_08Nov21.pdf) (finding that reinstatement of the 2016 Rule, or adoption of substantially similar rules, would reduce the accumulated retirement savings of 2.7 million individuals with incomes below

Proposal and our detailed comments on the Proposal in this letter are driven by a desire to avoid repeating this extremely adverse outcome for retirement savers. IRI and our members have a significant interest in this rulemaking effort, and this letter reflects our best effort to present the perspectives of those members. Unfortunately, the brief comment period provided by the Department was profoundly inadequate for stakeholders to effectively review, digest, analyze, and formulate comprehensive and substantive feedback on this extremely consequential and complex regulatory package. We will continue to engage in a robust dialogue with our members regarding the Proposal in the coming weeks, and we reserve the right to submit supplemental comments to the Department as necessary and appropriate.

\* \* \* \* \*

#### **Executive Summary**

1. **America's retirement income challenge and the need for retirement income products** (see pp. 6-9)
  - a. Managing longevity risk is key to solving America's retirement crisis.
  - b. Retirement savers need access to products that can provide a source of protected retirement income.
  - c. Retirement savers who work with financial professionals are better prepared for retirement than those who do not.
  - d. The Department fundamentally misunderstands annuity products.
2. **IRI's core principles for the regulation of financial professionals' conduct** (see pp. 10-14)
  - a. Financial professionals should be – and already are – held to a best interest standard when recommending insurance and/or investment products to retirement savers.
  - b. Retirement savers are entitled to freedom of access to retirement income protection.
  - c. The availability of protected retirement income through IRA rollovers meets a critical need.
  - d. Rules for annuity products must be specifically crafted to account for their protected lifetime income features.
  - e. Competitive annuity markets serve the interests of retirement savers.
  - f. Retirement savers have a right to choose their preferred source of retirement advice.

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\$100,000 by approximately \$140 billion over 10 years, and would increase the wealth gap for Black and Hispanic Americans by roughly 20 percent) (the "[HLF Report](#)").

- g. Congress' public policy position in favor of access to and utilization of protected lifetime income products should be advanced.

3. **General comments on the Proposal** (see pp. 14-24)

- a. The Proposal is a solution in search of a problem.
- b. The Proposal has been inaccurately characterized as a best interest rule but would actually hold financial professionals to a far more stringent "sole interest" standard.
- c. Treating rollover and post-rollover recommendations as fiduciary investment advice under Title I of ERISA is impermissible and unnecessary.
- d. Adopting the Proposal will harm low- and middle-income retirement savers and underserved communities.
- e. The Proposal disregards the robust and effective state insurance regulatory framework and reflects a fundamental misunderstanding of annuities.
- f. The Department should deploy its limited resources to advance regulatory initiatives that will enhance retirement security.

4. **Comments on the Department's jurisdiction and legal authority to adopt the Proposal** (see pp. 24-30)

- a. The Department lacks jurisdiction to impose uniform standards for the provision of investment advice to all retirement savers.
- b. The application of the Proposal to annuities is preempted under the McCarran-Ferguson Act.
- c. The Proposal and any final rule adopted prior to Senate confirmation of a permanent Secretary of Labor may be unconstitutional and invalid.
- d. The components of the Proposal are inextricably linked and cannot be severed.

5. **Comments on the Department's rulemaking process with respect to the Proposal** (see pp. 30-32)

- a. The Department's rulemaking process with respect to the Proposal violates the letter and spirit of the Administrative Procedure Act.
- b. The Department failed to adequately consider less disruptive alternatives to the approaches taken in the Proposal.

6. **Comments on the Fiduciary Definition Proposal** (see pp. 32-38)

- a. The Fiduciary Definition Proposal fails to establish appropriate parameters for the imposition of fiduciary status under Title I of ERISA.

- b. The Fiduciary Definition Proposal would effectively prohibit many common activities that benefit retirement savers.
  - c. The Fiduciary Definition Proposal includes overbroad and problematic definitions of key terms and concepts.
  - d. The omission of clear and appropriate carve-outs in the Fiduciary Definition Proposal will deprive Title I Plan sponsors and participants of access to essential services and information.
- 7. **Comments on Both the 84-24 Proposal and the 2020-02 Proposal** (see pp. 38-45)
  - a. The 84-24 Proposal and the 2020-02 Proposal are not administratively feasible.
  - b. The 84-24 Proposal and the 2020-02 Proposal are not in the interests of plans and their participants and beneficiaries.
- 8. **Additional comments on the 84-24 Proposal** (see pp. 45-52)
  - a. The strict and narrow limitations on eligibility for exemptive relief under the 84-24 Proposal are arbitrary and capricious.
  - b. The 84-24 Proposal would not achieve the Department's goal of a level playing field.
  - c. PTE 84-24 would no longer be administratively feasible with the overly burdensome and unworkable conditions contemplated by the 84-24 Proposal.
- 9. **Additional comments on the 2020-02 Proposal** (see pp. 52-53)
  - a. The Department failed to appropriately consider reasonable alternatives to the approach taken in the 2020-02 Proposal.
  - b. The 2020-02 Proposal would render PTE 2020-02 unworkable for insurers in the institutional market.
- 10. **Comments on the Other PTEs Proposal** (see pp. 53-55)
  - a. The Other PTEs Proposal is impermissible under ERISA § 408(a).
  - b. The Other PTEs Proposal is arbitrary and capricious.
- 11. **Comment on the timeline for effectiveness and implementation** (see pp. 55-56)
  - a. The proposed effective date is arbitrary and capricious, and impermissible under ERISA §408(a).
- 12. **Comments on the Department's regulatory impact analysis** (see pp. 56-60)
  - a. The Department's regulatory impact analysis relies on stale and inaccurate data.

- b. The Department's regulatory impact analysis is littered with wholly unreasonable and inaccurate assumptions.
- c. The Department's regulatory impact analysis ignores critical factors and information.

\* \* \* \* \*

**IRI's Comments on the Proposal**

**I. The Context for IRI's Comments on the Proposal: America's Retirement Income Challenge and the Need for Retirement Income Products<sup>7</sup>**

With unprecedented growth in the number of retired Americans,<sup>8</sup> the nation's retirement system is at a crossroads, and policymakers in Washington have taken notice. Congress enacted two comprehensive retirement bills over the past several years<sup>9</sup> in an effort to make protected lifetime income products more widely available. The Proposal would undermine these efforts to expand access to retirement savings, undoing advances made through bipartisan action.

**A. Managing longevity risk is key to solving America's retirement crisis.**

Americans today are at risk of outliving their assets. This longevity risk has never been greater. The rapid and continuing shift away from defined benefit plan designs in favor of a defined contribution plan model, coupled with increasing life expectancies and rising health care costs, are combining to exert significant pressures on individual retirement savers – particularly middle-income Americans – seeking a financially secure retirement. These challenges did not exist for earlier generations.

<sup>7</sup> The views, concerns, and principles presented in Sections I and II of this letter are very similar to those reflected in our written comment letter on the Department's 2015 proposal titled, "Definition of the Term 'Fiduciary'; Conflict of Interest Rule – Retirement Investment Advice." We reiterate these views and concerns here, updated with more recent data and information, to demonstrate that, while the regulatory framework governing the provision of advice to retirement savers has significantly evolved since 2015, the challenges facing retirement savers have, unfortunately, changed very little.

<sup>8</sup> See, e.g., Anne Stanley, *Baby Boomers Are Hitting Peak 65. What It Means For Retirement Planning*, Investor's Business Daily (August 10, 2023), <https://www.investors.com/etfs-and-funds/retirement/retirement-planning-reckoning-arrives-as-baby-boomer-generation-hits-peak-65/>. ("According to the U.S. Census Bureau's population projections, about 12,000 people will turn 65 every day in the next year. That's about 4.4 million in 2024. And by 2030, all boomers — those born from 1946 through 1964 — will be 65 or older. This means one in every five Americans will have reached the traditional retirement age.").

<sup>9</sup> *Setting Every Community Up for Retirement Enhancement Act of 2019*, Pub.L. No. 116–94 (2019) (the "SECURE Act"); *SECURE 2.0 Act of 2022*, Division T of the Consolidated Appropriations Act, 2023, Pub. L. No. 117–328 (2022) ("SECURE 2.0").

At their peak in 1985, over 114,000 private-sector defined benefit plans were in place,<sup>10</sup> but by 2022, less than 25,000 of these defined benefit plans remained.<sup>11</sup> Only 15 percent of private-sector workers had access to a defined benefit plan in 2022.<sup>12</sup>

Individuals today are living longer than in past generations. The population of older Americans continues to increase at a faster rate than the overall population. For example, between 2010 and 2020, the 65-plus population grew by 38.6 percent, from 40.3 million to 55.8 million. This was the fastest growth rate of any decade since 1880 to 1890 (40.3 percent) and more than twice as fast as the prior decade (15.1 percent from 2000 to 2010).<sup>13</sup> Moreover, according to the Society of Actuaries, a married couple age 65 has more than a 65 percent chance of one or both spouses living to age 90 and a 35 percent chance of one spouse living to age 95.<sup>14</sup>

As a result of these trends, over 40 percent of U.S. households where the head of the household is between 35 and 64, inclusive, are projected to run short of money in retirement. Further, having adequate retirement assets is a top concern, with 44 percent of these workers believing they will not have sufficient income to last throughout retirement and will not be able to remain independent throughout retirement.<sup>15</sup> This reality underscores the critical importance of a regulatory environment that enables retirement savers to access products that meet their need to protect against longevity risk.

**B. Retirement Savers Need Access to Products that Can Provide a Source of Protected Retirement Income.**

Outside of Social Security and private pensions, annuities are the sole source of protected lifetime income during retirement. Only insurance companies and their distribution partners can provide these products. With proper planning and use, annuities provide retirees with a source of protected lifetime income and the security of knowing they will not outlive their savings.

Nine out of 10 baby boomers believe it is important for income generated from their savings to be protected for life, highlighting the importance of annuities as an integral part of retirement planning for the 85 percent of workers without access to a defined benefit plan.<sup>16</sup> Owning an annuity is highly correlated with confidence in retirement, as 85 percent of baby boomers who

<sup>10</sup> Pension Benefit Guaranty Corporation, *Trends in Defined Benefit Pension Plans*.

<sup>11</sup> Pension Benefit Guaranty Corporation, *Pension Benefit Guaranty Corporation Annual Report 2022*.

<sup>12</sup> Bureau of Labor Statistics, *National Compensation Survey: Employee Benefits in the United States, March 2022*.

<sup>13</sup> United State Census Bureau, *The Older Population 2020*.

<sup>14</sup> Society of Actuaries, *SOA 2012 Individual Annuitant Mortality tables*.

<sup>15</sup> Insured Retirement Institute, *Retirement Readiness Among Older Workers 2021*.

<sup>16</sup> *Id.*

own annuities believe their retirement savings will last until at least the age of 75, versus only 46 percent of baby boomers who do not own annuities.<sup>17</sup> And baby boomers who own annuities are nearly three times more likely than non-annuity owners to believe their retirement savings will last their entire lives.<sup>18</sup>

Annuities appeal to Americans of all income levels and retirement savers who do not have access to other retirement savings vehicles. In fact, annuity owners are overwhelmingly middle-income earners. Seven in 10 annuity owners have annual household incomes of less than \$100,000. Unfortunately, as we will explain in greater detail below, the Proposal would unreasonably limit retirement savers' access to annuity products through Title I Plans<sup>19</sup> and individual retirement accounts ("IRAs") at precisely the point in time when access to annuities is most vitally needed.

C. Retirement Savers Who Work with Financial Professionals are Better Prepared for Retirement than Those Who Do Not.

Financial professionals play a critical role in helping retirement savers understand the wide variety of annuity products available in the market and how best to utilize them to prepare for retirement. Working with a financial professional has a positive influence on retirement planning behaviors, including increased usage of tax-advantaged savings vehicles, improved asset allocation, greater portfolio diversification, and less-speculative investing. Research shows that a financial professional can add approximately 5.12 percent to investment returns through the combination of active portfolio rebalancing, behavioral coaching, customized experience and family wealth planning, and tax-smart planning and investing.<sup>20</sup>

The services performed by financial professionals also translate into greater financial confidence, and greater confidence in retirement preparedness.<sup>21</sup> Baby boomers who work

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<sup>17</sup> *Id.*

<sup>18</sup> Insured Retirement Institute, *Boomer Expectations for Retirement 2019*.

<sup>19</sup> As used in this letter, the term "Title I Plans" refers to employee benefit plans described in ERISA §3(3), codified at 29 U.S.C. §1002(3).

<sup>20</sup> Russell Investments, *2023 Value of an Advisor* (May 9, 2023);

[https://russellinvestments.com/Publications/US/Document/Value\\_of\\_an\\_Advisor\\_Study.pdf](https://russellinvestments.com/Publications/US/Document/Value_of_an_Advisor_Study.pdf).

<sup>21</sup> See, e.g., Matthew Greenwald, PhD, Greenwald Research, *The Importance of Access to Financial Guidance to Moderate Income Retirement Savers* (May 18, 2022), [https://www.acli.com/-/media/acli/public/files/pdfs-public-site/public-newsroom/051822\\_greenwald\\_aclisurveymoderateincomeretirementsrsvrsresentation.pdf](https://www.acli.com/-/media/acli/public/files/pdfs-public-site/public-newsroom/051822_greenwald_aclisurveymoderateincomeretirementsrsvrsresentation.pdf) (finding that a majority of moderate-income savers who are in or near retirement are concerned that a fiduciary-only regulation would keep them from the professional financial guidance they want and need, especially during difficult economic times, with 85 percent believing they have at least a somewhat great need for financial guidance from a professional, 81 percent feeling the guidance they receive helps them feel reassured during difficult economic times, and 97 percent of savers without a financial professional believe it would be important to work with one to feel reassured through difficult economic times and during times of high inflation.)



with financial professionals are two to three times more likely to believe they are doing an effective job preparing for retirement, and that their income will last throughout retirement.<sup>22</sup>

It is also significant to note the particular benefits of retirement planning advice for women. Women who work with a financial professional are much more likely to be confident in their outlook on retirement. Forty percent of women who work with a financial professional say they feel very prepared for retirement, compared with 27 percent of women who do not work with a financial professional.<sup>23</sup> Women are also statistically more likely to live long lives, highlighting the importance of lifetime income from sources like Social Security, pensions, and annuities. In 2021, there were 89,739 centenarians in the U.S., 85 percent of whom were women.<sup>24</sup>

#### D. The Department Fundamentally Misunderstands Annuity Products.

The Proposal and related public statements by senior Department officials suggest a fundamental misunderstanding of annuity products. We have attached two IRI publications to this letter to help the Department better understand annuities and the implications of the Proposal in the annuity context.

First, IRI publishes an annual Retirement Fact Book,<sup>25</sup> a guide to concepts, solutions, trends, and data in the retirement income industry. The Fact Book provides detailed information on the features of annuities, illustrating the wide variety of benefits that a retirement saver could obtain from an annuity, and is known as a reliable source in the industry for annuity information and retirement topics. Chapter 4 of the Fact Book, which provides a primer on annuity products, is attached as Appendix A to this letter.

In 2023, IRI published the first edition of The IRI Retirement Saving and Income Handbook,<sup>26</sup> a basic guide to commonly available annuities and non-annuity alternatives. This publication provides basic information about the structure, benefits, and limitations of each solution, combined with visual representations of the mechanics of each solution and a robust glossary of key terminology. The Handbook is attached as Appendix B to this letter.

We respectfully encourage the Department to review these resources to better understand annuity products, how they work, how they are sold, and how they differ from non-insurance securities products. This information will help the Department better understand why and how the Proposal will impair the ability of retirement savers to access these valuable products.

<sup>22</sup> Insured Retirement Institute, *Boomer Expectations for Retirement 2019*.

<sup>23</sup> LIMRA, *Impact of Financial Professionals on Retirement Security*.

<sup>24</sup> Boston University School of Medicine, *New England Centenarian Study*.

<sup>25</sup> Insured Retirement Institute, *2023 Retirement Fact Book*.

<sup>26</sup> Insured Retirement Institute, *Retirement Saving and Income Handbook* (2023).

**II. IRI's Core Principles for the Regulation of Financial Professionals' Conduct**

The following core principles have guided IRI's assessment of and comments on the Proposal:

**A. Financial Professionals Should be – And Already Are – Held to a Best Interest Standard When Recommending Insurance and/or Investment Products to Retirement Savers.**

IRI has long supported the application of a best interest standard to firms and financial professionals who provide advice or recommendations about insurance and/or investment products to retirement savers, and we believe the vast majority of firms and financial professionals already act in the best interest of their clients.

While the Proposal has been presented to the public as a “best interest” proposal, this is not the case. In fact, as we will discuss further below, Title I of ERISA requires fiduciaries to act “solely” in the interest of the Title I Plan and its participants.<sup>27</sup> As explained in the Chamber Decision, this more stringent and restrictive standard is appropriate only in circumstances involving a special relationship of trust and confidence. However, this creates a significant challenge for the Department in light of the binary nature of ERISA.

Under ERISA, firms and financial professionals are either fiduciaries whose conduct can be regulated by the Department or non-fiduciaries whose conduct falls outside the Department's jurisdiction. There is no third option. ERISA does not provide a mechanism or pathway for the Department to regulate the conduct of firms and financial professionals that have not triggered fiduciary status, nor does it allow the Department to hold such firms and financial professionals

<sup>27</sup> See, e.g., Bennett Aikin, *What's the difference between “sole” interests and “best” interests?* (May 13, 2015), <https://www.fi360.com/blog/post/whats-the-difference-between-sole-interests-and-best-interests> (outlining the differences between a “sole interest” standard and a “best interest” standard as follows:

“The sole interest standard is the more rigid standard, requiring that conflicts of interest in a fiduciary relationship be avoided entirely. Strictly speaking, a sole interest standard forbids even mutually beneficial transactions or compensation for the advisor. Just the opportunity for impropriety is enough to violate this standard, even if no actual harm occurs. Because of the strict interpretation of a sole interest standard, prohibited transaction exemptions are put into effect to allow for even a minimum of commerce to occur within the confines of the client-advisor relationship.

“A sole interest standard exists because of the highly vulnerable position investors and beneficiaries are put into when someone else has control of their assets. It is deeply embedded in trust law, which is the foundation upon which ERISA is built.

“A best interest standard is the more flexible standard. It allows for the fact that sometimes beneficiaries stand to gain the greatest benefit when the fiduciary can also benefit. The most obvious example of this is compensation. If compensation for advisors didn't exist, professional advice would not exist either and disinterested, expert advice would be exceedingly difficult to come by.

“The upside of a best interest standard vs. a sole interest standard is that it incentivizes quality of services and allows for such benefits as economy of scale. The downside is that it is more open to interpretation and ripe for abuse if not carefully monitored.”)

to a best interest standard rather than the more stringent “sole interest” standard once fiduciary status has been triggered.

While the Department has adopted PTE 2020-02,<sup>28</sup> which requires firms and financial professionals to act in their clients’ best interest, the overarching “sole interest” standard still applies. Compliance with the conditions of PTE 2020-02 does not relieve a fiduciary of the “sole interest” obligation, nor is such compliance, in and of itself, sufficient to satisfy the “sole interest” standard.

Given these constraints, the Department desires to expand the reach of fiduciary status under Title I of ERISA. The Department sees this as a choice between ensuring that the conduct of financial professionals is regulated – even if such conduct would be needlessly overregulated in many instances – or allowing such conduct to be left unregulated. Fortunately, however, the broader regulatory framework governing the financial services industry is far more flexible and adaptable than ERISA.

The U.S. Securities and Exchange Commission (“SEC”) and state insurance regulators operate under statutory regimes that allow for the establishment of robust best interest standards that protect retirement savers without the unnecessary and problematic restraints inherent in the “sole interest” standard imposed on ERISA fiduciaries. Historically, the SEC and state insurance regulators required financial professionals subject to their jurisdiction to satisfy a suitability standard when making individualized recommendations to their clients. In recent years, however, the overall regulatory framework governing the conduct of financial professionals has evolved. Nearly all firms and financial professionals are now held to a best interest standard by regulators with the expertise needed to craft rules that make sense for the industries to which they apply:

- The SEC adopted Regulation Best Interest (“Reg BI”),<sup>29</sup> which requires firms and financial professionals to act in their clients’ best interest when providing advice or recommendations regarding securities.
- The National Association of Insurance Commissioners (“NAIC”) adopted amendments to its model regulation on annuity sales practices (the “NAIC Model”),<sup>30</sup> which requires

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<sup>28</sup> 85 FR 82798.

<sup>29</sup> 17 C.F.R. § 240.15I-1 (2019).

<sup>30</sup> *NAIC Suitability in Annuity Transactions Model Regulation (#275)* (While the official name of the NAIC Model refers to a suitability standard, the 2020 version replaced the suitability standard imposed under prior versions with a best interest standard that aligns with the standard established under Reg BI. The NAIC intentionally decided not to change the official name of the NAIC Model in order to avoid any uncertainty with respect to the requirements of §989J of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”). Under §989J of the Dodd-Frank Act, certain annuities are treated as exempt from the Securities Act of 1933 if, among other things, the NAIC Model (or a successor regulation that meets or exceeds the requirements of the

firms and financial professionals to act in their clients' best interest when providing advice or recommendations regarding annuities. To date, 41 states have adopted the NAIC Model, and the remaining states are expected to do so by the end of 2024.

Collectively, these rules establish a robust framework that imposes tough but fair and workable responsibilities on the industry to effectively protect retirement savers. Further rulemaking is not needed at this time.

**B. Retirement Savers are Entitled to Freedom of Access to Retirement Income Protection.**

It is in the best interests of American workers to have the freedom to shop the financial marketplace for annuity products as a source of protected retirement income. The Proposal would severely constrain individual access to annuity products based on the assumption that individual workers are too uninformed to look out for their own interests. IRI disagrees with the premise that all retirement savers should be prejudged as incapable of looking after their own affairs and that existing regulations do not appropriately require financial professionals to act in the best interest of their clients.

**C. The Availability of Protected Retirement Income through IRA Rollovers Meets a Critical Need.**

As a result of dramatic declines in defined benefit plan coverage, coupled with the fact that very few defined contribution plans provide lifetime income forms of distribution, IRI believes individual annuity purchases through IRAs are, on a de facto basis, the primary means, other than Social Security, through which retirees procure protected retirement income. The Proposal will effectively cut off access to protected income products for most Americans when such access is most urgently needed.

**D. Rules for Annuity Products Must be Specifically Crafted to Account for their Protected Lifetime Income Features.**

Annuity products, by virtue of the protected lifetime income and other guarantees they provide, are uniquely suited to provide the financial safety and security many retirees want and need. The Proposal fails to account for the benefits and costs associated with these guarantees. In particular, the levelized distribution compensation structures that appear to be compelled by the 84-24 Proposal and the 2020-02 Proposal are incompatible with well-functioning individual annuity product distribution models and would curtail the availability of those products.

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version that was in effect when Congress enacted the Dodd-Frank Act) has been adopted by the state in which the annuity is issued or by the state of domicile of the insurance company that issues the annuity.)

E. Competitive Annuity Markets Serve the Interests of Retirement Savers.

A competitive product marketplace is in the best interests of retirement savers. Marketplace competition between and among manufacturers and other investment providers, and between and among affiliated and unaffiliated distributors, fosters innovations and efficiencies that advance the interests of retirement savers. The Proposal would stifle product innovation and price competition by superimposing a “value of services” compensation model that ignores the intrinsic value of insurance guarantees of safety and security.

F. Retirement Savers Have a Right to Choose their Preferred Source of Retirement Advice.

Retirement savers should be free from regulatory interference when selecting a financial professional. Regulators should establish appropriate guardrails to protect retirement savers against bad actors, but should not preclude retirement savers from exercising their own judgment when making such an important and highly personal decision. Some retirement savers may prefer to work with commission-based financial professionals while others may prefer the fee-based model. Some may find value in working with a financial professional who can offer products from a wide range of issuers while others may place more value on the in-depth knowledge and expertise that comes with a more limited product shelf.

The current regulatory framework effectively protects retirement savers without substituting the judgment of regulators for the preferences and priorities of retirement savers. This approach is working, as evidenced by the fact that 85 percent of baby boomers feel better prepared for retirement as a result of their financial professional’s help.<sup>31</sup> The Proposal would deprive many retirement savers of the right to work with their preferred financial professional based on the Department’s opinions about different business models and compensation practices.

G. Congress’ Public Policy Position in Favor of Access to and Utilization of Protected Lifetime Income Products Should be Advanced.

IRI enthusiastically supports the recent bipartisan efforts by Congress to facilitate retirement savers’ access to and use of protected lifetime income products. The SECURE Act and SECURE 2.0 included numerous provisions designed to make it easier for retirement savers to access and use annuities and other protected lifetime income products. For example, the SECURE Act established a new and improved safe harbor to guide plan fiduciaries when selecting lifetime income options for their plans,<sup>32</sup> a new requirement that participant benefit statements

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<sup>31</sup> Insured Retirement Institute, *Boomer Expectations for Retirement 2018*.

<sup>32</sup> SECURE Act §204.

illustrate participants' total accrued benefits in the form of a "lifetime income stream,"<sup>33</sup> and rule changes intended to facilitate portability of lifetime income products held in plans.<sup>34</sup> Similarly, SECURE 2.0 updated the rules governing qualifying longevity annuity contracts ("QLACs") to enable retirement savers to allocate higher amounts to QLAC products<sup>35</sup> and eliminated tax penalties for partial annuitization that have served as a disincentive to the use of protected lifetime income products.<sup>36</sup>

These and many other changes made in these two major retirement reform statutes have been widely hailed as positive changes that will help more Americans prepare for a secure and dignified retirement. Unfortunately, the Proposal will significantly impair the value of the SECURE Act and SECURE 2.0 because, as we explain below, it will deprive countless retirement savers of access to financial professionals who can help them determine whether and how to most effectively leverage the many valuable changes made by these laws.

### III. General Comments on the Proposal

Federal courts have defined "arbitrary and capricious conduct" as "willful and unreasonable action without consideration or regard for the facts and circumstances."<sup>37</sup> In our view, the Proposal would clearly be considered arbitrary and capricious under this standard. As explained further below, the Proposal disregards the fact that there is no evidence that existing rules are not working to effectively protect retirement savers, while also ignoring extensive evidence that the Proposal will harm many retirement savers and impose significant costs, burdens, and risks on the industry.

#### A. The Proposal is a Solution in Search of a Problem.

As noted above, IRI and our members have long supported efforts to ensure that financial professionals are held to a meaningful and workable best interest standard when providing personalized investment advice to retirement savers. We also recognize and appreciate the important roles played by the Department, the SEC, and state insurance regulators in ensuring that the consumers they are charged with protecting are covered by a best interest standard. This is why we supported the adoption and implementation of PTE 2020-02, Reg BI, and the NAIC Model.<sup>38</sup>

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<sup>33</sup> SECURE Act §203.

<sup>34</sup> SECURE Act §109.

<sup>35</sup> SECURE 2.0 §202.

<sup>36</sup> SECURE 2.0 §204.

<sup>37</sup> *Boothe v. Roofing Supply, Inc. Of Monroe*, 893 So. 2d 123 (La. Ct. App. 2005).

<sup>38</sup> IRI's expression of support for PTE 2020-02, Reg BI, and the NAIC Model should not be misunderstood as complete agreement with the entirety of each of those rules. In each case, IRI expressed concerns during the

We cannot, however, support the Proposal, which reflects the Department's continued attempts to improperly expand its jurisdiction and would make it harder for financial professionals to receive fair compensation for the hard work and effort they make to connect retirement savers with products that can help them achieve their financial goals.

PTE 2020-02, Reg BI, and the NAIC Model have been in place for a relatively brief time. The vast majority of firms and financial professionals have invested extensive time, money, and resources in good faith efforts to comply with the letter and spirit of these regulations. Using real-world experience, firms continually assess the effectiveness of their compliance efforts and refine and enhance their programs as needed. During these early stages, regulatory guidance and support can significantly enhance the ability of firms to satisfy applicable requirements and the expectations of regulators.

Similarly, pursuing enforcement actions against bad actors who intentionally violate the existing rules can provide regulators with real-world evidence as to the effectiveness of those rules. To state the obvious, the true test of the effectiveness of laws and rules is not whether they fully eliminate or prevent misdeeds by bad actors (which is impossible) but rather to ensure that regulators have the tools they need to appropriately remedy the harm suffered by victims of bad actors, to penalize bad actors, and to impair the ability of bad actors to inflict similar harm on other victims. The Proposal includes no evidence that the ability of the Department or other regulators to protect retirement savers against bad actors has been inhibited by limitations in the current regulatory framework. To the extent that regulators actually encounter such barriers to the achievement of these important goals based on gaps or flaws in their regulations, rulemaking can and should be pursued to eliminate such gaps or flaws.

In the absence of such real-world experiences, as is the case now, the continued pursuit of fundamental changes to the regulatory framework, such as those contemplated by the Proposal, is premature and less likely to result in greater protection for retirement savers. Changing the rules, yet again, will only continue to delay and interfere with the ability of the industry and regulators to effectively implement and enforce the already robust and effective best interest standards.

B. The Proposal Has Been Inaccurately Characterized as a Best Interest Rule but Would Actually Hold Financial Professionals to a Far More Stringent "Sole Interest" Standard.

In the preamble to the Fiduciary Definition Proposal, the Department notes that, "[i]nvestor confusion is exacerbated by different regulatory regimes referencing a "best interest standard"

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rulemaking process that were not fully addressed in the final rules and reserves the right to seek guidance and further rulemaking in the future to address any or all our remaining concerns.

while defining what that means and the protections that entails differently.”<sup>39</sup> This statement, while presumably intended to support the Proposal, actually reveals one of the fundamental flaws in the Proposal – the improper and inaccurate conflation of the best interest standard established in Reg BI and the NAIC Model with the “sole interest” standard applicable to ERISA fiduciaries.

The SEC recognized that many retirement savers do not want or need the ongoing services of a fiduciary investment adviser and should not be forced to pay for such services. As a result, the SEC took great care in developing Reg BI to preserve the transactional broker-dealer business model rather than forcing all investors into the ongoing fiduciary relationship of the investment adviser business model.

The NAIC similarly opted to expressly state that the NAIC Model does not impose a fiduciary standard on insurance producers to avoid inadvertently saddling producers with ongoing monitoring obligations or other requirements that may be imposed on fiduciaries under state law.

The statutory text of ERISA, by contrast, does not impose a best interest standard, and our understanding is that a best interest standard had never been imposed under any rules or regulations promulgated by the Department prior to the 2016 Rule. Instead, under ERISA, fiduciaries are required to act “solely in the interest of [plan] participants and beneficiaries...for the exclusive purpose of...providing benefits to participants and their beneficiaries...”<sup>40</sup> This clearly goes far above and beyond the best interest standard established under Reg BI and the NAIC Model.

The now-vacated Best Interest Contract Exemption (“BICE”),<sup>41</sup> which was adopted by the Department as part of the 2016 Rule, incorporated the “sole interest” standard into its definition of “best interest” by requiring that recommendations be made “without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party.”<sup>42</sup>

By improperly and inaccurately conflating ERISA’s “sole interest” standard with the best interest standard imposed under Reg BI and the NAIC Model, the Department and supporters

<sup>39</sup> Fiduciary Definition Proposal, at 75921.

<sup>40</sup> ERISA §404(a)(1), codified at 29 U.S.C. §1104(a)(1).

<sup>41</sup> 81 FR 21002.

<sup>42</sup> *Id.*, at 21062. (“[T]he Department has retained the “without regard to” language as best capturing the exemption’s intent that the Adviser’s recommendations be based on the Investor’s interest. This approach also accords with ERISA section 404(a)(1)’s requirement that plan fiduciaries act “solely in the interest” of plan participants and beneficiaries.”).



of the Proposal have exacerbated the risk of confusion regarding the different standards that apply in different circumstances.

Department leadership and supporters of the Proposal often assert that industry objections to the Proposal are evidence of the industry's resistance to acting in the best interest of our clients, but nothing could be further from the truth. As has been stated repeatedly by IRI and many other industry organizations over the years, we are fully supportive of and committed to a best interest standard.

We cannot, however, support efforts to require all financial professionals to act in the "sole interest" of their clients. As we understand it, the "sole interest" standard requires a complete disregard of *any* financial interest of the fiduciary and its affiliates. Such a standard is incompatible with the business and economic reality that broker-dealers, registered representatives, and insurance producers only receive compensation for completed sales and rely on sales to generate enough revenue to cover their costs and earn enough to stay in business so they can support their families and continue to provide valuable services to retirement savers.

C. Treating Rollover and Post-Rollover Recommendations as Fiduciary Investment Advice Under Title I of ERISA is Impermissible and Unnecessary.

The Fiduciary Definition Proposal defines "recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property" to include recommendations "as to how securities or other investment property should be invested after the securities or other investment property are rolled over, transferred, or distributed from the plan or IRA" and "[a]s to rolling over, transferring, or distributing assets from a plan or IRA, including recommendations as to whether to engage in the transaction, the amount, the form, and the destination of such a rollover, transfer, or distribution."<sup>43</sup> The Fiduciary Definition Proposal would treat a person who satisfies the proposed new test for fiduciary status when making a rollover or post-rollover recommendation as a fiduciary under Title I of ERISA.<sup>44</sup>

The attempted imposition of Title I fiduciary status in connection with rollover and post-rollover recommendations under the Proposal is further solidified by the proposed amendments to the fiduciary acknowledgment requirements in the 2020-02 Proposal and the proposed addition of corresponding fiduciary acknowledgment requirements in the 84-24 Proposal.

The Department has long argued that such regulation is necessary because "decisions to take a benefit distribution or engage in rollover transactions are among the most, if not the most,

<sup>43</sup> Fiduciary Definition Proposal, at 75978.

<sup>44</sup> *Id.*, at 75979.

important financial decisions that plan participants and beneficiaries and IRA owners and beneficiaries are called upon to make.”<sup>45</sup> The Department further asserts that a person who recommends a rollover from a plan to purchase an annuity with the rollover proceeds would have “no obligation to adhere to a best interest standard unless they meet all prongs of the [five-part test], including regularly giving advice to the plan participant.”<sup>46</sup>

Taken together, these statements clearly illustrate the Department’s perspective that only regulation of rollover and post-rollover recommendations by the Department through the imposition of Title I fiduciary status can effectively protect retirement savers. This is factually inaccurate.

The significance of rollover and post-rollover decisions and the need for appropriate regulation of recommendations related to such decisions do not automatically confer primary responsibility for the establishment of such regulations on the Department. ERISA fiduciary status would not apply in such circumstances under the current five-part test, but Reg BI and the NAIC Model require adherence to a best interest standard in connection with rollover and post-rollover recommendations involving securities<sup>47</sup> and annuities, respectively.

The Department’s effort to treat rollover and post-rollover recommendations as fiduciary investment advice under Title I of ERISA is incompatible with the statutory language of ERISA and the Chamber Decision. As the court explained in the Chamber Decision:

ERISA Title II created tax-deferred personal IRAs and similar accounts within the Internal Revenue Code. 26 U.S.C. § 4975(e)(1)(B). Title II did not authorize DOL to supervise financial service providers to IRAs in parallel with its power over ERISA plans. Moreover, fiduciaries to IRAs are not, unlike ERISA plan fiduciaries, subject to statutory duties of loyalty and prudence. Instead, Title II authorized the Treasury Department, through the IRS, to impose an excise tax on “prohibited [i.e. conflicted] transactions” involving

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<sup>45</sup> *Id.*, at 75894.

<sup>46</sup> *Id.*, at 75915.

<sup>47</sup> *Id.*, at 75897 (“The best interest standard in the SEC’s Regulation Best Interest applies to broker-dealers and their associated persons when they make a recommendation to a retail customer of any “securities transaction or an investment strategy involving securities (including account recommendations).” See also, SEC, *Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Account Recommendations for Retail Investors*, <https://www.sec.gov/tm/iabd-staff-bulletin> (“When making a rollover recommendation to a retail investor, you must have a reasonable basis to believe both that the rollover itself and that the account being recommended are in the retail investor’s best interest...[T]he staff believes that there are specific factors potentially relevant to rollovers that you should generally consider when making a rollover recommendation to a retail investor[, including], without limitation, costs; level of services available; features of the existing account, including costs; available investment options; ability to take penalty-free withdrawals; application of required minimum distributions; protection from creditors and legal judgments; and holdings of employer stock.”); SEC, Division of Trading and Markets, *Frequently Asked Questions on Regulation Best Interest*, <https://www.sec.gov/tm/faq-regulation-best-interest> (last accessed on December 24, 2023).

fiduciaries of both ERISA retirement plans and IRAs. 26 U.S.C. § 4975 (a), (b), (f)(8)(E). DOL was authorized only to grant exemptions from the prohibited transactions provision, 29 U.S.C. § 1108(a), 26 U.S.C. § 4975(c)(2), and to “define accounting, technical and trade terms” that appear in both laws, 29 U.S.C. § 1135. Title II did not create a federal right of action for IRA owners, but state law and other remedies remain available to those investors.

The critical term “fiduciary” is defined alike in both Title I, 29 U.S.C. § 1002(21)(A), and Title II, 26 U.S.C. § 4975(e)(3). In Title I, fiduciaries are subject to comprehensive DOL regulation, while in Title II individual plans, they are subject to the prohibited transactions provisions.<sup>48</sup>

The Chamber Decision makes clear that the Department does not have the authority to establish new private rights of action – only Congress has this power. It appears, however, that the Department is seeking to circumvent this limitation by treating rollover and post-rollover advice as fiduciary investment advice under Title I of ERISA, which would make the private right of action provided in Title I of ERISA available in far broader circumstances than intended or contemplated by Congress.

Relatedly, the fiduciary acknowledgment requirement in the 84-24 Proposal and the 2020-02 Proposal, combined with the prohibition on language that would appropriately limit the scope of such fiduciary status, would force firms and financial professionals to expose themselves to private rights of action provided by a variety of existing state laws and rules. As explained in the preamble to the 2020-02 Proposal, firms and financial professionals would be required to acknowledge fiduciary status explicitly, unequivocally, and without limitation. A blanket acknowledgment of fiduciary status would likely trigger fiduciary status under state laws and rules that typically provide private rights of action to enforce the requirements of such state fiduciary laws and rules. As noted in the Chamber Decision, “whether federal or state law may be the vehicle for...lawsuits is immaterial in the absence of statutory authorization.”<sup>49</sup>

The approach taken in the 84-24 Proposal and the 2020-02 Proposal fails to account for the fact that a firm or financial professional can be a Title I fiduciary, a Title II fiduciary, and a non-fiduciary to the same client, depending on the context in which they are interacting with the client. As a result, this would require a separate and distinct disclosure by the firm or financial professional at the outset of each interaction with the client to clearly and definitively indicate whether or not that particular interaction is covered by the Title I fiduciary standard, the Title II fiduciary standard, or neither.

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<sup>48</sup> Chamber Decision, at 364.

<sup>49</sup> Chamber Decision, at 384.

However, the Department has also made clear throughout the Proposal that disclaimers of fiduciary status are not effective. Taken together, this effectively means that a firm or financial professional that triggers Title I fiduciary status in one circumstance is automatically deemed to be a Title I fiduciary in all other cases involving the same client, as there would be no way for them to effectively limit their Title I fiduciary obligations only to those situations where they are appropriately imposed.

A series of recent District Court decisions confirmed the Department's lack of jurisdiction to extend Title I fiduciary status to rollover and post-rollover recommendations.<sup>50</sup>

In sum, rollover and post-rollover recommendations should be – and already are – appropriately regulated to ensure that advice about such transactions is in the best interest of retirement savers who receive such advice. Further regulation of such recommendations under ERISA as contemplated by the Proposal is both unnecessary and improper.

D. Adopting the Proposal Will Harm Low- and Middle-Income Retirement Savers and Underserved Communities.

Despite the Department's assertions to the contrary, low- and middle-income retirement savers were significantly harmed by the Department's 2016 Rule, which drove many firms and financial professionals to completely discontinue serving retirement savers with lower account balances. As outlined in great detail in the Chamber Report and the Deloitte Report, the 2016 Rule left millions of people to fend for themselves at a time when they most needed the guidance of qualified financial professionals.<sup>51</sup> And as explained in the HLF Report, adopting a substantially similar rule would cause a repeat of that experience, with the most severe harm likely to be experienced by Black and Latino families.<sup>52</sup>

While the Biden Administration has been working diligently to grow the economy from the bottom up and the middle out, a core objective of Bidenomics, the Proposal will drop the bottom out for millions of Americans who are already struggling to save for retirement by limiting their access to qualified financial professionals who can help them make informed,

<sup>50</sup> See, e.g., *American Securities Association v. U.S. Dep't. of Lab.*, 8:22-cv-330-VMC-CPT, at 55-57 (M.D. Fla. Feb. 13, 2023) ("ASA Decision") ("According to the Department, the five-part test for fiduciaries applies to both Title I and the Internal Revenue Code and 'it would make no sense to treat someone who would satisfy the fiduciary definition with respect to the Title II plan following the rollover as exempt from fiduciary status with respect to the original rollover recommendation'....The Court does not find this persuasive....To determine whether an individual is a fiduciary under ERISA, 'a court must ask whether a person is a fiduciary with respect to the particular activity at issue.'" (internal citations omitted). See also, *Carfora v. Teachers Insurance Annuity Association of America*, No. 1:2021cv08384 - Document 63 (S.D.N.Y. Aug. 21, 2023); and *Federation of Americans for Consumer Choice v. U.S. Dep't. of Lab.*, No. 22 Civ. 243 (K) (BT) (N.D. Tex. Jun. 30, 2023) (recommendations of Magistrate).

<sup>51</sup> See Chamber Report and Deloitte Report.

<sup>52</sup> See HLF Report.

educated decisions regarding their retirement savings. A recent study by the National Association of Insurance and Financial Advisors (“NAIFA”) bears this out, finding that 72 percent of NAIFA members will have a required minimum threshold that clients must meet in order to receive financial services if the Proposal is adopted as proposed, up from 30 percent in the current regulatory environment.<sup>53</sup>

E. The Proposal Disregards the Robust and Effective State Insurance Regulatory Framework and Reflects a Fundamental Misunderstanding of Annuities.<sup>54</sup>

We strongly disagree with the Department’s improper and offensive assertion that state regulation of annuity sales practices is deficient and ineffective. State regulation has been proven to work countless times over the past 150-plus years, and state regulators have the expertise and experience to assess how best to regulate annuity products and sales practices. The Department has neither.

The Proposal reflects the Department’s lack of expertise and experience with respect to annuities and other insurance products. Throughout the Proposal, the Department repeatedly conflates annuities and other insurance products with mutual funds, other securities products, and other non-securities products such as real estate and commodities. This ignores the intrinsic value of insurance guarantees of safety and security, as well as the added time and work needed for a financial professional to fully understand annuity products and how they should and should not be used, and to effectively convey that information to their clients.

This inaccurate perception of annuities as equivalent – or perhaps even inferior – to securities and other investment options, as articulated in the Proposal, contributed to the development of the Proposal’s unworkable approach to the regulation of annuity recommendations and sales.

This is not to suggest that the Department does not have jurisdiction over annuity recommendations made to participants in Title I Plans. The Department has important responsibilities in this regard. We merely assert that the Department can and should have confidence that state insurance regulators, who universally share the Department’s commitment to robust consumer protection, have crafted a regulatory approach that is well-tailored to the unique nature of the annuity industry and appropriately balances

<sup>53</sup> National Association of Insurance and Financial Advisors, *Impact of the Proposed DOL Fiduciary-Only Rule on NAIFA Members* (December 2023), <https://2635471.fs1.hubspotusercontent-na1.net/hubfs/2635471/NAIFA%20Members%20Respond%20to%20the%20Proposed%20US%20DOL%20Rule.pdf>

<sup>54</sup> Consistent with the views expressed in this section, IRI supports, endorses, and agrees with the comments submitted by the NAIC to the Department regarding the Proposal. See NAIC letter to EBSA regarding RIN 1210–AC02 (December 21, 2023), <https://content.naic.org/sites/default/files/government-affairs-rin-1210-ac02-def-fiduciary.pdf>.

retirement savers' need for effective regulatory protection with their need to access products and services that help them achieve their financial objectives.

The NAIC Model provides a workable framework to regulate the conduct of insurance producers when recommending annuities, including a robust best interest standard, disclosure and conflict of interest obligations, insurer supervision requirements, and extensive producer training requirements.<sup>55</sup> However, the Department appears to be operating under a number of significant misconceptions about the NAIC Model:

- **Misconception #1: The NAIC Model is deficient because it expressly does not impose a fiduciary standard.** This was an intentional choice made by the NAIC to avoid inadvertently and inappropriately exposing producers to state law fiduciary standards, which would have significant risks, burdens, and implications beyond the intended purpose of the NAIC Model. Consistent with the SEC's approach in Reg BI, the NAIC opted not to shoehorn financial professionals into pre-existing fiduciary standards that are incompatible with their business models. Instead, both the NAIC and SEC focused on developing appropriate and workable rules tailored to the circumstances under which those rules would apply. By contrast, the Proposal would expose financial professionals to the risks and burdens associated with state fiduciary status under various state laws, including exposure to private litigation to enforce such laws.
- **Misconception #2: The NAIC Model fails to address conflicts of interest relating to compensation.** While cash and non-cash compensation are excluded from the definition of material conflict of interest in the NAIC Model, this was intentional to make clear that receipt of compensation is not a material conflict and that compensation conflicts for individual agents are best addressed through disclosure. Of course, the NAIC Model clearly treats certain situations as conflicts subject to the NAIC Model provisions, such as ownership interests in insurers. Given that disclosure is typically the only real-world way to mitigate compensation-related conflicts and that the NAIC Model's disclosure obligation already expressly requires meaningful compensation disclosure, the inclusion or exclusion of cash and non-cash compensation in the definition of material conflict of interest is unlikely to result in different outcomes. Moreover, consistent with Reg BI, the NAIC Model expressly prohibits sales contests and similar incentive compensation programs based on sales of particular products during specified periods of time.

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<sup>55</sup> Laws and rules based on the NAIC Model are far from the only state insurance laws or rules that protect retirement savers. The states also have robust laws and rules that govern annuity illustrations, advertising, replacements, anti-inducement, rebating, disclosures, producer licensing, and more. The Proposal seemingly disregards the existence of these other state laws and rules entirely.

- **Misconception #3: The NAIC Model merely imposes a suitability standard, rather than a best interest standard, because the top-line best interest language is not repeated in each of the four component obligations.** In reality, the NAIC recognized that restating the best interest standard in each component would create a circular definition, where acting in your client's best interest requires compliance with component obligations that require you to act in your client's best interest. The NAIC wisely avoided this. The care obligation is designed to ensure that agents consider all their product options and recommend the one that is right for the client.

In addition to the NAIC Model, there are a myriad of state insurance laws and regulations that provide protections to retirement savers, including specific laws and regulations governing insurance advertising,<sup>56</sup> replacement transactions,<sup>57</sup> free-look periods, disclosures/buyers guides and illustrations,<sup>58</sup> anti-rebating/inducements/gifts,<sup>59</sup> and agent investigations.<sup>60</sup>

Congress has explicitly recognized the primacy of state insurance regulation and deferred to the expertise of state regulators on numerous occasions over the past eight decades, dating back to the passage of the McCarran-Ferguson Act ("McCarran-Ferguson")<sup>61</sup> in 1945. More recently, in the Dodd-Frank Act, Congress determined that fixed indexed annuities should be regulated by the states under their insurance laws and regulations, and not by the SEC as securities.<sup>62</sup> The Department should afford its state counterparts the same measure of respect and deference.

**F. The Department Should Deploy its Limited Resources to Advance Regulatory Initiatives That Will Enhance Retirement Security.**

Recent reports issued by the U.S. Government Accountability Office ("GAO")<sup>63</sup> and the Department's own inspector general (the "DOL IG")<sup>64</sup> found that EBSA has inadequate funding and staffing to support all the regulatory responsibilities assigned to it by Congress. GAO specifically noted that EBSA's "resources have generally remained unchanged while oversight responsibilities have increased over the last decade" and that EBSA "experienced a decline in staffing levels [but] has received many new responsibilities through legislation" over that same

<sup>56</sup> See, e.g., NAIC Advertisements of Life Insurance and Annuities Model Regulation (#570).

<sup>57</sup> See, e.g., NAIC Life Insurance and Annuities Replacement Model Regulation (#613).

<sup>58</sup> See, e.g., NAIC Annuity Disclosure Model Regulation (#245).

<sup>59</sup> See, e.g., NAIC Unfair Trade Practices Act (#880).

<sup>60</sup> See, e.g., NAIC Producer Licensing Model Act (#218).

<sup>61</sup> McCarran-Ferguson Act, ch. 20, 59 Stat. 33, codified as amended at 15 U.S.C. §§ 1011–1015 (1945).

<sup>62</sup> Dodd-Frank Act § 989J.

<sup>63</sup> U.S. Gov't Accountability Off., GAO-24-105667, *Employee Benefits Security Administration: Systematic Process Needed to Better Manage Priorities and Increased Responsibilities* (2023) ("GAO Report").

<sup>64</sup> Off. of Insp. Gen., U.S. Dep't of Labor, *Semiannual Report to Congress, Vol. 90, April 1, 2023-September 30, 2023* (2023) ("DOL IG Report").

time period.<sup>65</sup> Similarly, the DOL IG expressed concerns about EBSA's "ability to protect the integrity of pension, health, and other benefit plans of about 153 million workers, retirees, and their families" and its "inadequate resources to conduct compliance and enforcement."<sup>66</sup>

EBSA employs 752 total full-time employees, including 364 investigators to oversee roughly 747,000 employer-sponsored retirement plans, not to mention millions of group health plans and other welfare benefit plans – that's one investigator for every 2,052 retirement plans.<sup>67</sup> The Department now purports to have the capacity to oversee an estimated 100,000 independent producers – a figure vastly underestimated in the DOL's commentary on the Proposal.

Despite these significant challenges, EBSA has nevertheless elected to move ahead with the Proposal. Over the past thirteen years, the Department has expended substantial funds on various efforts to revise the rules defining and governing the provision of fiduciary investment advice. We respectfully suggest that the Department reevaluate its priorities and focus on enforcement of existing rules and implementation of new Congressional directives such as SECURE and SECURE 2.0 rather than continuing to divert its limited resources to this unnecessary and dangerous rulemaking project.

#### **IV. Comments on the Department's Jurisdiction and Legal Authority to Adopt the Proposal**

##### **A. The Department Lacks Jurisdiction to Impose Uniform Standards for the Provision of Investment Advice to All Retirement Savers.**

As noted above, IRI and our members fully support and agree with the premise that financial professionals should act – and should be required to act – in their clients' best interests when providing personalized advice or recommendations to retirement savers. The preamble to the Fiduciary Definition Proposal asserts that "the Department of Labor, uniquely among the regulators, can impose uniform standards for the provision of investment advice to retirement investors."<sup>68</sup> We strongly disagree with this assertion.

The Department clearly does not have jurisdiction to regulate the conduct of financial professionals when providing advice or other services to consumers with respect to assets held in retail accounts not covered by Title I of ERISA or §4975 of ERISA. In the context of such retail accounts, the SEC has jurisdiction over advice about securities and other securities-related services, and the state insurance departments have jurisdiction over advice about annuities and other annuity-related services. Moreover, in the Dodd-Frank Act, Congress expressly directed the SEC – and not the Department – to study and decide whether and how to pursue uniform

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<sup>65</sup> GAO Report.

<sup>66</sup> DOL IG Report.

<sup>67</sup> GAO Report.

<sup>68</sup> Fiduciary Definition Proposal, at 75927.



standards of conduct for financial professionals.<sup>69</sup> The Dodd-Frank Act also included a provision clarifying that fixed indexed annuities are to be regulated by the states under their insurance laws and rules, and not by the SEC as securities.<sup>70</sup> The Chamber Decision explicitly stated that the 2016 Rule violated these provisions of Dodd-Frank:

The Fiduciary Rule conflicts with both of these efforts. The SEC has the expertise and authority to regulate brokers and dealers uniformly. DOL has no such statutory warrant, but far from confining the Fiduciary Rule to IRA investors' transactions, DOL's regulations effect dramatic industry-wide changes because it is impractical to separate IRA transactions from non-IRA securities advice and brokerage. Rather than infringing on SEC turf, DOL ought to have deferred to Congress's very specific Dodd-Frank delegations and conferred with and supported SEC practices to assist IRA and all other individual investors. By presumptively outlawing transaction-based compensation as "conflicted," the Fiduciary Rule also undercuts the Dodd Frank provision that instructed SEC not to prohibit such standard forms of broker-dealers' compensation. And in direct conflict with Congress's approach to fixed indexed annuities, DOL's regulatory strategy not only deprives sellers of those products of the enhanced PTE 84-24 exemption but it also subjects them to the stark alternatives of using the BIC Exemption, creating entirely new compensation schemes, or withdrawing from the market. While Congress exhibited confidence in the states' insurance regulation, DOL criticizes the Dodd-Frank provisions as "insufficient" to protect the "subset" of retirement related fixed-indexed annuities transactions within DOL's purview. Certainly, however, most such products are sold to retirement investors, so DOL is occupying the Dodd-Frank turf.<sup>71</sup>

Despite this clear rebuke of the Department's effort to regulate fixed indexed annuities in contravention of clear and explicit Congressional action, the Proposal once again represents an improper attempt by the Department to supersede the states' laws and regulations governing annuity sales practices.

The Department does, however, have jurisdiction to administer and enforce the fiduciary, reporting, and disclosure requirements imposed under Title I of ERISA. This includes, among other things, the authority to interpret the statutory language of Title I, such as the phrase "renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so" in

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<sup>69</sup> Dodd-Frank Act §913.

<sup>70</sup> Dodd-Frank Act §989J.

<sup>71</sup> Chamber Decision, at 385-386. We acknowledge that the 84-24 Proposal would allow the revised exemption to be used in the context of fixed indexed annuity transactions. However, as we explain below, the 84-24 Proposal would impose unduly burdensome and unworkable conditions that would effectively require the development of "entirely new compensation schemes."

the definition of fiduciary in §3(21) of ERISA. In addition, the Department is authorized to issue exemptions from the prohibited transaction rules applicable to Title I Plans under §406 of ERISA. The Department is also responsible for enforcement of Title I and any regulations and PTEs issued thereunder.

The Department is also authorized to issue regulations, rulings, opinions, and exemptions with respect to IRAs under Title II of ERISA, which is incorporated into §4975 of the Tax Code.<sup>72</sup> This includes, among other things, the authority to interpret the statutory language of Title II, such as the phrase “renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so” in the definition of fiduciary in §4975(e)(3)(B) of the Tax Code. In addition, the Department is authorized to issue exemptions from the prohibited transaction rules applicable to Title I Plans under §4975(c) of the Tax Code. The Department is not responsible for enforcement of Title II of ERISA, §4975 of the Tax Code, or any regulations and PTEs issued thereunder; this enforcement authority resides with the Department of the Treasury and the Internal Revenue Service.

The Department’s authority with respect to Title I Plans and IRAs is, however, constrained by the statutory text of ERISA and the Tax Code. As the Fifth Circuit Court of Appeals explained in the Chamber Decision:

Congress chose not to require advisers to individual retirement plans to bear the duties of loyalty and prudence required of Title I ERISA plan fiduciaries. That times have changed, the financial market has become more complex, and IRA accounts have assumed enormous importance are arguments for Congress to make adjustments in the law, or for other appropriate federal or state regulators to act within their authority. A perceived “need” does not empower DOL to craft de facto statutory amendments or to act beyond its expressly defined authority.<sup>73</sup>

Stated more directly, the Department may not exceed its authority to impose Title I burdens and risks on firms and financial professionals operating outside of a special relationship of trust and confidence with a Title I Plan or a participant in such a plan. The Department’s opinion regarding gaps in the statutory language – here, that the burdens and risks imposed on fiduciaries to Title I Plans should be extended to advice provided in other circumstances – cannot override the limitations imposed by Congress.

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<sup>72</sup> Presidential Reorganization Plan No. 4 of 1978, 43 FR 47713, 92 Stat. 3790, as amended Pub. L. 99–514, §2, Oct. 22, 1986, 100 Stat. 2095; Pub. L. 109–280, title I, §108(c), formerly §107(c), Aug. 17, 2006, 120 Stat. 820, renumbered §108(c), Pub. L. 111–192, title II, §202(a), June 25, 2010, 124 Stat. 1297 (“Reorg Plan No. 4”).

<sup>73</sup> Chamber Decision, at 379.

The Chamber Decision further established that the Department cannot override Congress' decision to preserve the "dichotomy between mere sales conduct, which does not usually create a fiduciary relationship under ERISA, and investment advice for a fee, which does."<sup>74</sup> ERISA fiduciary status, which requires the financial professional to act solely in the interest of the plan, participants or beneficiaries, can only be imposed where there is a special relationship of trust and confidence, which is extremely rare in the context of sales activity, even when accompanied by incidental advice.

The Department has asserted that the Fiduciary Definition Proposal is more narrowly tailored than the 2016 Rule because it would impose fiduciary status only when a retirement saver has placed their trust and confidence in a firm or financial professional. However, judicial precedent makes clear that a "special relationship of trust and confidence" requires far more than mere subjective trust by one party in another. "[N]ot every relationship involving a high degree of trust and confidence rises to the stature of a fiduciary relationship....mere subjective trust does not, as a matter of law, transform arm's-length dealing into a fiduciary relationship."<sup>75</sup> The Department's analysis is thus flawed as it mistakenly equates mere subjective trust with a special relationship of trust and confidence.

The Proposal clearly and blatantly disregards and is entirely inconsistent with the Chamber Decision, the common law understanding of the circumstances under which fiduciary status should properly arise, and the limitations placed on the Department's jurisdiction by Congress. As such, the Proposal must be withdrawn in its entirety.

**B. The Application of the Proposal to Annuities is Preempted under the McCarran-Ferguson Act.**

Congress enacted McCarran-Ferguson in 1945 in reaction to a U.S. Supreme Court ruling<sup>76</sup> that interpreted the Commerce Clause in the U.S. Constitution as authorizing the regulation of the insurance industry by the federal government. McCarran-Ferguson provides that "the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."<sup>77</sup> This determination is reflected in the operative text of the statute, which provides that:

"(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

<sup>74</sup> Chamber Decision, at 374.

<sup>75</sup> *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 177 (Tex. 1997).

<sup>76</sup> *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944).

<sup>77</sup> McCarran-Ferguson, at §1011.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance..."<sup>78</sup>

These provisions have long been understood as prohibiting federal intrusion into the regulation of insurance except where Congress has specifically and intentionally enacted new legislation applicable to the business of insurance. While §514 of ERISA<sup>79</sup> does provide that ERISA supersedes state laws related to employee benefit plans, it also provides that ERISA does not "exempt or relieve any person from any law of any State which regulates insurance, banking, or securities."<sup>80</sup> The Proposal, to the extent applicable to annuities, would impair state laws enacted for the purpose of regulating the business of insurance and, as such, would be impermissible under the provisions of McCarran-Ferguson and §514 of ERISA.

In *Barnett Bank v. Nelson*,<sup>81</sup> the U.S. Supreme Court held that, under McCarran-Ferguson, a federal statute "specifically relates to the business of insurance" when it focuses directly upon industry-specific selling practices and affects the relation of insured to insurer and the spreading of risk. The Court further observed that McCarran-Ferguson "seeks to protect state regulation primarily against inadvertent federal intrusion"<sup>82</sup> and concluded that McCarran-Ferguson's anti-pre-emption rule would apply to "federal statutes with potentially pre-emptive effect [that] use general language that does not appear to 'specifically relate' to insurance [that] conflict with state law that was enacted 'for the purpose of regulating the business of insurance...'"<sup>83</sup>

Applying the Court's reasoning to the Proposal, we note first that numerous state laws and regulations expressly permit and govern the receipt of compensation by insurance producers for their services (including but not limited to the laws and rules adopted in 41 states to date based on the NAIC Model).<sup>84</sup> The Proposal, if adopted as proposed, would prohibit the receipt of such compensation except if certain onerous and unworkable conditions are satisfied, thereby impairing the purposes of those state laws and rules.

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<sup>78</sup> *Id.*

<sup>79</sup> 29 U.S.C. § 1144(a).

<sup>80</sup> 29 U.S.C. § 1144(b)(2)(A).

<sup>81</sup> *Barnett Bank of Marion Cty. v. Nelson*, 517 U.S. 25 (1996).

<sup>82</sup> *Id.*, at 39.

<sup>83</sup> *Id.*, at 42.

<sup>84</sup> Most states have other laws and rules, beyond those that are based on the NAIC Model, that govern producer compensation. See, e.g., N.Y. Ins. Law § 4228 (under which insurance companies licensed to do business in New York are permitted to employ a wide variety of compensation practices subject to specified restrictions).

We acknowledge that the savings clause in ERISA<sup>85</sup> could be interpreted to support the assertion that ERISA specifically relates to insurance. A compelling argument could be made, however, that ERISA applies to employee benefit plans in broad, general terms and only inadvertently applies to the business of insurance, and that the savings clause in and of itself does not definitively establish Congressional intent to directly regulate insurance under ERISA.

We also note that McCarran-Ferguson only allows Congress to enact legislation that specifically relates to the business of insurance, and that action by an executive branch agency such as the Department would not be covered by its terms. The Proposal is clearly not Congressional legislation, but we suspect the Department would assert that the Proposal is merely an interpretation of legislation that is not preempted by McCarran-Ferguson, and therefore should enjoy the same insulation from preemption. This position should not prevail, given that the Proposal is focused primarily on one discrete provision of ERISA that imposes fiduciary status on providers of “investment advice.”

Congress could have easily referred to “investment and/or insurance advice” in §3(21) of ERISA, but it chose instead to refer only to “investment advice.” McCarran-Ferguson explicitly states, “silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.”<sup>86</sup> Given Congress’ silence as to the inclusion of insurance in the phrase “investment advice,” McCarran-Ferguson could be applied to prohibit the Department from interpreting “investment advice” in a manner that encompasses advice about insurance products.

C. The Proposal and Any Final Rule Adopted Prior to Senate Confirmation of a Permanent Secretary of Labor May Be Unconstitutional and Invalid.

Acting Secretary of Labor Julie Su has served in that role since March 11, 2023, and her formal nomination to serve as the permanent Secretary of Labor was transmitted to Congress just three days later. We understand that the Biden Administration has taken the position that, while Acting Secretary Su lacks adequate support to secure Senate confirmation, she may and will continue to serve in an acting capacity indefinitely based on the administration’s interpretation of the Federal Vacancies Reform Act<sup>87</sup> and the Labor Code.<sup>88</sup> A detailed analysis of the validity of actions taken by the Department under these circumstances is beyond the scope of this letter. That being said, we believe there are strong, compelling, and legally sound arguments that any actions taken by the Department in this regard under the leadership of an

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<sup>85</sup> 29 U.S.C. §1144(b)(2)(A).

<sup>86</sup> McCarran-Ferguson, at §1011.

<sup>87</sup> 5 U.S.C. § 3341 et seq.

<sup>88</sup> 29 U.S.C. §552.

Acting Secretary under the present circumstances would violate Article II, Section 2 (the Appointments Clause) of the U.S. Constitution<sup>89</sup> and would therefore be invalid.

**D. The Components of the Proposal are Inextricably Linked and Cannot be Severed.**

The Proposal notes that the Department “generally intends discrete aspects of this regulatory package to be severable [such that] the updated regulatory definition of a fiduciary would survive even if a court vacated any of the amendments to the PTEs leaving in place the previously granted versions of those PTEs.”<sup>90</sup> We disagree with this assessment. The proposed changes to the rules that determine when investment advice fiduciary status is triggered and proposed changes to the rules that govern the ability of investment advice fiduciaries to receive reasonable compensation for their services are so inextricably linked that neither should be able to survive in the absence of the other. Just as the Fifth Circuit ruled in the Chamber Decision in 2018, “this comprehensive regulatory package is plainly not amenable to severance.”<sup>91</sup>

**V. Comments on the Department’s Rulemaking Process with Respect to the Proposal**

**A. The Department’s Rulemaking Process with Respect to the Proposal Violates the Letter and Spirit of the Administrative Procedure Act.**

The Department provided just 60 calendar days for stakeholders to submit comments on the Proposal. This translated into just 39 business days when accounting for the several major federal, religious, and cultural holidays that fell within the comment period. Such a short comment period for major federal rulemaking affecting retirement planning and financial security for millions of workers and retirees does not allow for meaningful public engagement and is inconsistent with the Department’s past practice of providing at least 75 to 105 days for interested stakeholders to comment on prior iterations of the Proposal. The Department nevertheless rejected a reasonable request to extend the comment period time.

In addition, the Department scheduled and held a public hearing on December 12<sup>th</sup> and 13<sup>th</sup>, 2023, before the end of the comment period and a week earlier than initially indicated in its announcement of the Proposal. Public hearings are typically held after an agency receives comments, with additional time for stakeholders to supplement their written comments after the hearing. In this case, however, the Department arbitrarily and needlessly elected to deviate from its past practice to unreasonably accelerate the rulemaking process, creating the

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<sup>89</sup> U.S. Const. art. II, §2.

<sup>90</sup> Fiduciary Definition Proposal, at 75912.

<sup>91</sup> Chamber Decision, at 388.

appearance that the Department is unlikely to make meaningful changes to the Proposal based on public comments.<sup>92</sup>

Moreover, the preambles to each component of the Proposal collectively seek public input on well over a hundred important (and in many cases, fundamental) questions and topics that should have been addressed before the Department undertook formal rulemaking. For example, the preamble notes that “the Department intends to examine the ways investment advice providers market themselves and describe their services.”<sup>93</sup> The Department should have sought stakeholder input on these types of questions through a request for information rather than moving directly to issuance of the Proposal.

**B. The Department Failed to Adequately Consider Less Disruptive Alternatives to the Approaches Taken in the Proposal.**

Federal regulatory agencies are generally required to identify and consider reasonable alternatives that could achieve the desired outcome in a more efficient or less disruptive manner.<sup>94</sup> In our view, the Department has not satisfied this obligation.

For example, the Department has asserted, in part, that the Fiduciary Definition Proposal is necessary because the five-part test enables firms and financial professionals to avoid fiduciary status by including a disclaimer of fiduciary status in fine print disclosures. However, the five-part test is already a functional test, meaning that courts should not give effect to any attempted disclaimer of fiduciary status if the conduct of the parties makes clear that a fiduciary relationship exists. Moreover, even if this were not the case, the Department should have considered whether this theoretical concern could have been addressed in a less disruptive manner, such as a requirement that any purported disclaimer of fiduciary status

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<sup>92</sup> Public comments by senior Department officials – and even President Biden’s comments at the press release during which the Proposal was announced – can be interpreted to suggest that the Department has already decided how to proceed, such that the notice-and-comment period is nothing more than a check-the-box exercise. For example, President Biden stated, “[i]f this rule is finalized as proposed, it’s going to protect workers and it’s going to save for —that are saving for their retirements.” Moreover, in her letter rejecting the industry’s reasonable request that the comment period be extended and that the public hearing be delayed, Assistant Secretary Lisa Gomez stated, “EBSA believes that its current proposal reflects significant input it has received from public engagement with this project since 2010, and...has engaged informally with numerous stakeholders representing multiple viewpoints on issues related to the proposed rulemaking package. Therefore, at this point, EBSA does not intend to extend the comment period or delay the hearing.” Judicial precedent makes clear that an illusory notice-and-comment period does not satisfy the requirements of the Administrative Procedure Act. *See, e.g., Nehemiah Corp. of America v. Jackson*, 546 F. Supp. 2d 830 (E.D. Cal. 2008) (holding that “[a]llowing the public to submit comments to an agency that has already made its decision is no different from prohibiting comments altogether. Indeed, if the public perceives that the agency will disregard its comments, there may be a chilling effect that causes the public to refrain from submitting comments as an initial matter.”)

<sup>93</sup> Fiduciary Definition Proposal, at 75903.

<sup>94</sup> *See, e.g.,* Exec. Order No. 12866, *Regulatory Planning and Review*, 58 FR 51735 (October 4, 1993).

would be effective only if presented in an adequately prominent fashion and/or if the financial professional has a reasonable basis to believe that the client understands and agrees to such a disclaimer. Nothing in the Fiduciary Definition Proposal suggests that the Department considered this reasonable and less disruptive alternative approach.

Throughout this letter, we will identify a number of other aspects of the Proposal where the Department seemingly failed to satisfy its obligation to consider reasonable alternatives.

## **VI. Comments on the Fiduciary Definition Proposal**

### **A. The Fiduciary Definition Proposal Fails to Establish Appropriate Parameters for the Imposition of Fiduciary Status Under Title I of ERISA.**

Under current rules, a person is a fiduciary only if they: (1) render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing, or selling securities or other property (2) on a regular basis (3) pursuant to a mutual agreement, arrangement, or understanding with the plan or a plan fiduciary that (4) the advice will serve as a primary basis for investment decisions with respect to plan assets, and that (5) the advice will be individualized based on the particular needs of the plan.<sup>95</sup>

In the Chamber Decision, the Fifth Circuit stated that this five-part test “captured the essence of a fiduciary relationship known to the common law as a special relationship of trust and confidence between the fiduciary and his client.”<sup>96</sup> We agree with this assessment. In particular, the regular basis, mutual understanding, and primary basis prongs of the five-part test – which would be eliminated under the Fiduciary Definition Proposal – reflect the fact that a special relationship of trust and confidence cannot spring into existence spontaneously but rather must be intentionally cultivated over time.

The Department, however, has asserted that this test is “underinclusive because it fails to capture many circumstances in which an investor would reasonably believe they were receiving advice from an investment professional who was rendering services to the investor based upon the investor’s best interest.”<sup>97</sup>

The Fiduciary Definition Proposal would replace this five-part test with a new test under which a firm or financial professional will be a fiduciary under ERISA when recommending an investment transaction to a Title I Plan or a fiduciary, participant, or beneficiary of a Title I Plan, or to an IRA or an owner, fiduciary, or beneficiary of an IRA, if the firm or financial professional makes recommendations to retirement savers on a regular basis as part of their business and

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<sup>95</sup> 29 CFR 2510.3–21(c)(1).

<sup>96</sup> Chamber Decision, at 365.

<sup>97</sup> Fiduciary Definition Proposal, at 75899.



the circumstances indicate that the recommendation is based on the retirement saver's particular needs or situation and can be relied upon by the retirement saver as being in their best interest.

While the reasonable expectations of retirement savers should be taken into account when determining when fiduciary status should arise, other factors are also relevant and must be considered. The five-part test recognizes these other factors whereas the Fiduciary Definition Proposal disregards them and focuses solely on retirement savers' expectations (and, arguably, the Department's opinion as to whether a relationship of trust and confidence should exist in any particular circumstance).

Trust and confidence must be earned; they are not commodities that can be bought and sold. By removing the regular basis prong in the five-part test, the Fiduciary Definition Proposal reflects a failure to understand this basic fact.

Moreover, a special relationship of trust and confidence is, by definition, tied to the particular individuals involved in that relationship. Whether a financial professional makes recommendations to other retirement savers on a regular basis as part of their business has no bearing on the nature of the financial professional's relationship with any particular client.

Lastly, conditioning fiduciary status on whether a recommendation "can be relied upon by the retirement saver as being in their best interest"<sup>98</sup> serves no meaningful purpose in the current insurance regulatory environment. All financial professionals in the insurance industry are now required to act in their clients' best interest, whether under PTE 2020-02, Reg BI, or state insurance laws and rules based on the NAIC Model.

**B. The Fiduciary Definition Proposal Would Effectively Prohibit Many Common Activities That Benefit Retirement Savers.**

The Fiduciary Definition Proposal inappropriately characterizes as fiduciary in nature a broad spectrum of financial marketing and sales activities where no reasonable expectation can exist that the retirement saver has engaged the firm or financial professional to act as an unbiased and impartial source of recommendations under a legal obligation to disregard its own interests as a seller of financial products and services. Firms and financial professionals should be permitted to recommend products they believe are in a retirement saver's best interest without necessarily triggering fiduciary status under Title I of ERISA by making such a recommendation. The Fiduciary Definition Proposal would make this impossible.

Firms and financial professionals engage in a wide range of activities that have significant value to retirement savers but should not be considered "advice" that would give rise to fiduciary

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<sup>98</sup> Fiduciary Definition Proposal, at 75977.

status within the ambit of this rulemaking. Listed below are just a few examples of such activities. However, despite assertions to the contrary by the Department, each of these activities would seemingly be captured under the Fiduciary Definition Proposal and would likely have to be discontinued if the Proposal is adopted:

- Call center representatives and other administrative staff providing sales, marketing, informational, or educational materials or answering general questions and providing general customer services;
- Giving a mere factual description of the features of an annuity product, such as an immediate fixed annuity or a deferred variable annuity, and explaining how the product can meet certain needs;
- Responding to a request for proposal or other inquiry by submitting a description of a product that may fit the needs of a plan, including a sample fund line-up;
- Offering, marketing, or otherwise making available a plan recordkeeping service which includes access to a platform of available investment options that a retirement plan sponsor may select from to serve as its plan investment option menu;
- “Hire me” activities involving the offering of advisory service capabilities, including past performance and available investment strategies;
- Provision of recommendations to a plan or retirement saver by a person who is affiliated with a firm that provides discretionary asset management services to the plan or retirement saver;
- Routine participant plan enrollment activities, including education and recommendations to enroll in the plan;
- Answering questions from plan participants about the operation of an “in-plan” protected lifetime income product and its available features;
- Proprietary product “wholesaling” activities where representatives of an annuity product provider meet with financial professionals – either one-on-one or in group sessions – to explain the features of the product and to conduct training;
- Providing a brochure to a prospective purchaser describing the features of one or more annuity products available for sale through a registered broker-dealer;
- Presenting to a prospective annuity purchaser a list of investments that are available under a variable annuity product;

- Explaining basic asset allocation concepts and providing examples of how one or more particular annuity products could be used to implement an individual's asset allocation plan;
  - Counseling a recent retiree about their likely income replacement needs and the features available under various annuity products that could help meet those income replacement needs; and
  - Referral of a client by one financial professional to another who specializes in annuity products and has specialized knowledge and training in annuity features.
- C. The Fiduciary Definition Proposal Includes Overbroad and Problematic Definitions of Key Terms and Concepts.

The definitions and interpretations of several key terms and concepts in the Fiduciary Definition Proposal are significantly and inappropriately overbroad and incompatible with ERISA and judicial precedent.

*1. Overly Broad Definition of "Recommendation"*

The Fiduciary Definition Proposal defines "recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property" to mean recommendations:

- (i) As to the advisability of acquiring, holding, disposing of, or exchanging, securities or other investment property, as to investment strategy, or as to how securities or other investment property should be invested after the securities or other investment property are rolled over, transferred, or distributed from the plan or IRA;
- (ii) As to the management of securities or other investment property, including, among other things, recommendations on investment policies or strategies, portfolio composition, selection of other persons to provide investment advice or investment management services, selection of investment account arrangements (e.g., account types such as brokerage versus advisory) or voting of proxies appurtenant to securities; and
- (iii) As to rolling over, transferring, or distributing assets from a plan or IRA, including recommendations as to whether to engage in the transaction, the amount, the form, and the destination of such a rollover, transfer, or distribution.<sup>99</sup>

While the Department asserts that this definition aligns with the SEC's definition and interpretation of "recommendation" in Reg BI, it differs in important and meaningful ways.

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<sup>99</sup> Fiduciary Definition Proposal, at 75978-75979.

Most notably, in the preamble to the Fiduciary Definition Proposal, the Department clarifies its intent, noting that, “[f]or purposes of the proposed rule, the Department views a recommendation as a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the retirement investor engage in or refrain from taking a particular course of action.”<sup>100</sup> The SEC has clearly explained on numerous occasions that a “recommendation” exists only where there is “a call to action.” A mere suggestion would fall far short of “a call to action” and thus would not be treated as a recommendation under Reg BI, but seemingly would suffice under the Fiduciary Definition Proposal.

The Department further notes that “the fact that a communication is made to a group rather than an individual would not be dispositive of whether a recommendation exists”<sup>101</sup> and “providing a selective list of securities to a particular retirement investor as appropriate for the investor would be a recommendation as to the advisability of acquiring securities even if no recommendation is made with respect to any one security.”<sup>102</sup> Under Reg BI, neither of these examples would be considered calls to action, and therefore, neither would constitute recommendations.

## 2. *Overly Broad Definition of “Retirement Investor”*

The term “Retirement Investor” is not included in the “Definitions” section of the Fiduciary Definition Proposal but appears to be defined in the operative text to include plans, plan fiduciaries, plan participants and beneficiaries, IRAs, IRA owners and beneficiaries, and IRA fiduciaries. It is inappropriate and unnecessary for advice to plans and their fiduciaries to be subjected to the same rules that govern advice provided to individual retirement savers.

While it is true that neither Reg BI nor the NAIC Model covers advice to plans or plan sponsors, the Department has provided no evidence that plans, plan sponsors, or IRA fiduciaries are actually being harmed by conflicted advice and that the Department does not have the tools it needs under current rules to protect plans, plan sponsors, or IRA fiduciaries against such harm. If the Department has real-world evidence of such harm, it should seek public input to guide a targeted rulemaking project to address that particular issue. Lumping plans, plan sponsors, and IRA fiduciaries into a rulemaking effort focused on advice provided to individual retirement savers ignores the extensive and important differences between individuals and institutional entities.

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<sup>100</sup> *Id.*, at 75904.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

In addition, the term “Retirement Investor” is included in the ‘Definitions’ sections of the 2020-02 Proposal and the 84-24 Proposal, and in both cases, the term is defined far more narrowly, including only plan participants and beneficiaries, IRA owners, and fiduciaries to plans and IRAs. The Department has provided no explanation for the different meanings ascribed to this term.

*3. Overly Broad Definition of “For a Fee or Other Compensation, Direct or Indirect”*

The interpretation of “for a fee or other compensation, direct or indirect” as encompassing a broad array of compensation incident to the transaction is inconsistent with ERISA and the Chamber Decision. As the Court noted, the federal securities laws have long recognized that firms and financial professionals receive no compensation for the provision of advice that is incidental to brokerage services, and therefore, such incidental advice is not sufficient to trigger fiduciary status under the Advisers Act.<sup>103</sup>

Congress was well aware of the securities law approach and could have expressly stated in ERISA that compensation paid for brokerage services would be attributed also to any incidental advice provided in connection with such services, such that incidental advice would be sufficient to trigger ERISA fiduciary status. Under the rules of statutory construction, the absence of such express language in ERISA means that Congress chose not to override the securities law approach. The Department may disagree with this approach, but only Congress has the authority to change it.

D. The Omission of Clear and Appropriate Carve-Outs in the Fiduciary Definition Proposal Will Deprive Title I Plan Sponsors and Participants of Access to Essential Services and Information.

The Fiduciary Definition Proposal lacks appropriate and effective carve-outs for conduct that should not be treated as fiduciary. In contrast, the 2016 Rule included carve-outs and exceptions from the definition of recommendation for (i) platform providers, (ii) selection and monitoring assistance, (iii) general communications, and (iv) investment education (including plan information; general financial, investment, and retirement information; asset allocation models; and interactive investment materials). The 2016 Rule also included exceptions from fiduciary status for (1) transactions with independent fiduciaries with financial expertise; (2) swap and security-based swap transactions; (3) and the conduct of employees of plans, plan sponsors or affiliates, or plan fiduciaries.

The Department asserts in the preamble that such carve-outs are not needed in the Fiduciary Definition Proposal because the facts and circumstances covered by these carve-outs would not trigger fiduciary status under the proposed new test.<sup>104</sup> While we appreciate this general

<sup>103</sup> Chamber Decision, at 372-373.

<sup>104</sup> *Id.*, at 75907-75909.

statement of the Department's intent, we do not believe it is sufficient or appropriate to expect the industry to rely on informal guidance on such a fundamental aspect of the Fiduciary Definition Proposal.

Moreover, we are extremely concerned that conversations between financial services firms (including but not limited to their consultants, wholesalers, and salespeople) and plan sponsors (or with other financial professionals acting as fiduciaries to plans and IRA owners) would likely trigger fiduciary status under the Proposal. Imposing fiduciary status in such circumstances will adversely impact the provision of information to plans or plan fiduciaries in the institutional space, such as in the case of wholesaler relationships, pension risk transfer transactions, and sales of QLACs and stable value funds to Title I Plans and health savings accounts.

#### **VII. Comments on Both the 84-24 Proposal and the 2020-02 Proposal<sup>105</sup>**

The 84-24 Proposal and the 2020-02 Proposal include many identical (or nearly identical) provisions. This section outlines our concerns about these provisions. In the sections that follow, we will discuss additional concerns we have with respect to provisions in the 2020-02 Proposal that are not identical to the 84-24 Proposal and with respect to provisions in the 84-24 Proposal that are not identical to the 2020-02 Proposal.

##### **A. The 84-24 Proposal and the 2020-02 Proposal Are Not Administratively Feasible.**

ERISA §408(a) authorizes the Department to grant PTEs from the restrictions of ERISA sections 406 and 407(a) for fiduciaries to Title I Plans in instances where the Secretary makes a finding on the record that relief is (1) administratively feasible, (2) in the interests of the Title I Plan and its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries of such Title I Plan. Tax Code §4975(c)(2) establishes identical requirements for the issuance of PTEs from Tax Code §4975(c)(1).<sup>106</sup> Given the complexities of the 84-24 Proposal and the 2020-02 Proposal, and for the specific reasons noted below, we do not believe it would be administratively feasible for the industry to implement the proposed changes to PTE 84-24 and PTE 2020-02 or for the Department to effectively and consistently oversee and enforce compliance with those changes.

<sup>105</sup> As used throughout Sections VII and VIII of this letter in relation to the 84-24 Proposal, the terms Insurer, Independent Producer, and Insurance Sales Commission have the meanings ascribed to such terms in the 84-24 Proposal.

<sup>106</sup> Reorg Plan No. 4 (transferring authority to issue exemptions from Tax Code §4975(c)(1) from the Secretary of the Treasury to the Secretary of Labor.)

*1. Administratively Unfeasible Regulation of Conflicts Arising from Unconscious Interests*

The 84-24 Proposal defines “conflict of interest” as “an interest that might incline a Financial Institution or Investment Professional—consciously or unconsciously—to make a recommendation that is not in the Best Interest of the Retirement Investor.”<sup>107</sup> The 2020-02 Proposal similarly defines “conflict of interest” as “an interest that might incline a Financial Institution or Investment Professional—consciously or unconsciously—to make a recommendation that is not in the Best Interest of the Retirement Investor.”<sup>108</sup> However, the Department offers no insight as to how a firm or financial professional can identify, manage, or mitigate unconscious factors, nor does the Department explain how an unconscious factor could negatively impact investment advice. Unless and until the ability to read minds moves out of the realm of science fiction and into reality, it will be administratively and practically unfeasible for the industry to comply with this requirement and for the Department to effectively monitor compliance and determine when to pursue enforcement.<sup>109</sup>

*2. Administratively Unfeasible Requirement that Disclosures Reflect Level of Financial Experience*

The preambles to the 84-24 Proposal and the 2020-02 Proposal indicate that disclosures must be presented in plain English, “taking into consideration a Retirement Investor’s level of financial experience.” All retirement savers have different levels of financial literacy and sophistication, though, so the disclosures would effectively have to be individualized to more than 100 million unique retirement savers to satisfy this requirement.

For the industry, it would be nearly impossible to develop and implement policies and procedures that could both allow for the development of such individualized disclosures and ensure that such disclosures fully comply with all applicable legal requirements. Even for the small fraction of the industry that could potentially do so, the process would be extraordinarily expensive and time-consuming.

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<sup>107</sup> 84-24 Proposal, at 76031.

<sup>108</sup> 2020-02 Proposal, at 76002-76003.

<sup>109</sup> We acknowledge that the SEC, in Reg BI, defines “conflict of interest” to include conflicts arising from unconscious interests on nearly the same terms as reflected in the 84-24 Proposal and the 2020-02 Proposal. We expressed similar concerns in our written comments to the SEC on the proposal to establish Reg BI. We disagreed with the SEC’s decision to retain that language in the final version of Reg BI, and we remain concerned about the implications of that decision. While alignment across regulatory jurisdictions is typically appropriate and beneficial, in this case, such alignment would serve to exacerbate our concerns.

For the Department, there would be no feasible way to effectively monitor the sheer volume of disclosures that would be impacted to appropriately and consistently enforce this requirement.

*3. Administratively Unfeasible Requirement that Disclosures be Presented in Actual Dollars*

Disclosures about fees and costs cannot always be provided in actual dollars, as compensation structures are often tied to the value of assets at particular times and can therefore fluctuate. The 84-24 Proposal and the 2020-02 Proposal fail to recognize this fact, which would make it administratively and practically unfeasible for the industry to comply with this requirement.

*4. Administratively Unfeasible Treatment of Omissions as Misleading Statements*

Both the 84-24 Proposal and the 2020-02 Proposal specify that the prohibition on misleading statements as part of the Impartial Conduct Standards would also prohibit “omitting information that is needed to prevent the statement from being misleading to the Retirement Investor under the circumstances.”<sup>110</sup> This would be administratively unfeasible in the absence of appropriate and workable qualifications, such as a requirement that the omission was intentional or negligent, or even a requirement that the person making the statement had actual knowledge of allegedly omitted information.

*5. Solicitation of Feedback on Administratively Unfeasible Public Website Disclosure Requirement*

Both the 84-24 Proposal and the 2020-02 Proposal specifically request feedback from stakeholders as to whether the exemptions should be further revised to require disclosure of certain information on a publicly available website, including pre-transaction disclosures, descriptions of a firm’s or financial professional’s business model, associated conflicts of interest (including arrangements that provide third party payments), and a schedule of typical fees. IRI and our members would strongly oppose any such requirement. Establishing and maintaining such websites would require significant time, money, and resources. Clients and prospective clients have access to a wide range of information upon request at any time. We do not see the need to require a publicly available website, especially in light of the costs involved.

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<sup>110</sup> 84-24 Proposal, at 76027; 2020-02 Proposal, at 76000.



**B. The 84-24 Proposal and the 2020-02 Proposal Are Not in the Interests of Plans and Their Participants and Beneficiaries.**

***1. Conflation of Impartial Conduct Standards and “Sole Interest” Standard***

As explained above, the 84-24 Proposal and the 2020-02 Proposal improperly conflate the impartial conduct standards with the “sole interest” standard to which fiduciaries are held under Title I of ERISA. See Section III.A. of this letter for our detailed explanation as to why and how this would harm plans, participants, and beneficiaries. Imposing fiduciary status under Title I of ERISA on all firms and financial professionals rather than limiting such status to only those circumstances in which there is a true relationship of trust and confidence will deprive millions of retirement savers of the ability to obtain advice that is in their best interest from their preferred firm and/or financial professional.

The very concept of imposing fiduciary status on all financial professionals on a transaction-by-transaction and exemption-by-exemption basis is fundamentally flawed and inconsistent with federal securities law and state insurance regulation. As we note above, the SEC was careful to preserve the distinction between a registered representative’s transactional best interest obligations and the ongoing fiduciary obligations owed by investment adviser representatives. The Proposal rejects this sensible and appropriate distinction in a misguided and dangerous effort to establish one rule to govern all relationships and activities.

***2. Overly Broad and Restrictive Prohibition on Incentive Compensation Programs***

The 84-24 Proposal and the 2020-02 Proposal would prohibit the use of “quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other similar actions or incentives that are intended, or that a reasonable person would conclude are likely, to result in recommendations that are not in Retirement Investors’ Best Interest.”<sup>111</sup> In addition, the preambles to both the 84-24 Proposal and the 2020-02 Proposal assert that “[a] Financial Institution should not offer incentive vacations, or even paid trips to educational conferences, if the desirability of the destination is based on sales volume and satisfaction of sales quotas.”<sup>112</sup>

This would operate, in effect, as an almost complete prohibition on the use of incentive compensation. This departs significantly from the approach taken in the original version of PTE 2020-02. The Department provides no clear rationale for such an abrupt change so soon after publishing the original exemption.

<sup>111</sup> 84-24 Proposal, at 76028; 2020-02 Proposal, at 76001.

<sup>112</sup> 84-24 Proposal, at 76011; 2020-02 Proposal, at 75987.

Importantly, this provision is also substantially more restrictive than the approach taken by the SEC and state insurance departments. Under Reg BI and the NAIC Model, incentive compensation is only prohibited outright when tied to sales of particular products within a limited period of time, and other applicable state laws and regulations expressly authorize and regulate other forms of compensation.<sup>113</sup>

To be clear, we are not suggesting that incentive compensation programs should be free from regulatory oversight or that such programs should be universally permitted. Instead, our objection to this provision is that the Department's approach ignores important and meaningful distinctions and nuances that necessitate more thoughtful and careful rulemaking that is incompatible with the one-size-fits-all regulatory framework reflected in the Proposal.

Compensation practices can be designed and used for a wide range of purposes. For example, compensation practices can be used to encourage financial professionals to re-evaluate their preconceived notions about products that meet particular financial needs or goals or to offset the added work required to sell certain types of products. Broadly prohibiting incentive compensation programs would result in many retirement savers losing access to products that could be in their best interest. Clearly, this would not be in the interest of plans, participants, and beneficiaries.

### 3. *Draconian Eligibility Provisions*

The 84-24 Proposal and the 2020-02 Proposal include provisions that would force entire enterprises out of the retirement business for ten years due to convictions of affiliates or even family members of affiliates for a wide range of offenses, whether in the U.S. or in foreign countries, even for convictions that are unrelated to the provision of investment advice or other services to American retirement savers. These disqualification provisions are draconian and not in the interests of plans and their participants and beneficiaries.

Under these provisions, a fiduciary investment advice provider would lose eligibility to use PTE 84-24 and PTE 2020-02 even if, for example:

- the misconduct forming the basis for the conviction occurred prior to the effective date contemplated by the Proposal;
- the misconduct forming the basis for the conviction is entirely unrelated to the provision of services to retirement plans or retirement savers;
- the convicted individual never colluded with any individuals involved in the provision of services to retirement plans or retirement savers;

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<sup>113</sup> See, e.g., N.Y. Ins. Law § 4228 (under which insurance companies licensed to do business in New York are permitted to employ a wide variety of compensation practices subject to specified restrictions).

- neither the fiduciary investment advice provider nor its directors, officers, or employees participated in the misconduct; or
- no plans or plan assets were involved or affected by the misconduct forming the basis for the conviction.

Even the most robust and effective compliance programs cannot fully prevent criminal conduct by affiliates or their family members. This is particularly troubling given that the criminal justice systems in many foreign nations do not provide the same due process protections we enjoy in this country. This is also unnecessary, as Congress has already enacted a crime bill that establishes appropriate penalties for crimes related to the business of insurance.<sup>114</sup> Moreover, most states require that an insurance producer be competent, trustworthy, and of good moral character in order to obtain an insurance license. Such agent investigations are undertaken either by the state insurance regulator or by the insurer prior to requesting the producer be appointed as its agent.

Neither the 84-24 Proposal nor the 2020-02 Proposal provide meaningful arguments to support the imposition of such extreme consequences, nor do they offer any insights or guidance as to how a firm or financial professional could protect itself against the risk of such consequences.

This unworkable and inequitable approach to disqualification will harm plans and participants, who would face significant negative consequences and costs if their fiduciary investment advice provider loses eligibility to rely on PTE 84-24 and PTE 2020-02. A disqualified provider would only be permitted to provide services that do not require exemptive relief to avoid violating the prohibited transaction rules. As a result, most plans and participants would need to transition to a new provider, which will result in significant transition costs and burdens, such as the costs and time required for a Request for Proposal process, costs associated with consultants to assist or manage the process, legal review and negotiation of new agreements, and other due diligence expenses.

Due to the draconian, self-effectuating disqualification provisions in the 84-24 Proposal and the 2020-02 Proposal, and the wholly inadequate “opportunity to be heard” provision, plans and their participants and beneficiaries would face a perpetual risk of losing access to their selected advice provider based on entirely unrelated and irrelevant circumstances, with no way to effectively manage or mitigate this risk. This would not be in the interests of the plan and its participants and beneficiaries.

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<sup>114</sup> 18 U.S.C. § 1033.

#### 4. *Overly Broad Access to Records*

The 84-24 Proposal would require the maintenance of

...records necessary to...determine whether the conditions of this exemption have been met with respect to a transaction for a period of six years from the date of the transaction in a manner that is reasonably accessible for examination...[which must be made] reasonably available at their customary location during normal business hours for examination by: (A) Any authorized employee of the Department or the Internal Revenue Service or another state or federal regulator; (B) Any fiduciary of a Plan that engaged in a transaction pursuant to this exemption; (C) Any contributing employer and any employee organization whose members are covered by a Plan that engaged in a transaction pursuant to this exemption; or (D) Any participant or beneficiary of a Plan or beneficial owner of an IRA acting on behalf of the IRA that engaged in a transaction pursuant to this exemption.”<sup>115</sup>

The 2020-02 Proposal seeks public input as to whether the recordkeeping provision of PTE 2020-02 should be amended to align with this provision. We oppose the inclusion of this provision in both exemptions.

We acknowledge that the 84-24 Proposal further clarifies that “[n]one of the persons described in subsection (2)(B)–(D) above are authorized to examine records regarding a transaction involving another Retirement Investor, privileged trade secrets or privileged commercial or financial information of the Insurer, or information identifying other individuals.”<sup>116</sup> The request for feedback on this subject in the 2020-02 Proposal contemplates the inclusion of the same limitations.

To be clear, our objection is not to the inclusion of recordkeeping provisions but to the needlessly and inappropriately broad universe of persons to whom access must be provided. Clearly, the Department would need access to such information to effectively enforce the requirements of the applicable exemption. However, the Department provides no explanation as to why such sensitive information needs to be made so widely available.

In our view, allowing plan fiduciaries and employers to access information relating to compliance with the conditions of the exemption with respect to transactions made by individual participants is contrary to the interests of plans and participants. Also, allowing plans to have access to details about particular transactions in this manner could be interpreted as imposing a new affirmative duty on the plan to ensure that the conditions of the applicable exemption have been fully satisfied. We do not believe this is an appropriate burden to place

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<sup>115</sup> 84-24 Proposal, at 76030.

<sup>116</sup> *Id.*

on plans. Similarly, putting plans in this position would also be inconsistent with the rights of participants to make their own decisions about how to manage their own retirement savings accounts.

#### **VIII. Additional Comments on the 84-24 Proposal**

PTE 84-24 has been in place for more than 45 years (dating back to the issuance of its predecessor, PTE 77-9). The Department has provided no evidence of circumstances arising during that time under which the Department or other authorities have found that retirement savers were harmed or inadequately protected as a result of actions taken by fiduciaries or non-fiduciary parties-in-interest in compliance with the conditions imposed under the current version of the exemption.

Despite this fact, the 84-24 Proposal would, in effect, revoke the relief provided for investment advice fiduciaries under the current version of the exemption and replace it with an entirely new framework. These changes to PTE 84-24 are not necessary or appropriate without sufficient evidence of a need or problem.

##### **A. The Strict and Narrow Limitations on Eligibility for Exemptive Relief Under the 84-24 Proposal are Arbitrary and Capricious.**

Under the 84-24 Proposal, the exemptive relief provided under PTE 84-24 for providers of fiduciary investment advice would only be available to Independent Producers for Insurance Sales Commissions in connection with recommendations of annuities that are not regulated as securities by the SEC. In all other circumstances, PTE 2020-02 would be the sole source of exemptive relief available to investment advice fiduciaries. For the reasons presented in the following sections, these limitations are arbitrary and capricious.

##### ***1. Overly Narrow Definition of Independent Producer***

The definition of “Independent Producer” in the 84-24 Proposal is too narrowly tailored and would leave many producers without access to a workable exemption. For example, the definition of Independent Producer would seemingly not include “captive” or “career” producers who are employees of one insurer but are authorized to sell a diverse mix of both proprietary (either to carrier or distributor) and national products, including other insurers’ products. Moreover, comments in the preamble indicating that only “an independent, insurance-only agent” would be eligible to rely on the revised exemption<sup>117</sup> raises a question as to whether the definition would include registered representatives of broker-dealers who are

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<sup>117</sup> *Id.*, at 76008.

permitted by their firms to sell fixed and indexed annuities away from the broker-dealer as outside business activities.<sup>118</sup>

In each of these circumstances, the producer's employer would face the same challenges as an insurer whose products are sold through a financial professional who falls within the current definition. Excluding such producers from eligibility for relief under the exemption would be arbitrary and capricious.

In addition, PTE 84-24 is often used as a preventative measure by insurance producers who do not believe they are fiduciaries but want to avoid violating the prohibited transaction rules in case they are later found to have inadvertently triggered fiduciary status. Due to the fiduciary acknowledgment requirement in the 84-24 Proposal, the exemption would no longer be available for use in this manner. Allowing the use of the exemption in this manner would result in greater protection for retirement savers, as financial professionals would have an incentive to comply with the exemption's conditions even where fiduciary status has not been definitively established.

## *2. Overly Narrow Definition of Insurance Sales Commission*

The definition of "Insurance Sales Commission" in the 84-24 Proposal would arbitrarily and needlessly prohibit a wide variety of different forms of compensation that are common in the marketplace, even where such practices are consistent with a best interest standard. For example:

- Many Independent Producers rely on marketing support, lead generation, technological assistance, back office and compliance support, and practice building services provided by independent marketing organizations in connection with annuity sales. In the absence of these services, many Independent Producers would not survive.
- Many insurers maintain "career" or "captive" agent sales forces who promise to devote all or substantially all their sales efforts to the insurer's products. In exchange for that commitment, and to maintain a highly trained and professional sales force, insurers typically provide captive agents with various benefits subject to continuing production and service requirements, such as health and retirement plan coverage and contributions, office allowances, travel expense reimbursements, and other benefits customary in the industry.

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<sup>118</sup> Under the federal securities laws, firms are not required to supervise outside business activities. Many firms are likely to discontinue the practice of allowing registered representatives to sell fixed and indexed annuities if they would be required to take on co-fiduciary status and supervisory responsibility for such transactions under PTE 2020-02.

In both circumstances, the services and benefits provided to financial professionals would seemingly be treated as cash or non-cash compensation under the Fiduciary Definition Proposal. As such, the exclusion of the value of such services from coverage under the 84-24 Proposal would effectively prohibit the use of PTE 84-24 by Independent Producers who rely on those services and benefits to operate their businesses despite the absence of any evidence that such services and benefits could result in harm to retirement savers.

By contrast, the NAIC Model allows for assistance with marketing, office support, retirement benefits, or other reasonable compensation as long as those benefits are not based on the volume of sales of a specific annuity within a limited period of time. Reg BI takes a similar approach. There is no indication in the preamble to the 84-24 Proposal to suggest that the Department considered this alternative approach.

Moreover, longstanding guidance from the Department makes clear that PTE 84-24 is not limited to traditional commissions and can be used for a wide range of forms of compensation.<sup>119</sup> The industry has operated in reasonable reliance on this guidance for many years and, to our knowledge, there is no evidence that retirement savers have been harmed as a result.

The limitation on the types of compensation for which relief is available under PTE 84-24 is also arbitrarily and capriciously inconsistent with PTE 2020-02, both in its current form and as proposed to be amended in the 2020-02 Proposal. PTE 2020-02 can be used for all forms of compensation as long as the applicable conditions are satisfied. The Department has offered no justification for this disparate treatment. In fact, as explained further below, limiting the types of compensation for which PTE 84-24 can be used when PTE 2020-02 can be used for all forms of compensation directly contradicts the Department's pursuit of a "level playing field."

### *3. Overly Narrow Limitation on Types of Products Eligible for Relief*

All fixed and variable annuities, whether registered as securities or not, are insurance products that provide protected lifetime income and therefore should be treated the same under PTE 84-24. Given the need for a level playing field for all annuities, exemptive relief should be available for sales of both variable annuities and fixed annuities to IRAs under both PTE 84-24 and PTE 2020-02.

For decades, PTE 84-24 has been the primary pathway for exempting the sale of annuity and insurance products to plans, including IRAs, and IRI believes it should continue to be available

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<sup>119</sup> Letter from U.S. Dep't. of Lab. and I.R.S. to John A. Cardon et. al., 1977 ERISA LEXIS 87 (October 31, 1977) ("[T]he focus of the disclosure requirement...is upon the entire commission paid by the insurance company in connection with the transaction for the purchase by the plan of the insurance or annuity contract. However,... compensation paid by an insurance company pursuant to a bonus, contingency, override or similar arrangements...would be subject to disclosure...")

to exempt the sale of all such products. Under the 84-24 Proposal, transactions involving sales of variable annuities would no longer be eligible for this exemption. The Department has not provided any evidence to support the need for this disparate treatment.

PTE 2020-02 is available to cover the sale of both fixed and variable annuity products. Such even-handed treatment facilitates the application of uniform sets of exemptive relief conditions to sales of annuity contracts of all types, whether fixed or variable, and should prevail under PTE 84-24 as well. Given the purported alignment between these exemptions under the Proposal, arbitrarily limiting the types of annuity products for which PTE 84-24 can be used would provide no greater level of protection for retirement savers.

The Department's approach to the 84-24 Proposal appears to be based on an inaccurate perception that variable annuities are nothing more than a "package" or "bundle" of mutual funds. IRI strenuously rejects this notion. As with fixed annuities, the protected lifetime income features of variable annuities are the primary attribute of the product, not the investment features. In that vein, IRI observes that variable annuity contracts have more in common with fixed annuity contracts than mutual funds.

**B. The 84-24 Proposal Would Not Achieve the Department's Goal of a Level Playing Field.**

The Department has argued that PTE 84-24 needs to be amended to align more closely with PTE 2020-02 to provide a level playing field. As explained in more detail in Section X.A. below, ERISA does not require a level playing field but is designed to give the Department flexibility to tailor the conditions for exemptive relief to match the specific circumstances to which that relief would apply. The fact that the Department has created a newer exemption that includes conditions that are not part of PTE 84-24 does not mean that PTE 84-24 must be updated to align with the newer exemption.

Even if we put that fact aside, however, the 84-24 Proposal would fail to produce the level-playing field sought by the Department as a result of the arbitrary and problematic distinctions between the two exemptions, as described above. These distinctions would result in competitive disadvantages for those who operate under PTE 84-24.

**C. PTE 84-24 Would No Longer Be Administratively Feasible with the Overly Burdensome and Unworkable Conditions Contemplated by the 84-24 Proposal.**

As noted above, the 84-24 Proposal would impose significant new conditions on eligibility for exemptive relief under PTE 84-24 in the context of fiduciary investment advice. Many of these conditions would be so overly burdensome and unworkable as to render the exemption administratively unfeasible for Independent Producers to implement and the Department to regulate and enforce. For example:



- The rollover disclosures contemplated by the 84-24 Proposal would require Independent Producers to compare annuities with securities products, but the federal securities laws prohibit individuals from recommending or providing detailed information or advice about securities without a securities license. Independent producers who are not also securities-licensed (as most are not) would be forced to either break the law to comply with this condition or undertake the expense and burden of obtaining the appropriate securities license(s).<sup>120</sup>
- The 84-24 Proposal would require Independent Producers to disclose all the products and services they are authorized to sell. Producing such disclosures would be extremely time-consuming (much more than the Department has assumed in its Regulatory Impact Analysis), particularly given the frequency with which this information can potentially evolve as producers expand or narrow their offerings to align with the evolving needs of their clients. The Department has offered no compelling explanation as to why this information should have to be proactively provided to retirement savers rather than providing such information upon request.

Moreover, we fear that many retirement savers would be overwhelmed by the breadth of products and services offered by their preferred financial professional. They would be better served by allowing financial professionals to make case-by-case determinations as to which products and services to discuss with particular retirement savers.

- As the Department has recognized, many Independent Producers are authorized to sell products issued by multiple insurers. In practice, each insurer would develop policies and procedures to comply with the requirements of the exemption based on its own interpretations of the exemption, its own business practices, and its own overall compliance policies and procedures. As a result, Independent Producers would have to figure out how to operate within the different policies and procedures developed by different insurers. This, along with other requirements in the 84-24 Proposal (such as the requirement to disclose all products and services they are authorized to sell), will drive many Independent Producers to reduce the number of insurers for whom they sell and the number of different products they can recommend, not based on the needs of their clients but rather on the need to streamline and simplify their compliance obligations. This would not be in the interest of retirement savers.
- While the 84-24 Proposal would not require Insurers to acknowledge fiduciary status, the supervisory responsibilities imposed on Insurers appear to be nearly indistinguishable from the responsibilities imposed on co-fiduciary Financial Institutions

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<sup>120</sup> The 2020-02 Proposal includes similar rollover disclosure requirements, and therefore, Independent Producers who may choose to rely on PTE 2020-02 rather than PTE 84-24 would encounter the same dilemma in that context.

under the 2020-02 Proposal. In light of the Department's assertion in the preamble to the Fiduciary Definition Proposal that "ERISA has a functional fiduciary test and imposes fiduciary status only to the extent the functional test is satisfied," IRI is concerned that compliance with the supervisory responsibilities included in the 84-24 Proposal would expose Insurers to a risk that fiduciary status could be imposed on them even in the absence of a fiduciary acknowledgment.

- The 84-24 Proposal would require that Insurers review every recommendation before issuing the recommended annuity. Given the sheer volume of annuity transactions, this would be impossible. Insurers have a wide variety of tools and techniques at their disposal to appropriately supervise recommendations of their products without necessarily conducting a detailed review of every individual transaction. For example, many insurers use technology to screen transactions to identify circumstances in which closer review may be warranted while allowing transactions that do not trigger any concerns to proceed in due course. In addition, many insurers contract with third parties to perform the supervisory functions required under the NAIC Model. These and other tools and techniques have proven effective to protect consumers, but the Department does not appear to have considered allowing the use of such tools and techniques as an administratively feasible alternative to the approach taken in the 84-24 Proposal.
- The 84-24 Proposal would require that Insurers review recommendations to ensure compliance with the Impartial Conduct Standards and the other conditions of the exemption. However, as the Department acknowledges in the preamble to the 84-24 Proposal, "insurance companies working with independent agents have much less authority over the conduct and compensation of independent agents [and] do not have the necessary control over the independent agents to manage the independent agent's product offerings and do not know the full range of products the independent agent is authorized to sell."<sup>121</sup> Given this reality, insurers would not have access to the information they would need to effectively ensure that Independent Producers have fully complied with the Impartial Conduct Standards and the other exemption conditions.
- The 84-24 Proposal would require Insurers to establish and implement a process to assess whether an Independent Producer can be relied upon to adhere to the Impartial Conduct Standards and to take action as necessary to protect retirement savers against Independent Producers who have failed or are likely to fail to adhere to the Impartial Conduct Standards. However, producer licensing and appointments are governed by applicable state insurance laws and regulations as well as by the terms of contracts that

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<sup>121</sup> 84-24 Proposal, at 76005.

may exist between insurers and producers. Depending on the particular circumstances, an insurer may not be able to take the actions contemplated by this provision without violating state law and/or contractual obligations. Moreover, for the same reasons outlined above, insurers would not have access to the information they would need to effectively assess whether any particular Independent Producer can be relied upon to adhere to the Impartial Conduct Standards.

- The retrospective review provision in the 84-24 Proposal would seemingly require every Insurer to conduct an individualized review of each Independent Producer who sold one of the Insurer's products in the prior year "to detect and prevent violations of, and achieve compliance with the conditions of the exemption, including the Impartial Conduct Standards."<sup>122</sup> The findings of this review are required to be detailed in individualized reports that must be provided to each Independent Producer. Insurers typically have tens of thousands of individual producers who are licensed and appointed to sell their products across the country. Requiring individualized reviews and reports for each appointed producer is unnecessary, impractical, and not administratively feasible.
- Moreover, the 84-24 Proposal only requires Independent Producers to share with the Insurer its "conclusion as to whether the recommended annuity is in the Best Interest of the Retirement Investor" in section VII(b)(6) and the rollover documentation in section VII(b)(7). This level of information would be wholly inadequate to conduct the required retrospective review effectively.
- The 84-24 Proposal would require Insurers to conduct separate retrospective reviews (or sub-reviews) for each Independent Producer that has sold any business in the period covered by the review. Many Insurers would have supervisory obligations over thousands of Independent Producers if the 84-24 Proposal is adopted, which would require Insurers to conduct and document thousands of individual retrospective reviews. This would be impossible without investing many multiples of the time and resources estimated by the Department.
- Under the 84-24 Proposal, an Independent Producer would be allowed to make the corrections needed to avoid a nonexempt prohibited transaction. Self-correction would be allowed when either (1) the Independent Producer has refunded "any charge" to a retirement saver, or (2) the Insurer has rescinded a mis-sold annuity, canceled the contract, and waived the surrender charges. The Independent Producer would be required to notify the Department of the violation and the opportunity for a refund or

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<sup>122</sup> 84-24 Proposal, at 76028-76029.

rescission via email within 30 days of correction. In addition, the Independent Producer would be required to notify the person(s) at the Insurer responsible for conducting the retrospective review during the applicable review cycle and the violation and correction must specifically be set forth in the written retrospective review report.<sup>123</sup>

In general, we support allowing for self-correction to preserve reliance on PTE 84-24. However, it appears that self-correction would be expected whenever an Independent Producer refunded any charge to the retirement saver, regardless of the amount refunded. The absence of a materiality threshold would make the self-correction provision administratively unfeasible, as the Department and the Insurer would have to be notified of each and every instance in which any amount is refunded to the retirement saver.

It appears that the Department did not consider the inclusion of a materiality qualifier that would allow *de minimis* refunds (e.g., those below a certain dollar amount) to be made without notification to the Department and the Insurer while still maintaining reliance on PTE 84-24. Such a provision would reduce the scenarios in which Independent Producers have to provide notifications, in circumstances where the absence of notification would not deprive the Insurer and the Department of meaningful information.

#### IX. Additional Comments on the 2020-02 Proposal

##### A. The Department Failed to Appropriately Consider Reasonable Alternatives to the Approach Taken in the 2020-02 Proposal.

The preamble to the Fiduciary Definition Proposal asserts that:

PTE 2020-02 is consistent with the requirements of the SEC's Regulation Best Interest and the fiduciary obligations of investment advisers under the Advisers Act. Therefore, broker-dealers and investment advisers that have already adopted meaningful compliance mechanisms for Regulation Best Interest and the Advisers Act fiduciary duty, respectively, should be able to adapt easily to comply with the PTE.<sup>124</sup>

Senior Department officials have emphasized this point in recent public statements, claiming that firms and financial professionals operating in compliance with Reg BI should have no problem satisfying the changes contemplated by the 2020-02 Proposal. However, the 2020-02 Proposal includes extensive requirements that go far beyond the requirements of Reg BI. If the Department's intent is to align PTE 2020-02 with Reg BI, it should have considered providing a

<sup>123</sup> 84-24 Proposal, at 76029.

<sup>124</sup> Fiduciary Definition Proposal, at 75899.

safe harbor for Reg BI compliance as a reasonable alternative to the approach taken in the 2020-02 Proposal. There is no indication in the preamble to the 2020-02 Proposal or anywhere else in the Proposal that the Department considered this alternative.

**B. The 2020-02 Proposal Would Render PTE 2020-02 Unworkable for Insurers in the Institutional Market.**

PTE 2020-02 and the changes contemplated by the 2020-02 Proposal are designed for transactions involving retail customers. The conditions in the exemption, such as the required compensation disclosure, would not be workable in the context of transactions between institutions. The Department has provided no compelling reason to hold providers of advice to plans and their fiduciaries to the same rules as those who provide advice to individual retirement savers. On the contrary, doing so would harm plans and plan fiduciaries by making it more difficult for them to obtain the services they need to effectively serve plan participants.

**X. Comments on the Other PTEs Proposal**

**A. The Other PTEs Proposal is Impermissible Under ERISA § 408(a).**

Under the Other PTEs Proposal, investment advice fiduciaries would no longer be eligible for exemptive relief under PTEs 75-1, 77-4, 80-83, 83-1, and 86-128. Instead, fiduciaries would be forced to rely on the revised versions of either PTE 2020-02 or PTE 84-24. The Department has asserted that this one-size-fits-all approach to exemptions is necessary to ensure a level playing field for all investment advice fiduciaries and to avoid regulatory arbitrage. However, ERISA does not require a level playing field or charge the Department with responsibility for avoiding regulatory arbitrage. In fact, we believe ERISA actually requires that the Department tailor exemptions to the particular circumstances in which exemptive relief is needed.

ERISA §408(a) authorizes the issuance of conditional or unconditional exemptions for any class of fiduciaries or transactions from all or part of the restrictions imposed by ERISA Sections 406 and 407(a). An exemption can only be issued upon a finding that the exemption is (1) administratively feasible, (2) in the interests of the plan and its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries of such plan. The Other PTEs Proposal fails to satisfy the requirements of ERISA §408(a) for several reasons:

- i. By authorizing the issuance of exemptions for “any fiduciary or transaction, or class of fiduciaries or transactions,” Congress made clear that exemptions should be designed for the particular circumstances in which they would be used. The Department has recognized and understood this for nearly a half-century, as evidenced by the issuance of countless individual and class exemptions that were specifically tailored. Importantly, we believe the Department has appropriately considered the overall regulatory frameworks that govern the conduct of different investment advice fiduciaries when

crafting the existing exemptions. For example, mutual funds and annuities are heavily regulated by well-established agencies under strong and effective rules, while the rules for cryptocurrency are still under development. More vigorous rules may be appropriate in some cases, but there is no need to impose extensive new burdens on well-regulated products. Treating all investment advice fiduciaries alike, as contemplated by the Proposal, overlooks these significant and relevant differences.

- ii. The changes contemplated by the Other PTEs Proposal would require these firms and financial professionals to discontinue using their existing and effective policies, procedures, and systems and to undertake extensive, costly, and time-consuming efforts to develop new policies, procedures, and systems to satisfy the conditions of PTE 2020-02 or PTE 84-24. To assert that such a massive project is somehow administratively feasible seems to reflect a serious misunderstanding of the concept of feasibility.
- iii. Given the lack of evidence that retirement savers are being harmed under the current framework, it is clear and obvious to us that plans and participants will be no more effectively protected if the Proposal is adopted in its current form. In fact, many plans and participants will be harmed by the Other PTEs Proposal, as it will surely cause some firms and financial professionals to make the difficult decision to discontinue serving retirement savers rather than taking on the massive and costly work that would be needed to transition from their existing exemptions to PTE 2020-02.

**B. The Other PTEs Proposal is Arbitrary and Capricious.**

Depriving investment advice fiduciaries of access to PTEs 75-1, 77-4, 80-83, 83-1, and 86-128 is arbitrary and capricious. These exemptions have been in place for decades, and as required by ERISA §408(a), each is designed for a particular class or classes of fiduciaries or transactions:

- i. PTE 75-1 Part I provides relief for agency transactions and services.
- ii. PTE 75-1 Part II(1) permits the purchase or sale of a security between an employee benefit plan or IRA and a broker-dealer, a reporting dealer who makes primary markets in securities of the United States Government or of any agency of the United States Government and reports daily to the Federal Reserve Bank of New York its positions with respect to Government securities and borrowings thereon, or a bank supervised by the United States or a State.
- iii. PTE 75-1 Part II(2) contains a special exemption for mutual fund purchases between fiduciaries and plans or IRAs.
- iv. PTE 75-1 Part III permits a fiduciary to cause a plan or IRA to purchase securities from a member of an underwriting syndicate other than the fiduciary itself when the fiduciary is also a member of the syndicate.

- v. PTE 75-1 Part IV permits a plan or IRA to purchase securities in a principal transaction from a fiduciary that is a market maker with respect to such securities.
- vi. PTE 75-1 Part V permits the extension of credit to a plan or IRA by a broker-dealer in connection with the purchase or sale of securities.
- vii. PTE 77-4 provides relief for a plan's or IRA's purchase or sale of open-end investment company shares where the investment adviser for the open-end investment company is also a fiduciary to the plan or IRA.
- viii. PTE 80-83 provides relief for a fiduciary causing a plan or IRA to purchase a security when the issuer may use the proceeds of the securities issuance to retire or reduce indebtedness to the fiduciary or an affiliate.
- ix. PTE 80-83 provides relief for the sale of certificates in an initial issuance of certificates by the sponsor of a mortgage pool to a plan or IRA when the sponsor, trustee, or insurer of the mortgage pool is a fiduciary with respect to the plan or IRA assets invested in such certificates.
- x. PTE 86-128 provides relief for certain types of fiduciaries to (a) use their authority to cause a plan or IRA to pay a fee to the fiduciary, or its affiliate, for effecting or executing securities transactions as agent for the plan, and (b) act as agent in an "agency cross transaction" for both a plan or IRA and one or more other parties to the transaction, and for such fiduciaries or their affiliates to receive fees from the other party(ies) in connection with the agency cross transaction.

Firms and financial professionals have relied upon these exemptions in good faith and have expended significant time and resources to develop and maintain policies, procedures, and systems tailored to the specific conditions and requirements of each exemption. The Department has offered no evidence of harm to retirement savers who have received fiduciary investment advice under these exemptions. Upending these long-standing and effective PTEs in pursuit of a "level playing field" – which, as noted above, is neither required by nor consistent with ERISA §408(a) – would be the epitome of arbitrary and capricious rulemaking.

#### **XI. Comment on the Timeline for Effectiveness and Implementation**

##### **A. The Proposed Effective Date is Arbitrary and Capricious, and Impermissible Under ERISA §408(a).**

The Department has significantly underestimated the amount of time annuity providers and distributors would need to come into compliance with the rule changes reflected in the Proposal. It would be impossible for most, if not all, our members to fully assess and implement the highly complex requirements and conditions included in the Proposal in just sixty days. Past

Department rulemaking projects have provided far longer implementation periods, ranging from eight months for the 2016 Rule (which was itself inadequate in light of the extremely challenging and complex requirements of that rule, and was eventually extended through a non-enforcement policy adopted by the Department) to two years for the service provider disclosure regulations under ERISA §408(b)(2).

Despite the Department's assertion that the Proposal is intended to align with other existing standard of conduct regulations, such as Reg BI, a firm could not assert that they are in compliance with the ERISA fiduciary standard based on their compliance with Reg BI. Many firms and financial professionals would be subject to this standard for the first time as a result of the Proposal and would therefore have to significantly overhaul their policies, procedures, and information technology systems to ensure compliance with that standard.

Even firms and financial professionals already operating under the current version of PTE 2020-02 would have to undertake extensive revisions to their policies and procedures and perform costly and time-consuming information technology re-designs and build-outs. Many companies would not be able to meet the Proposal's requirements within such a short time frame and would be forced to suspend delivery of services to customers in order to avoid violating the conditions of the exemption (and, by extension, to avoid the risk of losing eligibility to rely on the exemption based on such violations under the draconian disqualification provision). As a result, many plans, participants, and beneficiaries would immediately be left without access to much-needed professional guidance and advice until the necessary work can be completed.

Relatedly, compliance efforts will be complicated and challenged by the absence of grandfathering protection for conduct occurring before the Proposal takes effect.

The Department has offered no compelling rationale for this extraordinarily compressed, unworkable, and unprecedented implementation timeline, and as such, we believe this timeline is arbitrary and capricious. Moreover, it would not be administratively feasible or in the interests of plans and participants to require implementation of the changes being made to PTE 2020-02, PTE 84-24, and the other exemptions to be amended under the Proposal, and therefore violates the requirements of ERISA §408(a).

## **XII. Comments on the Department's Regulatory Impact Analysis**

### **A. The Department's Regulatory Impact Analysis Relies on Stale and Inaccurate Data.**

The Department's regulatory impact analysis (the "RIA"), as presented in the preamble to the Fiduciary Definition Proposal, includes no real-world evidence or data showing that retirement savers are being harmed as a result of deficiencies in the current regulatory framework. Such evidence would be difficult to produce given that Reg BI, the NAIC Model, and 2020-02 have



only been in place for a relatively short period of time. In place of current data and information, the RIA relies on stale data used by the Department to support the 2016 Rule.

Most notably, the RIA recycles the assertion made in 2015 by the President's Council of Economic Advisers that \$17 billion in annual IRA losses can be attributed to conflicts of interest.<sup>125</sup> This assertion is extremely misleading and has no basis in fact. It is simply one percent of the total retirement savings in the United States in 2015. No evidence was provided at that time or since to support the implication that all advice received by retirement savers is conflicted.

**B. The Department's Regulatory Impact Analysis is Littered with Wholly Unreasonable and Inaccurate Assumptions.**

The RIA is largely based on the Department's own estimates and assumptions as to the costs and benefits likely to result if the Proposal is adopted in its current form. However, many of the Department's estimates and assumptions are highly flawed and inaccurate. For example:

- The RIA significantly underestimates the costs and risks associated with taking on fiduciary status under Title I of ERISA. The expansiveness of the Fiduciary Definition Proposal means that many firms and financial professionals would find themselves subject to fiduciary status for the first time. The RIA is based on estimates of time and cost that do not come close to accurately reflecting the actual amount of time and money that would be needed to perform the extensive work necessary to implement and comply with the Proposal.
- The RIA severely underestimates how many Independent Producers sell annuities and would potentially need exemptive relief under PTE 84-24 if the Proposal is adopted. The actual number of Independent Producers is nearly 20 times the number included in the RIA. The RIA also fails to consider the implications for Independent Producers who may need to rely on third parties to perform some or all the work necessary to implement and comply with amended PTE 84-24, which could potentially be treated as cash or non-cash compensation for which exemptive relief would be needed.
- The RIA incorrectly assumes that all eligible entities currently rely on PTE 2020-02 and would continue to do so if the Proposal is adopted. Our understanding is that some eligible entities do rely on PTE 2020-02, but a meaningful number of eligible entities have either determined that their conduct does not trigger fiduciary status in the first place or opted to modify their business practices to avoid triggering fiduciary status or to avoid engaging in prohibited transactions for which exemptive relief under PTE 2020-

<sup>125</sup> Council of Economic Advisors, *The Effects of Conflicted Investment Advice on Retirement Savings* (2015), [https://obamawhitehouse.archives.gov/sites/default/files/docs/cea\\_coi\\_report\\_final.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_coi_report_final.pdf).

02 would be required. The Proposal would, in our view, make this course of action far less viable, meaning that some eligible entities who do not currently rely on PTE 2020-02 would be compelled to do so. These entities would have to incur many, if not all, of the same costs and burdens as entities that implemented PTE 2020-02 prior to the issuance of the Proposal. These costs are not taken into account in the RIA.

- The RIA incorrectly assumes that implementation of the changes reflected in the 2020-02 Proposal will be relatively simple and easy to implement based on an assertion that the revised version of the exemption would closely align with Reg BI. However, as we explain above, this is not true. The 2020-02 Proposal includes significant changes that go well beyond the requirements of Reg BI. Significant amounts of time, money, and resources would be needed to implement and comply with the material differences between Reg BI and the 2020-02 Proposal.

C. The Department's Regulatory Impact Analysis Ignores Critical Factors and Information.

The RIA is based almost exclusively on research, data, information, and evidence that purportedly supports the Proposal. Rather than considering all relevant research, data, information, and evidence to achieve the best outcome for retirement savers, the Department seemingly elected to disregard any contradictory data and evidence in order to move forward with the Proposal. For example:

- The RIA includes no compelling evidence to suggest that the changes contemplated by the Fiduciary Definition Proposal and the 2020-02 Proposal are necessary to address deficiencies or problems with the current definition of fiduciary or the current version of PTE 2020-02, respectively.
- The RIA briefly acknowledges and quickly dismisses significant real-world evidence of the widespread harm suffered by retirement savers due to the 2016 Rule.<sup>126</sup> Reputable studies by well-respected research organizations found that at least 10.2 million retirement savers lost access to financial advice in 2016. The Department asserts that this inconvenient data is inaccurate but offers no evidence to support its view.
- The RIA fails to adequately account for the value of financial advice or the long-term value of annuities and insurance products. Instead, the RIA focuses only on the costs associated with such products and related services provided by firms and financial professionals and therefore significantly underestimates the potential benefits of taking no action and overestimates the potential benefits that would result from the Proposal.

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<sup>126</sup> See, e.g., the Chamber Report and the Deloitte Report.

- For example, the RIA cites a 2007 study by Friesen and Sapp to assert that equity mutual fund investors experience an average 1.56 percent return reduction and that poor market timing stems from broker advice. If this is true, then not timing the market poorly should preserve that 1.56 percent, and variable annuities with protected lifetime income benefits generally prevent this reduction due to poor market timing by requiring investment in an asset allocation fund or adherence to a model portfolio with periodic automatic rebalancing, partially offsetting the additional fees associated with the variable annuity and the income guarantee. Further, a 2022 Dalbar study found that the average equity subaccount investor outperformed the average equity mutual fund investor by 3.5 percent due to this effect, with equity subaccount investors exhibiting retention rates up to 1.38 years longer than equity mutual fund investors.<sup>127</sup>
- The costs involved with having access to a financial professional in the context of a rollover IRA cannot be compared to the costs of investment options in a workplace defined contribution plan. This is akin to comparing a full-service hotel to a hostel and concluding the hotel is unsuitable because a stay costs more. Access to a financial professional is not typically available to workplace plan participants but is available in the context of an IRA rollover. The financial professional should be compensated for those services, and the financial professional and the retirement saver should be free to decide whether that relationship should be ongoing or transactional.
- The RIA clearly demonstrates the Department's lack of expertise and experience regarding annuity products and annuity distribution channels.
  - The RIA asserts that "overpriced" annuities are commonly used in IRA rollovers and that this harms retirement savers but provides no benchmark or basis upon which to determine whether an annuity is overpriced or not. An in-plan index fund with a 25 basis point management fee cannot be compared to an annuity that may carry three to four percent in total annual charges but is professionally managed and provides lifetime income protection.
  - The RIA takes pains to note that I-share sales of variable annuities fell following the vacatur of the 2016 Final Rule in 2018, yet the percentage decrease is both inaccurate and misleading. According to Morningstar data, I-share sales fell 15 percent in 2019, to \$5.8 billion from \$6.8 billion, were unchanged in 2020, and actually doubled in 2021 to \$10.2 billion due to a strong equities market

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<sup>127</sup> DALBAR, Inc., *2022 Quantitative Analysis of Investor Behavior - Variable Annuities*.

performance in 2021. Moreover, citing only percentage increases neglects to acknowledge that fee-based variable annuity sales currently account for less than 2 percent of total annuity sales.

- The RIA posits a \$6.6 billion increase in annual returns from an average 30 basis point reduction in fees if all \$2.2 trillion in total variable assets in 2018 were moved to low-fee variable annuities, but this ignores the fact that low-cost annuities either do not offer lifetime income protections or offer them for an additional fee, which is not reflected in the analysis. It also ignores the fact that approximately \$400 billion of the \$2.2 trillion is in fixed accounts which carry no fee, and another \$300 billion is in group contracts.
- The RIA displays a fundamental ignorance regarding fixed indexed annuities through the statement, "...the terms in the contract and the method used to calculate gains and losses MAY [emphasis added] result in actualized gains and losses that differ from the gains and losses experienced by the index."<sup>128</sup> This is not a "may," this is a "will." The basic structure of an fixed indexed annuity would make it impossible to credit the full gain of the index to the contract, as only a portion of the premium is used to purchase options on one or more market indexes. Moreover, the value proposition of fixed indexed annuities for retirement savers is that they provide downside protection in exchange for limitations on upside potential. As required under state law, purchasers of fixed indexed annuities are provided with clear disclosures explaining how the products work, including the limitations on gains and losses. Depicting index performance above and beyond the specified limitation on gains as equivalent to investment losses, as implied in the RIA, is inaccurate and irresponsible.

### XIII. Conclusion

In an age when saving and preparing for retirement is squarely on the shoulders of individuals, financial professionals play an important role in helping their clients develop retirement plans and grow their savings. As currently formulated, the Proposal will deprive lower- and middle-income retirement savers of access to affordable guidance with retirement planning. For all the reasons expressed above, we urge the Department to withdraw the Proposal and discontinue its efforts to change the definition of fiduciary investment advice and the existing exemptions relied upon by investment advice fiduciaries. Instead, the Department should direct its time and resources to initiatives that will improve retirement security, such as implementation of the SECURE Act of 2019 and the SECURE 2.0 Act of 2022.

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<sup>128</sup> Fiduciary Definition Proposal, at 75928.

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Thank you again for the opportunity to provide these comments. If you have questions about our comments on the Proposal or if we can be of any further assistance in connection with this matter, please feel free to contact the undersigned at [wchopus@irionline.org](mailto:wchopus@irionline.org) or [jberkowitz@irionline.org](mailto:jberkowitz@irionline.org).

Respectfully submitted,



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Attachments



**ATTACHMENT 1a**

Excerpt from  
IRI's 2023 Fact Book  
Chapter 4 – Annuities 101



## Annuities 101

### What Is an Annuity?

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Annuities have been around for centuries. In early Roman times, citizens would make a one-time payment to a contract known as an *annua* in exchange for income payments received once a year for the rest of their lives. Today, an annuity is an insurance agreement that comes in a number of different forms and can (1) help individuals accumulate money for retirement through tax-deferred savings, (2) provide them with monthly income that can be guaranteed to last for as long as they live, or (3) do both.

An annuity can be viewed as life insurance in reverse. Whereas life insurance protects a family's financial situation against the premature death of a breadwinner, an annuity protects an individual or a couple from running out of money at an advanced age. As with life insurance, annuity contracts are based on the principle of risk pooling; that is, the pooled funds of a large group are used to pay benefits to a relative few in any given year. The burden of not knowing how long one will live is shifted from the individual to the insurance company, which spreads the longevity risk among all annuitants, some of whom will die sooner than expected while others will live longer than expected. A good analogy is homeowner's insurance: the risk of fire is common to all homeowners, but during a given span of time only a few houses will burn down. For most people such an event would be financially devastating, so the risk is pooled using insurance.

Annuities can play a vital role in helping investors save for retirement and receive guaranteed lifetime income during retirement — effectively giving them the ability to create their own pensions. Unlike other investments, annuities provide a wide variety of benefit options that can protect against untimely death, provide principal guarantees, assure a specified amount of income when the contract is annuitized, guarantee withdrawals for life, or a combination of all of these.

## What Role Can Annuities Play in a Comprehensive Retirement Plan?

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Annuities are the only financial instruments available today, other than Social Security and employer-provided pensions, that can guarantee a lifetime stream of income during retirement. Along with giving retirees the peace of mind that comes from knowing they will not outlive their assets, annuities provide another important benefit — a way to increase current income.

Many of today's retirees are faced with the challenge of how to withdraw enough money from their portfolios to live comfortably during retirement without depleting their funds if they live a long life. Withdrawing money from an investment portfolio may not present a problem in the early years, but as retirees age, the risk of running out of money can increase dramatically. Allocating a portion of the portfolio to one or more annuities reduces this risk.

Annuity payments form an essential part of a comprehensive retirement plan along with Social Security and pension income. The amount of each annuity payment reflects the fact that some annuitants will not live as long as others. This "risk pooling" allows insurance companies to make annuity payments that are larger than would be possible through a systematic withdrawal plan, where an individual retiree periodically withdraws funds in amounts that give reasonable assurance that he or she will not run out of money. Thus, annuities can serve to both reduce the risk of running out of money in retirement and increase the amount of each income payment received.

## Who Are the Parties to an Annuity Contract?

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Most annuity contracts — and all commercial annuity contracts — are issued by life insurance companies. When the purchaser completes the application to buy an annuity, the contract owner, annuitant, and beneficiary are designated and identified as such in the contract.

### ***Contract Owner***

The owner of an annuity contract pays the premiums. He or she has certain rights under the contract, such as the right to make contributions, withdraw all or a portion of the contract value, or change the parties to the contract. The owner is usually an individual or couple but can also be a non-natural person such as a trust or a partnership. Special tax rules apply to annuities owned by non-natural persons.

### ***Annuitant***

The annuitant is the person upon whose life annuity payments are based. Often, the annuitant is also the contract owner, so payments continue as long as the owner/annuitant is alive. It is also possible for two people, such as an owner and spouse, to be designated as joint annuitants so that income can continue throughout either of their lives. This type of annuity is called a "joint and survivor annuity." While in most cases payments are made to the contract owner or annuitant, funds also can be paid to a third party referred to as a "payee."



***Beneficiary***

The beneficiary is the person designated under the contract to receive any payments that may be due upon the death of the contract owner or annuitant. Contingent beneficiaries, to whom payments are made in the event the primary beneficiary predeceases the owner or annuitant, may also be named in the contract.

***Respective Rights of the Parties***

Because annuity contracts can offer a great deal of flexibility in setting up income payments, the respective rights of the contract owner, annuitant, and beneficiary can vary. For example, under one insurer's contract, the owner may be entitled to receive annuity payments. Under another insurer's contract, the annuitant may be the party entitled to receive annuity payments.

## **What Types of Annuities Are Available?**

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A wide variety of annuities are available today, many designed to meet specific needs and help consumers achieve their retirement goals. With a deferred annuity, assets accumulate on a tax-deferred basis until distributions are made, usually during retirement; with an immediate annuity, the contract owner converts assets into income and starts receiving payments right away. Fixed annuities accumulate savings or distribute income at guaranteed rates and in guaranteed amounts; variable annuities accumulate savings or distribute income based on the performance of the underlying investment options chosen by the contract owner. Annuities can be part of an IRA, a qualified retirement plan such as a 401(k) or 403(b) (a "qualified" annuity) or may be purchased with after-tax dollars (a "non-qualified" annuity). The following is a more detailed look at various types of annuities.

**Figure 4-1** Types of Annuities

	Deferred	Immediate
<b>Variable (VA)</b>	<ul style="list-style-type: none"> <li>• Purchased either with a single premium or with periodic payments to help save for retirement; the contract owner determines the point at which accumulated principal and earnings are converted into a stream of income.</li> <li>• The contract value or income payments vary based on the investment performance of underlying subaccounts or a stated rate, if provided by the issuer.</li> <li>• Total sales of deferred VAs in 2022 were \$98.6 billion.</li> </ul>	<ul style="list-style-type: none"> <li>• Purchased with a single lump sum; income payments begin within a short period — less than 13 months.</li> <li>• The income payments vary based on the investment performance of underlying subaccounts or a stated rate, if provided by the issuer.</li> <li>• Total sales of immediate VAs in 2022 were about \$0.1 billion.</li> </ul>
<b>Structured</b>	<ul style="list-style-type: none"> <li>• Structured annuities, also called Registered Index Linked Annuities (RILAs) use options on market indexes to provide purchases with upside potential and downside protection</li> <li>• RILAs carry investment risk, and are therefore a form of variable annuity</li> <li>• Total RILA sales in 2022 were \$36.4 billion (included in deferred VA total sales above)</li> </ul>	<ul style="list-style-type: none"> <li>• There are no immediate versions of RILAs, but as a variable annuity they may be annuitized to create a fixed lifetime income stream</li> </ul>
<b>Fixed</b>	<ul style="list-style-type: none"> <li>• Purchased either with a single premium or with periodic payments to help save for retirement; the contract owner determines the point at which accumulated principal and earnings are converted into a stream of income.</li> <li>• Guarantees that the contract owner will earn a stated rate of interest during the accumulation phase of a deferred annuity and receive a defined amount of income on a regular schedule when the contract is annuitized.</li> <li>• Total sales of deferred fixed annuities in 2022 were \$192.2 billion.</li> </ul>	<ul style="list-style-type: none"> <li>• Purchased with a single lump sum; income payments begin within a short period — less than 13 months.</li> <li>• The income payments are a pre-determined amount on a regular schedule.</li> <li>• Total sales of immediate fixed annuities in 2022 were \$10.3 billion.</li> <li>• Total sales of deferred income annuities (essentially “immediate” annuities with a five to 40 years waiting period before payments begin) in 2022 were \$1.0 billion.</li> </ul>

Source: Morningstar, Inc.; Beacon Research

## What Are the Differences Between Deferred and Immediate Annuities?

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### ***Deferred Annuities: A Way to Save Money for Retirement***

Many people buy annuities because they want their money to grow tax-deferred while they are saving for retirement, and they want a guaranteed income stream once they retire. This type of annuity is called a deferred annuity. A deferred annuity contract has two phases — an accumulation or savings phase, and a payout or retirement income phase.

In the accumulation phase, the owner pays premiums (also referred to as purchase payments) into the contract to accumulate assets. Some contracts are purchased with a single payment and are called single premium contracts. Other contracts allow payments to be made at any time and are called flexible premium contracts. During the accumulation phase, the owner can surrender the contract or take one or more partial withdrawals.

In the payout phase, the owner (or other designated payee) receives income. When he or she wants payments to begin, the insurance company starts sending checks on a regular basis, typically monthly. The effective date of payments is called the annuity start date or the annuity commencement date. In certain circumstances, the insurance company will allow annuity payments to be commuted for a lump sum equal to their present value.

### ***Immediate Annuities: When You Want to Receive Money Right Away***

An immediate annuity (commonly known by the acronym SPIA, which stands for Single Premium Immediate Annuity, and may also be called a “payout” or “income” annuity) is purchased with a single premium and annuity payments begin right away (there is no accumulation period). If the owner chooses to receive monthly payments, payments usually begin at the end of the first month but may be scheduled to start any time within one year after purchase. An immediate annuity can be purchased using retirement savings, for example, from a 401(k) plan and/or personal savings, as a way to create guaranteed income payments during retirement. It can also be purchased using money from other sources, such as an inheritance or the sale of a business.

Annuity payments can be made over the lives of one or more individuals or for a specified number of years, e.g., for 10 or 15 years. Life annuity payments typically end when the annuitant dies, but various types of guarantees are widely available. For example, you can purchase a life annuity with 10 years of payments guaranteed. Under such an annuity, the payments will continue for the longer of 10 years or the annuitant's life. In addition, insurers offer annuity payments that provide that if the annuitant dies before annuity payments equal to the premiums paid for the contract have been paid, the contract beneficiary will receive a lump sum equal to the difference between the sum of the annuity payments and the premiums paid (“cash refund”). As there are many payout options offered by issuing insurers, the owner should work with his or her financial advisor to assure that the payment feature meets his or her financial needs.

Data from the CANNEX annuity quoting platform shows about one-third of quote requests, a good proxy for sales, are for SPIA with cash refund, about 20 percent are for life-only payments, and the remaining approximately one-half are for life with periods certain of various durations, 10 years being the most common. More than 85 percent are for monthly payments.

### ***Inflation-Protected Annuities***

An inflation-protected annuity (IPA) is similar to an immediate annuity but payments are indexed to the rate of inflation. Initial payments will usually be smaller than they would be without the

inflation protection. Even at a moderate rate of 4 percent, inflation reduces the purchasing power of one dollar to fifty cents in approximately 15 years. IPAs guarantee a real rate of return at or above inflation. Very few life insurance companies offer true IPAs for sale in the United States (largely due to the difficulty of hedging the inflation risk). However, consumers can buy immediate annuity contracts available that provide pre-determined annual increases in the amount of annuity payments, e.g., 3 percent each year for the life of the contract. CANNEX data indicates more than 90 percent of quotes include no payment adjustment feature, i.e., no provision for increasing future monthly payments.

### ***Structured Settlement Annuities***

Structured settlement annuities are used to provide periodic payments to satisfy legal judgments. Structured settlement sales numbers are not included in the market data used in this publication.

## **What Are the Differences Between Fixed and Variable Annuities?**

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### ***Fixed Annuities: Guaranteed Investment Performance***

With a fixed annuity, the owner is guaranteed at least a minimum rate of investment return. The insurer declares a specific credited rate of return based on the investment performance of its general account assets. In the case of a deferred fixed annuity, the insurance company guarantees a minimum interest rate (also known as a minimum credited interest rate) on payments made by the owner during the accumulation phase. In many cases, an insurer will credit interest at a higher rate than the minimum for varying periods. This type of interest is often referred to as "excess interest." The owner's purchase payments are invested in the insurance company's general account. When the annuity reaches the payout phase, the dollar amount of the annuity income payments is determined based on payment rates guaranteed at the time the deferred annuity was issued (or the insurer's current payment rates, if higher) and are guaranteed for the selected payout duration, e.g., the owner's life or a specified period of years.

Generally, fixed annuities involve less investment risk than variable annuities because they offer a guaranteed minimum rate of interest. The minimum rate is not affected by fluctuations in market interest rates or the company's yearly profits. Some people like the security of knowing that their annuity payments will never vary or that they will receive at least a minimum amount of credited interest. Although they are less risky, fixed annuities generally offer less investment flexibility and less opportunity for growth than variable annuities.

### ***Fixed Indexed Annuities: Market-Linked Interest Potential and Guaranteed Minimum Interest***

A Fixed Indexed Annuity is a fixed annuity that typically provides the contract owner with an investment return that is a function of the change in the level of an index, such as the S&P 500, while guaranteeing no less than a stated fixed return on the investment. These products are designed for investors who want to partake in the benefits of a market-linked vehicle with a protected investment floor if there is a downturn in the benchmark index. Some indexed annuities also offer riders that guarantee income for life, even if the annuity value declines to zero.

### ***Variable Annuities: Investment Performance Based on Portfolios Chosen by the Owner***

With a variable annuity, contract owners may choose from a wide range of investment options called subaccounts, each of which generally invests in shares of a single underlying mutual

fund or, in some cases, in a “fund of funds (FOF),” which is a mutual fund that invests in several other mutual funds or in exchange-traded funds (ETFs). Variable annuity contract owners may direct the allocation of their contract value among subaccounts that correspond to a wide range of underlying mutual funds, such as equity funds, bond funds, funds that combine equities and bonds, actively managed funds, index funds, domestic funds, and international funds. Unlike mutual funds sold to the public, the mutual funds that underlie subaccounts are available only to investors in variable annuities, variable life insurance contracts, and in some cases, 401(k) plans, IRAs, and certain other investments permitted by applicable tax laws and regulations. Assets in a variable annuity can be transferred between subaccounts tax-free. As a result, investment decisions can be made based on an investor’s needs and strategy without worrying about the tax implications.

As with mutual funds, the investment returns of variable annuity subaccounts fluctuate. During the accumulation phase, the contract value varies based on the performance of the underlying subaccounts. During the payout phase of a deferred variable annuity (and throughout the entire life of an immediate variable annuity), the dollar amount of the annuity payments may also fluctuate if variable annuitization is chosen, again based on how the portfolio performs. Fixed annuitization generally produces equal payments over the time period selected (life only or life in combination with a minimum payment period).

Unlike mutual funds, annuities offer a wide variety of guarantees to protect a contract owner’s investment. Death benefits provide principal protection in the event a contract owner dies during a market downturn. Living benefit features protect against investment and/or longevity risk by providing guarantees that cover income, accumulation, and withdrawals for either a fixed number of years or for life.

In addition to variable investment options or subaccounts, many variable annuities offer a fixed account or fixed investment option. This means that during the accumulation phase of a deferred variable annuity, the owner can allocate payments not only to one or more variable investment options, but to a fixed interest option as well. The money allocated to the fixed option goes into the insurance company’s general account. A minimum rate of interest is typically guaranteed for a period of one or more years.

Registered Index Linked Annuities (RILAs) are a relatively recent innovation. RILAs generally do not offer subaccounts (although some include a money market subaccount); rather, purchase payments are invested in the insurer’s general account, and a portion is used to purchase options on one or more market indexes selected by the purchaser. The use of options provides some upside potential to contract owners in years when the index(es) perform well, and limit downside risk during years when returns are negative.

During the payout phase of some contracts, only fixed annuity income payments are offered. Other contracts provide fixed and/or variable payouts. Providing both types of payouts allows contract owners to take on the added risk associated with variable investment options while accumulating assets, and to manage their level of risk during retirement by choosing to have the rate of return guaranteed for at least some portion of their income payments.

## What Are the Differences Between Qualified and Non-Qualified Annuities?

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### ***Qualified Plans versus Non-Qualified Plans***

Annuities can be used in tax-qualified retirement plans, such as IRAs, pension or profit sharing plans, 401(k) plans, 403(b) plans, and certain governmental plans. These annuities are called qualified annuities and are typically funded with pretax dollars. (Some qualified annuities are purchased with after-tax dollars for use with Roth accounts, under which the annuity payments and other withdrawals are tax-free if certain tax rules are satisfied.) Annuities that are not used in qualified plans are called non-qualified annuities and are purchased by members of the general public with after-tax dollars.

The first variable annuity in America was designed and developed for a qualified retirement program offered by TIAA-CREF (now called TIAA) in 1952. As such, the variable annuity was available only as an investment within a tax-qualified plan until 1960, when the first publicly available variable annuity outside a qualified plan was developed and brought to market by the Variable Annuity Life Insurance Company (VALIC).

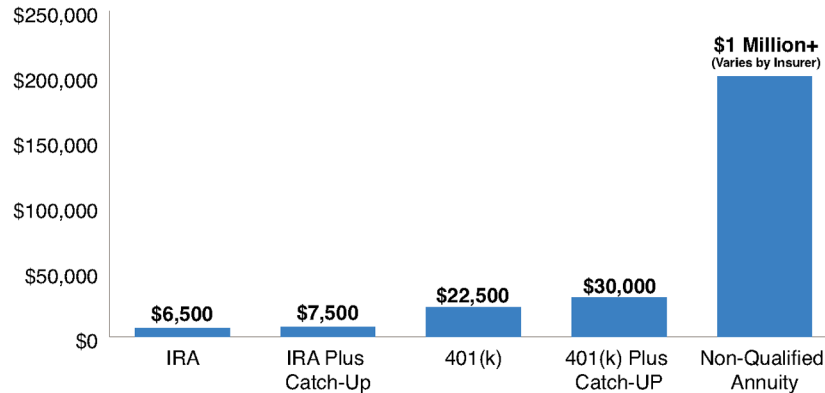
An annuity used in a qualified plan can provide contract owners with the same insurance benefits offered by non-qualified annuities, such as guaranteed death benefits, guaranteed living benefits, and guaranteed income payments for life. It does not, however, provide any additional tax-deferred treatment of earnings — tax deferral is provided by the qualified plan itself. (Other tax aspects of qualified and non-qualified annuities are discussed in Chapter 14: *Regulation and Taxation of Annuities*.)

**Figure 4-2** Qualified and Non-Qualified Annuities

	Qualified	Non-Qualified
Variable	<ul style="list-style-type: none"> <li>• Purchased through retirement plans or IRAs using pre-tax dollars, up to specified limits.</li> <li>• The contract value or income payments vary based on the investment performance of underlying subaccounts.</li> <li>• Total sales of qualified variable annuities in 2022 were \$69.1 billion.</li> </ul>	<ul style="list-style-type: none"> <li>• Purchased by members of the general public using after-tax dollars.</li> <li>• The contract value or income payments vary based on the investment performance of underlying subaccounts.</li> <li>• Total sales of non-qualified variable annuities in 2022 were \$29.6 billion.</li> </ul>
Fixed	<ul style="list-style-type: none"> <li>• Purchased through retirement plans or IRAs using pre-tax dollars, up to specified limits.</li> <li>• Guarantees that the contract owner will earn a stated rate of interest during the accumulation phase of a deferred annuity, and receive a defined amount of income on a regular schedule when the contract is annuitized.</li> <li>• Total sales of qualified fixed annuities in 2022 were \$111.9 billion.</li> </ul>	<ul style="list-style-type: none"> <li>• Purchased by members of the general public using after-tax dollars.</li> <li>• Guarantees that the contract owner will earn a stated rate of interest during the accumulation phase of a deferred annuity, and receive a defined amount of income on a regular schedule when the contract is annuitized.</li> <li>• Total sales of non-qualified fixed annuities in 2022 were \$91.6 billion.</li> </ul>
Total	<ul style="list-style-type: none"> <li>• Total sales of qualified annuities in 2022 were \$181.0 billion.</li> </ul>	<ul style="list-style-type: none"> <li>• Total sales of non-qualified annuities in 2022 were \$121.2 billion.</li> </ul>

Source: Morningstar, Inc.; Beacon Research

Annuities used within qualified plans are subject to annual contribution limits (Figure 4-3 shows the limits for 2023). The government does not, however, limit the total annual amount of premium payments to non-qualified annuities. Insurance companies may impose maximum premium limits that are typically very high and do not affect most contract owners. Because of this feature, many people view non-qualified annuities as valuable personal retirement accounts to which they can contribute as much as they need for retirement.

**Figure 4-3 Retirement Savings Plan Contribution Limits – 2023**

Source: Internal Revenue Service – Publication 590, Individual Retirement Arrangements

## Are Annuities Sold Outside of the Retail Market?

In addition to the annuities described above that are sold through the retail market, several annuities are sold through institutional or private markets. This includes group annuities as well as lesser-utilized annuity products such as private annuities, private placement annuities, and charitable gift annuities. While most of the remainder of the IRI Retirement Fact Book concentrates on individually sold annuities, a brief mention of these additional types of annuities is included for informational purposes.

### Group Annuities

Group annuities are typically used as a retirement income plan for employees. Unlike annuities sold in the retail market, group annuity contracts are generally owned by the employer, and employees are participants. Certain individual annuities used in 403(b) plans may also be referred to as “group annuities,” but these are actually individually owned contracts purchased in a group setting and contributed to via payroll deduction, for example in the case of a retirement plan for employees of a university or hospital. Group annuities are covered in more detail in Chapter 12: *Tax-Qualified Retirement Plans*.

### Private Annuities

In the United States, all commercial annuities are issued exclusively by insurance companies. A “private” annuity is not issued by an insurance company. Rather, it involves the transfer of property (such as real estate) from an individual or a revocable living trust in exchange for an unsecured promise by the transferee (an individual or a non-insurance entity, such as a trust) to make a periodic stream of fixed payments. The tax treatment of private annuities is complex and differs from the tax treatment of commercial annuities.



**Private Placement Annuities**

Private placement annuities are variable annuity contracts that are not registered under federal or state securities laws. They are available exclusively to investors who meet certain minimum net worth and income levels under such laws. The types of investment options available under private placement annuity contracts often include hedge funds, commodities, managed accounts, and other kinds of private equity offerings.

**Charitable Gift Annuities**

With a charitable gift annuity, a donor transfers cash or property (including appreciated property) to a charitable organization in exchange for income payments for life or joint lives, with no guarantee period. The federal tax law imposes specific requirements on the relationship of the amount donated and the value of the promised annuity stream. The charity can fund its payment obligations using its own assets, or it can fund them by purchasing a commercial annuity.

## What Fees and Expenses Are Associated With Annuities?

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**What Fees and Expenses are Associated with Fixed Annuities?**

A fixed annuity typically does not impose direct expense charges on the contract owner, other than surrender charges (charges for cancellation of the contract during its early years) for deferred fixed annuities. The spread, or difference between what the issuing company expects to earn and what it commits to pay out is intended to cover the insurer's expenses.

**What Fees and Expenses are Associated with Variable Annuities?**

A variable annuity, on the other hand, involves direct expenses in the form of insurance charges and indirect expenses in the form of management and other fees and expenses associated with the underlying mutual funds in which the variable annuity subaccounts invest.

**Insurance, Administrative, and Distribution Charges**

The fees and charges commonly associated with variable annuities include mortality and expense risk charges (M&E fees), administrative charges, and distribution charges.

In most contracts, the M&E fee pays for three important insurance guarantees:

- The ability to choose a payout option that provides an income that cannot be outlived at rates set forth in the contract at the time of purchase
- When available, a death benefit to protect beneficiaries
- The promise that the annual insurance charges will not increase

The administrative and distribution charges pay for all of the services involved in the maintenance of variable annuity contracts, such as the preparation of contract statements and mailings and other customer services. Some variable annuities also impose an annual contract fee that is similar to the annual account maintenance fee imposed by many IRAs. This fee generally ranges between \$30 and \$40 per year. Most insurers waive this fee for contracts with an accumulation or contract value of at least a certain amount, e.g. \$25,000.

### ***Mutual Fund Fees and Expenses***

Underlying mutual funds incur investment management fees and operating expenses, and in many cases, distribution charges known as “12b-1 fees,” which are named after the SEC rule that governs them. Investment management fees for the mutual funds that underlie the subaccount investment options in variable annuities are, on average, lower than those charged for publicly offered mutual funds. These lower fees have the effect of offsetting, to some extent, the insurance charges. See Chapter 9: Focus on Accumulation with Income Flexibility, for illustrations show how projected accumulation values can vary between variable annuity and mutual fund portfolios.

### ***Surrender Fees***

If a contract owner decides to cancel a deferred annuity during the early years of the contract, surrender charges may apply. These charges, if applicable, generally begin in a range from 5 percent to 7 percent of the amount invested and decline to zero over a period of time, such as five to seven years. Surrender charges are structured differently for different annuity products. (See the following section, How Are Variable Annuity Sales Charges Structured?)

### ***Unbundled Fees***

Some variable annuity contracts permit purchasers to select from a menu of optional product features, each of which usually has an associated charge. This unbundling approach gives customers the ability to select and pay for only those features they want. Optional features, referred to as riders, include, for example, enhanced guaranteed death benefits and guaranteed minimum living benefits. These riders typically have a separate, additional fee. See Chapter 8: Planning for Future Income, for data on these optional contract rider fees.

### ***Premium Tax***

States may impose premium taxes on variable annuity purchases. Currently California, Maine, Nevada, South Dakota, West Virginia, and Wyoming tax life insurance and annuity premiums, and only California and West Virginia tax qualified purchases. Tax rates range from 0.5 percent (California on qualified monies) to 3.5 percent (Nevada on non-qualified). Florida assesses a 1 percent tax on both qualified and non-qualified monies, but it is typically absorbed by the issuing insurance company.

## **How Are Variable Annuity Sales Charges Structured?**

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### ***B-Share Variable Annuities***

Most variable annuity contracts are B-share products. They are offered with no initial sales charge, but cancellation of the contract during its early years may trigger a withdrawal charge known as a surrender charge. These charges typically range from 5 percent to 7 percent of premium in the first policy year, and subsequently decline to zero, generally after five to seven years (known as the surrender charge period). Some annuity contracts impose surrender charges only during the initial surrender charge period that begins after the contract is purchased, while others associate a new surrender charge period with each subsequent premium payment.

Surrender charges underscore the long-term nature of the annuity product. As long as contract owners remain committed to accumulating money for retirement through their variable annuity, they generally will not incur these charges. In addition to surrender charges, B-share contracts have annual M&E and administration fees. B-shares accounted for over 80 percent of variable annuity sales in 2022.

A number of insurers have begun to offer other types of charge structures to meet different investor needs. The following are the most common.

### ***A-Share Variable Annuities***

Like A-share mutual funds, A-share variable annuities have up-front sales charges instead of surrender charges. Sales charges are calculated as a percentage of each premium payment.

A-share variable annuities offer breakpoint pricing, which means up-front sales charges decrease depending on the cumulative amount of purchase payments that have been made. In addition, assets that a contract owner has in other products in the company's product line may be recognized in the cumulative payment amount used to determine the breakpoint pricing. A-share contracts often have lower ongoing M&E annual fees than annuities with surrender charges. A-shares accounted for less than one percent of total VA sales in 2022.

### ***C-Share or No-Surrender-Charge Variable Annuities***

C-share, or no-surrender-charge variable annuities, offer full liquidity to owners at any time, without any up-front or surrender charges (although tax penalties may apply to withdrawals before age 59½). There are, however, ongoing M&E and administrative fees. C-shares made up about two percent of total VA sales in 2022.

### ***I-share or Fee-Based Variable Annuities***

I-share, or fee-based variable annuities, are intended for investors who favor paying one fee to have their investment portfolio managed by a registered investment advisor or fee-only advisor, (for example, a wrap-fee advisory program). Typically, the sale of an I-share does not result in a sales commission for an advisor from the issuing insurance company. However, the advisor assesses fees for the services, including the I-share contract, which is agreed upon by the client. Consequently, M&E annual fees are generally less than other share-classes due to the absence of commissions. I-shares have no surrender charges and may provide optional living benefit guarantees for an additional fee. I-share sales are a larger percentage of the VA market than they were several years ago; sales of I-shares have grown as overall VA sales have dropped, so I-shares are about eight percent of the VA market today versus three percent 10 years ago.

### ***L-Share Variable Annuities***

L-share variable annuities have no up-front sales charges. They typically have relatively short surrender charge periods, such as three or four years, but may have higher ongoing M&E and administrative charges than other share classes. It is becoming more common for L-shares to be structured as a B-share with an optional "buy down," which reduces the duration of surrender charges for an additional fee. This "liquidity rider" expires when the shortened surrender charge period is over, as does its fee. L-shares once accounted for almost one-third of the market but have almost disappeared from the VA landscape due to suitability concerns and represented less than 1 percent of total VA sales in 2022, with almost all this likely coming from additional purchase payments to existing contracts rather than new sales.

### ***O-share Variable Annuities***

O-shares are intended to merge the advantageous M&E and surrender charges of A-share and B-share variable annuities, respectively. Unlike A-shares, O-shares do not impose up-front sales charges, while, typically, possessing surrender charge periods akin to B-shares. Instead, M&E charges are assessed against both the account value and the premium, with the premium-based charges progressively declining throughout the surrender period, and ending after the surrender period. These features result in expenses similar to an A-share once the contract is free of surrender charges. The design of O-shares encourages investors to think of variable annuities as a long-term investment by rewarding longer holding periods with lower fees. O-shares were less than three percent of sales in 2022.

### ***X-Share (Bonus) Variable Annuities***

X-Share variable annuity contracts credit an additional amount or bonus to the contract value, which is calculated as a percentage of purchase payments added to the contract at or subsequent to contract issue. Bonus amounts generally range from 1 percent to 6 percent. For example, with a 3 percent bonus feature, a contract owner paying \$10,000 in premiums would have \$300 credited immediately to the balance. This category does not include contracts that credit additional amounts to the contract value after a designated period, sometimes referred to as “persistence bonuses.” Variable annuities with bonus credits may have higher ongoing expense charges and longer surrender periods than variable annuities without bonus credits. Some contracts allow the insurer to re-capture all or part of the bonus if the contract is surrendered within the first few years. Bonus contracts are difficult for companies to offer in a low interest rate environment, and there are far fewer available than there once were. There are only a few X-shares available for new purchase, and the class accounted for about one percent of total sales in 2022; as with L-shares, most if not all of these sales represent additional premiums paid into older X-share variable annuities.

## **What Are Guaranteed Minimum Death Benefits?**

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If a contract owner dies in the accumulation phase, a deferred annuity contract will, at a minimum, pay the accumulation value to a named beneficiary. Sometimes the contract may be continued by the beneficiary, with the beneficiary as the new owner. The contractual payout of this benefit varies by policy and can be payable as a lump-sum payment or as periodic annuity payments. (Fees associated with death benefits are discussed in Chapter 8: Planning for Future Income. The tax treatment of death benefits is discussed in Chapter 14: *Regulation and Taxation of Annuities*.)

Most, but not all, variable annuity contracts provide a standard Guaranteed Minimum Death Benefit (GMDB) during the accumulation period equal to the greater of (a) the contract value at death or (b) premium payments minus any prior withdrawals. The “return of premium” (ROP) GMDB gives contract owners the confidence to invest in the stock market, important in keeping up with market inflation, as well as the security of knowing their families will be protected against financial loss in the event death occurs as a time when the account value has incurred losses due to negative market returns.

The value and importance of the death benefit is periodically highlighted during major market corrections, such as the COVID-19 precipitated selloff in equity markets in March 2020; the financial crisis in 2008; or the technology stock led market downturn between 2001 and 2003. While markets inevitably recover and historically go on to reach new highs (as they certainly did in 2021!), the beneficiaries of variable annuity contracts owned by those who die during or

immediately after a huge selloff are protected. During each of these major market corrections, variable annuity beneficiaries received death benefits worth significantly more than the value of the annuities, protecting annuity value for beneficiaries. For a VA contract owner dying in a “trough” of financial market returns, the preservation of assets for heirs afforded by a GMDB, even a standard ROP, can be quite significant: estimates of unhedged GMDB exposure at the height of the 2008-2009 financial crisis were as high as \$15 billion, meaning \$15 billion of death benefit liability in excess of variable annuity account value. A similar circumstance occurred at the onset of the pandemic; contract owners who died in the early months when the market dropped precipitously before recovering were protected from those losses. Beyond ROP there are also several types of enhanced GMDBs that provide additional growth and/or protection of account value. The different types of enhanced GMDBs are described below, some of which have additional associated charges.

#### ***Contract Anniversary Value or Ratchet***

Some life insurance companies offer death benefits that step up or increase based on pre-determined criteria. Called contract anniversary value or ratchet, these enhanced GMDBs are equal to the greater of (a) the contract value at death, (b) premium payments minus prior withdrawals, or (c) the contract value on a specified prior date. The specified date could be a prior contract anniversary date, such as the date at the end of every seven-year period, every anniversary date, or even more often. A ratchet GMDB locks in the contract's gains on each of the dates specified.

#### ***Initial Purchase Payment With Interest or Rising Floor***

Some insurers offer a rising floor GMDB that is equal to the greater of (a) the contract value at death or (b) premium payments minus prior withdrawals, increased annually at a specified rate of interest. In some cases, a ratchet and a rising floor may be available within the same contract. Some contracts offer a choice of a ratchet or a rising floor. Though they have become less common and more expensive in recent years due to low interest rates, they are still available.

#### ***Enhanced Earnings Benefits***

Not all variable annuity death benefits are associated with protection against falling markets. Many variable annuity contracts offer enhanced earnings benefits (EEB) that provide a separate death benefit to help offset federal and state income taxes payable upon death on any gains in the contract. With this feature, beneficiaries receive not only the base death benefit amount, but also an additional amount that is usually equal to a percentage of the contract's earnings at death, e.g., 40 percent.

## **What Are the Different Types of Guaranteed Minimum Living Benefits?**

Prior to 1997, principal protection under variable annuity contracts was offered only in the case of death. In 1997 the first Guaranteed Minimum Income benefit was issued by Equitable, which offered contract holders the opportunity to generate annuity income from the greater of the account value or a guaranteed minimum amount based on the premium, after a multi-year waiting period. In subsequent years insurers developed other “living protection” against investment and/or longevity risk in variable annuity contracts by guaranteeing minimum accumulation values or withdrawal amounts. Some type of living benefit rider is offered on about two-thirds of “open” (i.e., available for new purchases) variable annuity contracts.

Various types of guaranteed minimum living benefit (GMLB) riders are described below. Besides offering these in new contracts, some companies allow them to be added to existing contracts. Guaranteed living benefits are usually offered as riders to variable annuity contracts for an optional charge. (Fees associated with guaranteed living benefits are discussed in Chapter 8: *Planning for Future Income*.)

#### ***Guaranteed Minimum Income Benefit***

A guaranteed minimum income benefit (GMIB) rider is designed to provide the investor with a base amount of lifetime income when they retire regardless of how the investments have performed. It guarantees that if the owner decides to annuitize the contract (for life, life plus a certain period, or the lives of two people), payments are based on the greater of the contract value, or the amount invested credited with simple or compound “interest” at a rate of 1 percent to 3 percent. The “interest” creates a notional balance upon which annuity payments can be calculated; it does not represent account or cash value. An investor must annuitize to receive this benefit and there is typically a 10-year holding period before it can be exercised. Age limits may also apply.

#### ***Guaranteed Minimum Accumulation Benefit***

A guaranteed minimum accumulation benefit (GMAB) rider guarantees that an owner’s contract value will be at least equal to a certain minimum percentage (usually 100 percent) of the amount invested after a specified number of years (typically 10 years), regardless of actual investment performance.

#### ***Guaranteed Minimum Withdrawal Benefit***

First introduced in 2002 by The Hartford, a guaranteed minimum withdrawal benefit (GMWB) rider guarantees that a certain percentage (usually 4 percent to 6 percent) of the amount invested can be withdrawn annually until the entire amount is recovered, regardless of market performance. Reducing withdrawals in one year generally does not allow for increased withdrawals in subsequent years. However, if a contract owner defers withdrawals and the account value grows and is “locked in” at certain points as the new “benefit base,” the subsequent withdrawal amounts allowed may be larger.

If the underlying investments perform well, there will be an excess amount in the policy at the end of the withdrawal period. If they perform poorly and the account value is depleted before the end of the withdrawal period, the investor can continue to make withdrawals until the full amount of the original investment is recovered.

If the investor decides to terminate the contract before the end of the withdrawal period, he or she will receive the cash surrender value of the contract.

#### ***Guaranteed Lifetime Withdrawal Benefit***

Another type of GMWB rider that guarantees withdrawals for life was introduced in 2004. The guaranteed lifetime withdrawal benefit (GLWB) guarantees that a certain percentage (typically 3 percent to 5 percent, often based on age) of the amount invested can be withdrawn each year for as long as the contract holder lives. This percentage may vary depending on the person’s age when withdrawals begin, whether the payment is guaranteed to continue for the life of one (single life) or two (joint life) individuals, and in some of the newest structures based on the level of an external benchmark such as the 10-year Treasury Constant Maturity Rate. More recently issued benefits may also include other levers that help the insurance company manage the risk of guaranteeing lifetime income on a variable annuity, such as a reduction in the withdrawal percentage rate if the account value is exhausted while income payments are still being made.



In many GMLBs, “step-up” features periodically, e.g., annually or every five years, lock in higher guaranteed withdrawals if investments do well. “Roll-up” features, conversely, increase the amount that may be withdrawn (by increasing the “benefit base” used to calculate withdrawals) during the deferral period, i.e., prior to the commencement of withdrawals. Allocation to a balanced or volatility managed fund, adherence to an asset allocation program, or a minimum allocation to a fixed or fixed income subaccount is often required when electing a GMLB. The liability risk to the insurer may also be managed through dynamic rebalancing, which shifts allocation toward more conservative investment options when equity returns are negative and/or market volatility increases.

### ***In-Plan Lifetime Income Benefit***

The standalone lifetime income benefit (SALB) was introduced in 2008. While the SALB did not get much traction in the individual market, the framework has evolved into a defined contribution plan option that embeds a lifetime income benefit into a target-date fund. Since this is not an annuity per se, under current law it is eligible as a Qualified Default Investment Alternative (QDIA), which participants can be auto-enrolled in with the option to opt out if they so choose. This provides in-plan income protection similar to that provided by GLWB on an individually purchased annuity, enabling retirement savers to create their own pensions within workplace plans. Combined with the SECURE Act and SECURE 2.0, which helped alleviate fiduciary concerns by providing a safe harbor for plan sponsors, strong growth is expected in this area in the coming years (see Chapter 14: Regulation and Taxation of Annuities, for more information about the SECURE Act).

### ***Long-Term Care Protection***

Some annuity contracts have features designed to address aging Americans’ concerns about long-term care (LTC). Many contracts permit owners to withdraw money from their contracts for long-term care needs without incurring surrender charges. Surrender charges may be waived if, for example, a contract owner has been confined to a nursing home for a minimum period or has suffered a critical illness. Some variable annuity contracts provide GLWB features that double the income payment during a qualified long-term care event, for example admission to a long-term care facility or the inability to perform the Activities of Daily Living (ADLs). Additional benefits may also be offered, such as eldercare resources, referral and consultation services, and discounted long-term care services from a specified group of providers. Hybrid annuity/long-term care products can provide valuable protection against the impact of long-term costs to consumers for whom traditional long-term care may be unaffordable, or unobtainable due to pre-existing conditions.

With the enactment of the Pension Protection Act of 2006, new hybrid products that combine annuities with LTC were introduced. Beginning in 2010, tax-free distribution status was given to both annuity assets and LTC rider benefits used for a qualified LTC purpose. Under prior law, withdrawals taken from the annuity to pay the LTC premiums were taxable and subject to a 10 percent penalty prior to age 59½.

## **How Is the Value of a Deferred Annuity Determined?**

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The accumulation period begins when the initial purchase (or premium) payment is made by the contract owner and the contract is issued by the life insurance company. Gifts, an inheritance, or any other source of income can be used to initiate or add to a contract. Typically, insurance companies have minimum requirements for initial and additional premium amounts. However, sometimes a life insurance company will permit a smaller minimum initial payment, for example,

\$1,000, if the purchaser agrees to pay premiums on a regular basis, e.g., through automatic payroll deduction. Insurers may also have lower minimum premium requirements for annuities in qualified retirement plans such as 403(b) or 401(k) plans. As is true for all qualified plans, contributions to annuities used to fund qualified plans must come from earned income.

## How Is the Value of a Variable Annuity Measured?

The value of a contract owner's variable annuity is equal to the sum of the contract owner's account values in all the variable investment options or subaccounts plus the value of any amounts allocated to available fixed account options, if any.

### ***Unit Values***

Each subaccount has a unit value, which is similar to the net asset value (NAV) of a mutual fund. The unit value measures the numerical worth of the assets in a subaccount, per unit of the subaccount owned. The unit value increases or decreases, respectively, with the positive or negative investment performance of the underlying mutual fund in which the subaccount invests and is reduced by insurance charges and the fees and expenses of the underlying mutual fund. Unit values vary among the subaccount options inside a variable annuity. A contract owner's account value allocated to a particular subaccount is equal to the number of units of the subaccount owned multiplied by the current unit value.

Unit values apply to variable annuities in both the accumulation phase and the payout phase. Although the specific unit values differ between the accumulation and payout phases, the concept is the same. During the payout phase, contract owners are entitled to receive a determined number of units of benefit, which translate into an income payment amount based on the unit value at the time of payment. The unit value and resultant income payment may increase or decrease due to investment performance.

### ***Variable Investment Options***

Variable annuities offer investment choices called subaccounts, a selection of funds similar to publicly sold mutual funds, often managed by the same fund managers (most variable annuities also offer a fixed account, effectively an embedded fixed annuity, within the variable contract). The value of the subaccounts will fluctuate over time, and the variable annuity's return will be based on the investment performance of those subaccounts.

A variable annuity contract will generally permit the owner to choose from a range of subaccounts with different asset classes and strategies. The choices may include equity funds, bond funds, balanced funds, money market funds, and specialty funds such as international and sector funds.

The subaccounts are often managed by a variety of investment advisors, who may or may not be affiliated with the insurance company. Most of the largest mutual fund companies, and many smaller shops, offer subaccounts that serve as investment options or provide professional fund management services for variable annuities.

### ***Variable Annuity Portfolio Allocation***

Variable annuities offer investors a wide variety of funds to choose from to match their risk tolerance and views of the market. There are different types of asset allocation programs available to help variable annuity purchasers analyze their risk tolerance and decide on a specific mix of funds. Choosing the right mix can be a complex process.



### ***Portfolio Rebalancing***

Once a contract owner has decided on the investment mix best suited for his or her needs, premium payments are allocated in accordance with those percentages. However, as time goes by, market performance may alter the percentage of the variable annuity's contract value held in certain subaccounts (e.g., equity exposure may be significantly higher after a period of strong stock market returns). Many variable annuity issuers offer programs that automatically maintain a pre-determined investment diversification based on the specific needs of each investor. These programs, referred to as portfolio rebalancing programs, periodically reallocate variable annuity contract assets among fixed and variable investment options to reflect the proportions originally selected.

### ***Dollar Cost Averaging***

Contract owners who are wary of investing when the market is at a peak can take advantage of dollar cost averaging programs offered under many variable annuity contracts. An owner may choose to allocate a substantial portion of his or her premium payments to a particular stock fund. If the allocation is made all at once, it is possible that a single purchase price could be locked in when asset values of the stock fund are relatively high. With dollar cost averaging, the premium is systematically transferred (typically from the variable annuity's fixed account option or a money market option) to one or more stock, bond, or balanced funds over a specified period of time, with the goal of investing at lower, as well as higher, prices. While dollar cost averaging does not ensure a profit or protect against a loss, it can be an effective investment technique.

### ***Importance of Tax Deferral to Portfolio Allocation***

The benefits of tax deferral are vital to rebalancing programs and dollar cost averaging. In a taxable account, such as a stand-alone mutual fund, each time an investor sells a stock, mutual fund, or other investment, and replaces it with another in order to reallocate assets, the investor can be required to pay short- or long-term capital gains tax on any investment growth. With a variable annuity, an owner can rebalance between funds as desired without being taxed, thereby maximizing investment potential.

### ***Transfers***

While variable annuity contract owners may transfer money, tax free, from one investment option to another during the accumulation period, certain restrictions typically apply. Owners may be restricted to the number and amount of transfer payments allowed in any given year from a fixed account contained inside a variable annuity contract. Another restriction may also limit the number of transfers made among the variable investment options within a specified period of time. Transfers in excess of such limits may be subject to nominal administration charges or alternative transfer request methods, such as a requirement to send such requests via U.S. Mail versus online or telephonic instruction.

## How Is the Value of a Fixed Annuity Measured?

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Fixed annuities offer a rate of return that is determined by the insurance company for a set period of time, subject to a specified minimum. When the applicable period is over, the company may offer a new rate for the next period, which can be for a different length of time. Fixed annuities generally specify a minimum credited interest rate for the lifetime of the contract.

There are several types of deferred fixed annuities available, each with its own method of crediting interest.

- *Book value deferred* products earn a fixed rate for a guaranteed period. The surrender value is based on the annuity's purchase value plus credited interest, net of any charges.
- *Market value adjusted (MVA)* annuities are similar to book value deferred annuities, but the surrender value is subject to a market value adjustment based on interest rate changes.
- *Fixed indexed annuities (FIA)* guarantee that a certain rate of interest will be credited to premiums paid but also provide additional credited amounts based on the performance of a specified market index (such as the S&P 500).

Individual fixed indexed annuity contracts have additional interest crediting provisions. These include:

- *Crediting method* — the method used to measure the change in the underlying index, e.g., point-to-point or annual reset.
- *Participation rate* — the percentage of the calculated index gain credited to the contract owner as interest. This can be guaranteed or eligible for reset.
- *Spread/Margin* — the percentage by which the gross index gain is reduced before being credited to the contract owner as interest.
- *Cap* — the maximum index-based interest credited to the contract owner. This can be guaranteed or eligible for reset.
- *Volatility Controlled Indexes* — custom indexes intended to mute the effect of ups and downs in the markets they track; may be used instead of, or in conjunction with, participation rates, caps, and spreads.

## What Happens to the Annuity Value if the Contract is Surrendered?

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Deferred annuity contracts permit the contract owner to surrender the annuity contract during the accumulation period and receive a cash payment from the insurance company. This amount is called the cash value or cash surrender value of the contract. It equals the sum of premiums paid plus any earnings, minus prior withdrawals and charges deducted. The owner may take partial withdrawals or fully surrender the contract during the accumulation phase. Penalties for early withdrawal may be incurred and federal income taxes will apply to any gain in the contract value. The amount paid to the contract owner on surrender may be subject to surrender charges, which generally range from 5 percent to 7 percent. Some deferred annuity contracts impose surrender charges only for an initial period after the contract is purchased; others start a new surrender charge period for each individual premium paid. Surrender charges usually decline to zero over a period of time, such as five or seven years.

A partial surrender is the withdrawal of an amount less than the entire cash surrender value of the contract. Partial surrenders can also be taken as a pre-scheduled series of payments under a systematic withdrawal plan. Many contracts permit annual withdrawals of an amount, such as 10 percent of the contract value, free of a surrender charge. Tax penalties may apply, however, in the event such withdrawals occur prior to the contract owner reaching age 59½.

## How Are Annuities Used to Generate Retirement Income?

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While much of the focus on annuities in recent years has been on their value as a savings vehicle for retirement, their value as a source of lifetime income during retirement is equally important. Traditional sources of guaranteed retirement income are diminishing at the same time retirees are living longer, more active lives. This places the burden on individuals to both carefully save for retirement and wisely manage their investments during retirement, so their money lasts as long as they live. How retirees decide to receive income from their annuities once they retire can play an important role in achieving this outcome.

## What Are the Various Options for Receiving Retirement Income?

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Once a person is ready to retire, annuities offer a number of retirement income options. The contract owner can choose to receive all the assets from the annuity at once, opt for a series of withdrawals of his or her choosing until all the assets are exhausted, or decide to exercise the annuitization features of the contract.

The following information pertains to non-qualified annuities that are purchased with after-tax dollars. While the payout options available are the same for annuities purchased as part of qualified retirement plans, as discussed in the last section of this chapter the tax consequences are different.

### ***Lump-Sum Option***

When a contract owner elects a lump-sum distribution, the annuity is surrendered and all assets are withdrawn from the contract. Taxes will be due on earnings in the year the money is received, and tax penalties may apply to withdrawals before age 59½. With this option, individuals are still faced with the need to generate a guaranteed stream of income.

### ***Systematic Withdrawal Plan***

With a systematic withdrawal plan, the assets are left in the annuity and the contract owner receives distributions at regular intervals until the assets have been exhausted or the contract owner elects to suspend the operation of the plan. All earnings on the investment are considered to be distributed before any return of principal and are taxable at ordinary income tax rates. Assets remaining in the annuity continue to grow tax deferred until withdrawn.

The principal advantages of a systematic withdrawal plan are the flexibility provided to the contract owner and the ability to maintain full ownership of the assets. The principal disadvantage is that the contract owner retains the risks associated with both uncertain longevity and investment fluctuations, particularly the exposure to adverse market performance during the early stages of retirement.

If a specified dollar amount is withdrawn each period, whether adjusted for inflation or not, the contract owner assumes the full risk of market cycles. The very principles that recommend dollar cost averaging as a successful strategy for entering the market work against the contract owner in a liquidation strategy. Withdrawal of a fixed dollar amount means that a higher percentage of assets will be liquidated in a down market than in an up market. This can be a very dangerous strategy, even if long-term investment performance meets anticipated targets, since the withdrawal of assets in earlier years can prevent the overall portfolio from achieving the projected return.

The withdrawal of a specified percentage of assets rather than a specified dollar amount may help reduce this risk. Many people plan their retirement income based on an average rate of return on their investments (such as 8 percent). If they happen to retire during a time of far lower (or even negative) returns, however, the specified percentage of assets they withdraw may not provide sufficient income to maintain their desired lifestyle. To help reduce the impact of market fluctuations on retirement income, it is important for retirees to have a variety of diversified investments in their portfolios, including annuities, which can help create a guaranteed source of income that will last as long as they live.

### ***Guaranteed Withdrawals***

Contract owners electing a guaranteed minimum withdrawal benefit (GMWB) rider can choose to receive the value of their investment through annual withdrawals (up to a set percentage) at least until the entire amount invested is completely recovered. Contract owners electing a guaranteed lifetime withdrawal benefit (GLWB) can choose to withdraw a percentage of their contract value each year for as long as they live, even if the account value is exhausted. Distributions are deemed to represent investment earnings until total payments equal the account value in excess of total purchase payments and are taxable at ordinary income tax rates, after which time payments are deemed return of principal and are not taxed. Payments made by the insurance company after the account value is reduced to zero are deemed ordinary income and taxed as such.

Contract owners electing these benefits have greater control over their assets but may receive lower monthly payments than if they annuitize. While some GLWBs are beginning to tailor the percentage withdrawal to the age of the contract owner, it is only through annuitization that an investor can maximize the benefit of mortality risk pooling.

### ***Annuitization***

Annuitization involves turning the contract owner's accumulated assets into a stream of income based on the amount of the contract, the annuitant's age, payout choices, etc. The insurance company guarantees that it will provide payments for the life of the annuitant(s). With a deferred annuity, money is saved and invested during the accumulation period, and then annuity payments are received during the income period (e.g., during retirement). With an immediate annuity, payments begin immediately or within one year after the annuity is purchased. Payments can be either fixed or variable and guaranteed for one person's life, for the lives of two people, and/or for a specified period. Payments may also be structured with a cash refund feature, which provides for a payment to beneficiaries of an amount equal to the difference between the annuitized amount and the total payments made prior to the annuitant's death, should death occur before payments at least equal the amount annuitized.

### ***Deferred Income Annuities***

With a deferred income annuity (sometimes called longevity insurance), a retiree can purchase a contract at one point in time, for example, at age 65, but defer payments until a later time, for example, at age 85. Individuals not living until the commencement age will not receive benefits;

and individuals who do live to the required age and beyond, will receive income payments. Because these products usually have no death or living benefits, and not all contract owners will live long enough to collect income, insurance companies can maximize insurance leveraging (risk pooling) and thus make larger income payments to retirees still living. Recent innovations include optional death benefit and joint and survivor payments, but the trade-off is a higher premium or smaller monthly payments. The issuance of new regulations from the U.S. Treasury in June 2014, the “Qualified Longevity Insurance Contract” rules, provided clarity around the use of these products in qualified plans by establishing a deferred income annuity purchase amount limit of the greater of 25 percent of account value or \$125,000 and created provisions for the addition of a death benefit and the ability to reverse an excess purchase payment in order to avoid tax penalties. The SECURE 2.0 Act removed the 25 percent limitation and increased the QLAC purchase limit to \$200,000 for 2023.

## What Are the Benefits of Annuitization?

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By exercising the annuitization option of a deferred annuity (or by purchasing an immediate annuity), the contract owner can transfer the longevity risk to the insurance company and, if a fixed annuity is chosen, the investment risk as well.

As mentioned earlier, annuities are the only financial instruments available today, other than Social Security and pensions, that can guarantee a lifetime stream of income during retirement. Annuitizing a portion of retirement savings provides retirees with an effective hedge against outliving their assets. And because annuity owners are part of a mortality pool, the annuity payments received are larger than they could generate by saving on their own and systematically withdrawing funds in amounts that give them a reasonable assurance of not running out of money.

As part of a comprehensive retirement portfolio, annuities both reduce the risk of running out of money if a person lives a long life and increase the amount of each income payment received.

## What Types of Annuity Payout Options Are Typically Available at Annuitization?

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One of the first choices contract owners may have to make once they decide to annuitize is whether to receive fixed or variable payments. Owners of deferred fixed annuities can elect only a fixed payout option. Owners of deferred variable annuities, however, can sometimes choose either fixed or variable payouts. Once a selection is made, it is usually irreversible. With fixed payments, the insurance company sets a given amount it will pay (typically monthly) for the term of the contract. With variable payments, the amount of each payment is not guaranteed but changes with the performance of the underlying portfolio selected by the contract owner. Fluctuations in these payments can sometimes be reduced by opting for level payments (which hold payments level for a certain period of time) or stabilization guarantees (which provide a floor below which payments will not fall).

### **Life Annuities**

A life annuity provides an income stream guaranteed to last as long as the annuitant lives. Under a straight or pure life annuity, annuity payments stop when the annuitant dies. A joint and survivor annuity (often selected by spouses) provides income for as long as either of the two annuitants is alive, although the amount of each payment will be less than if the payment were based on a

single life. Payments can stay the same or decrease after the death of the first annuitant. Under a joint and two-thirds annuity, each payment made after the death of the first annuitant is two-thirds of the amount paid while both annuitants were alive. This can be an effective strategy, as it results in a higher payment when both annuitants are alive and expenses will likely be lower for one person than for two.

As discussed previously, a valuable feature of an annuity is the fact that it can generate higher income payments than an individual systematic withdrawal plan and continue payments for as long as a person lives. But what about the investor who does not live long enough to receive many payments? There are a number of options for mitigating this risk. Each, however, results in a lower basic periodic payment.

### ***Period Certain Annuities***

With a period certain annuity, payments are guaranteed to continue for a specified time, for example, 10 years, no matter how long the annuitant lives. If the annuitant dies before the period has expired, payments continue to the designated beneficiaries for the remainder of the period. Period certain annuity payments typically are available for periods from five to 30 years. This option, however, offers no protection against longevity risk as payments are only made for the fixed period selected.

### ***Life Annuities With a Period Certain***

Life annuities with a period certain option guarantee payments for the life of the annuitant, but also guarantee that these payments will continue for a set period of time if the annuitant dies before the period has expired. Payments continue to the designated beneficiaries until the guarantee period has ended.

### ***Cash Refund Annuities***

With a pure life annuity, payments stop when the annuitant dies. In the most extreme case, an annuitant could die after one payment is made. Some annuitants prefer to hedge against this possibility by setting up a life annuity with some form of refund feature. As indicated earlier, adding such provisions results in a lower payment than would otherwise be the case.

There are two types of refund annuities now being offered that pay a refund to the beneficiary if the annuitant dies before the total of the annuity payments received equals the premiums paid for the annuity.

- *A cash refund annuity* provides for a lump sum refund of the premium minus the annuity payments already made at the time of the annuitant's death.
- *An installment refund annuity* provides that payments will continue in installments until the amount received is equal to the premiums paid.

### ***Risk Tolerance vs. Longevity***

In deciding what type of annuity payment option to choose and how much to commit to it, individuals must determine their risk tolerance with respect to their possible longevity, as well as the relative importance to them of receiving lifetime income versus leaving money to their heirs. All else equal, individuals who live beyond average life expectancy will generally realize higher income but lower estate values when using annuities versus other approaches.



## How Are Variable Annuity Payment Amounts Determined?

The amount of each payment received from a fixed annuity is calculated at the time of annuitization and does not change during the life of the contract. The amount of each variable payment, on the other hand, fluctuates based on the investments chosen. Since the investment return of the portfolio cannot be determined in advance, some assumptions must be made in order to calculate the amount of the initial payment under the contract. This is accomplished by selecting an assumed interest rate, or AIR. After the initial payment, each subsequent payment is determined by adjusting the previous payment up or down based on the actual performance of the underlying portfolio for the period of time in question. If the portfolio earns more than the AIR, the subsequent payment will increase. If the portfolio earns less, the payment will decrease. If it earns the same amount, the payment will stay the same.

Some contracts set the AIR, but most allow the contract owner to choose from a range (usually 3 percent to 6 percent), the outside limits of which are set by state regulations. Selecting a low AIR will cause payments to increase faster with higher positive returns, or decline more slowly with low or negative returns, than if a higher AIR were selected. However, the initial income payment will be less than if the higher AIR were selected.

### ***Level Annuity Payments***

Some variable annuity contracts provide payment streams that can be adjusted at periodic intervals of up to 12 months, rather than monthly, to provide the annuitant with an element of certainty. This allows the annuitant to plan on a given level of payments for the period in question. When the periodic adjustments are made, however, they are likely to be more substantial than if the adjustments had been calculated more frequently.

### ***Payment Stabilization Guarantees***

Other variable annuity contracts offer payments supported by “floors.” These floors guarantee that subsequent payments will never be less than a given percentage of the original payment e.g., 85 percent or 100 percent, regardless of the performance of the underlying portfolio. Some provisions, limit the investment choices underlying the annuity, providing the insurance company with the opportunity to hedge its guarantee with derivative instruments. These floors provide contract owners with a safety net that may make them more comfortable with having their annuity payments subject to the variability of stock market performance. If a contract owner chooses this feature, however, payment amounts will be lower than if no floor were elected.

### ***Liquidity Options***

Historically, once an annuity contract was annuitized the stream of payments could not be altered. Some insurance companies now offer life annuities that allow annuitants who have also selected a period certain option to receive an advance of a given percentage of income payments, subject to certain restrictions that vary by company. These partial commutations, as they are called, reduce the remaining annuity payments. Some companies also allow the liquidation of the entire annuity, converting the value of the future stream of income into a lump-sum payment. If this option is exercised, all future payments cease.

## How Are Annuity Payments Taxed?

If an annuity (fixed or variable) was purchased with non-qualified or after-tax dollars, a portion of each payment is considered to be a tax-free return of principal. The remainder of the payment is subject to taxation to the extent it represents earnings. Current federal income tax law specifies that the taxable portion of annuitized payments is taxable at ordinary income tax rates.

To determine the amount of each fixed annuity payment that qualifies as a tax-free return of principal, the insurance company makes an underlying calculation based on a formula known as the "exclusion ratio." For variable annuities, since the amount of each future payment is unknown, a different calculation is performed to determine the exclusion amount.

If an annuity was purchased with qualified or pre-tax dollars using funds from a 403(b), a 401(k), or an IRA (other than a Roth or an after-tax IRA), the full amount of each distribution is taxable at ordinary income tax rates, even the amount attributable to principal.

Qualified assets, once they have been annuitized, are not subject to the required minimum distribution rules of the Internal Revenue Code since the insurance company is deemed to have already made the appropriate calculation for a lifetime distribution of the underlying assets. (See Chapter 14: *Regulation and Taxation of Annuities*, for more details on taxation.)

## How Are Annuities Used in Estate Planning?

A variable annuity, while not designed as an estate planning tool, does offer some benefits in this area. An annuity avoids probate, provides flexibility when passing on assets to heirs, and can potentially increase the likelihood of leaving a larger estate in some circumstances.

*Variable Annuities Avoid Probate* — A variable annuity is a contract between an owner and an insurance company. The contract requires that a beneficiary be named. When a contract owner dies, there is a payout directly to the beneficiary. As a result, the annuity assets do not go through the probate process.

Probate, or the distribution of a deceased's assets via the court system, can be costly and time consuming. There are attorney fees, court costs, and administrative expenses, and the process slows the distribution of proceeds. Plus, probate proceedings are a matter of public record. Assets held in a variable annuity bypass this process and go directly to the beneficiary.

Variable annuity proceeds will be subject to probate only if the estate is named as beneficiary, when no beneficiary is named, or when a death benefit is disclaimed by the beneficiary and no contingent beneficiary is named.

*The Restricted Beneficiary Option Offers Advantages* — Naming a restricted beneficiary is a unique option available to an annuity owner. This enables the owner to direct the amount, frequency, and timing of the distributions. Choosing the restricted beneficiary option provides the added benefit of continued tax-deferral over the life expectancy of the beneficiary. The individuals named as beneficiaries get payouts over a period of time, during which the proceeds grow tax deferred and compound over time, potentially providing many times more from the investment than a lump-sum payout. An individual must be directly named as beneficiary to take advantage of this treatment. It is necessary to complete paperwork instructing the insurer how



to distribute the death benefit proceeds.

*A Single Premium Immediate Annuity as an Estate-Building Tool* — Here is an example of an annuity product that can, under some circumstances, increase the value of an estate. A single premium immediate annuity (SPIA) is usually not considered to be a vehicle that can help preserve or increase the size of an estate. Indeed, many people have the false belief that a SPIA always reduces the size of the estate. However, for those retirees who need to make regular withdrawals from their assets, a portfolio that uses a SPIA is more likely to leave a larger estate than a portfolio without it. Consider an example. Most retirees, especially as they age, place at least half of their money in fixed investments, usually bonds or certificates of deposit. Regular income is often taken from these fixed investments. As of July 2023, the average 10-year High Quality Market (HQM) Corporate Bond Spot Rate was 5.14 percent, about 40 basis points higher than at the same time last year. For a retiree to withdraw \$1,000 a month (\$12,000 per year) from high quality corporate bonds, that person would have to invest approximately \$235,000, versus almost \$500,000 before rates began to rise in 2021, illustrating the tremendous impact interest rates have on income streams during retirement. In 10 years, the retiree would still have the \$235,000 investment “at par,” or the redemption value of the bonds. However, the actual value of the bond holdings would be lower if rates had risen and higher if they had fallen.

However, rising rates benefit retirees using annuities for income as well. A 70-year-old male could elect to receive the same \$1,000 monthly income from a SPIA with a 10-year certain period for a premium of about \$145,000. Imagine this hypothetical retiree has the same \$235,000 to invest for retirement income. He can use \$145,000 for the SPIA purchase while investing the remaining \$90,000 in a side fund for long-term growth. After 10 years, assuming an annual return from a balanced portfolio of approximately 9.7 percent per year, the side fund would grow to the same \$235,000. The side fund also has the potential to grow significantly larger if returns are higher, as would certainly be possible based on the long-term average return of a diversified investment portfolios. Additionally, options such as Registered Index Linked Annuities (RILAs) enable participation in market growth with some protection against potential extreme market loss events discussed earlier. According to the Center for Research in Security Prices, the historic average annual return of a 60 percent stock, 40 percent bond portfolio from 1961 through June 30, 2021 was about 10 percent, which would grow the hypothetical side fund in this example to over \$240,000. In addition, the retiree continues receiving the \$1,000 monthly payment from the annuity for life, while the bond holder would get no further income after the bonds mature and may have to reinvest the proceeds at a lower interest rate (though the value of the bonds would likely have risen in this scenario, providing a partial offset). A 70-year-old male has an 80 percent chance of living 10 years, a 63 percent chance of living 15 years, and four in 10 70-year-olds can expect to reach at least age 90, which means that most people who buy a SPIA at age 70 will be alive at age 80 and are likely to have more money and more income with a SPIA and a side fund than if they relied solely on bonds for income.

*A Variable Annuity Offers a Death Benefit* — Most variable annuities offer a death benefit, which guarantees that if the annuity owner dies at a time when the market value is less than the money they put into it because of market declines, the beneficiaries will get the original purchase amount, minus any withdrawals that may have made. In some cases, the beneficiaries can receive more than was invested via an enhanced death benefit, which steps up the death benefit payout based on positive performance of the investments, or a fixed percentage increase annually in the promised death benefit payout. A beneficiary must often recognize income and pay taxes on the earnings portion of the death benefit payout. The earnings enhancement death benefit can help offset a higher tax bill.

Overall, annuities are not designed as estate-planning tools. But these products do help a person protect his or her financial security and can often lead to a larger estate if an annuity is invested in a retirement portfolio.

## How Are Annuity Products Developed and Sold?

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In the United States, commercial annuities are issued by insurance companies. When new fixed and variable products are developed, they must be filed with the state's insurance department. Before these products can be sold, each state where they will be available must provide written approval.

Because variable annuities are considered securities as well as insurance products, when a new variable annuity is developed, a registration statement must be filed with the Securities and Exchange Commission (SEC). This statement includes a prospectus that discloses, among other things, the fees and charges associated with the annuity contract; a description of the various benefits, rights, and privileges afforded under the contract; any changes that can be made to the contract; and the risks and tax consequences associated with investing in the contract. The prospectus, which is updated annually, is a vital source of information for all contract holders and should be read thoroughly.

### ***Insurance Company Ratings***

Annuity guarantees are subject to the claims-paying ability of the issuing insurance company. It is therefore important to consider the financial soundness of a company before making a purchase. Companies are rated by one or more of the following independent industry analysts: AM Best Company, Standard & Poor's, Fitch Ratings, and Moody's Investors Services. The ratings do not apply to the underlying mutual funds, which are subject to market risk and will fluctuate with changes in market conditions. Ratings can differ somewhat among the analysts, so it is useful to check the ratings from at least two analysts.

## Who Can Sell Annuities?

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People who sell variable annuities need training in both securities and insurance. This training can be obtained from many sources. Some distributors provide in-house training to their registered representatives; others utilize training provided by insurance company wholesalers and independent third-party educators.

Fixed annuity sellers receive much of the same instruction as those selling variable annuities but do not need the securities training.

To legally sell annuities, individuals must first obtain a state insurance license from the state in which their office is located. A non-resident license must be obtained for all states in which out-of-state clients reside.

Since variable annuities are considered securities under federal securities laws, individuals who wish to sell them must, in addition to having an insurance license, be associated with a broker-dealer, be federally registered as a representative, and pass a Series 6 exam, or the more comprehensive Series 7 exam. In some jurisdictions, a state securities license is also required.

## Where Can Annuities Be Purchased?

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Some insurance companies sell their products only through a dedicated sales force (captive agents); others use agents who represent many companies and have no primary relationship (independent agents). But annuities can also be purchased from a variety of different sources, some of which may sell both fixed and variable annuities while others may market only one type.

Variable annuities can be purchased through several distribution channels, such as independent FINRA firms, wire houses, regional investment firms, captive agents, and banks. Fixed annuities are sold through these same distribution channels, yet sales are dominated by independent agents and banks. The difference in the percent of sales by distribution channel for fixed and variable annuities may be explained, at least in part, by the fact that purchasers of fixed annuities tend to be more conservative with their investments than those who buy variable annuities.

## How Are Variable Annuity Commissions Determined?

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Broker-dealer firms may be paid a commission by insurance companies when they sell variable annuity contracts. The amount of compensation depends upon the issuing insurer, the relationship the broker-dealer has with the insurer, the types of annuities sold, the amount of money invested in the annuity, and the way commissions are paid. Commissions can be paid in full at the time the annuity is sold, as a level commission over the life of the contract or some other period, or as a smaller amount at the time of the sale with a trail commission paid each year thereafter for a period. Both fixed and variable annuities may also be sold within managed, fee-based accounts, where the account is charged an ongoing annual fee and there is no commission paid on the sale of the annuity.

Registered sales representatives are, in turn, paid a commission when they sell an annuity contract. Commissions paid to representatives are generally less than the full amount paid to the broker-dealer and may or may not be on the same basis. Also, certain management personnel, such as branch managers, may be paid for sales made by representatives over whom they have supervisory responsibility.

In addition to commissions, the broker-dealer may receive other forms of compensation from insurance companies, such as lodging, travel, and meals at insurance company-sponsored meetings. Some broker-dealers also receive monetary and other support to conduct client and educational seminars.

Insurance companies recoup the commissions and other compensation they pay through the various fees, charges, and deductions within the annuity contract, including any sales load that may be imposed, but no one charge is specifically earmarked to pay commissions.



**ATTACHMENT 1b**

IRI's  
2023 The Retirement Saving and Income Handbook:  
A Basic Guide to Annuity and Non-Annuity Solutions  
for Accumulating and Preserving Wealth,  
and  
Generating Retirement Income

# The Retirement Saving and Income Handbook

A Basic Guide to Annuity and Non-Annuity Solutions for Accumulating and  
Preserving Wealth, and Generating Retirement Income

2023

 Insured  
Retirement  
Institute

## Annuities and Other Solutions Included in this Handbook

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### ANNUITY SOLUTIONS

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## Structure and Content of this Handbook

### HOW TO USE THIS HANDBOOK

First, a few words on what this handbook is, and what it is not. This is not an exhaustive guide to all annuity and non-annuity products available in the market today, nor does it purport to present all the features and benefits of each product discussed or all the various features and benefits offered by insurers, asset managers, and banks in their unique product offerings. Rather, this handbook provides a basic description of each product or solution, a synopsis of common features found in each, and a visual representation of how each one functions. It is intended as an introduction to annuities and other solutions that provide investors with opportunities to accumulate wealth, fully or partially protect investable assets from market risk and market volatility, and efficiently distribute wealth to create supplemental income throughout retirement.

### WHY ANNUITIES?

Annuities play a unique role in an investor's portfolio. While alternatives can be effective and, in some cases, preferable, only annuities guarantee income for the life of the investor, no matter how long that life may be. This guide describes the basics of these products and provides examples for how they can help consumers achieve their financial goals.

### RISK VERSUS RETURN

All deferred annuities can be thought of as falling along a spectrum of potential return and market risk. Fixed annuities, which guarantee preservation of principal but credit a fixed rate of interest, have the lowest level of market risk but also the lowest potential return. Variable annuities, conversely, can be fully invested in risk assets (i.e., stocks) through subaccounts that are like open-end mutual funds, and therefore have the highest risk but also the highest potential return. Immediate annuities, in their purest form, solely represent income and are not shown in the chart below.



## Benefits Common Across Annuities

Rather than repeat certain benefits common to all or most insured (annuity) products and solutions on each page of this guide, the simple table below briefly describes each benefit and notes exceptions to the description and limitations.

Benefit	Description	Exceptions and Limitations
Tax-deferred interest/earnings on unlimited after-tax contributions	Federal and state income taxes are not payable until monies are withdrawn from the <u>annuity</u> or the account value is annuitized.	<u>Immediate annuities</u> do not have a deferral period, therefore no tax deferred earnings accrue.
<u>Death benefits</u>	Payments to <u>beneficiaries</u> upon the death of the annuity <u>owner</u> . Enhanced benefits may be available paying an amount greater than the annuity cash value, such as " <u>return of premium</u> " options which guarantee a death benefit of at least the total amount invested.	<u>Annuitized</u> income may not continue after the death of the <u>annuitant</u> or may be limited.
Exemption from <u>probate</u>	Monies paid out to beneficiaries upon the death of an annuity <u>owner</u> are excluded from the probate process.	For trust-owned <u>annuities</u> , the provisions of the <u>trust</u> govern distribution of assets and generally avoid probate.
Protection from creditors	Annuity benefits may be unconditionally exempt from seizure by creditors.	Levels of protection vary by state. AK, CA, FL, GA, HI, IN, TX, and LA provide for 100% annuity protection.
Protection from outliving one's income ( <u>annuitization</u> )	All annuities can be "annuitized," i.e., contributions or account balances can be converted into guaranteed lifetime income. In non-qualified contracts, the portion of each payment representing the amount invested is not taxed (this is the " <u>exclusion ratio</u> ").	Account values are generally not accessible other than through set, scheduled ongoing income payments. The insurance benefits of annuities are subject to the claims paying ability of the issuing company. <u>State funds</u> exist to help make policy holders whole in the event of insolvency, up to specified dollar amounts which vary by state.



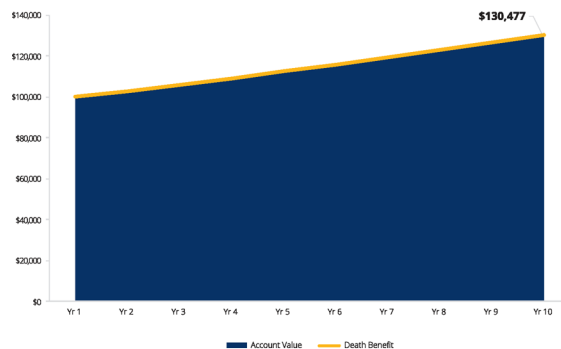
## Fixed Annuities

### SUMMARY

Fixed annuities are insurance contracts that offer tax-deferred investing and a guaranteed rate of return in the form of interest credited to the contract by the issuing insurance company.

### HOW IT WORKS

An initial purchase payment is invested by the contract owner and managed in the insurance company's general account. The insurance company guarantees that the account will earn a specific interest rate for a specified period. This period is known as the accumulation phase. Many fixed annuities have specific terms after which they "mature" and will automatically renew for another term of the same length unless liquidated or exchanged, similar to the manner in which CDs issued by a bank mature. Others continue to credit interest at renewal rates published each year, after an initial guaranteed rate period, until the contract is terminated. As with all deferred annuities, fixed annuities can be "annuitized," or converted into lifetime income payments.



In this example, \$100,000 is invested in the annuity and the annuity credits interest at a 3% rate for 10 years, resulting in an ending value of \$130,477. The contract owner dies 10 years after the contract is issued and the accumulated value is paid to the beneficiary. Basic fixed annuities are simple and straightforward, often have higher crediting rates than certificates of deposit, and include the benefit of compounding interest on a tax deferred basis.

### BENEFITS

- > Principal protection and a guaranteed minimum rate of return, subject to the claims paying ability of the issuer.
- > Fixed annuities offer beneficiaries a simple standard death benefit: the annuity's accumulation value or the minimum guaranteed surrender value, whichever is greater, which ensures beneficiaries receive no less than the current value. Some products offer optional enhanced death benefits that may pay out a higher value.
- > Ability to annuitize the contract to create lifetime income in retirement.
- > Interest rates for fixed annuities are usually higher than what you would get from a CD.

### RESTRICTIONS AND LIMITATIONS

- > Most contracts have a minimum investment amount, commonly \$5,000 to \$25,000, and a maximum of \$1 million without prior approval.
- > Annual withdrawals exceeding 10% of the amount invested may be subject to an early withdrawal penalty (surrender charge) during the early contract years (three years is common).
- > Most fixed annuities are "spread products" without explicit fees (other than for optional benefits).

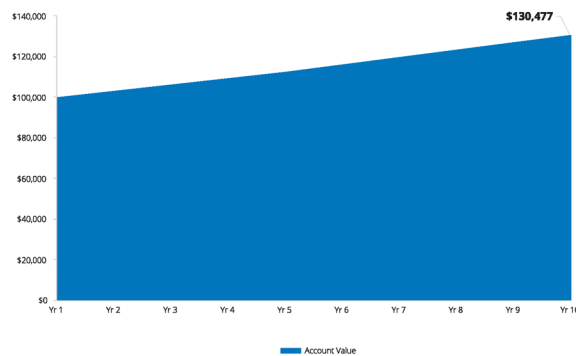
## Certificates of Deposit

### SUMMARY

Certificates of deposit (CDs) are fixed income investments issued by banks and credit unions. CDs are credited with a fixed rate of interest on a lump sum for a specified number of years. In general, the longer until the CD matures, the higher the interest that is paid. Virtually every bank and credit union offers a variety of CD options.

### HOW IT WORKS

An initial contribution is made to purchase the CD, which is then held for the time period specified with interest credited and compounded annually. The interest rate credited to the CD is locked in for the term (e.g., a six-month or one-year CD) and cannot be changed by the bank. When the CD matures at the end of the specified period, it may be liquidated, or cashed in, within a specified time period, usually 30 days. After 30 days the CD will automatically roll over to a new CD for the same time period at prevailing interest rates. Unless held in a qualified account, the interest credited to the CD is included in taxable income each year.



*In this example, \$100,000 is invested in a 10-year CD crediting 3% per year. At the end of 10 years the CD is worth \$130,477 due to compound interest. This is very similar to a fixed annuity, excepting that in the event of death the CD is included in the estate of the investor and in probate proceedings unless held in a trust. The fixed annuity is paid out directly to the beneficiary named in the contract. Unlike a fixed annuity, taxes are due every year as the bank credits interest rather than when the CD matures or is cashed in.*

### CLIENT BENEFITS

- > Principal and interest are guaranteed by both the bank and the Federal Deposit Insurance Corporation (FDIC) up to \$250,000 per depositor, per insured bank.
- > Simple, easy to understand structure.
- > Can be purchased in many denominations and durations to align with future spending needs.

### RESTRICTIONS AND LIMITATIONS

- > Ultra-conservative investments have lower returns over time, making it more difficult to accumulate wealth.
- > Interest rates are generally lower than those available in fixed annuities.
- > CDs carry penalties for early withdrawals. Unlike annuities, CDs do not generally offer free withdrawal provisions.
- > A CD cannot be directly converted to lifetime income.
- > Interest earned on CDs is taxable when it is credited by the bank, not when the CD matures and can be liquidated.

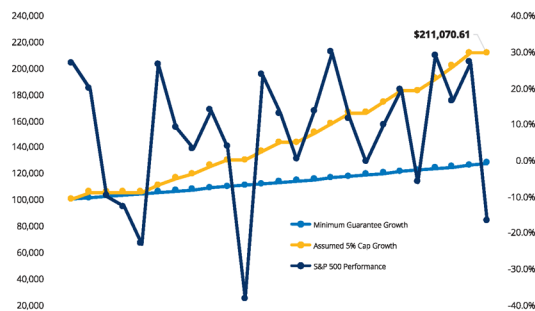
## Fixed Indexed Annuities

### SUMMARY

Fixed indexed annuities (FIAs) are a type of annuity that offers more upside potential than a traditional fixed annuity with a crediting rate based on the performance of an underlying stock market index such as the S&P 500, Dow Jones, and Nasdaq. FIAs are insurance contracts, not investments or securities, that offer tax-deferred growth with a guaranteed rate of return that provide protection from loss of principal in market downturns, capping both gains and losses. FIAs can be used for guaranteed income through annuitization or the inclusion of a guaranteed income rider.

### HOW IT WORKS

An initial contribution is invested by the contract owner and managed in the insurance company's general account. While the contract owner is not invested directly in options, a portion of general account earnings is used to purchase options on market indexes (e.g., the S&P 500). Positive returns on the options result in additional interest credited to the contract. Interest may be credited based on a participation rate, spread, or trigger basis.



*In this example using actual S&P 500 return data from 1998 to 2022, the FIA is guaranteed a minimum crediting rate of 1% per year. In years where the change in the S&P 500 is positive, the annuity is credited with the gain in the index, up to 5%. When the change in the S&P 500 is negative no additional interest is credited, and no loss of principal occurs. Over time, and in the volatile stock market conditions shown here, the fixed indexed annuity grows from \$100,000 to approximately \$211,000, or a compound annual return rate of about 3.2%.*

### CLIENT BENEFITS

- > Tax-deferred growth, and during the income phase clients only pay taxes on the interest earned (for non-qualified FIAs).
- > Principal protection and a guaranteed minimum rate of return, subject to the claims paying ability of the issuer.
- > The ability to earn interest based on the positive performance of a market index.
- > Death benefits ensuring beneficiaries receive no less than the account value and optional enhanced death benefits that may pay out a higher value.
- > Ability to annuitize the contract or utilize an income benefit rider to create lifetime income in retirement.

### RESTRICTIONS AND LIMITATIONS

- > Most contracts have a minimum investment amount, commonly \$5,000 to \$25,000, and a maximum of \$1 million without prior approval.
- > The minimum guaranteed surrender value is typically 87.5% of premium. The contract must be held to maturity for 100% principal protection.
- > Annual withdrawals exceeding the surrender charge free amount may be subject to an early withdrawal penalty (surrender charge) during the first several contract years.
- > Most FIAs are "spread products" without explicit fees (other than for optional benefits). Fee-based products are available with fees up to 1.5% of the account value.
- > Guaranteed interest is generally lower than that credited by a fixed annuity, but potential returns are higher due to index-based crediting.

## Fixed Income + Index Call Options

### SUMMARY

For a given investment amount, a CD, Treasury security, or corporate bond is purchased that will grow to equal that amount plus one percent at maturity. The difference between the value of the fixed income security at maturity and its cost is used to purchase options on the S&P 500 (or other) index or indexes.

### HOW IT WORKS

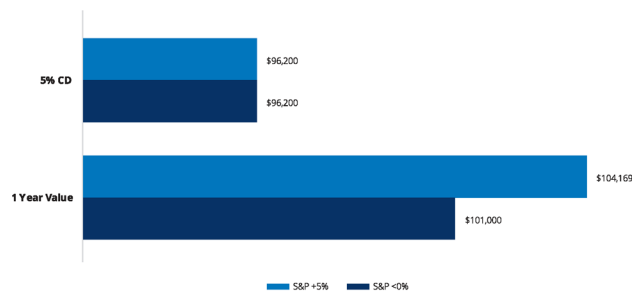
The discounted purchase price of the CD or bond grows to equal the total initial investment, or the total investment plus some interest when the instrument matures. Coincident with the maturity of that security, the options are either sold “in the money,” i.e., the S&P 500 index has increased in value and the options are worth more than when purchased, or they expire worthless. This options concept is referred to as “moneyness.” The total return is equal to the interest on the fixed income security plus the profit realized from the options trades, if any. This mimics the basic structure of an FIA — a minimum fixed rate of return and a portion of any gain in the index (options profit). The options strategy may be a simple purchase of call options, or the simultaneous purchase of an in-the-money call and sale of an out-of-the-money call, making the options cheaper and providing a higher participation rate in the gain of the index, if any.

### CLIENT BENEFITS

- > Provides principal protection if strategy is held until maturity.
- > Many different indexes and options strategies can be utilized.
- > May be easier to exit than a fixed indexed annuity if a significant change in portfolio strategy is desired.

### RESTRICTIONS AND LIMITATIONS

- > Requires knowledge of options trading as well as frequent monitoring and trading.
- > Earnings are not tax deferred.
- > Guaranteed lifetime income is not directly available in conjunction with the strategy.



*In this example, \$100,000 is the total investment. \$96,200 is invested in a 5% one-year CD, which will mature at \$101,000. The remaining \$3,800 is used to purchase one-year SPDR S&P 500 ETF Trust (SPY) calls at a strike price of \$398 when the index is at \$3,790.30. After one year, if the S&P is up 5%, the total return will consist of \$1,000 from the CD and a \$3,800 profit from sale of the options, for a total of \$104,169 or a roughly 83% participation rate versus the return if the initial investment received 100% of the index return. If the S&P is flat or down, the options expire worthless, and the return is limited to the interest on the CD.*

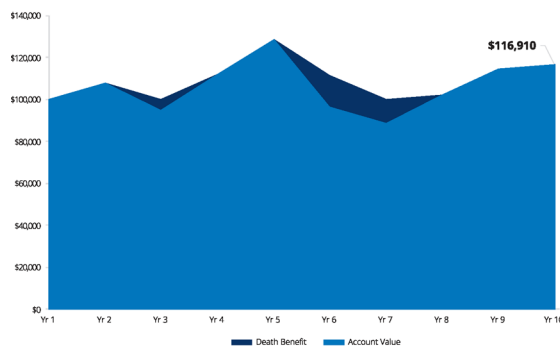
## Variable Annuities

### SUMMARY

Variable annuities (VAs) are insurance contracts that are considered securities that allow tax-deferred growth by investing the premium in investment subaccounts that resemble open-end mutual funds. These subaccounts invest the premium in pools of different assets like stocks, bonds, money market funds, and in most VAs, a general account option. Variable annuity subaccounts are open-end mutual fund share classes created specifically for use by VAs. Most VAs include optional riders for a fee that offer principal or income protection during the life of the owner and to the beneficiary. These may include enhanced death benefits, guaranteed lifetime withdrawal benefits (GLWBs), guarantee lifetime accumulation benefits (GMABs), and guaranteed lifetime income benefits (GLIBs).

### HOW IT WORKS

An initial purchase payment is invested by the contract owner and allocated among the subaccounts and general account of the insurer. Contracts may be funded with a single purchase payment or funded over time subject to minimums and maximums defined by the issuer. Funds in the annuity can be withdrawn, the contract can be "annuitized" (converted to lifetime income payments), or funds may be paid out to beneficiaries upon the death of the contract owner. The death benefit will be no less than the account value, less any surrender charges that may apply. However, most contracts include a standard death benefit that pays the beneficiary no less than the amount invested and waives surrender charges in the event of the owner's death.



*In this example, \$100,000 is invested in the annuity and the contract owner dies 10 years after the contract is issued. At time of death the accumulated value of \$116,910 is higher than the amount invested so the full value is paid to the beneficiary. However, had death occurred at a point when negative returns lowered the accumulated value, the full amount invested would have been paid instead.*

### CLIENT BENEFITS

- > Investing on a tax-deferred basis without being subject to the limitations currently in place on qualified plans (401(k), IRA, Roth IRA, etc.)
- > Principal protection through return of premium death benefits, if included in the contract, ensuring beneficiaries receive no less than the amount invested.
- > Ability to annuitize the contract to create lifetime income in retirement.
- > Portfolio rebalancing and investment changes can be made without tax consequences.
- > Higher potential returns based on market performance and reinvested dividends.

### RESTRICTIONS AND LIMITATIONS

- > Most contracts have a minimum investment amount, commonly \$5,000 to \$25,000, and a maximum of \$1 million without prior approval.
- > Annual withdrawals exceeding 10% of the amount invested may be subject to an early withdrawal penalty (surrender charge) during the first several contract years.
- > Most contracts include annual fees that pay for the distribution and administration of the annuity and the basic return of premium death benefit in the contract.
- > Risk of loss of principal due to market losses, benchmark risk and return dilution.

## Open-end Mutual Funds

### SUMMARY

Open-end mutual funds are SEC registered pooled investment portfolios that buy and sell securities on behalf of investors in the fund. Mutual funds are priced daily, highly liquid, and diversified. A wide range of investment strategies are available to enable advisors to build portfolios aligning with a client's financial goals and risk tolerance.

### HOW IT WORKS

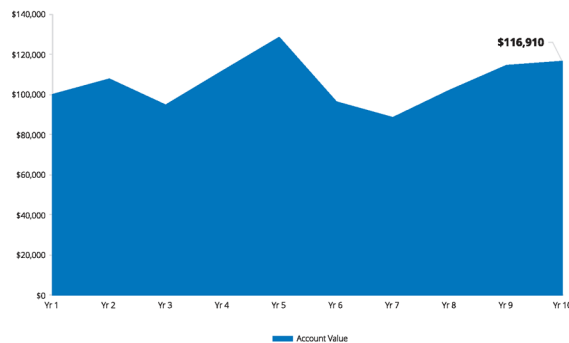
An investment account is opened with an online broker or through a financial professional (also called a financial advisor or investment advisor). A strategy is decided upon and mutual funds aligning with the strategy are purchased, either on an ad hoc basis or by setting up a regular investment plan.

### CLIENT BENEFITS

- > Professional portfolio management.
- > Convenience.
- > Fair pricing.
- > Diversification — losses due to poor performance of a single security are mitigated.
- > Higher potential returns based on market performance and reinvested dividends.

### RESTRICTIONS AND LIMITATIONS

- > No guarantees.
- > Tax inefficient; unless held in a qualified account (e.g., 401(k) or IRA), interest and capital gains are taxable when distributed or reinvested by the fund. Shares must be redeemed or other sources of capital must be used to satisfy tax liabilities, and it is possible to have net investment losses and tax liabilities in the same year.
- > Benchmark risk (fund returns may deviate from benchmarks).
- > Return dilution — the flip side of diversification, return dilution limits participation in returns from high performing securities.



In this example, \$100,000 is invested in the mutual fund. Its value rises and falls as the stocks and bonds held in the mutual fund portfolio fluctuate in price and dividend and capital gains are reinvested. In the example the ending value of \$116,910 is the same as in the VA example, but mutual funds have no insurance features, and therefore the cash value of the fund is always equal to the value of the underlying securities.

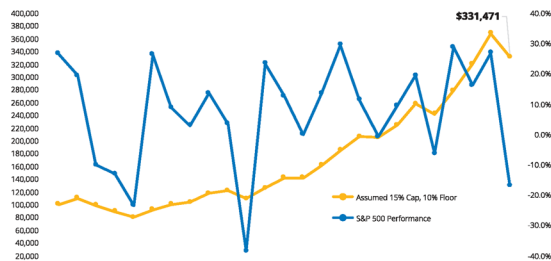
## Registered Index-linked Annuities I — Floor Strategy

### SUMMARY

Registered index-linked annuities (RILAs) utilize options strategies to provide both upside potential and downside protection. The contract owner is not directly invested in the securities that underlie the index, but rather receives a return on investment based on the performance of the options.

### HOW IT WORKS

The initial contribution is held in a segregated separate account managed by the insurance company. Earnings from this account are used to purchase options on one or more market indexes, the most common being the S&P 500 index. In a floor strategy, the client is protected from losses beyond a set percentage, with gains capped at a predefined percentage. As an example, a 10% floor and a 15% cap limits loss to 10% if the index drops 25% and caps the gain at 15% even if the index rises 25%.



In this example using actual S&P 500 return data from 1998 to 2022, \$100,000 is invested in the annuity. In years when the S&P 500 has a positive change in value, the RILA account value increases up to 15%. In years when the change in the value of the S&P 500 is negative, losses are limited to 10%. The insurance company absorbs losses beyond the 10% floor. The RILA outperforms the S&P 500 due to market volatility and the years the S&P 500 experienced significant losses, and the annuity grows from \$100,000 to \$331,471, or a compound annual return rate of about 5.1%.

### CLIENT BENEFITS

- > Upside potential is greater than in conservative fixed income investments.
- > The client receives a measure of principal protection by giving up some upside potential.
- > Losses are limited to the preset floor percentage.
- > The client is more likely to stay invested and accumulate greater savings for retirement than with a very conservative investment strategy.
- > Attractive investment options in a volatile equity market where consumers want greater upside potential than a FLA fixed annuity, or CD can offer.

### RESTRICTIONS AND LIMITATIONS

- > Principal protection is generally less than 100 percent in RILA products.
- > Gains are limited to the preset cap percentage.
- > Only certain indexes are available.
- > Index gains do not include dividend income.

## Managed Floor ETFs

### SUMMARY

Managed floor ETFs use a laddered options strategy to target a maximum level of loss while seeking to achieve incremental positive returns. The options strategies used in the ETF are designed to provide upside potential with call options while targeting a loss “floor,” for example limiting losses to 10 percent, using put options.

### HOW IT WORKS

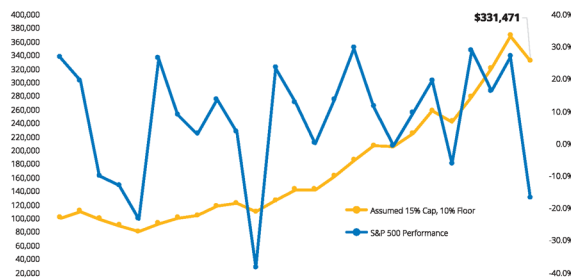
Exchange-traded put option contracts are purchased to provide a floor against significant losses in the target market indexes. Short-dated call options are simultaneously sold with the objective of generating incremental returns above and beyond the cost of the put options. Capital appreciation of the underlying holdings and the incremental returns from the call options are intended to generate positive returns for investors over the long term, while limiting losses.

### CLIENT BENEFITS

- > Upside potential, which can be described as “equity like,” is greater than in conservative fixed income investments.
- > The client receives a measure of principal protection by giving up some upside potential.
- > Intended to limit losses to a defined percentage.
- > The client is more likely to stay invested and accumulate greater savings for retirement than with a very conservative investment strategy.
- > May include dividend returns depending on the specific product chosen.

### RESTRICTIONS AND LIMITATIONS

- > Requires frequent maintenance and trading.
- > Loss limits and return goals are targets, not guarantees.
- > Insured principal protection and lifetime income are not directly available.
- > Gains are not tax deferred.
- > May not include dividend returns depending on specific product chosen.



*From an illustration perspective, a managed floor ETF is similar to a RILA using a floor strategy; that is, the downside is limited to a 10% loss while the upside is capped. In the case of the ETF, the upside cap is not defined but rather a result of the gains and losses stemming from the options trades. For simplicity, the same 15% upside cap shown for the RILA floor strategy is used here, with the same result in terms of the ending account value. Note, however, that the difference in tax treatment of the annuity and the ETF would have a material impact on the net result.*



## Registered Index-linked Annuities II — Buffer Strategy

### SUMMARY

RILAs utilize options strategies to provide both upside potential and downside protection. The contract owner is not directly invested in the securities that underlie the index but rather receives a return on investment based on the performance of the options.

### HOW IT WORKS

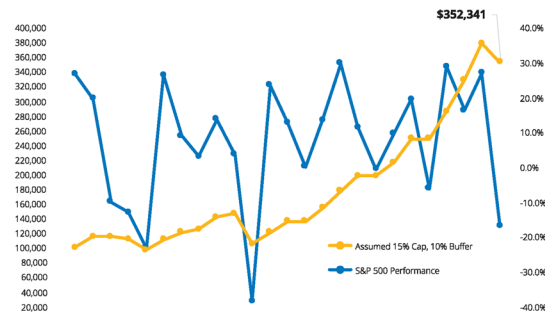
The initial contribution is held in a segregated separate account managed by the insurance company. Earnings from this account are used to purchase options on one or more market indexes, the most common being the S&P 500 index. In a buffer strategy, the client is protected from losses up to a set percentage, with gains capped at a predefined percentage. As an example, a 10% buffer with a 15% cap will protect against losses up to 10%, resulting in a 15% loss if the index drops 25%, while the cap limits annual gains to 15%.

### CLIENT BENEFITS

- > Upside potential is greater than in conservative fixed income investments.
- > The client receives a measure of principal protection by giving up some upside potential.
- > Client is protected against losses up to a set percentage.
- > The client is more likely to stay invested and accumulate greater savings for retirement than with a very conservative investment strategy.
- > Income benefit riders may be available.

### RESTRICTIONS AND LIMITATIONS

- > Principal protection is generally less than 100 percent in RILA products.
- > Losses beyond the buffer are unlimited.
- > Only certain indexes are available.
- > Index gains do not include dividend income.



In this example using actual S&P 500 return data from 1998 to 2022, \$100,000 is invested in the annuity. In years when the S&P 500 has a positive change in value, the RILA account value increases by the lesser of 15% or the actual change in value of the index. In years when the change in the value of the S&P 500 is negative, losses are protected up to 10%. The client absorbs losses beyond the 10% buffer. There is no guaranteed minimum return, and in this example the RILA grows to \$352,341 and the account experiences far less volatility and reduced losses when the S&P drops significantly.

## Buffered ETFs

### SUMMARY

Buffered ETFs use a laddered options strategy to target a maximum level of loss while seeking to achieve incremental positive returns. A buffered ETF is designed to provide investors with the upside of an asset's returns, up to a capped percentage, while also providing downside protection on a percentage of losses, for example on the first 10 or 15 percent. Buffered ETFs typically have one-year outcome periods.

### HOW IT WORKS

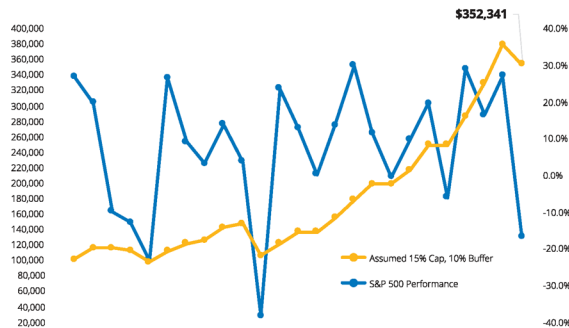
A typical buffered ETF purchases one-year call options on a market index, allowing it to purchase the index at the current price in one year. It will also buy put options to provide protection and sell calls to generate premium income that is intended to defray the cost of the put options and generate additional incremental returns.

### CLIENT BENEFITS

- > Upside potential is greater than in conservative fixed income investments.
- > The client receives a measure of principal protection by giving up some upside potential.
- > Losses are only incurred beyond a set percentage.
- > The client is more likely to stay invested and accumulate greater savings for retirement than with a very conservative investment strategy.

### RESTRICTIONS AND LIMITATIONS

- > Gains are less than the return of the underlying index.
- > Loss limits and return goals are targets, not guarantees.
- > Insured principal protection and lifetime income are not available.
- > Gains are not tax deferred.
- > Do not typically include dividend return.
- > Requires frequent maintenance and trading.



From an illustration perspective, a buffered ETF is like a RILA using a buffered strategy; as in the RILA, in this example the downside is protected up to a 10% loss while the upside is capped. Unlike the RILA, in the case of the ETF the upside cap is not defined but rather is the result of the gains and losses stemming from the options trades. For simplicity a 15% cap is used in the chart. The ending value is the same as in the buffered RILA example, but again taxes would impact this result.

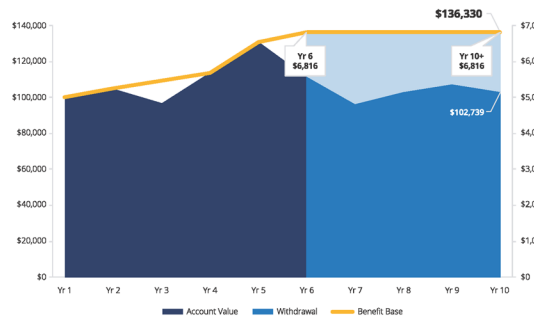
## Living Benefits I — Guaranteed Lifetime Withdrawal Benefits

### SUMMARY

Living benefits, as the name suggests, provide benefits to annuity owners while they are still alive, most notable a minimum amount of income from an annuity for as long as they might live, even if the annuity value goes to zero. The most common is the GLWB, which provides income through regular lifetime withdrawals of a set amount. GLWBs are optionally available for an additional fee on many VAs and EAs as well as some RILAs and fixed annuities.

### HOW IT WORKS

An initial purchase payment is invested by the contract owner. A “benefit base” is initially equal to the amount invested and may increase at a fixed rate prior to income payments beginning and on contract anniversaries before and after income payments begin if positive investment returns cause the account value to exceed the current benefit base. Income is taken through lifetime guaranteed withdrawals calculated against the benefit base.



*In this example, \$100,000 is invested in the annuity and withdrawals begin after five years. Prior to the start of withdrawals, the benefit base increases each year due to either positive investment performance (step-up) or annual increases based on a fixed percentage rate. Once withdrawals begin, the guaranteed withdrawal amount may still increase if returns increase the contract value more than withdrawals, negative returns and fees reduce it. If the account value is depleted to \$0, income is paid out of the insurance company's general account.*

### CLIENT BENEFITS

- > The client receives regular payments guaranteed for life, or two lives in the case of joint life benefits, to supplement Social Security retirement benefits and other sources of retirement income, such as pensions.
- > Unpaid account value may be distributed to beneficiaries upon the death of the owner(s).
- > The guarantee itself may give the client more confidence to remain invested during periods of high market volatility, potentially increasing overall portfolio returns in the long run.
- > Many GLWBs allow additional penalty-free withdrawals to satisfy required minimum distribution (RMD) rules.

### RESTRICTIONS AND LIMITATIONS

- > If the contract value becomes zero, payments will continue and will not increase or decrease, will cease at the death of the owner(s), and in some contracts the income amount may be reduced.
- > There may be a limited menu of investment options, or some riskier options may not be available, when a GLWB is elected.
- > If excess withdrawals are taken the guaranteed amount will be reduced, usually on a pro-rata basis, and in some cases is no longer payable for life.

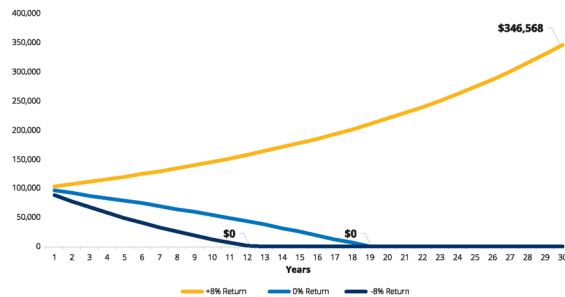
## Systematic Withdrawal Plans

### SUMMARY

A systematic withdrawal plan (SWP) is a method of generating regular retirement income from an investment portfolio by systematically withdrawing set amounts, usually on a monthly basis. A SWP is generally actively managed, using a diversified portfolio of investments. Withdrawals may be taken from a combination of qualified assets (e.g., 401(k) and IRA) and non-qualified assets, requiring careful consideration of the differences in taxation of these assets, as well as special rules for qualified assets such as RMDs.

### HOW IT WORKS

The initial withdrawal is calculated as an amount that will provide sufficient supplemental income to the client and also be sustainable over many years during retirement. The so-called "4% rule," where the initial withdrawal is 4% of the total portfolio value, is often used as a starting point. Subsequent withdrawals are typically increased annually to offset increased spending needs due to the impact of inflation.



*\$100,000 is invested in a mutual fund portfolio and withdrawals begin at \$4,000 per year, or 4% of the portfolio value, and are increased each year using a 3% inflation assumption. In the positive case, where returns average 8% annually, the account value continues to grow, reaching \$346,568 as earnings exceed withdrawals. If returns average 0% the portfolio is depleted in about 19 years, and at -8% it takes about 12 years for the portfolio value to reach zero. In all three scenarios, the withdrawal amounts are the same but reach over \$9,000 annually in the 8% return scenario and end at about \$5,500 after 12 years in the -8% example.*

### CLIENT BENEFITS

- > The client receives regular monthly payments to supplement Social Security and any other sources of retirement income, such as a pension.
- > The account remains fully liquid, permitting ready access to additional funds if needed; however, additional withdrawals increase the likelihood of funds running out while the client is still alive.
- > Tax harvesting can be employed to manage tax liability (selling off investments with capital losses first to provide tax deductions).

### RESTRICTIONS AND LIMITATIONS

- > No guarantee systematic withdrawals will be sustainable for the life of the client(s); funds may be depleted entirely or systematic withdrawal amounts significantly reduced to preserve principal.
- > No principal protection.
- > Increases in income due to gains in the portfolio cannot be locked in, as with step-ups in a GLWB.
- > No death or lifetime income benefits are available in a mutual fund portfolio.

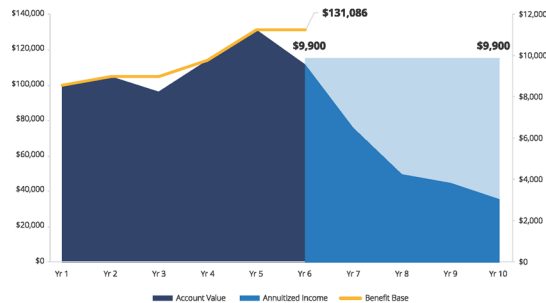
## Living Benefits II — Guaranteed Minimum Income Benefits

### SUMMARY

GIMBs provide annuitants with a guaranteed lifetime income payment through annuitization of a minimum contract value after a set period, usually 10 years. Annuity payments are calculated against the guaranteed benefit base if that value is higher than the actual account value. GIMBs are available for an additional fee on some VAs.

### HOW IT WORKS

An initial purchase payment is invested by the contract owner. A benefit base, initially equal to the amount invested, increases at a set rate for 10 years, and may also be stepped up on contract anniversaries if the current contract value is higher. After 10 years the contract may be annuitized using the greater of the current contract value or the benefit base.



\$100,000 is invested in the annuity and the contract value of \$131,086 is annuitized after 10 years. Prior to annuitization, the benefit base increases each year due to either positive investment performance (step-up) or annual increases based on a fixed percentage rate. Once annuitization occurs, there is no account value to withdraw from and the annuitant receives guaranteed income payments for as long as they live. Like a SPIA, upon death beneficiaries may receive a lump sum benefit or continued payouts for a period of time, depending on the type of annuitization chosen.

### CLIENT BENEFITS

- > The client receives regular payments guaranteed for life, or two lives in the case of joint life benefits.
- > The guarantee itself may give the client more confidence to remain invested during periods of high market volatility, potentially increasing returns in the long run.
- > Guaranteed income payments are generally higher than from a GLWB.

### RESTRICTIONS AND LIMITATIONS

- > While the insurance company guarantees the income amount, there is no guarantee of the contract value or the amount invested.
- > There may be a limited menu of investment options, or some riskier options may not be available, when a GIMB is elected.
- > Exercising the benefit requires annuitization of the account value; there is no liquidity other than through annuitization features such as cash or installment refund and period certain payments.
- > These benefits are less commonly available than they once were.

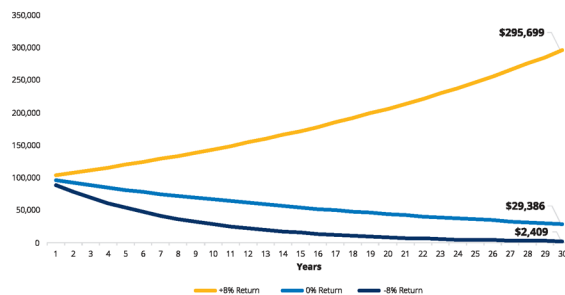
## Variable Income Plans

### SUMMARY

In a variable income plan, a constant percentage is withdrawn on a regular basis, with the amount of the withdrawal fluctuating based on the returns of a portfolio of investable assets. When the portfolio increases in value, income increases; conversely, when returns are flat or negative and the portfolio decreases in value, income decreases, helping to preserve principal.

### HOW IT WORKS

The initial withdrawal is calculated as an amount that will provide sufficient supplemental income to the client and be sustainable over many years during retirement. As opposed to the “4% rule,” where income payments start as a set dollar amount and increase by the inflation rate, in a variable income plan the same percentage is taken out each year but the amount fluctuates.



*\$100,000 is invested in a mutual fund portfolio and withdrawals begin at \$4,000 per year, or 4% of the portfolio value. In all cases the portfolio continues for the entire 30-year time horizon. In the positive case, where returns average 8% annually, the account value continues to grow to \$295,699 as earnings exceed withdrawals and income payments grow to over \$11,000 per year. However, in the negative return scenario performance is poor enough to drive withdrawals down to only \$100 per year as the 4% withdrawal rate is applied to a portfolio that has decreased to just a few thousand dollars in value.*

### CLIENT BENEFITS

- > The client receives regular monthly payments to supplement Social Security and any other sources of retirement income, such as a pension.
- > The account remains fully liquid, permitting ready access to additional funds if needed; however, additional withdrawals increase the likelihood of funds depleting while the client is still alive.
- > Tax harvesting can be employed to manage tax liability (selling off investments with capital losses first to provide tax deductions).
- > The portfolio will never be completely depleted.

### RESTRICTIONS AND LIMITATIONS

- > There are no guarantees systematic withdrawals will be sustainable for the life of the client(s); funds may be depleted to a point where withdrawal amounts must be significantly reduced to preserve principal.
- > Funds may be depleted to a point where they fall below minimum account requirements.
- > Increases in portfolio value cannot be locked in, as with step-up in a GLWB.
- > Poor performance and a long period of withdrawals may reduce income payments considerably.
- > No enhanced death or lifetime income benefits are available in a mutual fund portfolio.

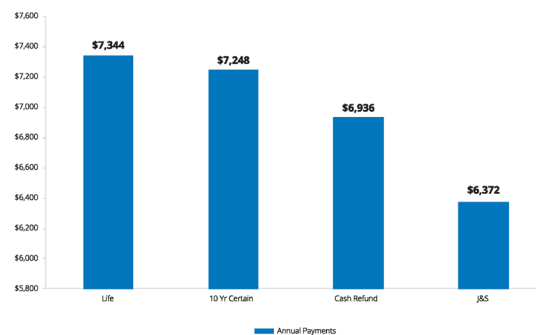
## Single Premium Immediate Annuities

### SUMMARY

Single premium immediate annuities (SPIAs) provide lifetime income payments in exchange for a lump sum investment.

### HOW IT WORKS

An initial purchase payment is invested by the contract owner and deposited to the general account of the insurer. The annuitant (usually the contract owner) receives monthly payments for life, and beneficiaries may or may not receive payments upon the annuitant's death depending on the structure of the annuity.



*In this example, \$100,000 is invested in the SPIA and payments begin immediately, usually the following month. There is no account value shown on the graph, as the annuitant is only entitled to the payments. The different amounts reflect varying levels of liquidity, i.e., period certain, refund features and joint & survivor (J&S) represent higher guaranteed payments and therefore lower payment amounts.*

### CLIENT BENEFITS

- > The client receives regular payments guaranteed for life, or two lives in the case of joint life benefits.
- > Payments may continue after the annuitant's death with period certain, cash refund, and installment refund features.
- > SPIAs generally produce the highest amount of guaranteed lifetime income per invested dollar.
- > Variable SPIAs invest purchase payments in variable subaccounts. Payments are initially set using an assumed interest rate, and future payments increase or decrease based on actual returns. Few variable SPIAs are available in the market today.
- > Some SPIAs may offer a "commutation" feature.

### RESTRICTIONS AND LIMITATIONS

- > The tradeoff for higher payments is the loss of liquidity; invested funds are only available as annuity payments or beneficiary payments under period certain or refund features, if elected.
- > Depending on the terms of the contract and how long the annuitant lives, there may be no death benefit paid to beneficiaries.
- > In standard fixed SPIAs, payments do not increase if interest rates rise.

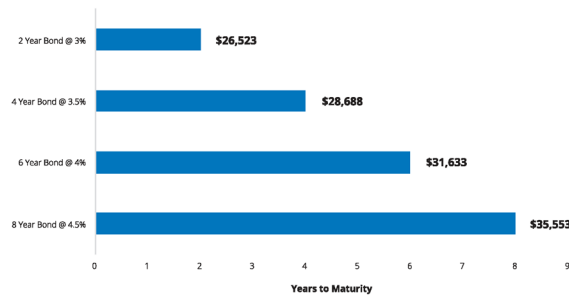
## Bond/CD Ladders

### SUMMARY

Bonds or CDs of varying duration are purchased. As each bond or CD matures, the proceeds are used to provide retirement income and purchase additional bonds or CDs at the longest duration, extending the ladder.

### HOW IT WORKS

The initial purchase is of a series of bonds or CDs of varying duration, for example two, four, six, and eight years. As each bond matures, it is used to purchase another eight-year bond. After eight years, an eight-year bond will be maturing every two years, providing both reinvestment proceeds and retirement income. This helps investors take advantage of the higher rates associated with longer maturities while eventually providing a steady stream of maturing bonds that can be rolled into those longer maturities when older bonds mature.



*A bond ladder is simply a series of fixed income purchases designed to ensure a bond is regularly maturing to both provide retirement income and take advantage of fluctuating interest rates. Here, equal investments of \$25,000 are made in four bonds or CDs of varying duration. Every two years, the proceeds from the maturing bond (less monies used for supplemental retirement income) are used to purchase another eight-year bond, extending the ladder an additional two years.*

### CLIENT BENEFITS

- > Simplicity and liquidity.
- > The client receives regular payments from the bonds or CDs.
- > Principal can remain intact if bond interest is sufficient to provide supplemental retirement income.

### RESTRICTIONS AND LIMITATIONS

- > Income will generally be lower than that provided by SPiAs because there is no mortality pooling component to the payments.
- > Low interest rates may result in very little income if principal is not tapped.
- > Rapidly rising rates can significantly reduce bond values, especially those of longer duration.
- > As bonds mature, the new purchase is subject to the current rate environment which could negatively impact ongoing interest payments if rates have fallen significantly.



## Definitions of Key Terms

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**Accumulation phase:** The period of time prior to annuitization or surrender when amounts invested in an annuity accrue interest, dividends, and/or capital gains.

**Annuity:** An insurance contract that provides future income in exchange for present contributions. It is a long-term investment designed to help protect investable assets and mitigate the risk of outliving income.

**Annuitant:** The individual entitled to payments made by the annuity and whose age and gender is used to determine the payment amount. The annuitant is usually also the contract owner but may be another person, such as a spouse.

**Annuitization:** Annuitization is the conversion of the contract value of a deferred annuity into a lifetime stream of income payments, or payments for a set period, or the greater of the two. There are several options to choose from when annuitizing; options that provide a greater guarantee of continuing payments generally result in lower initial payments:

- > **Life only:** Payments begin immediately and continue for the life of the annuitant. Payments cease at death, and there is no death benefit paid, even if only one payment was made.
- > **Life with period certain:** Payments continue for the longer of the annuitant's life or a set number of years; five, 10, 15, and 20 year certain periods are commonly available.
- > **Life with cash refund:** If the annuitant dies before the total of payments made is equal to the amount annuitized, the difference is paid out in a lump sum to beneficiaries.
- > **Life with installment refund:** If the annuitant dies before the total of payments made is equal to the amount annuitized, the difference is paid out in installments to beneficiaries.
- > **Joint & survivor:** Payments continue until the second of two annuitants dies. Payments may continue at the same amount or at some percentage of the original payment, generally 75%, 66⅔%, or 50%. When payments reduce after the first death, the initial payment will be greater.

**Benchmark risk:** The potential for the investment returns of a mutual fund or subaccount to differ significantly from its benchmark (the market index it is measured against).

**Benefit base:** A value used to calculate a benefit in an annuity, most commonly a lifetime withdrawal benefit. The benefit base value is "notional," i.e., it does not represent contract or cash value but is only used to calculate the value of a benefit.

**Beneficiary:** The person, persons, or entity legally entitled to receive benefits from financial products. For annuities, these are contractual benefits paid upon the death of the owner, or owners, of the contract.

**Bonds:** Debt obligations issued by federal, state, and local government agencies or private companies. For example, treasury securities are debt obligations issued by the United States Department of the Treasury, including bills, notes and bonds of varying maturities that pay interest on a semi-annual basis. Corporate bonds are debt obligations issued by a private company. Investment-grade, or "high-grade" bonds have a lower risk of default and higher ratings from credit rating agencies such as Moody's, S&P and Fitch. High-yield corporate bonds offer higher rates of interest but are considered to be at greater risk of default.

**Buffered ETF:** Exchanged traded funds that provide investors with the upside of a market index, capped to a certain percentage, while also providing downside protection on the first pre-determined percentage of losses. As opposed to a Managed Floor ETF, the investor absorbs losses beyond this pre-determined percentage.

**Cash value:** The value of a financial product, less any fees or penalties, when fully liquidated. For annuities, also see surrender value.

**Certificate of deposit (CD):** A bank issued savings product that earns interest on a lump sum investment for a specified period.

**Claims paying ability:** The financial strength and relative ability of an insurance company to pay claims on its issued annuity and other insurance contracts. Claims paying ability is evaluated by rating agencies such as AM Best, Moody's, Standard & Poors, and Fitch. Rating agencies are businesses that assess the creditworthiness of issuers of annuities and fixed income securities for investors. The likelihood the debt of issuers, such as corporations and governments, is repaid in whole or part, is expressed in ratings arranged in a credit quality scale.

**Commutation:** A feature that may be available after a contract has been annuitized where future payments are converted to a lump sum, calculated as the present value of the remaining payments based on the life expectancy of the annuitant.

**Contract anniversary:** The date the contract is issued.

**Contract owner:** The individual who owns the annuity contract and has the authority to make withdrawals, change beneficiaries and terminate the annuity.

**Contract value:** The full value of the annuity, not including any early withdrawal penalties that may apply. This may also be referred to as the "account value."

**Contract year:** The one-year period between contract anniversaries.

**Corporate bond:** A debt obligation issued by a private company. Investment-grade, or "high-grade" bonds have a lower risk of default and higher ratings from credit rating agencies such as Moody's, S&P and Fitch. High-yield corporate bonds offer higher rates of interest but are considered at greater risk of default.

**Death benefit:** The amount an annuity contract pays to the contract owner's named beneficiary or beneficiaries upon the death of an owner or co-owner.

**Deferred annuity:** A contract with an insurance company that promises to pay the owner a regular income or lump sum at some future date. Interest and capital gains in fixed and variable annuities are not taxed until monies are withdrawn.

**Dividend return:** The portion of the overall return of a stock attributable to dividends paid per share by the issuing company.

**Duration:** The length of time it takes for an investor to recover the price paid for a bond from total cash flows (principal plus interest). It is also a measure of the sensitivity of the bond's price to changes in interest rates. The prices of bonds of longer duration (e.g., 30-year Treasuries versus 10-year Treasuries) will experience greater changes when interest rates rise or fall.

**Early withdrawal penalty:** Also called a "surrender charge," this is a type of sales charge that may be assessed if you withdraw money from an annuity during the surrender period defined in the contract. This charge allows the insurer to cover issuing and maintenance costs for policies surrendered before such costs are recovered. Most surrender charge periods are three to seven years with the charge reducing by one percent per year until it reaches zero.

**Enhanced death benefit:** Standard annuity death benefits are generally equal to the current account value or the greater of the account value or amount invested (return of premium, or ROP). Enhanced benefits may use roll-ups, step-ups, or both to provide a higher level of protection for beneficiaries.

**Exclusion ratio:** The percentage of annuity payments that is not subject to taxes and is excluded from gross income. It is calculated by dividing the initial investment over the expected payment period, which for lifetime annuity payments is equal to life expectancy. For example, if a payment of \$7,500 per year is made to a 65-year-old male annuitant with a 20 year life expectancy and the amount invested was \$100,000, \$5,000/\$7,500, or 66.67%, or each payment is not subject to income taxes until the amount invested is recovered. After 20 years the \$7,500 payment is fully taxable at ordinary income rates.

**Federal Deposit Insurance Corporation (FDIC):**

The Federal Deposit Insurance Corporation (FDIC) is an independent agency created by Congress to maintain stability and public confidence in the nation's financial system. To accomplish this mission, the FDIC insures deposits; examines and supervises financial institutions for safety, soundness, and consumer protection; makes large and complex financial institutions resolvable; and manages receiverships. The standard insurance amount is \$250,000 per depositor, per insured bank, for each account ownership category.

**Fees:** Most fixed annuities do not charge explicit fees, except for optional benefits, but are spread products. Variable annuities typically have a few different fees:

- > Mortality & expense risk (MER) fees, which cover costs related to distributing the product.
- > Administrative fees, which cover costs associated with managing the product over time.
- > Investment management fees, which are paid to the professional investment management firms that create and manage the subaccounts offered in the annuity.
- > Fees for optional benefits, which pay for additional death benefits, principal protection, or income guarantees.

**FIA spread:** The percentage subtracted from the index change before interest is credited to the FIA. For example, if the index increases by five percent and there is a two percent spread, the interest credited to the contract will be three percent. Spreads do not reduce the contract value if the index change is negative.

**Financial goals:** Financial priorities that impact the objectives investors set for how to save or spend money during important life stages.

**Financial professional:** A qualified person who can help investors understand their options and make financial decisions to work toward financial goals.

**Fixed annuity:** A tax-deferred insurance contract that promises to pay the buyer a guaranteed rate of interest on their contributions and provides a lifetime income stream in retirement. Interest is credited by the insurer based on what they think they will earn on their general account investments.

**Fixed indexed annuity (FIA):** A FIA is tax-deferred insurance contract that provides principal protection in down markets and an opportunity for growth. FIAs credit a guaranteed interest amount, with the opportunity to earn additional interest based on positive changes in the value of one or more market indexes, such as the S&P 500.

**Free withdrawals:** An annual percentage of the amount invested that can be withdrawn from the annuity without penalty each year. The penalty-free withdrawal amount can vary between insurers, but 10 percent is common.

**General account:** The account of the insurer (i.e., annuity issuer) where premiums invested in annuities are deposited and from which the insurer funds business operations. The general account aggregates all funds rather than holding dedicated amounts for specific policies. Fixed annuities and fixed indexed annuities are general account products, and most variable annuities offer a fixed account option that invests in the general account. Registered index-linked annuities may also utilize both general and separate accounts to invest premium depending on the structure.

**Guarantee minimum accumulation benefit (GMAB):**

A benefit that guarantees the account value will equal some fixed percentage (typically 100%) of premiums, minus any withdrawals, as long as the contract remains in-force and the account value does not decrease to zero as a result of withdrawals, after a minimum period of time, usually 10 years.

**Guaranteed minimum income benefit (GMIB):**

A benefit offered in variable annuities that guarantees the contract owner can annuitize the contract and receive annuity payments calculated against the greater of the actual account value or guaranteed benefit base. As with an immediate annuity, there is no cash value after annuitization and payments are made for the life or lives of the annuitant(s).

**Guaranteed lifetime withdrawal benefit (GLWB):** A benefit offered in variable, fixed indexed and RILAs that allows the contract owner to withdraw a set amount each year. Withdrawals continue for the life of the owner, or the owner and a spouse in the case of joint benefits, regardless of whether there is still account value in the product. Amounts are calculated using the benefit base and are withdrawn from the account value if there is still account value in the annuity. If the account value becomes zero due to withdrawals and/or market performance, the contract enters the settlement phase and the insurance company continues to make payments until the owner(s) die.

**Immediate annuities:** Also referred to as single premium immediate annuities (SPIAs), these are insurance contracts where a lump sum is invested and the insurance company agrees to make periodic income payments for life, a specified period, or the longer of the two. SPIAs have no cash value beyond the insurer's obligation to make the periodic payments under the terms of the contract.

**Investable assets:** Assets that can be easily liquidated, such as bank accounts, stocks, bonds, mutual funds and annuities.

**Joint life benefits:** Annuity income benefits that are issued on two people, usually spouses, and continue to pay to the second person after the first dies. Available as an [annuitization](#) option and with most [guaranteed lifetime withdrawal](#) and [guaranteed lifetime income benefits](#).

**Lifetime income:** Periodic income payments from an annuity that continue for the life, or lives, of one or more [owners](#). Lifetime income is available through [annuitization](#), or through living benefits such as [guaranteed lifetime withdrawal benefits](#) and [guaranteed lifetime income benefits](#).

**Liquidity:** The relative ease with which an [investable asset](#) can be converted into cash without affecting its market price.

**Living benefits:** Optional benefits offered on some annuities which provide benefits while the contract owner is still alive. Examples include GMAB, GMIB, and GLWB.

**Managed floor ETF:** Exchanged traded managed outcome funds that use options strategies to provide investors with the upside of equity markets while providing a measure of downside risk. As opposed to a [buffered ETF](#), the investor is protected against losses beyond a pre-determined percentage.

**Market index:** A hypothetical portfolio of investment holdings that represents a segment of the financial market. The value of the index is calculated using the prices of the underlying holdings.

**Market risk:** The chance an investor could lose money because of market downturns.

**Market volatility:** Also referred to as "market ups and downs," the way stocks, bonds and other market investments change in value, sometimes very quickly.

**Maturity:** The date a financial agreement ends, triggering repayment of principal with interest.

**Moneyness:** A term describing the relationship of an option's strike (exercise) price with its spot (market) price. "In the money" options have a strike price greater than the spot price, whereas "out of the money" options have strike prices below their spot prices.

**Mortality pooling:** Also called "mortality credits," in a large group of annuitants the investments of those who die earlier than expected contribute to the overall pool and provide higher payments to survivors. The mortality credit increases significantly with age (when more individuals in the group are likely to die) and hedges longevity risk, creating a return that would be difficult to match using other financial products or approaches.

**Open-end mutual fund:** A collective investment vehicle that buys and sells stocks, bonds, and options and can issue unlimited new shares, priced daily based on the net asset value of the securities held in the portfolio.

**Option:** The right to buy or sell a security at an agreed upon price for a defined time period.

**Participation rate:** The percentage of the increase in the index value that is credited to the annuity at the end of a selected time period.

**Principal protection:** Embedded or optional features in an annuity that guarantee the contract will return no less than the amount invested. All fixed and fixed indexed annuities contractually provide 100% principal protection, per the terms of the contract (FIAs return a minimum of 87.5% of principal and must be held to maturity for 100%) and subject to the claims paying ability of the issuer. Variable annuities can provide principal protection through GMABs, and RILAs provide partial principal protection using options strategies. Principal protection for beneficiaries in variable annuities can also be achieved through return of premium death benefits. Non-annuity products and solutions can also provide, but not guarantee, a level of principal protection using options strategies.

**Probate:** The formal legal process that occurs when a decedent leaves assets to distribute, such as bank accounts, real estate, and financial investments. The probate process involves gathering assets, satisfying debts, and distributing remaining amounts to beneficiaries. Amounts invested in annuities are generally paid directly to named beneficiaries as death benefits and are not included in the probate process.

**Purchase payment:** Also called premium, this is the payment or series of payments that represent the investment in the annuity.

**Qualified plan:** An individual or employer-sponsored retirement plan that offers individuals the opportunity to save for retirement on a pre-tax basis — contributions and earnings are not taxed until withdrawn. Individual retirement plans such as individual retirement accounts (IRAs) must meet the requirements of the Internal Revenue Code, and employer-sponsored plans such as 401(k) plans must also meet the requirements of the Employee Retirement Income Security Act (ERISA). Investments made with money that has already been taxed are referred to as “non-qualified.”

**Registered index-linked annuity (RILA):** An insurance contract providing a tax-deferred, long-term savings option that limits exposure to downside risk and provides the opportunity for growth.

**Required minimum distribution (RMD):** The amount you are required to withdraw annually from a qualified retirement account, such as an IRA, starting at age 72.

**Return dilution:** The limited participation in the returns of outperforming stocks when held in a widely diversified portfolio. In other words, one or two stocks with very high returns may not contribute much to overall returns in a portfolio of 50 different securities.

**Return of premium death benefit (ROP):** Pays beneficiaries the greater of the contract value or the total amount invested upon the death of the contract owner(s).

**Roll-up:** An annuity feature that increases the value of a benefit each year, independently of the contract value, on either a simple or compound basis. For example, a 4% guaranteed lifetime withdrawal benefit with a roll-up feature might increase the benefit base by 5% per year, compounded annually. The annual withdrawal amount would then be the greater of 4% of the account value OR 4% of the compounded benefit base when withdrawals begin. Similarly, a death benefit with a roll-up feature would pay beneficiaries the greater of the current account value or the roll-up value upon the death of the contract owner. Amounts calculated using roll-up percentages do not represent contract or cash value. They are only used to calculate benefit amounts, and those amounts are only accessible through the terms of the benefits in which they are used. Roll-ups generally terminate when benefit payments begin.

**Separate account:** A fund created by the insurer, separate from the company's general account, that is used for investing variable annuity and other holdings (such as pensions) in open-end funds and other investments.

**Spread:** The difference between the interest the insurance company earns on its investments and the interest credited to the annuity. Fixed and fixed indexed annuities are often referred to as “spread products.” The difference covers the insurance companies operating costs and profit.

**Step-up:** An annuity feature that increases the benefit base to equal the current account value. Step-ups generally occur on contract anniversaries and may be based on the anniversary value or the highest value the contract attained at certain points during the prior year, e.g., the highest value on any day the stock market was in session during the prior year. Step-ups may continue after benefit payments begin, provided there is contract value that has not been paid out.

**Subaccount:** A segregated account maintained by an insurance company to hold mutual fund-like investments for use in variable annuity and variable life products. Assets held in segregated accounts are not subject to the claims of the insurance company's creditors in the event of bankruptcy.

**Surrender value:** The cash value of the annuity less any early withdrawal penalty, market value adjustment, charges or fees.

**State guaranty associations:** State guaranty associations provide coverage (up to the limits spelled out by state law) for resident policyholders of insurers licensed to do business in their state.

**Systematic withdrawal plan (SWIP):** The withdrawal of fixed amounts from a portfolio of investable assets on a regular, periodic basis (monthly, quarterly, annually) for supplemental retirement income. The dollar amount of withdrawals typically begins as a defined percentage of the portfolio value (e.g., 4%) and is adjusted annually for inflation.

**Treasury security:** A debt obligation issued by the United States Department of the Treasury, including bills, notes and bonds of varying maturities that pay interest on a semi-annual basis.

**Trigger:** A method of crediting interest to an FIA where the contract is credited with a stated rate of interest if the change in value of the underlying index is positive over the specified time period.

**Trust:** A legal entity that holds asset for beneficiaries. The terms of the trust dictate the method and timing of the distribution of assets.

**Variable annuity (VA):** An annuity with an account value tied to the performance of an investment portfolio. The value of the annuity, and payments from the annuity, can increase if the portfolio performs well and decrease if the portfolio loses money.

**Variable income plan:** The withdrawal of a set percentage amount from a portfolio of investable assets on a regular, periodic basis (monthly, quarterly, annually) for supplemental retirement income. The dollar amount of withdrawals will vary based on investment returns and the reduction in portfolio value from withdrawals, effectively resulting in a "raise" when the portfolio performs well and a "pay cut" when it does not.

## Important Disclaimers

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- > For Financial Professional Use Only. Not For Use with Consumers.
- > All financial professionals, including securities licensed agents, must be licensed under state law to sell any type of annuity.
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- > This handbook contains information pertaining to annuities, which are backed by the claims paying ability of the issuer and state guaranty associations, with the amounts of coverage varying by state. It also contains information about certificates of deposit (CDs), which are insured by the Federal Deposit Insurance Corporation (FDIC) up to \$250,000 per depositor, per insured bank. The FDIC does not insure amounts invested in annuities.



ATTACHMENT 2

IRI's  
2023 DOL Fiduciary Rule Proposal:  
Overview and Analysis of Potential Impact





## What is this all about?

Since 1974, the Employee Retirement Income Security Act (ERISA) has imposed fiduciary status on anyone who provides investment advice for compensation to an employer-based retirement plan like a 401(k) or to any participant or beneficiary of such a plan. In 1975, the Department of Labor (DOL) adopted a five-part test to clearly define when a person or entity would trigger this fiduciary status. The federal tax code imposes a similar but not identical fiduciary standard on providers of investment advice to individual retirement accounts (IRAs) and IRA owners, and the same five-part test also applies in the IRA context.

The five-part test was designed to ensure that fiduciary status under ERISA and the federal tax code would only be imposed when there is a special relationship of trust and confidence between the advice provider and the advice recipient. Since 2010, the DOL has been trying to change its rules to treat more people as fiduciaries and to impose more stringent requirements on their conduct. This proposal is the DOL's latest effort to rewrite these rules following the rejection of its 2016 rule by the federal courts.

**In brief:** DOL's latest rule proposal aims to broaden the definition for who is classified as a fiduciary and impose more stringent requirements on fiduciaries.

**Nearly all firms and financial professionals would become fiduciaries under this proposal.**

## Will this proposed rule have a negative effect on consumers?

Millions of consumers are likely to suffer harm under this proposed regulation.

For the second time in less than a decade, DOL has proposed a regulation to treat all financial professionals who sell retirement planning products and services as fiduciaries. An attempt at a similar rule in 2016 was invalidated as arbitrary and capricious rulemaking by the U.S. Court of Appeals for the Fifth Circuit in 2018.

DOL has unreasonably dismissed the extensive research and real-world experience decisively demonstrating the 2016 DOL fiduciary rule significantly harmed lower- and middle-income workers before being vacated in federal court.

- > A study of the 2016 fiduciary rule found that more than 10 million smaller retirement account owners lost the ability to work with financial professionals.
- > A more recent analysis found that if DOL adopts a new rule similar to the 2016 rule, the retirement savings of 2.7 million individuals with incomes below \$100,000 would plummet by \$140 billion over ten years.
- > The analysis also found that people of color, particularly Black and Latino retirement account owners, would be among the hardest hit, increasing the racial wealth gap by 20 percent.

## What does it mean to be an investment advice fiduciary under ERISA?

The fiduciary standard imposed by ERISA is often referred to as the "highest standard known under the law" and for good reason. Fiduciaries to employer-based plans are held to statutory duties of prudence and loyalty and are subject to strict prohibited transaction rules. This means fiduciaries cannot make recommendations if their compensation would vary depending on what they recommend unless they qualify for an exemption from the prohibited transaction rules. Plan participants and beneficiaries have the right to sue in private litigation if they think a fiduciary has violated those duties or rules.

### Fiduciary Standard Summary Under ERISA

- > Duty of prudence and loyalty
- > Prohibited transaction rules
- > Private right of action

### For IRA Advice

- > Prohibited transaction rules
- > No private right of action
- > Fines for violations

## How is the fiduciary standard different in the IRA context?

The federal tax code imposes the same prohibited transaction rules on fiduciaries who provide investment advice to IRAs, but in the IRA context, the duties of prudence and loyalty do not apply and there is no private right of action. If a fiduciary to an IRA violates the prohibited transaction rules, they can be fined by the Internal Revenue Service (IRS), but they cannot be sued by the IRA or the IRA owner.

## Who would become a fiduciary under the proposal?

Just like the 2016 rule, nearly all firms and financial professionals would become fiduciaries under this proposal. Generally speaking, a person or entity will be a fiduciary if they or any of their affiliates regularly make investment recommendations as part of their business and if they make a recommendation to a particular client that could be taken as personalized and in the client's best interest. And this would include recommendations not only to plan participants and IRA owners, but also to plans and IRAs themselves. This could even impact call center representatives or other employees who might suggest particular courses of action. This would be a significant departure from and expansion of the five-part test.

### A person or entity would be a fiduciary if they or an affiliate . . .

- > Make investment recommendations as regular part of business
- > Make personalized recommendation to a client for compensation
- > Recommendation is presented as in client's best interest

## Would the proposal have an impact on the treatment of rollover recommendations?

Yes. Prior to the 2016 rule, a firm or financial professional who was not already a fiduciary to a plan could make a recommendation to a plan participant to roll their account balance over to an IRA without becoming a fiduciary to the plan, even if the recommendation also included advice about how to invest those funds after the rollover. The DOL has been trying to reverse this position since 2016 by changing the test for fiduciary status. The new proposal would expressly treat rollover recommendations as fiduciary advice to a plan, and as a result, providers of rollover advice would become exposed to the risk of private litigation.

## What are prohibited transaction exemptions and how will the proposal impact them?

The DOL can issue exemptions from the prohibited transaction rules to allow fiduciaries to engage in otherwise prohibited conduct that would be in the interests of plans, participants, and beneficiaries. Prohibited transaction exemptions (PTEs) typically require compliance with prescribed conditions designed to protect the rights of plan participants and beneficiaries. Over the past 48 years, the DOL has issued numerous PTEs for use by investment advice fiduciaries.

Currently, two primary exemptions, PTE 2020-02 and PTE 84-24, can be used in connection with annuity recommendations. The DOL's proposal would alter both significantly.

## What would happen to PTE 2020-02 under the proposal?

PTE 2020-02 was adopted by the DOL in 2022 to serve as the primary source of exemptive relief for all providers of fiduciary investment advice. To qualify for this relief, a fiduciary must do the following:

- ✓ Comply with impartial conduct standards
  - Best interest standard
  - Reasonable compensation standard
  - Prohibition on misleading statements
- ✓ Acknowledge fiduciary status
- ✓ Provide clients with information about services provided and material conflicts of interest

In addition, a broker-dealer, investment adviser, bank, or insurance company must serve as a co-fiduciary for the recommendations for which the PTE is needed.

Currently, many firms and financial professionals — but not all — operate under the existing version of PTE 2020-02 in connection with annuity recommendations as well as many other types of transactions.

Significant and problematic changes would be made to PTE 2020-02, including a near-ban on almost all forms of incentive compensation programs, burdensome new disclosure requirements, and draconian disqualification provisions that could result in entire enterprises losing eligibility to use the PTE for ten years based on completely unrelated foreign or domestic criminal convictions.

In addition, given that DOL believes all fiduciary investment advice should be provided under PTE 2020-02, the proposal would make such advice ineligible for relief under several other PTEs that have been used widely and without any reported problems for many years. These other PTEs were specifically designed to be used for very particular circumstances, but the DOL has now determined that the need for a so-called “level playing field” outweighs the value of tailoring exemptive relief to the situations in which they are used.

### Key changes to PTE 2020-02

- > Near-ban on incentive compensation programs
- > Burdensome new disclosure requirements
- > Draconian disqualification provisions
- > Only PTE for most investment advice fiduciaries

## What would happen to PTE 84-24 under the proposal?

This PTE was specifically designed to be used for annuity recommendations. Relief under this PTE is available as long as certain disclosure requirements are satisfied and the transaction is approved by an independent third party. In practice, this PTE is often used as a preventative measure by insurance producers who do not believe they are fiduciaries but want to avoid violating the prohibited transaction rules in case they are later found to have inadvertently triggered fiduciary status.

The proposal would preserve the use of PTE 84-24 in very limited circumstances. Independent insurance producers would be able to use this PTE when recommending fixed and fixed indexed annuities, but this relief would only be available for “insurance commissions.” PTE 84-24 would also be significantly modified to include the impartial conduct standards and to more closely align with PTE 2020-02 in most other respects, including the problematic changes described above.

In place of the co-fiduciary requirement, the proposal would require supervision of the independent producer by the insurance company whose product is being recommended. This accommodation reflects the DOL’s recognition that independent producers would generally be unable to satisfy the co-fiduciary requirement in PTE 2020-02. Unfortunately, the proposed supervisory requirements are inconsistent with applicable state laws and rules, and would be unworkable for many insurers.

### Key changes to PTE 84-24

- > Available only to independent producers
- > Covers only insurance commissions
- > Cannot be used for variable annuities
- > Problematic insurer supervision requirements

## How does this proposal compare to the 2016 rule?

In many ways, this proposal is worse than the 2016 rule. Both versions bring almost all interactions with retirement savers, including rollover advice, under the fiduciary umbrella, though the 2016 version did at least include some helpful carve-outs that are not part of the new version. And under both versions, retirement savers would have a private right of action with respect to rollover recommendations.

As for the PTEs, the new proposal does not require a best interest contract, which is a positive. However, many incentive compensation programs would be prohibited, and those who use the revised PTEs would have to grapple with the risk that they could be forced out of the business for a decade if any of their affiliates are convicted of a crime anywhere in the world.

The changes to PTE 84-24 in the new proposal are far more problematic than the 2016 version. Both versions significantly limit the circumstances under which the PTE could be used, but the new proposal imposes far more burdensome conditions and eliminates the opportunity to use the PTE as a preventative measure.

### Comparison to Vacated 2016 Rule Similarities

- > Bring nearly all interactions with clients, including rollover advice, under the fiduciary umbrella
- > Give retirement savers expanded private right of action
- > Prohibition on incentive compensation programs

### Differences

- > Does not require a best interest contract
- > Draconian disqualification provisions
- > Tighter restrictions on ability to use PTE 84-24

## How is this allowed after the court struck down the 2016 rule?

While the DOL has gone to great lengths to create the appearance that this new proposal is consistent with the ruling in that case, our view is that nothing could be further from the truth. The vast majority of the proposal is entirely incompatible with the court's decision. And there are also very serious questions about whether the DOL even has the authority to do everything contemplated by this proposal.

If and when this proposal is adopted as a final rule, the DOL will very likely face one or more legal challenges, and we believe those cases will have a very high likelihood of success.

## Where do things currently stand with the proposal?

The DOL is holding a public hearing on the proposal in mid-December and will be accepting written public comments on the proposal for 60 days (until January 2, 2024). This is a very aggressive and unprecedented timeline. The comment period on a proposal of this significance and complexity would typically be at least 90 days, with the hearing coming after the comment period ends. IRI joined with a coalition of industry organizations to formally request that DOL extend the comment period and delay the hearing, but this request was rejected.

IRI and many other financial services industry organizations will be presenting testimony at the hearing and submitting written comments. IRI's testimony and comments are being developed by our Standard of Conduct Working Group.

## Why is the DOL rushing through this rulemaking process?

With the 2024 presidential elections rapidly approaching, the DOL is concerned that an extended rulemaking process could expose this effort to possible reversal if Republicans win the White House and/or control of Congress. If the proposal is finalized and takes effect far enough in advance of the election, it would become much more difficult to unwind.

## What happens next?

Once the comment period closes, the DOL will have to review every comment letter and will have to confront the significant issues and concerns presented in those letters. However, it is inconceivable that the DOL could be persuaded to withdraw the proposal, and we are not optimistic that they will make any meaningful changes in response to industry comments. The final version will almost certainly be largely indistinguishable from the proposed version.

The DOL will have to send the final rule to the White House Office of Management and Budget (OMB) for review before it can be formally adopted. We expect this will happen in the first quarter of 2024 (possibly as soon as February 1, 2024), with OMB likely to complete its review in 30-45 days, clearing it for issuance in late Q1 or early Q2 (and possibly as soon as March 1, 2024). The proposal contemplates that the final rule would take effect 60 days after publication, which would fall sometime towards the middle of Q2 or the beginning of Q3 (possibly as soon as May 1, 2024).

As noted above, we do believe the final rule will face one or more legal challenges, although the timing, parties, venue, and strategic approach all remain to be determined. IRI has not yet made a formal decision about whether to participate in any litigation. Our Board of Directors will be presented with all the information they will need to make that decision at the appropriate time.

An important consideration for any parties that do pursue litigation will be whether to seek a preliminary injunction to stop the rule from taking effect until the case is resolved. The threshold for obtaining injunctive relief is fairly high, and at this time, it is far too early in the process to effectively assess the likelihood of success on that front.

### Estimated Timeline

**Public hearing:** December 12-14, 2023

**Comments due:** January 2, 2024

**Final version sent to OMB:** Q1 2024 (possibly as soon as February 1)

**OMB review complete, rule issued:** Late Q1 or early Q2 (possibly as soon as March 1)

**Final rule takes effect:** Mid Q2 to early Q3 (possibly as soon as May 1)

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**ATTACHMENT 3**

IRI's  
2023 DOL Fiduciary Rule Proposal:  
Key Issues of Concern for IRI Members



#### **In General**

- > Expansion of investment advice fiduciary status to include nearly all interactions with plans, participants, IRAs, IRA owners, and plan/IRA fiduciaries
- > Lack of clear path to avoid fiduciary status
- > Lack of grandfathering protection for conduct occurring before new rules go into effect
- > Treatment of rollover recommendations as fiduciary investment advice to a plan under ERISA, and the resulting availability of a private right of action in that context
- > Prohibition on use of quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other similar actions or incentives
- > Ten-year ban on ability to provide fiduciary investment advice to retirement plans and savers based on conviction of affiliated entities in foreign jurisdictions for unrelated conduct
- > Inadequate and unworkable implementation timeline (60 days after publication of final rule)

#### **For Insurance Companies**

- > Problematic supervisory obligations required as conditions for use of PTE 84-24 that go far beyond NAIC model requirements
- > Misalignment between treatment of different types of annuity products

#### **For Recordkeepers**

- > Expansion of investment advice fiduciary status to include conversations with existing and prospective clients about plan investment menu options and other plan decisions

#### **For Broker-Dealers**

- > Addition of onerous and potentially unworkable new disclosure requirements and other conditions that go far beyond Reg BI, which will make it far more difficult for firms to use PTE 2020-02

#### **For Independent Insurance Producers**

- > Overly restrictive definition of "independent producer" limits access to PTE 84-24 for some producers who cannot use PTE 2020-02
- > Inability to use PTE 84-24 for any form of compensation other than insurance commissions

#### **For Captive Insurance Producers**

- > Inability to use PTE 84-24 when selling products issued by other insurers

#### **For Independent Marketing Organizations and Similar Entities**

- > Lack of clarity as to whether services provided to independent producers would constitute conflicted compensation for which a PTE would be needed, and inability to use PTE 84-24 for such compensation if needed

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**ATTACHMENT 4**

Summary of Key Points  
from  
Letters Submitted to DOL  
By  
Members of Congress



Attachment 4: Summary of Key Points from Letters Submitted to DOL From Members of Congress

Attachment 4a: 2015 Letter from 93 House Democrats to DOL Secretary Tom Perez regarding Proposed Definition of the Term "Fiduciary;" Conflict of Interest Rule - Retirement Investment Advice (RIN 1210-AB32) – September 24, 2015. The signers include Representatives Hakeem Jeffries (D-NY), Pete Aguilar (D-CA), Brad Sherman (D-CA), Greg Meeks (D-NY), Emanuel Cleaver (D-MO), and Juan Vargas (D-CA).

- Page 3: "We strongly support and share the Department's goal to ensure financial advisors act in the best interests of their clients. In order to have a successfully implemented rule, it is vital that the proposal doesn't limit consumer choice and access to advice, have a disproportionate impact on lower- or middle-income communities, or raise the costs of saving for retirement."
- Page 2: Lifetime Income Options: "Annuities provide retirement savers a guaranteed lifetime income option, similar to what defined benefit pensions and Social Security offer. The Department has recognized the value of annuities as part of a diversified retirement strategy and has acted to encourage and facilitate the use of lifetime income options in retirement savings accounts. Unfortunately, the Rule's emphasis on cost seems to discount the value of annuity products. As you know, the value of the guarantee may result in higher costs than other retirement options, but the guarantee offered by the annuity is a value to consumers not offered by other, lower cost options. Additionally, costs associated with setting up the annuity amortized over the life of the annuity may, in fact, bring the costs in line with options that initially appeared cheaper. The Department should, therefore, take steps to clarify that the Rule does not disadvantage lifetime income options."

Attachment 4b: 2024 Letter to Acting DOL Secretary Julie Su and EBSA Assistant Secretary Lisa Gomez about DOL's proposed "Retirement Security" rule, announced October 31, 2023 signed by Representative Jimmy Panetta (D-CA).

- Page 1: "I am concerned that a one-size-fits all policy will make it impossible for insurance agents selling annuities to be determined a fiduciary under the current rules."
- Page 1: "Insurance products and annuities are not investments, per se, as the purchaser knows in advance what the return is. Rather, they function as risk mitigation or protection products.
- Page 1: At a practical level, I am concerned that this rule effectively bans commissions, which is how annuities are sold. While this rule contains exemptions from the requirement, or a salesperson can forgo commissions and work purely on a fee-based model, these exemptions are not workable. This could ultimately limit consumers' access to products that meet their unique needs.
- Page 2: I appreciate the spirit with which this rule was brought and believe that financial advisors should always look out for their clients' best interest. However, I do not believe that this goal requires us to undermine the insurance marketplace, ban commissions, or create conflicts of interest. I am hopeful that before this rule is finalized DOL can examine the impact this will have on the insurance marketplace, recognize the unique structure of the products being offered, and preserve access to those financial products.

Attachment 4c: 2023 Letter to Acting DOL Secretary Julie Su from 11 House Republican Members of the Committee on Education and the Workforce regarding RIN 12-10-AC02, Retirement Income Security Rule: Definition of an Investment Advice Fiduciary and Associated Proposed Amendments to Prohibited Transaction Exemptions – December 21, 2023. The signers include Representatives Virginia Foxx (R-NC), Bob Good (R-VA), Tim Walberg (R-MI), Glenn Grothman (R-WI), Elise Stefanik (R-NY), Rick Allen (R-GA), Jim Banks (R-IN), Lloyd Smucker (R-PA), Lisa McClain (R-MI), Aaron Bean (R-FL) and Erin Houchin (R-IN).

- **Page 1:** *"The Proposal attempts to broaden the types of retirement advice subject to fiduciary standards, which would limit access to investment advice and investor choice. These consequences will disproportionately impact lower- and middle-income Americans. Codifying the Proposal would jeopardize the retirement savings of millions of hardworking Americans. DOL should reconsider this harmful effort and withdraw the Proposal."*
- **Page 2:** The Proposal Would Create Confusion in the Marketplace: "DOL's position on the definition of investment advice fiduciary has, for the last decade, shifted constantly. *Each time DOL shifts its position, significant and expensive burdens are imposed on retirement service providers as they adapt to comply.*"
- **Page 3 and 4:** The Proposal Reaches Transactions in the Jurisdiction of Other Regulators: "After the 2016 Fiduciary Rule was vacated by the Fifth Circuit, the SEC and the states adopted rules and regulations to address conflicts of interest. The SEC's "Regulation Best Interest," which became effective on June 30, 2020, requires broker-dealers to act in their clients' best interest without putting their own interests first. Forty states and counting have adopted an annuity suitability and best interest standard for the sales of annuities since the 2016 Fiduciary Rule was vacated. *These rules and regulations were promulgated by authorities with direct jurisdiction over (and deep knowledge of) these industries and their distribution chains. In the Proposal, DOL cites no evidence that these other rules and regulations are falling short of mitigating conflicts of interest. DOL is attempting to regulate outside of its jurisdiction and outside of its expertise to the detriment of American workers, savers, and retirees."*

Attachment 4d: 2023 Letter to Acting DOL Secretary Julie Su from 4 House Republican Members of the Committee on Small Business regarding RIN 12-10-AC02, Retirement Income Security Rule: Definition of an Investment Advice Fiduciary and Associated Proposed Amendments to Prohibited Transaction Exemptions – December 7, 2023. The signers include: Representatives Roger Williams (R-TX), Dan Meuser (R-PA), Marc Alford (R-MO) and Aaron Bean (R-FL).

- **Page 1:** "These proposed changes would amend nearly 50-year-old standards and subject more financial professionals to the strictest fiduciary standards of conduct. *This increased burden and historic level of lost commission will likely lead these small financial professionals to go out of business or limit their services—negatively impacting both the business owners and the consumers. It appears that the Department of Labor (DOL) may not have properly considered small entities during this rulemaking process."*
- **Page 2:** "4. The US Securities and Exchange Commission already applies a best-interest standard for retail securities brokers and most of the states have adopted a best-interest-like model for insurance sales. *Why does the DOL believe this new strict rule is necessary when there are already regulations in place to protect consumers?"*

Attachment 4e: 2023 Letter to Acting DOL Secretary Julie Su from 8 Senate Democrats and Independents regarding RIN 12-10-AC02, Retirement Income Security Rule: Definition of an Investment Advice Fiduciary and Associated Proposed Amendments to Prohibited Transaction Exemptions – December 20, 2023. The signers include: Senators Jon Tester (D-MT), Gary Peters (D-MI), Joe Manchin (D-WV), Christopher Coons (D-DE), Benjamin Cardin (D-MD), Maggie Hassan (D-NH), Kyrsten Sinema (I-AZ) and John Hickenlooper (D-CO).

- **Page 1:** "This rulemaking will have a significant effect on how Americans access advice and services for retirement savings. As such, we believe it is critically important to significantly extend the public comment period for this rule to ensure that all stakeholders are able to provide feedback on this measure, so that any changes facilitate a system that works for hardworking Americans."
- **Page 1 and 2:** "We are hearing from constituents who are struggling to understand how to comply with such a sweeping rule during a time when many Americans are concerned about their economic security and ability to prepare for retirement. In addition, there have been various iterations of this rulemaking over the past decade, but each rulemaking should be taken on its own and previous public debate, hearings, comments, and meetings should not be considered sufficient engagement for this particular rulemaking as this proposal should reflect considerable changes resulting from a prior judicial order vacating an earlier version of the rule. In fact, especially because of the history of failed DOL rulemakings on this subject, and the concerns expressed during those processes by retirement savings providers, stakeholders, Members of Congress, and ultimately our court system, it is critical that the public process for any final rule provide enough time and reflect input received during the comment period. This proposal would be a significant change to our existing system with serious implications and potential repercussions. Adequate time must be taken to consider what would happen if this rule went into effect and address potential unintended consequences."
- **Page 2:** "Given the broad impacts of this potential rulemaking, we are concerned that you are rushing this process and the people that will be hurt are the ones you are trying to help the most. We believe that a thorough and thoughtful comment processes yield better results for those impacted by rulemakings. This is particularly important for a rulemaking with such a politically charged past."

Attachment 4f: 2023 Letter to Acting DOL Secretary Julie Su from 11 Senate Republicans regarding RIN 12-10-AC02, Retirement Income Security Rule: Definition of an Investment Advice Fiduciary and Associated Proposed Amendments to Prohibited Transaction Exemptions – December 18, 2023. The signers include: Senators Roger Marshall (R-KS), John Barrasso (R-WY), Mike Braun (R-IN), Susan Collins (R-ME), John Cornyn (R-TX), Joni Ernst (R-IA), Chuck Grassley (R-IA), Bill Hagerty (R-TN), Cindy Hyde-Smith (R-MS), Michael Rounds (R-SD) and John Thune (R-SD).

- **Page 1:** "We appreciate the Department's desire to ensure Americans are protected as they pursue the financial means to enjoy a secure retirement, but this proposal will have the opposite effect by imposing significant costs that will limit investors' access to the financial advice they need to secure their future. In our view, the Department's proposal is unnecessarily duplicative of existing regulatory protections and will merely create excessive regulations on an already burdened industry."

- Page 1: *"Designating any advisor that charges a fee as a fiduciary misunderstands the purpose of choices in the advisor market. Investors can currently choose whether to pay for financial advice through fee for service planning, assets under management fees, and/or commissions. This choice benefits investors - for example, on buy-and-hold financial products, commissions are often less expensive than fees. Each type of advising serves a unique purpose and they should not be lumped together like this rule does."*
- Page 1: *"Further, the 5th Circuit's ruling invalidating the 2016 fiduciary rule found that Congress intentionally structured ERISA to recognize the distinction between investment advice and sales. This rule does not recognize the difference between investment advisers paid fees for advice, who have long been considered fiduciaries; and brokers and insurance agents, who did not assume fiduciary status in selling products to their clients. The Department of Labor does not have the authority to adopt this proposal and is deliberately acting against the 5th Circuit's previous decision.*
- Page 1 and 2: *"What the Department also forgets is that the Securities and Exchange Commission (SEC) has already addressed this issue through its Regulation Best Interest (Reg BI). Reg BI requires all financial professionals to provide their clients with advice that is in their best interest. Dually registered financial professionals (i.e. those offering services through a broker-dealer and investment adviser) are held to the Investment Adviser act of 1940's fiduciary standard. Further, those selling variable annuity products to retirement investors are subject to the NAIC's model fiduciary regulation. These regulations already ensure advisors and brokers are investing properly for their clients. Adding more onerous regulations will hamper this industry and add unnecessary costs that could otherwise be used to serve clients and generate wealth."*

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**ATTACHMENT 4a**

2015 Letter  
from  
93 House Democrats

**Congress of the United States**  
**Washington, DC 20515**

September 24, 2015

The Honorable Thomas E. Perez  
Secretary  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

Re: Definition of the Term "Fiduciary;" Conflict of Interest Rule – Retirement Investment Advice (RIN 1210-AB32)

Dear Secretary Perez:

We appreciate the opportunity to comment on the Department of Labor's (the Department) April 14, 2015, proposed rule, RIN 1210-AB32 (the Rule), defining who is a "fiduciary" of an employee benefit plan or individual retirement plan under the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code of 1986. We agree with the Department that updated retirement investment rules that align the incentives of advisors with investors will greatly enhance retirement security of millions of Americans. We would like to highlight several areas where we believe the Department could further refine the Rule to ensure it better serves the needs of retirement investors.

It has been widely noted, including by the White House Council of Economic Advisors study accompanying the Rule, that the landscape for retirement in America has undergone dramatic changes in the 40 years since passage of ERISA due to the shift away from defined benefit pension plans to defined contribution 401(k) and Individual Retirement Account (IRA) plans. The shift has necessitated that Americans be more involved in their retirement planning and to increasingly rely on advice from financial professionals.

The Department has stated that it is the intent of the updated Rule to accommodate various business models, compensation practices, and products. In large part, we agree that the framework of the Rule provides the flexibility to meet those goals, especially with the inclusion of the new Best Interest Contract (BIC) exemption, but we continue to hear from constituents, academics, providers, and investors that there are *specific* provisions of the Rule that may cause market disruptions and limit the ability of segments of the market to reasonably access advice. The following provisions are a sample of some of the concerns we believe need to be addressed.

**Best Interest Contract Exemption**

The BIC is intended as a principle-based exemption that is central to accommodating various common business and compensation models that would otherwise be prohibited under the Rule, while retaining an enforceable "best-interest" standard to protect investors. We are supportive of this flexible exemption structure designed to ensure that moderate savers continue to have access to investment advice, but are concerned that there may be practical problems for providers to

implement the exemption as proposed. We believe that the Department could implement the BIC using a less prescriptive and more principles-based approach.

The Department should continue to work with stakeholders to identify solutions to the issue of how to bring new and existing customers within the BIC by providing for a legally-enforceable commitment on the part of advisors without the administratively burdensome task of requiring signed contracts prior to any communication. We also believe the Department should examine the current disclosure requirements contained in the BIC and consider options for simplification, including incorporating already required disclosures. The BIC should also harmonize the standard for offering proprietary products, as to not disadvantage certain business plans without a corresponding consumer advantage and in accordance with Section 913 of the *Dodd-Frank Wall Street Reform and Consumer Protection Act*. Finally, we believe that it would be appropriate for the Department to make the BIC available for advice to small businesses maintaining participant-directed plans, notwithstanding the availability of the “platform provider” exemption.

#### **Education Exemption**

The Rule narrows the previous “investment advice” carve-out established in Interpretive Bulletin 96-1 to exclude advisors from providing examples of specific investment products, plans, or alternatives. Models for asset allocation and general information regarding investment vehicles without some additional, tangible examples may be frustratingly vague for investors. We believe the Department would benefit retirement savers by maintaining flexibility for advisors to provide investment education.

#### **Lifetime Income Options**

Annuities provide retirement savers a guaranteed lifetime income option, similar to what defined benefit pensions and Social Security offer. The Department has recognized the value of annuities as part of a diversified retirement strategy and has acted to encourage and facilitate the use of lifetime income options in retirement savings accounts. Unfortunately, the Rule’s emphasis on cost seems to discount the value of annuity products. As you know, the value of the guarantee may result in higher costs than other retirement options, but the guarantee offered by the annuity is a value to consumers not offered by other, lower cost options. Additionally, costs associated with setting up the annuity amortized over the life of the annuity may, in fact, bring the costs in line with options that initially appeared cheaper. The Department should, therefore, take steps to clarify that the Rule does not disadvantage lifetime income options.

#### **Implementation**

Given the number of outstanding “Questions” and “Requests for Comments” in the Rule, we urge the Department to continue to engage and maintain a transparent dialogue with stakeholders and Members of Congress. This is an essential and important step, because feedback on potential changes will determine how successfully the Rule is implemented. We would also strongly encourage the Department to consider options for convening a small working group of industry professionals and consumer advocates to aid with the finalization of the Rule as to further ease any final implementation issues.

In addition, given the significance of the Rule to the U.S. retirement saving framework, we believe it would be appropriate for the Department to provide a safe harbor for "good faith implementation," especially given the complexity of the Rule and the many outstanding questions regarding a final rule. We believe this would provide an opportunity for small businesses and financial advisors to comply with the rule without the threat of lawsuits, while still ensuring that the Rule benefits retirement savers. A safe harbor would help ensure continued access to retirement investment advice and minimal disruptions to the current marketplace.

We strongly support and share the Department's goal to ensure financial advisors act in the best interests of their clients. In order to have a successfully implemented rule, it is vital that the proposal doesn't limit consumer choice and access to advice, have a disproportionate impact on lower- or middle-income communities, or raise the costs of saving for retirement.

A number of studies have estimated the retirement gap for Americans is between \$7 and \$14 trillion, with one-in-five Americans approaching retirement age having insufficient retirement savings. The Rule should close this gap and protect access to investment information to help Americans responsibly save for retirement. We urge the Department to continue to seek a balanced approach to both consumer protection and access to retirement investment advice for all Americans.

Sincerely,

  
Tony Cardenas  
Member of Congress

  
Ron Kind  
Member of Congress

  
John Larson  
Member of Congress

  
Gwen Moore  
Member of Congress

  
Kyrsten Sinema  
Member of Congress

  
Emanuel Cleaver  
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Ann McLane Kuster  
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Grace Meng  
Member of Congress

  
Richard Neal  
Member of Congress





Alma Adams  
Member of Congress



Joyce Beatty  
Member of Congress



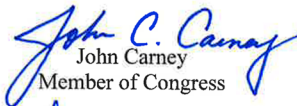
Sanford Bishop  
Member of Congress



Corrine Brown  
Member of Congress



G. K. Butterfield  
Member of Congress



John Carney  
Member of Congress



Yvette Clarke  
Member of Congress



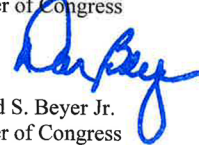
James E. Clyburn  
Member of Congress



Gerald Connolly  
Member of Congress



Brad Ashford  
Member of Congress



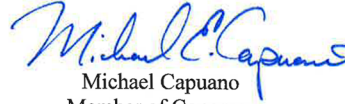
Donald S. Beyer Jr.  
Member of Congress



Earl Blumenauer  
Member of Congress



Julia Brownley  
Member of Congress



Michael Capuano  
Member of Congress



Kathy Castor  
Member of Congress



William "Lacy" Clay  
Member of Congress



Steve Cohen  
Member of Congress



Jim Cooper  
Member of Congress



Jim Costa  
Member of Congress



Henry Cuellar  
Member of Congress



Chaka Fattah  
Member of Congress



Marcia L. Fudge  
Member of Congress



Alcee Hastings  
Member of Congress



Michael M. Honda  
Member of Congress



Hakeem Jeffries  
Member of Congress



William R. Keating  
Member of Congress



Joseph P. Kennedy, III  
Member of Congress



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Member of Congress



Elizabeth Esty  
Member of Congress



Bill Foster  
Member of Congress



Gwen Graham  
Member of Congress



Jim Himes  
Member of Congress



Steve Israel  
Member of Congress



Henry C. "Hank" Johnson, Jr.  
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Gregory Meeks  
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Patrick Murphy  
Member of Congress



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Ann Kirkpatrick  
Member of Congress



Ted Lieu  
Member of Congress



Ben Ray Lujan  
Member of Congress



Sean Patrick Maloney  
Member of Congress



Jerry McNerney  
Member of Congress



Seth Moulton  
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Grace Napolitano  
Member of Congress



Frank Pallone, Jr.  
Member of Congress

  
 Bill Pascrell  
 Member of Congress

  
 Scott H. Peters  
 Member of Congress


  
 Chellie Pingree  
 Member of Congress

  
 Jared Polis  
 Member of Congress


  
 Charles B. Rangel  
 Member of Congress

  
 Cedric Richmond  
 Member of Congress

  
 Adam Schiff  
 Member of Congress

  
 Terri Sewell  
 Member of Congress

  
 Ed Perlmutter  
 Member of Congress

  
 Collin C. Peterson  
 Member of Congress

  
 Mark Pocan  
 Member of Congress

  
 Mike Quigley  
 Member of Congress

  
 Kathleen M. Rice  
 Member of Congress

  
 Linda J. Sánchez  
 Member of Congress

  
 Kurt Schrader  
 Member of Congress

  
 Albio Sires  
 Member of Congress



Brad Sherman  
Member of Congress



Mark Takano  
Member of Congress



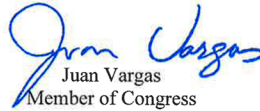
Mike Thompson  
Member of Congress



Dina Titus  
Member of Congress



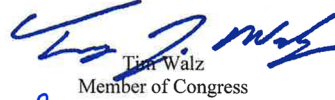
Norma Torres  
Member of Congress



Juan Vargas  
Member of Congress



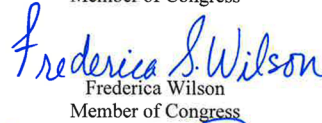
Marc Veasey  
Member of Congress



Tim Walz  
Member of Congress



Peter Welch  
Member of Congress



Frederica Wilson  
Member of Congress



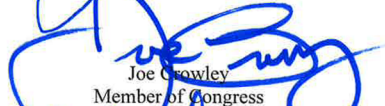
John Yarmuth  
Member of Congress



Jackie Speier  
Member of Congress



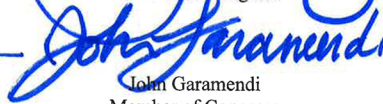
Pete Aguilar  
Member of Congress



Joe Crowley  
Member of Congress



Donald Norcross  
Member of Congress



John Garamendi  
Member of Congress



Danny K. Davis  
Member of Congress



Donald M. Payne Jr.  
Member of Congress



Denny Heck  
Member of Congress

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**ATTACHMENT 4b**

2023 Letter  
from  
Representative Jimmy Panetta (D-CA)



**JIMMY PANETTA**  
19<sup>TH</sup> DISTRICT, CALIFORNIA

COMMITTEE ON WAYS AND MEANS  
COMMITTEE ON ARMED SERVICES  
COMMITTEE ON BUDGET  
CHIEF DEPUTY WHIP



**Congress of the United States**  
**House of Representatives**  
**Washington, DC 20515**

304 CANNON HOUSE OFFICE BUILDING

1200 AGUAJITO ROAD, SUITE 003  
MONTEREY, CA 93940

701 OCEAN STREET, ROOM 318C  
SANTA CRUZ, CA 95060

841 BLOSSOM HILL ROAD, SUITE 209  
SAN JOSE, CA 95123

800 PINE STREET  
PASO ROBLES, CA 93446

January 30, 2024

The Honorable Julie A. Su  
Acting Secretary  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

The Honorable Lisa Gomez  
Assistant Secretary, Employee Benefits  
Security Administration  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

Dear Acting Secretary Su and Assistant Secretary Gomez:

I write to express concerns regarding the Department of Labor's (DOL) proposed "Retirement Security" rule, announced October 31, 2023. Specifically, I would like to highlight impacts to the insurance marketplace, due to stark differences in its operation from securities markets. I am concerned that a one-size-fits all policy will make it impossible for insurance agents selling annuities to be determined a fiduciary under the current rules.

Insurance professionals are different than typical investment advisors. Insurance products and annuities are not investments, per se, as the purchaser knows in advance what the return is. Rather, they function as risk mitigation or protection products.

For annuities, the amount of premium paid by the retiree does not vary based on the commissions paid to an insurance professional selling the contract. Instead, the retiree receives the same funds guaranteed by the issuer without regard to the commission received by the insurance professional.

This varies from than fee-based investment advice in which the retirement investor assumes most, if not all these risks. In these cases, a consumer typically has the annual fees deducted from the account assets, directly reducing the value of the assets and their retirement nest egg.

At a practical level, I am concerned that this rule effectively bans commissions, which is how annuities are sold. While this rule contains exemptions from the requirement, or a salesperson can forgo commissions and work purely on a fee-based model, these exemptions are not workable. This could ultimately limit consumers' access to products that meet their unique needs.

Specifically, the 84-24 exemption will not work with current compensation structures, as it only allows for up-front, renewal, or trail commissions. Unfortunately, there are a number of other



forms of compensation that are common but would be disallowed, including sharing the commission with others in the distribution chain, which allows for increased product availability, or even paying for health benefits for sellers.

Additionally, under exemption 2020-02, the rule would require carriers to be co-fiduciaries with independent agents. This creates conflicts of interest when a carrier's agent is offering a competitors' product. It would also prevent them from accepting invitations to educational seminars.

I appreciate the spirit with which this rule was brought and believe that financial advisors should always look out for their clients' best interest. However, I do not believe that this goal requires us to undermine the insurance marketplace, ban commissions, or create conflicts of interest.

I am hopeful that before this rule is finalized DOL can examine the impact this will have on the insurance marketplace, recognize the unique structure of the products being offered, and preserve access to those financial products.

Thank you for your consideration.

Sincerely,

A handwritten signature in blue ink, appearing to read 'J. Panetta', with a stylized flourish at the end.

Jimmy Panetta  
Member of Congress

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**ATTACHMENT 4c**

2023 Letter  
from  
11 House Republican Members  
of the  
Committee on Education and the Workforce



COMMITTEE ON  
EDUCATION AND THE WORKFORCE  
U. S. HOUSE OF REPRESENTATIVES  
2176 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6100

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NEW MEXICO  
KATHY E. MANNING, NORTH CAROLINA  
FRANK J. MRYAN, INDIANA  
JAMAAL BOWMAN, NEW YORK

December 21, 2023

Submitted Electronically Through [www.regulations.gov](http://www.regulations.gov)

The Honorable Julie A. Su  
Acting Secretary  
U. S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

**Re: RIN 12-10-AC02, Retirement Income Security Rule: Definition of an Investment Advice Fiduciary and Associated Proposed Amendments to Prohibited Transaction Exemptions**

Dear Acting Secretary Su:

We write in opposition to the Department of Labor's (DOL) proposed rule entitled "Retirement Security Rule: Definition of an Investment Advice Fiduciary" and proposed amendments to prohibited transaction exemptions (collectively, the Proposal), which would regulate transactions outside of DOL's jurisdiction.<sup>1</sup> The Proposal attempts to broaden the types of retirement advice subject to fiduciary standards, which would limit access to investment advice and investor choice. These consequences will disproportionately impact lower- and middle-income Americans. Codifying the Proposal would jeopardize the retirement savings of millions of hardworking Americans. DOL should reconsider this harmful effort and withdraw the Proposal.

**The Proposal Would Harm Lower- and Middle-Income Americans**

The Proposal would implement far-reaching regulatory changes to how services are delivered to retirement plans, retirees, and savers. The Proposal's reach is even broader than a similar DOL rule promulgated in 2016 (2016 Fiduciary Rule), which revised the definition of fiduciary under

<sup>1</sup> 88 Fed. Reg. 75,890 (proposed Nov. 3, 2023); Proposed Amendment to Prohibited Transaction Exemption 2020-02, 88 Fed. Reg. 75,979 (proposed Nov. 3, 2023); Proposed Amendment to Prohibited Transaction Exemption 84-24, 88 Fed. Reg. 76,004 (proposed Nov. 3, 2023); Proposed Amendment to Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, and 86-128, 88 Fed. Reg. 76,032 (proposed Nov. 3, 2023).

The Honorable Julie A. Su  
 December 21, 2023  
 Page 2

section 3(21) of the *Employee Retirement Income Security Act of 1974*.<sup>2</sup> While the 2016 Fiduciary Rule was vacated by the U.S. Court of Appeals for the Fifth Circuit,<sup>3</sup> a study on the effects of the rule before it was vacated found that 53 percent of financial institutions surveyed eliminated or limited access to brokerage advice services. Further, 95 percent of those financial institutions made changes to products available to retirement investors, including limiting or eliminating investment products.<sup>4</sup> History is clear: the 2016 Fiduciary Rule harmed retirement savers by reducing investment choices.

The Proposal, which is even broader than the 2016 Fiduciary Rule, will have greater harmful results. The Hispanic Leadership Fund warned that the 2016 Fiduciary Rule would “hurt the very people it was intended to help.... However well-intentioned, this was the wrong approach in 2016, and the consequences of repeating this mistake will be even graver this time for low and middle-income families.”<sup>5</sup> According to the Hispanic Leadership Fund’s analysis, reinstating the 2016 Fiduciary Rule would reduce the retirement savings of 2.7 million individuals with incomes below \$100,000 by an estimated \$140 billion over 10 years.<sup>6</sup>

#### **The Proposal Would Create Confusion in the Marketplace**

DOL’s position on the definition of investment advice fiduciary has, for the last decade, shifted constantly.<sup>7</sup> Each time DOL shifts its position, significant and expensive burdens are imposed on retirement service providers as they adapt to comply. In addition to wasting resources, DOL’s shifting positions have created confusion in both the marketplace and in court.<sup>8</sup> The U.S. District Court for the Southern District of New York cited DOL’s shifting interpretations as a reason to disregard DOL’s interpretations wholly in this area.<sup>9</sup> The court asked, “How, then, should the Court interpret the investment advice fiduciary provisions in light of DOL’s shifting interpretations? There is no DOL interpretation binding on this court.”<sup>10</sup>

<sup>2</sup> On April, 8, 2016, DOL published a final regulation titled “Conflict of Interest Rule – Retirement Investment Advice” (81 Fed. Reg. 20,946) and two associated prohibited transaction class exemptions, “The Best interest Contract Exemption (PTE 2016-01)” (81 Fed. Reg. 21,002) and the “Class Exemption for Principal Transactions in Certain Assets Between Investment advice Fiduciaries and Employee Benefit Plans and IRAs (PTE 2016-02)” (81 Fed. Reg. 21,089) as well as amendments to the following previously granted exemptions: PTEs 75-1, 77-4; 80-83; 83-1; 84-24; and 96-16 (81 Fed. Reg. 21,208; 21,139; 21,147; 21,181). Collectively, this regulatory package is referred to as the “2016 Fiduciary Rule.”

<sup>3</sup> U.S. Chamber of Com. v. DOL, 885 F.3d 360 (5th Cir. 2018).

<sup>4</sup> DELOITTE, THE DOL FIDUCIARY RULE: A STUDY ON HOW FINANCIAL INSTITUTIONS HAVE RESPONDED AND THE RESULTING IMPACTS ON RETIREMENT INVESTORS (Aug. 9, 2017), <https://www.sifma.org/wp-content/uploads/2017/08/Deloitte-White-Paper-on-the-DOL-Fiduciary-Rule-August-2017.pdf>.

<sup>5</sup> HISPANIC LEADERSHIP FUND, ANALYSIS OF THE EFFECTS OF THE 2016 DEPARTMENT OF LABOR FIDUCIARY REGULATION ON RETIREMENT SAVINGS AND ESTIMATE OF THE EFFECTS OF REINSTATEMENT (Nov. 8, 2021), [https://hispanicleadershipfund.org/wp-content/uploads/2021/11/FINAL\\_HLF-Quantria\\_FiduciaryRule\\_08Nov21.pdf](https://hispanicleadershipfund.org/wp-content/uploads/2021/11/FINAL_HLF-Quantria_FiduciaryRule_08Nov21.pdf).

<sup>6</sup> *Id.*

<sup>7</sup> *Carfora v. Teachers Ins. Annuity Ass’n of Am.*, 631 F.Supp.3d 125, 141-145 (S.D.N.Y. 2022), *amended in part by Carfora v. Teachers Ins. Annuity Ass’n of Am.*, 2023 WL 5342404 (S.D.N.Y. 2023) (providing at pages 141-142 a history of DOL’s “evolving interpretation” of investment advice fiduciary).

<sup>8</sup> *Id.* at 144 (referring to the inconsistency of DOL’s shifting interpretations of investment advice fiduciary).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

The Honorable Julie A. Su  
 December 21, 2023  
 Page 3

The Proposal is the latest example of DOL's inconsistency in this space. This confusing regulatory morass creates unnecessary uncertainty in the marketplace—harming retirement professionals and savers alike.

#### **The Proposal Would Lead to Costly Litigation**

As Chairwoman Foxx stated in her letter of November 17, 2023, this Proposal will have far-reaching implications if finalized.<sup>11</sup> The letter noted the retirement community has had inadequate time to digest and respond to the Proposal. The letter also argued it is critical that stakeholders be provided with ample opportunity to consider the implications of this rule, but DOL provided a truncated comment period of only 39 working days spanning across the holiday season. This suggests that DOL is not interested in allowing the retirement community to develop its responses fully and that DOL does not value those responses.

Further, the retirement community has expressed concerns that DOL does not intend to consider the filed comments fully and has already determined a course of action.<sup>12</sup> Like the 2016 Fiduciary Rule, the Proposal will likely face litigation challenges if finalized. A significant amount of taxpayer resources would thus be directed to efforts to defend the rule in court.

#### **The Proposal Reaches Transactions in the Jurisdiction of Other Regulators**

Like the 2016 Fiduciary Rule, the Proposal attempts to regulate sales. In 1975, DOL established a five-part test to determine who is an investment advice fiduciary.<sup>13</sup> Typically, under the five-part test, sales do not cause a person to become a fiduciary.<sup>14</sup> The Proposal significantly expands the scope of transactions subject to DOL regulation by eliminating the five-part test. As a consequence, broker-dealer transactions and annuity sales would be subject to DOL regulation. Currently, broker-dealer transactions are regulated by the U.S. Securities and Exchange Commission (SEC), and annuity sales are regulated by the states.

After the 2016 Fiduciary Rule was vacated by the Fifth Circuit, the SEC and the states adopted rules and regulations to address conflicts of interest. The SEC's "Regulation Best Interest," which became effective on June 30, 2020, requires broker-dealers to act in their clients' best interest without putting their own interests first.<sup>15</sup> Forty states and counting have adopted an annuity suitability and best interest standard for the sales of annuities since the 2016 Fiduciary Rule was vacated.<sup>16</sup> These rules and regulations were promulgated by authorities with direct jurisdiction over (and deep knowledge of) these industries and their distribution chains. In the

<sup>11</sup> Letter from Chairwoman Foxx to Julie A. Su, Acting Sec'y of Lab. (Nov. 17, 2023), [https://edworkforce.house.gov/uploadedfiles/11.17.23\\_final\\_fiduciary\\_rule\\_comment\\_period\\_letter\\_to\\_dol.pdf](https://edworkforce.house.gov/uploadedfiles/11.17.23_final_fiduciary_rule_comment_period_letter_to_dol.pdf).

<sup>12</sup> *Id.*

<sup>13</sup> See 40 Fed. Reg. 50,842 (Oct. 31, 1975), codified at 29 C.F.R. § 2510.3-21.

<sup>14</sup> The five-part test requires, in relevant part, that a person render advice to the plan on a regular basis.

<sup>15</sup> Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 Fed. Reg. 33,318 (July 12, 2019).

<sup>16</sup> National Ass'n of Ins. Comm'rs, Annuity Suitability & Best Interest Standard (Nov. 1, 2023), <https://content.naic.org/cipr-topics/annuity-suitability-best-interest-standard>.

The Honorable Julie A. Su  
 December 21, 2023  
 Page 4

Proposal, DOL cites no evidence that these other rules and regulations are falling short of mitigating conflicts of interest. DOL is attempting to regulate outside of its jurisdiction and outside of its expertise to the detriment of American workers, savers, and retirees.

#### **EBSA Must Address Performance Challenges**

DOL's Employee Benefits Security Administration (EBSA) has often stated that it is a "small agency" with broad responsibilities.<sup>17</sup> EBSA is already struggling to meet the scope of its responsibilities. In October 2023, the U.S. Governmental Accountability Office (GAO) found that EBSA's resource management is deficient.<sup>18</sup> In May 2021, GAO reported that a whopping 16 percent (one in six) of investigations opened in fiscal year 2017 were still not closed four years later.<sup>19</sup> In addition, EBSA's administrative exemptions practice has experienced a sharp and disappointing decline in individual exemptions over the last two decades.<sup>20</sup> Despite these performance deficiencies, EBSA has devoted significant resources to issuing and defending repeated expansions to the definition of investment advice fiduciary. EBSA's efforts should be redirected to addressing its own deficiencies rather than expanding its regulatory reach outside of its jurisdiction.

#### **Conclusion**

The Proposal is yet another instance of DOL creating unnecessary and burdensome regulations reaching well beyond its jurisdiction and expertise. This disastrous Proposal would reduce access to and choice of retirement products for millions of Americans, leaving them less financially secure for retirement. DOL should stop threatening the retirement security of hardworking Americans and should withdraw this harmful proposal. In addition, EBSA should direct its resources toward establishing efficient and effective controls over timely and focused investigations, providing individual transaction exemptions that assist employee benefit plans, and implementing the SECURE 2.0 Act.<sup>21</sup>

<sup>17</sup> DOL, FY 2024 CONGRESSIONAL BUDGET JUSTIFICATION: EMPLOYEE BENEFITS SECURITY ADMINISTRATION 10, <https://www.dol.gov/sites/dolgov/files/general/budget/2024/CBJ-2024-V2-01.pdf>; DOL, FY 2023 CONGRESSIONAL BUDGET JUSTIFICATION: EMPLOYEE BENEFITS SECURITY ADMINISTRATION 10, <https://www.dol.gov/sites/dolgov/files/general/budget/2023/CBJ-2023-V2-01.pdf>; DOL, FY 2022 CONGRESSIONAL BUDGET JUSTIFICATION: EMPLOYEE BENEFITS SECURITY ADMINISTRATION 10, <https://www.dol.gov/sites/dolgov/files/general/budget/2022/CBJ-2022-V2-01.pdf>.

<sup>18</sup> U.S. GOV'T ACCOUNTABILITY OFF., EMPLOYEE BENEFITS SECURITY ADMINISTRATION: SYSTEMIC PROCESS NEEDED TO BETTER MANAGE PRIORITIES AND INCREASED RESPONSIBILITIES (Oct. 24, 2023) (reporting that EBSA's management of priorities and increased responsibilities is deficient), <https://www.gao.gov/assets/d24105667.pdf>.

<sup>19</sup> U.S. GOV'T ACCOUNTABILITY OFF., EMPLOYEE BENEFITS SECURITY ADMINISTRATION: ENFORCEMENT EFFORTS TO PROTECT PARTICIPANTS' RIGHTS IN EMPLOYER-SPONSORED RETIREMENT AND HEALTH BENEFIT PLANS 12 (May 27, 2021), <https://www.gao.gov/assets/gao-21-376.pdf>.

<sup>20</sup> See Letter from Allison A. Itami & Jeanne K. Wilson, Principals, Groom Law Group, to Ali Khawar, Acting Assistant Sec'y, EBSA (May 27, 2022) (discussing the steady decline of individual exemptions and the associated chilling effect on otherwise beneficial industry practices and including detail, by year, since 1996 demonstrating the decline), <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AC05/00014.pdf>.

<sup>21</sup> Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, Div. T (2022).

The Honorable Julie A. Su  
December 21, 2023  
Page 5

Sincerely,



Virginia Foxx  
Chairwoman



Bob Good  
Chairman  
Subcommittee on Health, Employment,  
Labor, and Pensions



Tim Walberg  
Member of Congress



Glenn Grothman  
Member of Congress



Elise M. Stefanik  
Member of Congress



Rick W. Allen  
Member of Congress



Jim Banks  
Member of Congress



Llyod Smucker  
Member of Congress



Lisa C. McClain  
Member of Congress



Aaron Bean  
Member of Congress



Erin Houchin  
Member of Congress

227



**ATTACHMENT 4d**

2023 Letter  
from  
4 House Republican Members  
of the  
Committee on Small Business



ROGER WILLIAMS, TEXAS  
CHAIRMAN

NYDIA M. VELAZQUEZ, NEW YORK  
RANKING MEMBER

**Congress of the United States**  
**U.S. House of Representatives**  
**Committee on Small Business**  
2361 Rayburn House Office Building  
Washington, DC 20515-6515

December 7, 2023

The Honorable Julie A. Su  
Acting Secretary  
U.S. Department of Labor  
200 Constitution Ave. NW  
Washington, DC 20210

Dear Acting Secretary Su:

The House Committee on Small Business (the Committee) writes to inquire about the recent proposed rule changes to the Retirement Security Rule and amendments to Prohibited Transaction Exemptions. These proposed changes would amend nearly 50-year-old standards and subject more financial professionals to the strictest fiduciary standards of conduct.<sup>1</sup> This increased burden and historic level of lost commission will likely lead these small financial professionals to go out of business or limit their services—negatively impacting both the business owners and the consumers.<sup>2</sup> It appears that the Department of Labor (DOL) may not have properly considered small entities during this rulemaking process.

Nearly all the affected entities are small businesses—over 97 percent of broker-dealers and 99 percent of registered investment advisors are small businesses.<sup>3</sup> The costs associated with this rule package are significant; during the first year alone the estimated aggregate cost for small entities due to the proposed amendments to each exemption for a single small entity is approximately \$22,459 and \$248 million for all small entities.<sup>4</sup>

It is important for agencies to examine small businesses interests—which make up 99.9 percent of all businesses in the United States—when passing any new rule. America’s small businesses deserve to have their voices heard and considered. We therefore request the following information as soon as possible but no later than December 21, 2023:

1. The DOL assumes that impacted small entities “incur only incremental costs.”<sup>5</sup> However, the entities will incur costs associated to review the rules, disclosure requirements, rollover documentation and disclosure, retrospective review, written policies and

<sup>1</sup> Employee Retirement Income Security Act of 1974, 88 FR 75890 (2023) (to be codified at 29 CFR 2510); Austin R. Ramsey, *Biden Rolls Legal Dice by Proposing Fourth Fiduciary 401(k) Rule*, BLOOMBERG LAW (Nov. 7, 2023).

<sup>2</sup> Austin R. Ramsey, *Biden Touts 401(k) Fiduciary Rules as Attack Against ‘Junk Fees’*, BLOOMBERG LAW (Oct. 31, 2023).

<sup>3</sup> Employee Retirement Income Security Act of 1974, 88 FR 75890 (2023) (to be codified at 29 CFR 2510).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*


The Honorable Julie A. Su  
December 7, 2023  
Page 2 of 3


procedures, and recordkeeping.<sup>6</sup> Considering all various costs for all the amendments and rules, how did the DOL conclude that these costs are only incremental?

2. The proposed rule package is over 500 pages. Are there other resources available, besides the rules themselves, to small entities to help them understand the impacts the rules will have on their operations?
3. The proposed rule would apply expensive disclosure requirements to advisers who earn commissions to ensure their interests align with those of investors.<sup>7</sup> Did the DOL consider how to make this burden lighter on small entities?
4. The US Securities and Exchange Commission already applies a best-interest standard for retail securities brokers and most of the states have adopted a best-interest-like model for insurance sales.<sup>8</sup> Why does the DOL believe this new strict rule is necessary when there are already regulations in place to protect consumers?
5. Industry groups representing financial service firms are concerned that the short comment period will not give them sufficient time to respond to the package. Has the DOL considered extending the comment period to 90 days, or longer, to give the impacted entities sufficient time to respond?

To schedule the delivery of your response or ask any related follow-up questions, please contact Committee on Small Business Majority Staff at (202) 225-5821. The Committee on Small Business has broad authority to investigate “problems of all types of small business” under House Rule X. Thank you in advance for your cooperation with this inquiry.

In God We Trust,

  
Roger Williams  
Chairman  
Committee on Small Business


  
Dan Meuser  
Member  
Committee on Small Business

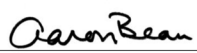
<sup>6</sup> *Id.*

<sup>7</sup> *Id.*; Austin R. Ramsey, *Biden Rolls Legal Dice by Proposing Fourth Fiduciary 401(k) Rule*, BLOOMBERG LAW (Nov. 7, 2023).

<sup>8</sup> *Id.*

The Honorable Julie A. Su  
December 7, 2023  
Page 3 of 3

  
\_\_\_\_\_  
Mark Alford  
Member  
Committee on Small Business

  
\_\_\_\_\_  
Aaron Bean  
Member  
Committee on Small Business

cc: The Honorable Nydia M. Velasquez, Ranking Member  
Committee on Small Business

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**ATTACHMENT 4e**

2023 Letter  
from  
8 Senate Democrats and Independents



December 20, 2023

The Honorable Julie Su  
Acting Secretary  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

Dear Acting Secretary Su:

We write regarding the importance of process and public comment in federal rulemaking, and the U.S. Department of Labor's (DOL) proposed rule released on October 31, 2023, with respect to proposed changes to the definition of "fiduciary" of an employee benefit plan under the Employee Retirement Income Security Act of 1974. This rulemaking will have a significant effect on how Americans access advice and services for retirement savings. As such, we believe it is critically important to significantly extend the public comment period for this rule to ensure that all stakeholders are able to provide feedback on this measure, so that any changes facilitate a system that works for hardworking Americans.

We believe the current 60-day comment period is insufficient for stakeholder engagement on a rule that the agency has spent almost three years drafting, more than a decade considering, and will have such broad impacts on retirement savers. This is significantly shorter than comment periods for previous iterations of this proposal. Furthermore, this comment period includes several major holidays, which has the effect of abbreviating the comment period even further. DOL's scheduling of a hearing 42 days into that comment period provided insufficient time for public comment or opportunity to examine the rule prior to the only opportunity for exchange. The 2010 proposal, which the Department eventually withdrew, offered a 90-day comment period with a 14-day extension followed by a public meeting with its own 15-day comment period. The 2016 fiduciary rule had a 75-day comment period with a 15-day extension and a public hearing followed by an additional 15-day comment period. We ask that DOL quickly move to extend the comment period, delay the hearing until after the close of the comment period, and provide an additional period for comment following that hearing.

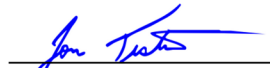
We are hearing from constituents who are struggling to understand how to comply with such a sweeping rule during a time when many Americans are concerned about their economic security and ability to prepare for retirement. In addition, there have been various iterations of this rulemaking over the past decade, but each rulemaking should be taken on its own and previous public debate, hearings, comments, and meetings should not be considered sufficient engagement for this particular rulemaking as this proposal should reflect considerable changes resulting from a prior judicial order vacating an earlier version of the rule. In fact, especially because of the history of failed DOL rulemakings on this subject, and the concerns expressed during those processes by retirement savings providers, stakeholders, Members of Congress, and ultimately our court system, it is critical that the public process for any final rule provide enough time and reflect input received during the comment period. This proposal would be a significant


change to our existing system with serious implications and potential repercussions. Adequate time must be taken to consider what would happen if this rule went into effect and address potential unintended consequences.


It is crucial that DOL engage stakeholders in a meaningful and robust way as that is not only the way to produce better, more workable rules, but it is also necessary to comply with the requirements of the Administrative Procedure Act. Without properly engaging in a dialogue, you risk not having a holistic approach in the rulemaking process, disregarding stakeholder input, and inviting potential challenges to the final rule. This is not productive for anyone – taxpayers, retirement savers, or the DOL.


Given the broad impacts of this potential rulemaking, we are concerned that you are rushing this process and the people that will be hurt are the ones you are trying to help the most. We believe that a thorough and thoughtful comment processes yield better results for those impacted by rulemakings. This is particularly important for a rulemaking with such a politically charged past. We appreciate your consideration of our request and your expeditious response.


Sincerely,


  
 Jon Tester  
 United States Senator

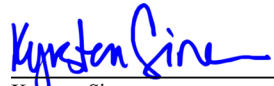
  
 Gary C. Peters  
 United States Senator

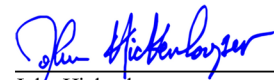
  
 Joe Manchin III  
 United States Senator

  
 Christopher A. Coons  
 United States Senator

  
 Benjamin L. Cardin  
 United States Senator

  
 Margaret Wood Hassan  
 United States Senator

  
Kyrsten Sinema  
United States Senator

  
John Hickenlooper  
United States Senator

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ATTACHMENT 4f

2023 Letter  
from  
11 Senate Republicans





December 18, 2023

Julie Su  
 Department of Labor  
 200 Constitution Ave. NW  
 Washington, DC 20210

Dear Acting Secretary Su:

We write today to express our concern with the Department of Labor's new rule proposal entitled "Definition of an Investment Advice Fiduciary," released on October 31, 2023. We appreciate the Department's desire to ensure Americans are protected as they pursue the financial means to enjoy a secure retirement, but this proposal will have the opposite effect by imposing significant costs that will limit investors' access to the financial advice they need to secure their future. In our view, the Department's proposal is unnecessarily duplicative of existing regulatory protections and will merely create excessive regulations on an already burdened industry.

Designating any advisor that charges a fee as a fiduciary misunderstands the purpose of choices in the advisor market. Investors can currently choose whether to pay for financial advice through fee for service planning, assets under management fees, and/or commissions. This choice benefits investors – for example, on buy-and-hold financial products, commissions are often less expensive than fees. Each type of advising serves a unique purpose and they should not be lumped together like this rule does. With the fiduciary responsibility comes added costs and liability for an advisor, leading them to change the way they invest for their clients and the services they may offer. Further, the 5th Circuit's ruling invalidating the 2016 fiduciary rule found that Congress intentionally structured ERISA to recognize the distinction between investment advice and sales. This rule does not recognize the difference between investment advisers paid fees for advice, who have long been considered fiduciaries; and brokers and insurance agents, who did not assume fiduciary status in selling products to their clients. The Department of Labor does not have the authority to adopt this proposal and is deliberately acting against the 5<sup>th</sup> Circuit's previous decision.

Building off of this, consumers will not only lose out on choices in the market, but some may be cut out from utilizing advisors entirely. As we saw from a similar rule in 2016, more than 10 million retirement account owners were limited or had to altogether stop working with their financial advisor<sup>1</sup>, not to mention the \$900 billion in savings they missed out on because of that rule. At a time when the current retirement gap is at \$3.68 trillion<sup>2</sup>, the last thing the Department needs to be doing is implementing rules that will take away retirement savings from our constituents.

What the Department also forgets is that the Securities and Exchange Commission (SEC) has already addressed this issue through its Regulation Best Interest (Reg BI). Reg BI requires all financial

<sup>1</sup> [https://hispanicleadershipfund.org/wp-content/uploads/2021/11/FINAL\\_HLF-Quantria\\_FiduciaryRule\\_08Nov21.pdf](https://hispanicleadershipfund.org/wp-content/uploads/2021/11/FINAL_HLF-Quantria_FiduciaryRule_08Nov21.pdf)

<sup>2</sup> <https://www2.deloitte.com/uk/en/insights/industry/financial-services/closing-retirement-savings-gap.html>

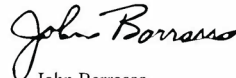
professionals to provide their clients with advice that is in their best interest. Dually registered financial professionals (i.e. those offering services through a broker-dealer and investment adviser) are held to the Investment Adviser act of 1940's fiduciary standard. Further, those selling variable annuity products to retirement investors are subject to the NAIC's model fiduciary regulation. These regulations already ensure advisors and brokers are investing properly for their clients. Adding more onerous regulations will hamper this industry and add unnecessary costs that could otherwise be used to serve clients and generate wealth.

Again, we appreciate the Department's overarching goal of protecting consumers, but there isn't anything they need to be protected from here. The industry currently has robust regulations in place. This rule would merely limit options for consumers and take money out of their pockets. We strongly urge the Department to rescind this rule so Americans can maintain their financial freedom.

Sincerely,



Roger Marshall, M.D.  
United States Senator



John Barrasso  
United States Senator



Mike Braun  
United States Senator



Susan Collins  
United States Senator



John Cornyn  
United States Senator



Joni K. Ernst  
United States Senator



Chuck Grassley  
United States Senator



Bill Hagerty  
United States Senator



Cindy Hyde-Smith  
United States Senator



M. Michael Rounds  
United States Senator

  
John Thune  
United States Senator



**ATTACHMENT 5**

Summary of Key Points  
from  
Letters Submitted to DOL  
By  
State Insurance Regulators

Summary of Key Points from Letters Submitted to DOL From Individual State Insurance Commissioners  
and the National Association of Insurance Commissioners (NAIC)

Letter from Doug Ommen, the Iowa Commissioner of Insurance, on the proposed "Retirement Security Rule: Definition of an Investment Advice Fiduciary" and the proposed amendments to PTE 84-24 and PTE 2020-02 – January 2, 2024.

- **Page 2: The Proposal Would Materially Affect the State Regulation of Insurance:** "The implications of the Proposal would...also negatively impact the ability of the Iowa Insurance Division to regulate insurance carriers and producers in our state to protect the interests of policyholders in Iowa and around the United States who are financially protected by Iowa insurance companies...**we are concerned that the Proposal would fundamentally "re-draw" the traditional line between our respective responsibilities, and, in our view, in a manner well beyond Congressional intent.**"
  
- **Page 4: The Department's Authority to Impose 10-Year Bans on Insurance Carriers and Producers Serving Retirement Investors Would Undermine the Iowa Insurance Division's Financial Solvency Responsibility:** "We are concerned about **the impact this provision could have on the financial stability and solvency of carriers domiciled in Iowa. Such a ban on a major insurance carrier could cause instability in the annuity market over which the Iowa Insurance Division would have little control.**"
  
- **Page 5 & 6: The Department's Proposal Would Effectively Displace the States' Annuity Best Interest Rule:** "**Virtually all of the requirements of the current Best Interest Rule would be displaced by different standards** required by the Proposed PTEs 84-24 and 2020-02...**[the NAIC] affirmatively decided not to adopt a fiduciary standard of care, but to adopt a best interest standard of care. We did not make this decision lightly. We did so because a fiduciary standard inherently restricts business models that many of our residents rely on to gain cost-effective access to the financial security products they need.**"
  
- **Page 10:** "In adopting the NAIC Best Interest standard of care, we in Iowa and more than other 40 states acted purposefully, after careful consideration of what is best for consumers and the market based on our experience as insurance regulators. **When 50 state regulators, all dedicated to protecting consumers, are joined by the SEC in rejecting a uniform fiduciary standard in order to protect our consumers' access to services and products, the Department should listen.**"

Letter from Jon Godfread, the North Dakota Insurance Commissioner, on the proposed "Retirement Security Rule: Definition of an Investment Advice Fiduciary" and the proposed amendments to the PTEs - January 2, 2024

- **Page 2:** "**The strength of the state-based regulation of the insurance industry comes from the fact that the fifty-six members of the NAIC represent a broad spectrum of ideas.** While members themselves may be partisan, the work of the NAIC must represent a consensus of ideas to be successful, thus insulating the organization from political whims. **I would assert that the rapid adoption of the provisions in Model #275 illustrates the point that the NAIC adopts sound policy. The same cannot be said of the rulemaking process at the federal level, where major shifts in policy could be proposed at regular intervals with changes in administrations.**"

Letter from the NAIC to DOL on the proposed "Retirement Security Rule: Definition of an Investment Advice Fiduciary" and the proposed amendments to the prohibited transaction exemptions (PTEs) - December 21, 2023. The signers are Chlora Lindley-Myers (NAIC President, Director of the Missouri Dept. Of Commerce and Insurance), Andrew N. Mais (NAIC President-Elect, Commissioner of the Connecticut Insurance Department), Jon Godfread (NAIC Vice President, Commissioner of the North Dakota Insurance Department), and Scott White (NAIC Secretary-Treasurer, Commissioner of the Virginia Insurance Department).

- **Page 2:** "We are...greatly disappointed in, and fundamentally disagree with, the Administration's characterization of state consumer protections around annuity sales as "inadequate" and providing "misaligned incentives." The rationale and justification for DOL's work should stand on its own as complementary to robust state efforts and should not mischaracterize differences in regulatory philosophy as an absence of regulatory competence or efficacy in this space."
- **Page 2: State Consumer Protections are Comprehensive and Consistent:** "In the seven years since the DOL last put forward a similar fiduciary proposal, the regulatory landscape for annuities has changed dramatically due, in large part, to the diligent work of state regulators and their legislative counterparts. While the DOL has shared jurisdiction with the states with respect to insurance products sold through Employee Retirement Income Security Act of 1974 (ERISA) plans, such as annuities, states' regulatory responsibilities extend to the entire market for such products, including disclosure requirements, professional standards of conduct for agents, and supervisory controls. In short, state insurance regulations cover all annuity products, not just those purchased within ERISA plans."
- **Page 3: Retirement Savings Gap:** "DOL should be encouraging, not potentially limiting, access to well-regulated retirement guidance and products such as annuities that could help to bridge the retirement savings gap. There are few retirement security products that protect consumers from their own longevity risk and provide lifetime income, except annuities. Regulators, state or federal, should not substitute our own judgement for those we intend to protect by potentially denying them access to such products when they are appropriate to the retiree."



ATTACHMENT 5a

2023 Letter from  
Iowa Insurance Division



Insurance Division

KIM REYNOLDS  
GOVERNORDOUG OMMEN  
COMMISSIONER OF INSURANCEADAM GREGG  
LT. GOVERNOR

January 2, 2024

The Honorable Lisa M. Gomez  
Assistant Secretary of Labor  
Employee Benefits Security Administration  
U. S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

**Re: Retirement Security Rule: Definition of an Investment Advice Fiduciary (RIN 121035-AC02); Proposed Amendment to Prohibited Transaction Exemption 84-24 (ZRIN 1210-ZA33, Application No. D-12060); and Proposed Amendment to Prohibited Transaction Exemption 2020-02 (ZRIN 1210-ZA32, Application No. D-12057)**

Assistant Secretary Gomez:

Thank you for the opportunity to comment on the Department's proposed regulation expanding the definition of fiduciary investment advice (the "Proposed Rule"); and on the Department's proposed amendments to Prohibited Transaction Exemptions 84-24 and 2020-02 ("Proposed PTE 84-24" and "Proposed PTE 2020-02") (collectively, the "Proposal").

For nearly eighty years, Federal law has specifically allocated the responsibility of regulating the business of insurance to the states.<sup>1</sup> But that consumer protection responsibility and the related insurance supervision in Iowa dates back to the earliest days of our history as a state. We have always prioritized that responsibility as a state. The same could be said of the other state regulators. The Iowa Insurance Division is the primary regulator supervising all insurance business transacted in the state of Iowa. The Iowa Insurance Division also has statutory authority over many activities related to the sale of securities and other regulated products in Iowa. Our primary focus is to protect consumers through robust and well-regulated state markets offering security and choice to consumers.

Iowa plays a significant role in protecting consumers purchasing life insurance and annuities. We serve as the domiciliary state for approximately 40 life insurance companies, the 10 largest of which hold nearly \$900 billion in assets.<sup>2</sup> As Iowa's insurance commissioner, I am privileged to

<sup>1</sup> See., McCarran-Ferguson Act, approved March 9, 1945 (15 U.S.C. 1011 et seq.).

<sup>2</sup> See., "10 Largest Iowa-Domiciled Life Insurance Companies," Iowa Division of Insurance, 2021, available at <https://iid.iowa.gov/media/3075/download?inline=report>.



lead a team with extensive expertise in all aspects of insurance regulation and consumer protection.

Our comments here express not only our significant concerns with the substance of the Proposal, but also our serious concerns about the Department's mischaracterization of state law in its attempts to justify federal intervention in the state regulation of insurance.

*The Proposal Would Materially Affect the State Regulation of Insurance:*

As explained in more detail below, the Proposal, as currently drafted, would have a material effect on the life insurance and annuity marketplace. The implications of the Proposal would also negatively impact the ability of the Iowa Insurance Division to regulate insurance carriers and producers in our state to protect the interests of policyholders in Iowa and around the United States who are financially protected by Iowa insurance companies.

While we recognize that the Department has responsibility to regulate retirement plans subject to the Employee Retirement Income Security Act of 1974 ("ERISA") and that the Department's responsibilities can apply simultaneously with State requirements with regard to such plans, we are concerned that the Proposal would fundamentally "re-draw" the traditional line between our respective responsibilities, and, in our view, in a manner well beyond Congressional intent.

*The Proposal is Premised on an Inaccurate Understanding of State Annuity Regulation:*

In developing the Proposal and seemingly in an attempt to justify its regulatory expansion, the Department engaged in an analysis of the state laws and regulations protecting consumers purchasing state-regulated annuity contracts. However, the mischaracterization of these state laws in the Proposal, and in statements made by officials in support of the Proposal, suggests that the Department does not accurately understand what state annuity regulation actually requires.

Given the Department's underlying confusion about the substance of state laws, we are concerned that the regulatory policies embodied in the Proposal will have a far greater effect on the states and on our regulation of insurance markets than the Department appreciates. Accordingly, in consideration of my comments below, we request that the Department reevaluate the Proposal's effect on the states, as required by the regulatory process under Executive Order 13132 regarding regulatory actions by agencies implicating principles of federalism.<sup>3</sup>

<sup>3</sup> See., E.O. 13132 of Aug 4, 1999: "'Policies that have federalism implications' refers to regulations...and other policy statements or actions that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government... Agencies shall closely examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and shall carefully assess the necessity for such action. To the extent practicable, State and local officials shall be consulted before any such action is implemented." 64 Fed. Reg. 43,255 (August 8, 1999).

Further, as the lack of material consultation by the Department with state insurance regulators may have contributed to the Department's misimpressions, we offer these comments as a starting point for meaningful and detailed consultations between the Department and the states. Such coordination is essential to promulgating federal and state rules that work in concert to protect consumers within our respective jurisdictions.

*The Department's Traditional Scope of Fiduciary Duty Did Not Broadly Affect State Insurance Regulation and Markets:*

As noted above, the Department is the primary regulator of ERISA-covered plans. Thus, even though ERISA expressly does not preempt state insurance regulation under ERISA Sec. 514(b)(2)(A), the Department does govern the conduct of fiduciaries under ERISA Title I plans, for which the ERISA statute provides a specific fiduciary standard of care and a legal cause of action for breach of fiduciary duty.<sup>4</sup> Thus, if an insurance professional recommending an in-plan annuity to an ERISA plan met the requirements of the Department's fiduciary regulation adopted in 1975, the ERISA fiduciary standard of care would apply in addition to the state insurance standard applicable to that sale. The current overlap between ERISA and state insurance law is reasonably well-defined, and most annuity sales related to retirement savings are governed by state insurance law, or state and federal securities law, not ERISA.

*The Vacated 2016 Fiduciary Rule Would Have Materially Affected State Insurance Regulation:*

In 2016, the Department promulgated a rule providing a new definition of fiduciary advice and associated class exemptions (collectively, the "2016 Rule")<sup>5</sup> that sought to dramatically expand the Department's fiduciary authority. The 2016 Rule would have broadly encompassed recommendations made to retirement savings vehicles covered by ERISA Title II as well as ERISA Title I. These Title II vehicles include Individual Retirement Accounts and Annuities ("IRA"), and the 2016 Rule would have applied fiduciary status to virtually all recommendations regarding rollovers, transfers and distributions to or from plans and IRAs by virtually all financial professionals. The result of the 2016 Rule would have been to make most annuity recommendations—those involving assets in or related to plans or IRAs—fiduciary advice under ERISA. While state insurance regulations would have technically applied, state law, as a practical matter, would have been displaced by ERISA.

This would have had a material effect on the state of Iowa's life insurance and annuity marketplace, and on the practical ability of the Iowa Insurance Division to regulate insurance carriers and producers in our state. However, the 5<sup>th</sup> Circuit Court of Appeals vacated the Department's 2016 Rule on several grounds, including a finding that the Rule's broad definition of fiduciary advice was inconsistent with the statutory definition, and that portions of the Rule were arbitrary and capricious.<sup>6</sup> The court ruled that fiduciary advice under ERISA was not

<sup>4</sup> See., ERISA Secs. 404 and 502.

<sup>5</sup> See., 81 Fed. Reg. 20,946 – 21,221 (April 8, 2016).

<sup>6</sup> U.S. Chamber of Commerce v. U.S. Department of Labor, 885 F.3d 360 (5th Cir. 2018).

intended to apply to sales recommendations of annuities and other investments absent a special relationship of trust with the consumer;<sup>7</sup> that Title II of ERISA did not authorize the Department to establish a standard of care governing recommendations to IRAs,<sup>8</sup> and that exemptions could not impose new and extensive duties on Title II fiduciaries.<sup>9</sup> Thus, the broad expansion of the Department's fiduciary standards into state insurance regulation did not occur in 2016. We do not agree that the Department is authorized to use the rulemaking in the Proposal to expansively and dramatically reinterpret ERISA without Congressional authorization. Further, although the Proposal may not be directly in conflict with the McCarran-Ferguson Act, the Proposal has the practical effect of displacing a large portion of state regulatory responsibility over annuities, a policy outcome that we believe should not be pursued without Congressional authorization.

*The Current Proposal Would Significantly Expand the Department's Fiduciary Reach, Effectively Displacing Much of the State Annuity Regulation:*

The new fiduciary definition in the current Proposal would appear to dramatically expand the scope of the Department's fiduciary authority, much as the 2016 Proposal would have done, though using a differently worded fiduciary test. The Department states that the Proposal is "...intended to be responsive to the Fifth Circuit's emphasis on relationships of trust and confidence. The current proposal is more narrowly tailored than the 2016 Final Rule."<sup>10</sup> While in this comment letter we do not venture into an opinion on the application of the *Chamber* decision to the current rule, we do have serious concerns that the Proposal would effectively displace the States' role in regulating most annuity sales. As we read the Proposal, it appears that normal sales activity under the NAIC Best Interest Rule would meet the Proposal's definition of fiduciary advice if the annuity is sold in connection with a plan or IRA, or a rollover, transfer or distribution related to a plan or IRA.<sup>11</sup>

*The Department's Authority to Impose 10-Year Bans on Insurance Carriers and Producers Serving Retirement Investors Would Undermine the Iowa Insurance Division's Financial Solvency Responsibility:*

Both the Proposed PTE 84-24 and 2020-02 contain new eligibility provisions. The effect of becoming ineligible is that a producer or insurance company can no longer sell annuities or other

<sup>7</sup> "Had Congress intended to abrogate both the cornerstone of fiduciary status—the relationship of trust and confidence—and the widely shared understanding that financial salespeople are not fiduciaries absent that special relationship, one would reasonably expect Congress to say so." *Chamber* at 376.

<sup>8</sup> "Moreover, DOL's principal policy concern about the lack of fiduciary safeguards in Title II was present when the statute was enacted, but Congress chose not to require advisers to individual retirement plans to bear the duties of loyalty and prudence required of Title I ERISA plan fiduciaries. That times have changed, the financial market has become more complex, and IRA accounts have assumed enormous importance are arguments for Congress to make adjustments in the law, or for other appropriate federal or state regulators to act within their authority. A perceived 'need' does not empower DOL to craft *de facto* statutory amendments or to act beyond its expressly defined authority." *Id.* at 378-379.

<sup>9</sup> "The grafting of novel and extensive duties and liabilities on parties otherwise subject only to the prohibited transactions penalties is unreasonable and arbitrary and capricious." *Id.* at 384.

<sup>10</sup> 88 Fed. Reg. 75,901.

<sup>11</sup> See., Proposal §2510.3-21(c).

covered products to any retirement investor covered under the Proposal. Under these provisions, the Department can declare an insurance carrier or producer ineligible for 10 years based on a pattern of non-compliance, though the affected entities have some limited rights to be heard by the Department to contest or cure these failures.

We are concerned about the impact this provision could have on the financial stability and solvency of carriers domiciled in Iowa. Such a ban on a major insurance carrier could cause instability in the annuity market over which the Iowa Insurance Division would have little control. As we read the Proposal, if the Department concluded that an insurance carrier was found to have been involved in “a pattern of non-compliance” or that a foreign affiliate of one of Iowa’s largest carriers was convicted of certain crimes under foreign law—even though it was not related to investment advice—the Iowa carrier could become ineligible for either exemption for 10 years. Given the fact that roughly \$26 trillion<sup>12</sup> is held by retirement investors as that term is defined under the Proposal, a ten-year ban on participating in that market could financially ruin an insurance carrier, significantly impacting Iowa. The Proposal does not provide for coordination or notice with state regulators in such a case.

*The Department’s Proposal Would Limit Service Models and Compensation Reducing Availability of Annuities:*

One of the key goals of the NAIC and Iowa in adopting a Best Interest standard (as we discuss in more detail below) would be undone if the Proposal were to be adopted. Instead of preserving consumer choice in service models, the Proposal would impose a uniform fiduciary standard and new restrictions on forms of compensation permitted to insurance producers. For example, under the Proposed PTE 84-24, insurance producers would be divided into two new types—independent producers who are not employees of any carrier (including statutory employees) and other producers and agents. The non-employee independent producers would be eligible to use Proposed PTE 84-24, the others must use Proposed PTE 2020-02.

Proposed PTE 84-24 does not permit an insurance producer to receive any compensation other than an up-front, renewal or trail commission. No other form of compensation would be permitted. These are very rigid standards regarding business models limiting consumer choice and access, and are inconsistent with the approach the NAIC and Iowa have taken.

*The Department’s Proposal Would Effectively Displace the States’ Annuity Best Interest Rule:*

Virtually all of the requirements of the current Best Interest Rule would be displaced by different standards required by the Proposed PTEs 84-24 and 2020-02. While the Iowa and other states’ rules would technically remain, insurers would have to implement and maintain two different sets of supervisory requirements.

<sup>12</sup> “By the first quarter of 2022...IRAs held \$13.2 trillion in assets, private defined contribution plans held \$9.2 trillion, and private defined benefit plans held \$3.7 trillion in assets.” 88 Fed. Reg. 75,915.

*The Department's Proposal is Not Limited to Annuities:*

Further, the Proposal provides that “investment property” covered by the new definition likely includes other life insurance products with an “investment component.” It would not apply to “...health insurance policies, disability insurance policies, term life insurance policies, or other property to the extent the policies or property do not contain an investment component.” Thus, other state regulations governing life insurance could also be displaced by the Proposal.

We are concerned that the Proposal would fundamentally limit Iowa’s ability to regulate its own insurance markets or the conduct of companies domiciled in Iowa, and we are doubly concerned as the Proposal appears to be premised on an inaccurate understanding of how the Best Interest annuity regulation actually applies.

*The NAIC Model Rule Provides a Best Interest Standard that Puts Consumers First While Preserving Choice of Service Models for Consumer with Different Needs:*

I served on the NAIC’s Annuity Suitability (A) Working Group established in 2017 to revise the NAIC’s *Suitability in Annuity Transactions Model Regulation* (#275) (the “NAIC Best Interest Rule”). We worked in an open and cooperative manner for two years to develop the NAIC Best Interest Rule. Our process relied on extensive input from consumer groups, regulators, insurers and insurance professionals, examining in detail all of the issues presented by changing the standard of care governing annuity recommendations.

One of the options under serious consideration by the Working Group was to adopt a fiduciary standard of care for annuity sales. There were a variety of opinions within the Working Group and within the NAIC regarding the advisability of a fiduciary standard. The NAIC represents a wide array of elected and appointed officials from across the political spectrum. As regulators whose primary duty is to protect our citizens, however, we were united in our conviction that the interests of the consumer must come before the interests of the insurance professional or adviser. The issue was how best to achieve this goal. After extensive discussions, we were able to reach consensus, and affirmatively decided not to adopt a fiduciary standard of care, but to adopt a best interest standard of care.

We did not make this decision lightly. We did so because a fiduciary standard inherently restricts business models that many of our residents rely on to gain cost-effective access to the financial security products they need. As noted above, I serve as Iowa’s regulator for both insurance and securities. In this dual role, I regulate state laws applicable to fiduciary investment advisers as well as state laws applicable to insurance professionals. Yet my experience in these service models dates back to my work on securities and annuities sales practices during my 25+ years of service as a Missouri Assistant Attorney General, Securities Commissioner and Insurance Director. My extensive consumer protection law enforcement service has informed my understanding and left me very familiar with the advantages and disadvantages of both service models.

Our experience in Iowa has proven that having varied service models offers valuable consumer access by preserving consumer choice. Iowans choose professional financial services either through fee arrangements or through transactional commission arrangements based on their particular needs. Requiring high quality financial advice that fits the particular needs, objectives

and situation of the individual Iowan is best achieved by the coexistence of the fiduciary and the best interest standards of care. Consumer protection is achieved through smart, consistent and sophisticated enforcement of consumer protection standards, not by the Department's approach of restricting consumer access to high quality annuity products.

As a regulator of the securities investment advisers who are fiduciaries, I have found that the fiduciary service model is not immune to bad actors—some fiduciary advisers make recommendations that are not in the consumer's best interests and are made with misplaced loyalties. Fiduciary standards are not a panacea. It is my view that the Departments' fiduciary approach, with its emphasis on limiting and micromanaging business models and services, will increase costs and reduce access, resulting in less security for Iowans than our own rules provide.

The reasoning behind our decision at the NAIC was essentially the same as that of the Securities and Exchange Commission ("SEC") as we chose to develop and approve for state adoption a model best interest standard rather than a fiduciary standard. Having been authorized by Congress to evaluate the issues and to select a fiduciary standard if warranted, the SEC decided to adopt a best interest standard, explaining, "We have declined to subject broker-dealers to a wholesale and complete application of the existing fiduciary standard...we believe (and our experience indicates), that this [fiduciary] approach would significantly reduce retail investor access to differing types of investment services and products, reduce retail investor choice in how to pay for those products and services, and increase costs for retail investors of obtaining investment recommendations."<sup>13</sup> In our collective view, we state regulators agreed with the SEC that a best interest standard was in fact, collectively, in the best interest of American annuity consumers, and set about the effort to make it the law of the land. Over 40 states have concurred with this view and adopted the NAIC Best Interest Rule.

*The Department Mischaracterizes the Protections of the NAIC Best Interest Rule:*

The NAIC membership approved revisions to the NAIC Best Interest Rule in February of 2020, clarifying that all recommendations by agents and insurers must be in the best interest of the consumer and that agents and carriers may not place their financial interest ahead of the consumers' interest in making a recommendation. We chose to immediately bring these consumer protections to the market and Iowa was the first state to adopt the NAIC Model Rule on May 11, 2020. The rule has been in effect for several years, protecting Iowans in a robust insurance marketplace since January 1, 2021.<sup>14</sup>

Unfortunately, the Department mischaracterized these protections in the Proposal. Here are several specific misconceptions reflected in the Proposal and public statements:

<sup>13</sup> 84 Fed. Reg. at 33,322 (July 12, 2019).

<sup>14</sup> Iowa Admin. Code r. 191-15.72 – 15.78 (2020).



1. The Department Inaccurately Claims that NAIC Best Interest Rule Doesn't Put the Consumer First:

Sec. 6(A) of the NAIC Rule states, "A producer, when making a recommendation of an annuity, shall act in the best interest of the consumer under the circumstances known at the time the recommendation is made, without placing the producer's or the insurer's financial interest ahead of the consumer's interest." Sec. 6(A)(1-4) then lists the care, disclosure, conflict of interest and disclosure requirements.

Despite this clear statement prohibiting the producer from placing his own interest ahead of the consumer's interest, the Department effectively "reads out" the requirement from Iowa's Best Interest Rule without giving any amount of time or serious consideration to how the regulation is already being enforced. Instead, the Department rather conclusively asserts that "...the specific care, disclosure, conflict of interest, and documentation requirements do not expressly incorporate the obligation not to put the producer's or insurer's interests before the customer's interests, even though compliance with their terms is treated as meeting the 'best interest' standard."<sup>15</sup>

As we are now enforcing these provisions, we can conclude that the Department is not only uninformed, but surprisingly disinterested in actually considering any reasonable analysis of Iowa's regulatory efforts.<sup>16</sup> To be frank, some of us state regulators were shocked by the attack leveled against our organization by the Department. It is incredibly troubling that a federal agency would willfully disregard and dismiss the valuable work that the states have undertaken to protect consumers. The Department leveled its broad criticism of the NAIC without any sincere consideration of the benefits to consumers as a result of the NAIC's Best Interest Rule.

2. The Department Inaccurately Claims that the NAIC Best Interest Rule Doesn't Restrict Compensation-Related Conflicts of Interest:

The Department states that the NAIC Model Rule "disregard[s] compensation as a source of conflicts of interest" because it, "...carves out 'cash compensation or non-cash compensation' from treatment as sources of conflicts of interest."<sup>17</sup>

The NAIC Model rule does not disregard compensation as a source of conflicts of interest. In fact, Sec. 6(C)(2)(h) expressly prohibits sales contests, sales quotas, bonuses and non-cash compensation based on sales of specific annuities within a limited time frame due to the conflicts

<sup>15</sup> 88 Fed. Reg. at 75,898.

<sup>16</sup> "State Insurance Regulators Work to Protect Consumers Who Buy Annuities," National Association of Insurance Commissioners press statement, November 1, 2023: *"We fundamentally disagree with the...characterization of state consumer protections for annuity products. The...press statement that oversight...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."* available at <https://content.naic.org/article/state-insurance-regulators-work-protect-consumers-who-buy-annuities-naic-releases-statement-dol/>

<sup>17</sup> Id.

they present. The Model Rule does provide that cash and non-cash compensation are not per se conflicts, but context dependent, coupling disclosure of the compensation with any mitigation requirements applicable.

3. The Department Inaccurately Claims that the NAIC Best Interest Rule Allows the Producer to Recommend a “Worse” Option:

Building on its inaccurate dismissal of NAIC Best Interest Rule’s requirement to put the client first, DOL explains that it includes its own best interest standard as a condition of Proposed PTEs 84-24 and 2020-02 to clarify “that it is impermissible for the Investment Professional to recommend a product that is worse for the Retirement Investor because it is better for the Investment Professional’s or the Financial Institution’s bottom line...The Department notes this standard is consistent with the SEC’s standards for both registered investment advisers and broker-dealers.”<sup>18</sup> This reference noticeably omits the NAIC Best Interest Rule.

Department officials echoed this inaccurate notion during the public hearing on the Proposals. During questions about the disclosure of standards of care, an EBSA official stated:

“Are people told hey, you really do need to think of me as a sales person? *I’m just here to sell you this product and I have an obligation to make sure it’s good enough. But I could actually sell you a worst [sic] product because it’s better for me financially.*” [emphasis added]<sup>19</sup>

This is a simply inaccurate statement reflecting an incorrect understanding of the NAIC Best Interest Rule. Sec. 6(A) expressly prohibits such conduct.

4. The Department Inaccurately Claims that the NAIC’s Best Interest Annuity Rule “Varies Significantly” from State to State:

A consistent theme in the Department’s analysis is that Federal securities laws are uniform in their application to annuity recommendations, but state laws vary widely. For example, the Department writes, “Variable annuities and some indexed annuities are considered securities and are subject to securities laws, while fixed annuities, including fixed indexed annuities, are subject to state law. As discussed in the Regulatory Baseline section, these laws vary significantly from state to state...[under] regulations that potentially hold those selling such insurance products to a lower standard”<sup>20</sup>

This is also not correct. At present, more than 40 states have adopted the NAIC Best Interest Rule, and New York has adopted its own Best Interest Rule. It is anticipated that the remaining

<sup>18</sup> Id at 75,983.

<sup>19</sup> Transcript of “Public Comment Hearing, Retirement Security Rule: Definition of an Investment Advice Fiduciary,” question by EBSA Deputy Assistant Secretary Hauser, pg. 46, December 13, 2023.

<sup>20</sup> 88 Fed. Reg. 75,920.



states will adopt the NAIC Model Rule by the end of 2024. When nearly all states have already adopted the same standard, that standard does not “vary significantly” from state to state.

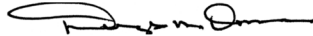
Conclusion:

The Proposal is likely to have a material impact on the ability of Iowa and other state regulators to manage their life insurance and annuity marketplaces. The effect would be much greater than the Department appreciates, as the Proposal effectively displaces not only the direct regulatory standards applicable to annuity recommendations, but also could affect indirectly the health and solvency of the state market as a whole.

In adopting the NAIC Best Interest standard of care, we in Iowa and more than 40 other states acted purposefully, after careful consideration of what is best for consumers and the market based on our experience as insurance regulators. When 50 state regulators, all dedicated to protecting consumers, are joined by the SEC in rejecting a uniform fiduciary standard in order to protect our consumers’ access to services and products, the Department should listen.

I urge you to reach out to me and to my fellow state regulators for meaningful coordination before you proceed further with the Proposal.

Sincerely,



Doug Ommen  
Commissioner of Insurance

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**ATTACHMENT 5b**

2023 Letter from  
North Dakota Insurance Department



January 2, 2024

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

To whom it may concern:

Thank you for the opportunity to offer comments on the proposed "Retirement Security Rule: Definition of an Investment Advice Fiduciary" and proposed amendments to the prohibited transaction exemptions by the Department of Labor (DOL).

As the elected chief insurance regulator for the state of North Dakota, I stand opposed to the proposal offered by the DOL. I recognize and completely agree with the analysis that has already been provided by the National Association of Insurance Commissioners (NAIC) and my regulatory peers in other states. I am providing this supplemental comment letter to expound upon the value of the NAIC model regulation process for both the insurance industry, specifically, and the public, in general.

As Commissioner Ommen indicates, the NAIC's *Suitability in Annuity Transactions Model Regulation* (Model #275) was the culmination of two years of work and collaboration by the state-based insurance regulators, consumer representatives, and the industry, including open meetings and public comment periods. Following approval of the revisions to Model #275 in February 2020 by NAIC membership, which consists of the chief insurance regulators from the fifty states, Washington DC, and the five U.S. territories, NAIC members brought Model #275 back to their respective jurisdictions. As of December 21, 2023, Model #275 has been adopted by forty states, is pending in an additional six others, and one state has adopted its own Best Interest Rule.

In addition to the open process undertaken by the NAIC to amend Model #275, its adoption by states also included additional layers of openness and transparency in each respective state's legislative or administrative rule adoption process. To reiterate, Model #275 has been adopted by forty states, is pending in an additional six others, and one state has adopted its own Best Interest Rule; this means that in addition to the NAIC process, forty-seven or more opportunities have, or still do, exist for industry, consumer groups, and the public to be involved in the process of making policy. It is expected that in 2024, the remaining nine jurisdictions that have not yet acted on Model #275 will also be undertaking their own open and transparent processes for adoption.

While I must acknowledge that the DOL is also undertaking an open process, abbreviated though it has been, as evidenced by the very act of submitting this comment letter, I will always argue that more openness and transparency in government is better than less. Forty-seven jurisdictions have already publicly addressed the Best Interest standard of care established in



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**Jon Godfread, Commissioner**

Model #275 in the past four years. In my opinion, to propose a standard that is vastly different from that adopted by the majority of states and developed in a less transparent and collaborative manner the DOL comes precariously close to acting in an undemocratic manner.

The strength of the state-based regulation of the insurance industry comes from the fact that the fifty-six members of the NAIC represent a broad spectrum of ideas. While members themselves may be partisan, the work of the NAIC must represent a consensus of ideas to be successful, thus insulating the organization from political whims. I would assert that the rapid adoption of the provisions in Model #275 illustrates the point that the NAIC adopts sound policy. The same cannot be said of the rulemaking process at the federal level, where major shifts in policy could be proposed at regular intervals with changes in administrations.

Sincerely,

A handwritten signature in blue ink, appearing to read "JG Godfread", written in a cursive style.

Jon Godfread  
North Dakota Insurance Commissioner

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**ATTACHMENT 5c**

2023 Letter  
from  
the National Association of  
Insurance Commissioners



December 21, 2023

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

**Re: RIN 1210-AC02-Definition of Fiduciary**

On behalf of the National Association of Insurance Commissioners (NAIC)<sup>1</sup>, we appreciate the opportunity to provide comments on the Department of Labor's (DOL) proposed "Retirement Security Rule: Definition of an Investment Advice Fiduciary" and proposed amendments to the prohibited transaction exemptions (PTEs) (collectively, the "Proposed Rule").

While the NAIC typically refrains from commenting on the rule proposals of fellow regulators unless they are directly preemptive of our authorities, in this instance, we are compelled to respond given the potentially significant impact the Proposed Rule would have on insurance consumers and access to lifetime income products in retirement. We also feel compelled to respond to commentary, used by the Administration to justify the proposal, that disparages the ongoing work of state insurance departments to adopt and enforce comprehensive and consistent standards of care for annuity products.

We are disappointed that the DOL did not engage or coordinate substantively with NAIC members—the chief insurance regulators from the 50 states, the District of Columbia, and the U.S. territories—before promulgating the current Proposed Rule. While the DOL has interacted with NAIC staff and members, those discussions were

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<sup>1</sup> As part of our state-based system of insurance regulation in the United States, the National Association of Insurance Commissioners (NAIC) provides expertise, data, and analysis for insurance commissioners to effectively regulate the industry and protect consumers. The U.S. standard-setting organization is governed by the chief insurance regulators from the 50 states, the District of Columbia and five U.S. territories. Through the NAIC, state insurance regulators establish standards and best practices, conduct peer reviews, and coordinate regulatory oversight. NAIC staff supports these efforts and represents the collective views of state regulators domestically and internationally. For more information, visit [www.naic.org](http://www.naic.org).



focused almost exclusively on aspects of the NAIC model and provided no opportunity for discussion of DOL's own work or thinking. We acknowledge the administrative limitations on DOL's ability to share or discuss the text of proposed rules, but substantive policy questions can and should be discussed with fellow regulators, even if in the abstract, to avoid duplication or conflict. DOL should demonstrate interest in coordination and harmonizing our respective rules given their overlapping impact on the same population of companies, industry participants, and customers. Only after the Proposed Rule text was released did DOL engage directly with insurance commissioners, albeit with a limited 30-day exposure period underway to digest and assess the proposal.

We are also greatly disappointed in, and fundamentally disagree with, the Administration's characterization of state consumer protections around annuity sales as "inadequate" and providing "misaligned incentives."<sup>2</sup> The rationale and justification for DOL's work should stand on its own as complementary to robust state efforts and should not mischaracterize differences in regulatory philosophy as an absence of regulatory competence or efficacy in this space.

In the seven years since the DOL last put forward a similar fiduciary proposal, the regulatory landscape for annuities has changed dramatically due, in large part, to the diligent work of state regulators and their legislative counterparts. While the DOL has shared jurisdiction with the states with respect to insurance products sold through Employee Retirement Income Security Act of 1974 (ERISA) plans, such as annuities, states' regulatory responsibilities extend to the entire market for such products, including disclosure requirements, professional standards of conduct for agents, and supervisory controls. In short, state insurance regulations cover *all* annuity products, not just those purchased within ERISA plans.

#### State Consumer Protections are Comprehensive and Consistent

Following extensive deliberations and input from state regulators, consumer representatives, and the insurance industry, the NAIC made significant revisions to its *Suitability in Annuity Transactions Model Regulation* (#275), adopting a best interest standard. The standard requires producers and insurers, when making annuity recommendations, to act in the best interest of the consumer, without placing their

<sup>2</sup> <https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/31/fact-sheet-president-biden-to-announce-new-actions-to-protect-retirement-security-by-cracking-down-on-junk-fees-in-retirement-investment-advice/> 2



financial interest ahead of the consumer's interest. These amendments were designed to be consistent with the U.S. Securities and Exchange Commission's (SEC) Regulation Best Interest to ensure a high degree of harmonization among regulatory platforms.

To meet the new standard, states require that insurance agents and carriers act with "reasonable diligence, care, and skill" in recommending an annuity. The recommended annuity must also appropriately address the specific consumer's "financial situation, insurance needs and financial objectives." Model revisions also included enhancements to supervision to assist with compliance, and development of additional guidance to respond to common state implementation questions to promote consistency not just in text but in practice. To date, 41 states have implemented—and five states are actively pursuing adoption of—the NAIC's best interest enhancements.

Currently, the NAIC is working with states to coordinate a two-phase implementation review of the top 25 annuity writers in the United States. The purpose of these implementation examinations is to ensure that companies are appropriately incorporating and executing the enhanced standards in their policies and procedures.

### Retirement Savings Gap

Amid these ongoing state regulatory efforts to enhance consumer protections, the elderly population in the U.S. has continued to grow at an unprecedented rate, while the working-age population has contracted, placing an increased strain on public assistance programs like Social Security and exacerbating the retirement savings gap. Further, defined-benefit pension plans have been largely replaced by defined-contribution plans in the workplace, which offer less certainty to retirement savers. And nearly half of all workers do not have access to an employer-sponsored retirement plan. Given these challenges, DOL should be encouraging, not potentially limiting, access to well-regulated retirement guidance and products such as annuities that could help to bridge the retirement savings gap. There are few retirement security products that protect consumers from their own longevity risk and provide lifetime income, except annuities. Regulators, state or federal, should not substitute our own judgement for those we intend to protect by potentially denying them access to such products when they are appropriate to the retiree.

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Kansas City 1100 Walnut Street NW, Suite 1500, Kansas City, MO 64106-2197	p   816 842 3600	f   816 783 8175
New York One New York Plaza, Suite 4210, New York, NY 20004	p   212 398 9000	f   212 382 4207

[www.naic.org](http://www.naic.org)





## NAIC GOVERNMENT AFFAIRS

Indeed, bipartisan Congressional efforts, such as the SECURE Act in 2019 and a follow-up effort in 2022, and multiple Administrations of both parties have consistently recognized the importance of lifetime income products in closing the retirement security protection gap. At the same time, Congress has consistently reaffirmed the states' role as the primary regulators in this area. We view these federal efforts as complementary to our own, and we have met the responsibility to regulate with collaborative action and resolve. We fear DOL's latest attempt at a fiduciary rule could undermine this important work.

Thank you for the opportunity to comment.

Chlora Lindley-Myers  
NAIC President  
Director  
Missouri Department of Commerce  
and Insurance

Andrew N. Mais (He/Him/His)  
NAIC President-Elect  
Commissioner  
Connecticut Insurance Department

Jon Godfread  
NAIC Vice President  
Commissioner  
North Dakota Insurance Department

Scott White  
NAIC Secretary-Treasurer  
Commissioner  
Virginia Insurance Department



**ATTACHMENT 6**

NAIC State Legislative Brief:  
The NAIC Annuity Suitability  
"Best Interest" Model Regulation



### The NAIC Annuity Suitability “Best Interest” Model Regulation

- *The NAIC’s Suitability in Annuity Transactions Model Regulation (#275) is designed to protect consumers from abusive and predatory practices by life insurance and annuity producers. Nearly every state has adopted some version of the model.*
- *In 2020, the NAIC adopted revisions to the model that incorporate a “best interest” standard of care that requires producers to put the consumer’s interest ahead of their own. The revisions align with the SEC’s Regulation Best Interest.*
- *As millions of people are set to retire and federal policymakers increasingly look to insurance products to address the lifetime income needs of retirees, state legislators and regulators must demonstrate that they have the authorities and tools necessary to oversee this marketplace.*

#### Background

Ensuring suitable sales of life insurance and annuity products to consumers of all ages is part of the NAIC’s core mission of protecting the public interest and facilitating the fair and equitable treatment of insurance consumers. To this end, the NAIC initially adopted the *Suitability in Annuity Transactions Model Regulation* in 2003 and has updated it several times since then. Nearly every state has adopted some version of the model.

In February 2020, the NAIC made significant revisions to the model, following extensive deliberations and input from state insurance regulators, consumer representatives, and the insurance industry. The revisions incorporate a “best interest” standard that requires all recommendations by agents and carriers to be in the interests of the consumer and that consideration of the consumer’s interest must always be placed ahead of any financial interest that the agent or carrier may have in the transaction.

To reflect this “best interest” duty, the regulation requires producers and insurers to satisfy requirements outlined in a care obligation, a disclosure obligation, a conflict-of-interest obligation, and a documentation obligation. The revisions require agents to disclose and answer questions about their role in the transaction, their compensation, and any material conflicts of interest. The regulation codifies, as a requirement, the good business practice of carefully and clearly explaining to the consumer the basis for a recommendation. This requirement is designed to ensure consumers understand why a product is consistent with their particular financial needs, situation, and objectives. Agents and carriers are required to document, in writing, any recommendation and the justification for such recommendation. Each of these new requirements strengthens the regulatory framework of consumer protections already available under the existing rule.

It is also designed to be consistent with the U.S. Securities and Exchange Commission’s “Reg BI,” which was finalized in June 2019. Together, these complementary state and federal initiatives will bolster protections for consumers, especially low and moderate balance savers and those seeking guaranteed lifetime income in retirement through annuities.

#### Adoption/Enactment

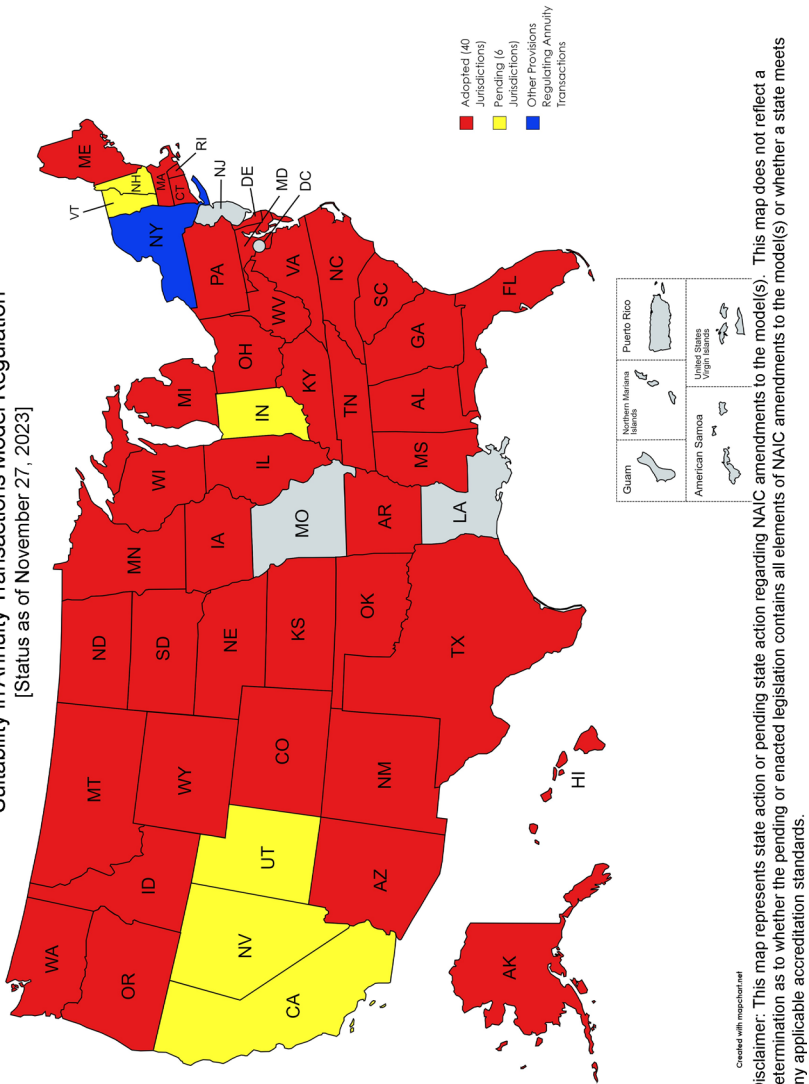
- ✓ As of this update, 40 jurisdictions have implemented the *Suitability in Annuity Transactions Model Regulation* (#275) revisions: AL, AK, AZ, AR, CO, CT, DE, **FL**, GA, HI, ID, IL, IA, **KS**, KY, ME, MD, MA, MI, MN, MS, MT, NE, NM, NC, ND, OH, **OK**, **OR**, PA, RI, SC, SD, TN, TX, VA, **WA**, WV, WI, and **WY**.

States in **red** are new additions since the last update to the legislative brief.

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Holly Weatherford, Senior Legislative Affairs Counsel, [hweatherford@naic.org](mailto:hweatherford@naic.org)  
 Jolie Matthews, Senior Health and Life Policy Counsel, [jmatthews@naic.org](mailto:jmatthews@naic.org)  
 Taylor Walker, Chief of State Relations and Policy Advisor, [twalker@naic.org](mailto:twalker@naic.org)

Implementation of 2020 Revisions to Model #275  
Suitability in Annuity Transactions Model Regulation  
[Status as of November 27, 2023]





**ATTACHMENT 7**

November 2, 2023:  
Statement from IRI President and CEO Wayne Chopus  
"We Do This Work Proudly, Mr. President"



[We Do This Work Proudly, Mr. President](#)

**Wayne Chopus, President & CEO**

President Biden took the stage this week to talk about how to help retirement savers. He spoke about families who save throughout their lives to enjoy a secure retirement. That is what our industry's mission – and very existence – is about: helping families fulfill the dream of a secure and dignified retirement. We do this work proudly.

We were shocked and disillusioned by many of the President's remarks. It was a speech filled with unsubstantiated rhetoric and devoid of factual evidence rationalizing a new rule imposing unnecessary regulatory burdens on investment advice.

Rather than explain why the rule is necessary, the President demonized and joked about the insured retirement industry and our products to justify a misguided and previously failed investment advice regulation. Worse, the President disparaged our industry and its workers by inventing a link to his efforts to fight "junk fees." In fact, there is no mention of that term in the 495 pages of the new regulation he announced.

The insured retirement industry champions workers and retirees and has long sought bipartisan policies to strengthen financial security. We aim to do this by expanding retirement saving opportunities and facilitating protected lifetime income solutions to secure a dignified retirement for workers, retirees, and their families. Our products uniquely deliver guaranteed retirement income, similar to the defined benefit pension plans available to many union and government workers.

Millions of workers and their families have chosen to purchase annuities to protect their retirement assets and provide a stream of guaranteed lifetime income. These individuals, whose median household income equals \$70,000, rely on our industry's innovative products to meet their accumulation, income, and asset protection needs. No doubt, many of them were also not amused by the President's jokes and misinformation made at our industry's and at their expense.

Financial professionals – dedicated, caring women and men – work daily in communities across the nation to provide tailored financial strategies and products that serve their clients' best interests. Consumers should be able to choose the financial professional that best meets their needs and feel protected under a system of rigorous regulation and enforcement. This system exists today under federal and state law.

The President's proposed fiduciary rule will harm the very consumers he wants to help and deepen the nation's retirement crisis by limiting access to sound financial advice. A similar regulation in 2016 by the Obama-Biden Administration caused 10.2 million retirement account holders with \$900 billion in savings to lose access to their financial professionals.

A study by Quantria Strategies, LLC for the Hispanic Leadership Fund found that reinstating that rule would increase the wealth gap for Black and Hispanic Americans by 20 percent when looking at accumulated IRA (individual retirement account) savings alone. Thankfully, a federal court vacated that rule in 2018.

IRI will [fight this latest proposal](#) as tenaciously as we fought and defeated the 2016 rule.

We are committed to protecting the rights of workers, retirees, and their families to ensure that they are not deprived of access to retirement savings strategies, choice of products to execute those strategies, and the right to choose their financial advisor on terms that best fit their needs.

President Biden and the Department of Labor showed a fundamental misunderstanding of how the insurance industry and annuity products work for the benefit of consumers. As always, IRI stands ready to provide education and information that fosters a greater understanding of our industry, its mission, and its products to policymakers who share our commitment to retirement security for all.



**ATTACHMENT 8**

November 2023

IRI List:

"What They Are Saying About  
President Biden's DOL Fiduciary Rule Proposal"



List of articles from publications that have reported on President Biden's announcement of a DOL proposed rule entitled the "Retirement Security Rule: Definition of an Investment Advice Fiduciary".

Wall Street Journal (subscription required) - [Biden's 'Junk Fee' Crackdown Comes for Retirement Advice](#)  
 CNN Online - [Biden administration wants to kill 'junk' fees in retirement investments and advice](#)  
 USA Today - [Biden wants to protect your retirement savings from junk fees? Will it work?](#)  
 Reuters - [New Biden target in junk fee crackdown: retirement advisers](#)  
 Barrons - (subscription required) [Annuity Trade Group Vows to Fight Biden's Fiduciary Proposal](#)  
 Barrons - (subscription required) [Biden Wants to Make This Big Change to IRA Rollovers](#)  
 Barrons - (subscription required) [Advisors Face Potential Regulation of 'Junk Fees' and Conflicts of Interest in Retirement Planning](#)  
 Barrons - (subscription required) [Fiduciary Rule Déjà Vu: Biden's New Battle Over Retirement Advice Feels Very Familiar](#)  
 Yahoo Finance - [How retirement advice morphed into a decade-long political fight](#)  
 MarketWatch - [Biden's latest fiduciary rule proposal has many critics — here's why](#)  
 Investment News - [DOL takes aim at 'junk fees'](#)  
 Investment News - [Biden criticizes advisors who prioritize their pay over clients' returns](#)  
 Investment News - [The insurance industry really doesn't like the DOL's proposed rule](#)  
 Think Advisor - [Critics Take Aim at New DOL Fiduciary Rule](#)  
 Bloomberg Law - [Biden 401\(k\) Fiduciary Rule Angers Precursor's Wall Street Foes](#)  
 The Messenger - [Biden Proposes New Rule to Crack Down on Retirement Investment Advice Loopholes](#)  
 Plan Adviser - [DOL Proposal Would Subject Rollovers and Annuity Sales to ERISA](#)  
 Plan Sponsor - [New House Speaker Mostly Unknown to Retirement Industry](#)  
 Plan Sponsor - ['Important Step' or 'Out of Touch'? Reactions to DOL Proposal Run the Gamut](#)  
 Ignites - [DOL Fiduciary Rule's Release Expected Tuesday](#)  
 Ignites - [Industry Groups Voice \(Big\) Apprehensions About DOL Rule Proposal](#)  
 WealthManagement.com - [New DOL Fiduciary Rule Cracks Down on 'Junk Fees'](#)  
 401k Specialist - [DOL Fiduciary Rule Released; Industry Reaction Pours In](#)  
 401k Specialist - [Biden: DOL Fiduciary Rule is a Further Crackdown on 'Junk Fees'](#)  
 Insurance News Net - [All eyes on the DOL fiduciary rewrite](#)  
 Insurance News Net - [Rollovers, exemption 84-24 among areas targeted in new fiduciary rule](#)  
 Insider - [The Biden Administration wants to close a retirement savings 'loophole' that could be costing you 20% on your investments](#)  
 Plan Adviser - [Safeguarding Proposal Remains Unpopular in Investment Industry](#)  
 Financial Advisor Magazine - [Financial Trade Groups Balk At Biden's 'Junk Fees' Language](#)  
 Financial Advisor IQ - [Trade Groups Slam New DOL Proposal and Biden's 'Junk Fees' Take](#)  
[President Biden Proposes Retirement "Insecurity" Regulation](#)  
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Chairman GOOD. Thank you, Mr. Berkowitz. Under Committee Rule 9, we will now question witnesses under the Five Minute Rule. I will wait to ask my questions at the end, and therefore, recognize Mr. Walberg from Michigan for 5 minutes.

Mr. WALBERG. Thank you, Mr. Chairman, and thanks to the panel for being here. This is an ongoing discussion with all sorts of changes and changes in stance, and I am sure that since 2010 DOL's attempts to change the definition of an investment advice fiduciary have created costly and constantly shifting landscape for all of us.

Mr. Berkowitz, can you discuss the costs and confusion the industry and the retirement investors have faced due to DOL's shifting stance in the fiduciary status?

Mr. BERKOWITZ. Thank you for that question. Yes. Look. We have had a situation here that is been going on now for a decade and a half, basically. We have had fits and starts where the Department has put out a proposal, withdrew the proposal, came back 5 years later with an even more stringent proposal, gotten themselves in Court after finalizing that rule, have that rule overturned.

Took another stab at in 2020 with rules that actually did go into effect and are working as designed. Now, just 2 years, 3 years later, are again looking to change the rules of the road. Along the way we have had SEC directed by Congress to study this issue of what standards should apply. Studies were done, decisions were made by the SEC about what they should—how they should regulate the conduct of financial advisors.

The NAIC has responded as the Commissioner Ommen referenced earlier, and adopted a very strong regulation concurrent with what the SEC did with regulation best interest. Moving goalposts constantly does not allow for the situation to settle, for firms to say okay, when you understand our responsibilities, for advisers to understand their responsibilities, to adapt their practices appropriately, and to be able to then make changes, and implement those, and then follow through on them.

Give regulators time to examine those. At this point, the examination of whether these rules are working or not, is still ongoing. We believe that it is. Everything we are hearing is that it is working, but that needs to continue. Changing the rules of the road those analyses are complete makes really no sense and will just create more confusion along the road.

Mr. WALBERG. Yes. It seems that a bobblehead mixed with a whack-a-mole climate is not helpful. Mr. Roberts, since U.S. Court of Appeals for the Fifth Circuit vacated the 2016 Fiduciary Rule, a new framework governing the standard of conduct of financial professionals has been put in place.

The Security and Exchange Commission has implemented a regulation's best interest standards as has been discussed. The DOL has implemented a new proposed transaction exemption, and the National Association of Insurance Commissioner's Best Interest Rule has been adopted in 42 states, as was mentioned.

How have these new rules affected the regulatory landscape, and could you comment on whether the new regulatory framework is working?

Mr. ROBERTS. Thank you for your question. I would be happy to. You know, the facts recounted in your question evidence the fact that there has been tremendous forward progress in enacting appropriate standards of conduct for investment professionals, including investment professionals who are compensated on a transaction basis, and work for broker dealers and insurance agents.

Both industries are subject to a best interest standard of conduct. That is a tremendous forward momentum in the consumer protections that are available to protect retirement savers today.

Mr. WALBERG. Yes. Appreciate that. Commissioner Ommen, did DOL work with the states to develop the proposed Fiduciary Rule?

Mr. OMMEN. They had some very limited contact with some of our full-time staff, but no, nothing substantive was every discussed.

Mr. WALBERG. Nothing significant.

Mr. OMMEN. The answer to that question is no. We believe that really, it would be important to have those discussions to make sure that the regulation, as it moves forward, it would be complementary of what is happened at the SEC as well as the states.

Mr. WALBERG. Yes. The coordination is so important on this, especially since we are talking about people who are vulnerable. They do not know what they are doing. They just want the outcome to be good. Do you have any other concerns with the way DOL has handled the development and rollout of the proposed Fiduciary Rule?

Mr. OMMEN. Yes. I mean the support for their rulemaking really in a large part, was to discredit the work that was done at the State level under the NAIC's Best Interest Rule—

Mr. WALBERG. To discredit—

Mr. OMMEN [continuing]. And frankly that was based upon unsupported speculation because they never spoke to us.

The rules have dramatically changed. We are in the midst of implementation reviews and enforcement, so you would think that before they started to make those sorts of speculations about the meaning of our rule, they would speak to the people who drafted it.

Mr. WALBERG. You would hope so. Well, I see my time is expired. I yield back.

Chairman GOOD. Thank you, Mr. Walberg. We will now recognize Mr. Norcross from New Jersey for 5 minutes.

Mr. NORCROSS. Thank you, Chairman, and to the leadership for holding this important hearing. This in many ways is personal for me. I grew up and became an electrician and was blessed to be able to work for the IBEW for close to 45 years. The last 17 of which I worked as the Assistant Manager.

As part of my duties, several times a week we would have members come in with a smile on their face into our office. You knew that smile because they were coming in to retire, to sign the papers, to start that part of life. They worked hard. They played by the rules, and they wanted to be able to retire with dignity.

Certainly, when we see that, a conversation with myself, as a Representative, so important because they get so much information on how they should invest their money. We would truly share with them the experiences of many other members. Well, the idea of having a member come in and hear a story where, like you, Mr.

Peiffer, he was sold a bill of goods, and he walked away with nothing.

Now that was over a dozen years ago, but the pain is still there. We have been at this for close to a decade. Where we were 10 years ago, and where we are today, is a very different world. The industry has come a long way. Are we perfect? Not, no we are not. The idea of understanding that, and anecdotally, there is always going to be those bad players out there no matter what we do.

The idea of not being able to retire because somebody ripped you off, it is just heartbreaking. We all can see that. The idea that many of these things, and this is a highly complex issue, and I want to applaud Mr. Walberg. We worked together on many of these issues over the last few Congresses, talking about annuities, and having the ability to put in a qualified defaulted, investment alternatives.

You would read somewhere that the idea of having fixed income through an alternative, or what many people would look at as an annuity, I think the baby is going out with the bath water, so I implore us to work together to get this thing right. I cannot tell you how important it is. Certainly, many of the folks that I have worked with my whole life are very much in favor of this.

I do not want the baby thrown out with the bath water because, historically, less opportunities for those who really need advice because the industry pulls back for fear that they are going to be sued. I want to start out, Mr. Berkowitz, when you look at some of the issues that are before us concerning annuities, give me your view on where you think they are in terms of what would fall into the Fiduciary Rule.

One of the concerns I had is back then if I was a business agent today, would I be considered under this rule a fiduciary?

Mr. BERKOWITZ. Thank you for that question, Congressman, and yes, I do think that there is a risk that under this rule in that capacity you would have been subject to fiduciary status in the course of performing those duties. Annuities are a product that can be used if properly used, can sustain someone through their retirement years to ensure that they do not run out of money, to ensure that they do not get to that zero dollar staring at them in their account balance, when they still have life left to live.

By providing a regulation such as this that makes it harder to make those products available. You are hurting the very people that are supposedly being helped here. What we think is the regulation—the regulatory system needs to be designed to ensure that if you are making a recommendation, you should have to act in your client's best interest.

The SEC has done that. The NAIC and the State insurance departments are doing that. It is unnecessary at this point for the Department of Labor to layer on additional obligations. Now if you—

Mr. NORCROSS. I have 45 seconds, so I really appreciate. I want to give Mr. Peiffer an opportunity to chime in here because the idea of where we are 10 years ago, where we are today, please.

Mr. PEIFFER. Sure. I think we have made some progress. However, it is not enough. There are still big, gaping holes in the regulatory system. Reg BI, for instance, does not cover advice to plans.

Reg BI does not cover advice to annuities. I am not saying you cannot sell annuities to a retiree, that is not what I am saying.

I am saying that it should be governed by a good, solid fiduciary standard like the DOL has proposed, rather than the Model Rule, which does not even count compensation as a conflict. If compensation is not a conflict, what is? It is directly related to the investor savings. The more the compensation to the advisor, or the insurance agent, the bigger the surrender period, the bigger cost to the investor.

Mr. NORCROSS. Thank you. Unfortunately, my time has expired. I yield back.

Chairman GOOD. Thank you, Mr. Norcross. I will now recognize Mr. Allen from Georgia for 5 minutes.

Mr. ALLEN. Thank you, Mr. Chairman, and thank you for this timely hearing based on this DOL ruling. Obviously, all of us believe saving for retirement is crucial for American families, and access to professional financial advice should not be hindered by burdensome overregulation.

However, the Biden Department of Labor has recently proposed fiduciary rules, nothing more than a recycled Obama era disaster. It does more harm than good to the very people it is claiming to protect and has American retirees and savers. We don't just have anecdotal evidence that this will lead to decreased access to financial advice for Americans, but actual data is shown by an almost identical rule issued by DOL in 2016, before the Fifth Circuit Court—Fifth Circuit vacated the rule in its entirety in 2018.

A Deloitte study shows that the 2016 Rule limited or eliminated financial advice to 10.2 million accounts. Both sides of the aisle urged DOL not to reduce access as expressed in a 2015 letter from 96 House democrats, and a 2023 letter from Senate democrats showing their concern. This precisely why I plan to introduce a congressional Review Act, a joint resolution of disapproval on the DOL's Fiduciary Rule as soon as its finalized and transmitted to Congress.

Commissioner Ommen, Congress passed Secure 2.0 to encourage retirement savings. Could you outline how DOL's fiduciary proposal could have the opposite result, and that is do you think the proposal will decrease access to retirement savings like the 2016 Rule did? Please explain.

Mr. OMMEN. Yes. I represent—yes, I do fear this regulation will have the opposite effect of the intent of the Secure Act. The numbers show that between now and 2027, 4.1 million Americans will be turning 65 every year. That is 11,200 a day. The median household for earners here in the U.S. is \$63,000.

It is important to know that the median income among annuity owners is \$76,000. These are products that really are targeted to provide retirement security for individuals that are not wealthy. These are middle-class and lower middle-class individuals that are planning for their future.

Yes, it is our view, and in fact we took those issues into consideration as we looked and studied whether a fiduciary only approach makes any sense at all. We do view that—we are interested in working with you to try to advance that, closing that retirement gap—

Mr. ALLEN. Exactly.

Mr. OMMEN [continuing]. We believe that the DOL's rule is going in the opposite direction.

Mr. ALLEN. Yes. We do not need to discourage it. Mr. Roberts, the U.S. Court of Appeals for the Fifth Circuit Court, which Mr. Walberg brought up, vacated the 2016 Fiduciary Rule. The Court explained that under ERISA, fiduciary status may only be imposed when there is a special relationship of trust and confidence.

How does the current fiduciary proposal address this issue, and does the fiduciary's proposal approach comply with the Fifth Circuit's decision?

Mr. ROBERTS. How the Department of Labor's current proposal could possibly be consistent with the Fifth Circuit's ruling on the prior proposal is a real head scratcher. I do not see it. The Fifth Circuit said very clearly, very clearly, that when Congress enacted ERISA, it did not intend to impose fiduciary standards on persons like stock brokers or insurance agents who are professional sales people.

It distinguished the conduct standards applicable to salespeople from the conduct standards applicable to fiduciaries, like trustees. Trustees is what they were talking about, and folks who function like trustees, who are in a relationship of trust and confidence. I see absolutely no consistency between this current proposal and the Fifth Circuit's Rule.

Mr. ALLEN. Mr. Berkowitz, obviously this is in contrast with SEC regulations, best interests, and NAIC's interest standards. Who would stand to benefit or profit from this rule? I mean we are looking at more litigation, trial lawyers? What is the deal here?

Mr. BERKOWITZ. Well, look. Thank you for that question, Congressman. I think that their—the intent here we want to assume the best of intentions from the Department, but in reality, it is the consumer who will suffer the most. Who will benefit? That remains to be seen, but I can assure you that it will not be the consumer.

Mr. ALLEN. Yes. Great. I yield back.

Chairman GOOD. Thank you, Mr. Allen. We will now recognize Mr. Courtney for Connecticut for 5 minutes.

Mr. COURTNEY. Thank you, Mr. Chairman, and like some of us, we have been through this rodeo for a while, and—but I thank the witnesses for your input here today. I have to just say at the outset, I mean I understand painfully that there is real honest disagreements in terms of the scope of the rule, the language of the rule, which I think is fair game.

I think everybody has a good, I think, point to make sometimes in terms of just, again the way it was drafted, and we went through this as I said once before. I have to say, Commissioner, I was reading your testimony on page 5 where you said that I would be remiss if I did not also express my concerns that DOL has overstepped its statutory authority in promulgating this proposed rule.

I mean to me that sort of gets to a much more almost ideological question about whether or not DOL really should be even involved in this. I mean, with that logic, the 1975 Five Part Rule really should be like repealed and eliminated. I just wanted you to clarify.

I mean, do you really think that DOL should completely absent itself, and get rid of the 1975 Rule?

Mr. OMMEN. No. That is not.

Mr. COURTNEY. Well, then why did you put that in your testimony that DOL has no role there. Of course—they are an agency. Administrative law from every department, from the Department of Defense to the Department of Education, they issue regs constantly, and this is well within the scope of ERISA in terms of DOL's authority.

Again, I just—I mean I appreciate the fact that you say you do not want to repeal the 1975 law. I think that is very inconsistent, honestly, with the language of your testimony. Mr. Peiffer, again, just to sort of talk about a few sort of, you know, comments that have been made here, which really have just sort of created my opinion of false equivalency between the 2011 proposal and this proposal.

Again, if you could just walk through again, the fact that this is not like the 2011 proposal was put through a copy machine, and it is back before us again.

Mr. PEIFFER. Absolutely not. It is a totally different rule with a much, much more narrow, more of a rifle shot focus. The earlier rule made a lot of people fiduciaries, and it subjected even things like websites and robo-advisors to fiduciary standards.

That turns out to not—the Fifth Circuit, overturned that. They went back to work, and they sharpened their pencils and really narrowed the rule. Now, who is a fiduciary? It is someone who has discretionary authority over an account, meaning they can trade in your account.

Someone who calls themselves a fiduciary, and someone that as a regular part of their business provides advice based on the particular needs or individual circumstances of a retirement investor—and gives advice that may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement saver's best interest.

That has a narrow standard where we had a very broad standard before. Also, the previous rule contained a contract requirement, and that I think was a lot of what the Fifth Circuit had a problem with. That is not in this rule.

Mr. COURTNEY. Well, I think that is important to note that people should take a deep breath here, and just sort of recognize you know, acknowledging the role of Insurance Commissioners again, our Commissioner in Connecticut, Andy Mays, I respect and really admire to the highest degree.

Honestly, I think he understands. I do not want to put words in his mouth, but I mean I think it is coexistence. I mean, it is joint jurisdiction. I mean I think you did allude to that at least in your testimony. Both states and the Federal Government have a role here, and it is a question of just getting the right balance to make sure that we are not seeing these horror stories, like my friend Mr. Norcross just described.

They are still happening, okay, and they should not happen. That is really what I think we should, you know, hopefully be able to have consensus that that is a problem, a real problem, and that we should try and figure out a way to solve it without again, just you know, going through wash, rinse and repeat, in terms of just,

you know, handcuffing the Department's role, which I think is legitimate.

I think that that is what you know when ERISA was passed in 1975, you know regs were issued. That was consistent with the intent of Congress. Again, we should all have plenty of time to debate and talk, and there are comment periods, and all that built into the system, but to sort of shut it down and just go right back to the status quo.

Again, the NAIC has put out its proposals, that is great. It does not have all 50 states, so it is leaving some people out. The fact of the matter is it really—it is not the Ten Commandments, and we really need to sort of work together to get the best product using both people of good will at both levels of government working together. I yield back.

Chairman GOOD. Thank you, Mr. Courtney. I now recognize Mr. Burlison from Missouri for 5 minutes.

Mr. BURLISON. Thank you, Commissioner Ommen. We should all be able to agree that the Department of Labor is changing their position on what it means to be an investment advice fiduciary three times in 3 years, is onerous. The costs and the confusion that goes along with this are clearly not in the best interests of either the providers, or the individual savers or retirees.

What do you see as the biggest concerns with the way that the Department of Labor has developed this new proposal?

Mr. OMMEN. Well, there were just comments from one of your fellow Subcommittee members about that lack, or the encouragement to have that communication. There was no communication, in my view, with regards to the development of this rule.

I have been doing enforcement for a long time. I worked in the Missouri Insurance Department, as well as served as an Assistant Attorney General, prosecuting scam artists. I can also tell stories of people that were ripped off by insurance agents and securities agents.

For my perspective, what we need to make sure is when regulations are put into place that they do not punish the well-intentioned individual, the investment advisor, the fiduciary, frankly, the insurance producer who is doing the good work. In my experience, that has been the vast majority.

The Department of Labor seems to just be overreaching with their view that there should be a fiduciary mandate. Commission structures and transaction based are often the most cost-effective way by which middle Americans can receive good advice. With the State, we focused on making sure that the advice is solid, that it has put the interests of the consumer first.

My criticism of the DOL has really been the lack of opportunity to sit down and have some of the recent discussions. As for the comment period, I got my comments in. We worked through the holidays. It was very abbreviated in my perspective, in trying to meet those requirements.

To be frank, I do not think the DOL was open for discussions, but that would frankly be—

Mr. BURLISON. It was over for what, 39 days?

Mr. OMMEN. Something like that. Again, this is through the holidays, so you know, it was basically all due right after the new year.

Mr. BURLISON. Your responsibility, let us talk about the state's role in this. We assume that we have to have all the answers on the Federal level, but the State plays a role in not only managing the activities, the licensing, everything that goes into the people that are able to do business in their State.

Mr. OMMEN. Yes. We begin our process in revising our standard to a best interest standard before the Court struck down the DOL Rule. We looked at a fiduciary only approach, but we worked together, and there are—it is true, there are 42 states that have adopted this, but I expect by the end of this year we will be approaching 50.

I know it is moving in those states that have not yet adopted it, so I am very confident, certainly by early 2025 we will have all jurisdictions. Yes, I mean these—the efforts that went into this were really designed to ensure that the consumers had choice.

In Iowa, we have a lot of a—we have a very large agriculture business. The distribution for annuities, for self-employed individuals, and those that are in farming, is very different than the distribution that you might find in some of our urban areas. It is really important for that distribution to be available for all middle Americans, again not just for those that are able to afford the fees associated with a fiduciary status.

Mr. BURLISON. Yes. I can tell you as a former investment advisor, you have—you feel the weight. I will say this to you, Mr. Peiffer. You feel the weight of the world on your shoulders when you sit across from a retiree, and you are trying to help them navigate the path to make sure that they are able to make it all the way to end of life without running out of money, right?

That burden, and that weight weighs very heavy on investment advisors, and so to suggest that—and within that industry the penalties are severe. If you do an improper job, you will lose your business. You could lose your business. If you do an improper job, you could be sued by Mr. Peiffer and his law firm.

There is currently a lot of—that is currently already in place to disincentivize the bad actors, and to—and I think that there is already innately a benefit. If you do a good job more business follows.

Mr. OMMEN. Again, in Iowa, I regulate both securities transactions and insurance, so I have the responsibility of imposing that sort of punishment, discipline on investment advisors, insurance producers, insurance companies, across securities broker dealers across those various means of which these products are distributed.

To be frank, I believe that the standards matter a great deal, but more important than that is the enforcement. I think that is what united us at the NAIC is that we improved our rule.

Chairman GOOD. I am sorry. The gentleman's time has expired, so I need to—

Mr. OMMEN. Thank you.

Chairman GOOD. Thank you, Mr. Burlison.

Mr. BURLISON. Thank you.

Chairman GOOD. I now recognize Ms. Wild from Pennsylvania for 5 minutes.

Ms. WILD. Thank you very much, Mr. Chairman. Well, I am really glad we are having this hearing. I cannot think of anything more vital to a large sector of Americans, working Americans, than our



retirees. In my view, retirement savings and investment should be sacred. I suspect the folks sitting behind the witnesses from AARP would agree with that, that retirement savings are really essential to dignity for our seniors and people who have worked a lifetime.

I am deeply concerned with opposition to a rule that I think really goes a long way toward improving life for our retirees. Mr. Peiffer, thank you so much for your excellent testimony. As I said, I think workers and retirees, and even employers who offer the retirement plans deserve to receive really sound investment advice that is in their best interest, and everybody has used the magic words about best interests.

Many advisors, I want to hasten to say are honorable professionals. This is not a diss on financial advisors. I was married to one once, and he still manages my retirement money and investments, so but I will say he happens to be fee-only, and I think that is an important distinction beyond the scope of this hearing.

The loophole ridden rule dating back to the Ford administration allows unscrupulous advisors to put their interests ahead of their retirement clients and provide what's known as conflicted advice. We have seen and we have heard that it costs our retirees billions of dollars of losses, and of course, leads to a lot of heartbreak, and harm to them and their families.

I think it is really important to note because we have been hearing a lot, and we are going to continue to hear a lot. We read in all the testimoneys about these studies or surveys that have been done, and I think it is really important for people listening to understand that these are not neutral or objective studies. They are generally done by large trade associations representing brokers and traders.

These are not studies that are done by, let us say, AARP, or other groups that represent retired citizens. These are literally lobbying organizations for folks who make money on this, and there is nothing wrong with making money. We know that in this country, but it is wrong to make money at the expense of somebody else, in my view.

Mr. Peiffer, you have presented some compelling real-world examples of people who have been harmed by the status quo. I am particularly concerned about the small dollar investors.

Mr. PEIFFER. Yes.

Ms. WILD. Can you just pick up at that point, and tell us what the ramifications are for people who are not born to wealth, or born with a silver spoon in their mouth?

Mr. PEIFFER. Absolutely.

Ms. WILD. Thank you.

Mr. PEIFFER. Small savers are—they are the most susceptible to conflicted advice. They can least afford to have conflicted advice, and you hear about these studies, and I am glad you brought that up because you hear about study after study, and they are all industry funded studies.

None of them are statistically significant, random samples, or anything along those lines. What we do know is what happened after the last DOL rule. When the industry came in here and all over the place, and saying that the sky would fall, and no one would be able to get advice. Well—

Ms. WILD. You mean that the financial professionals would lose money?

Mr. PEIFFER. Yes.

Ms. WILD. They would not be able to make as much?

Mr. PEIFFER. Yes. Well, and that they would not be able to serve small savers, but that turned out not to be true.

Ms. WILD. I am going to stop you for 1 second.

Mr. PEIFFER. Okay.

Ms. WILD. I am really sorry to do this, but I think it is important for people to know that these studies, for instance, the SIFMA 1.

Mr. PEIFFER. SIFMA.

Ms. WILD. That says it was published by Deloitte: was not written by Deloitte; they did not verify, validate, or audit the information; they were simply the conduit for a broker dealer trade association to prepare this report, right?

Mr. PEIFFER. They were a scrivener.

Ms. WILD. They were scriveners. The same thing with the 2021 Hispanic Leadership Fund. That one actually, not only was done by a group of people in the profession, but it does not even apply to the DOL Rule. Is that right?

Mr. PEIFFER. That is correct. It examines the last rule, not this one.

Ms. WILD. Okay. All of them, the NAIFA, the NAIFA survey, the FSI Oxford survey, all of them were done by trade associations for brokers and dealers, and that is what is being relied upon by the other witnesses in this hearing and by my colleagues across the aisle to justify trying to defeat the DOL Rule. Is that right?

Mr. PEIFFER. That seems correct.

Ms. WILD. Thank you. With that, I yield back.

Chairman GOOD. Thank you, Ms. Wild. Now we will recognize Mr. Banks from Indiana for 5 minutes.

Mr. BANKS. Thank you, Mr. Chairman. Mr. Berkowitz, as you know the Obama administration tried a very similar rule back in 2016. I want to read a few quotes from actual retirement advisors back then. One said, "After 36 years in the investment business, this proposed rule will force me to fire all of my clients who do not have substantial retirement assets for investment."

Another one warned, "This minimum fee level will be a detriment to the creation of potential plans for many small businesses, and likely will result in the termination of plans by existing clients. Why in the world would the Biden administration try to bring back a regulation that would do that?"

Mr. BERKOWITZ. Thank you for that question. That is a great question. It is a head scratcher for me why they are trying to do this when we have not—we are not looking at the status quo here. We have heard references to the status quo.

The status quo changed over the last 10 years, last 5 years with the SEC and the NAIC, and the Biden administration, and the Department of Labor are completely ignoring that, and diminishing the value and the viability of those regulations to justify this attempt to bring more people under the Department of Labor's jurisdiction.

When, you know, we heard earlier from the Representative Courtney, you know, he wants there to be a balance between regu-

lation by the states, and regulation by the Department of Labor. Well, that is what we are talking about here. The balance is when there is a relationship of trust and confidence that rises to that level, where ERISA fiduciary status should kick in, then the Department of Labor is in place to regulate that.

Short of that, the SEC and the NAIC and the State regulators are there to serve in that capacity to ensure that the advice is being provided in that client's best interest. This rule is simply just not needed. It is a solution in search of a problem.

Mr. BANKS. I mean am I wrong? I mean it seems that this especially targets small businesses and working-class families that are trying to save something to pass on to the next generation. I mean why target them? Why would the Biden administration be hell bent on targeting working class families?

Mr. BERKOWITZ. I would like to think that they are not targeting them, but that they are the—they are going to be the victims. Whether it is intentional or not. Those are the people. Those are the small businesses. Those are the small savers that are going to find themselves on the outside looking in when it comes time to plan for retirement, and figure out how to best get to, you know, a secure and dignified golden years.

Mr. BANKS. Do you think this rule will result in small brokerage firms having to cut their services, and making it harder for them to do what they do in advising middle-income, middle-class families?

Mr. BERKOWITZ. Absolutely. Really what it comes down to is what we heard, what we talked about earlier, the difference between a best interest standard and a sole interest standard. The folks that you are talking about provide advice on a commission basis. They get paid only if they complete a transaction.

They have a vested interest in completing the transaction. That vested interest does not prevent them from acting in the client's best interest, but it does mean that they cannot realistically meet a sole interest standard. They cannot completely disregard their own interest because they only get paid if they complete a transaction.

In order to avoid that, they are going to have to either transition to a fiduciary model, which means they are going to have to raise their account minimums, and NAIFA just did a survey of their members, whether it is statistically viable or not. I am not a statistician, so I cannot speak to that.

I can tell you that they found from their members that right now less than 30 percent have account minimums, and if this rule goes into effect that is going to go up to over 70 percent. These are sizable account minimums, six figure account minimums that the average American simply cannot meet. People are going to lose access, and it is those small balance savers that are going to be the most hard hit.

Mr. BANKS. It screws the people who need the help the most. I mean it makes no sense to me, but what type of—I mean in that regard, I mean if—if brokerage firms are cutting services, or they have to increase their fees. I mean dumb this down and play that out. What does that mean for the client?

Mr. BERKOWITZ. It means the clients, just like we saw back in 2016, are going to be getting letters in the mail from their financial institutions saying we are so sorry, but we can no longer service your account and provide financial advice or guidance, or assistance. If you have transactions that you would like us to execute you can submit those, but we cannot—we cannot serve you in the way of helping you figure out what to do.

Mr. BANKS. Yes. I have said it many times before. This administration is at war with working-class middle-income families in this country who right now are finding it harder than ever to save, to make ends meet, and this is another example of it, right? I mean this is pure insanity. With that, I yield back.

Chairman GOOD. Thank you, Mr. Banks. Now I will recognize Ms. Manning from North Carolina for 5 minutes.

Ms. MANNING. Thank you, Mr. Chair. Thank you to our witnesses for being here today, and I want to associate myself with a comment that was just made by one of my colleagues, Representative Wild, who said retirement savings should be sacred. They are benefits that people have earned, they are critical to allow seniors to live in dignity and for many people the most critical issue they grapple with is ensuring that they do not outlive their retirement savings.

I can tell you that is something that my 91-year-old father is currently grappling with. For most people who are not financial experts, they must rely on retirement advisors to help them—meet that critically important goal. Mr. Peiffer, I want to thank you for your thoughtful testimony today.

Often in hearings, we hear from experts who only share statistics and figures that are hard for us to understand, and certainly difficult for people who watch these hearings to understand. They may be important to hear, but it is also important for Members of Congress to fully understand who is being harmed, who is being taken advantage of, who are the victims of the kinds of rules that we are talking about.

You did us a service by sharing these compelling stories. Through the stories you have shared there is a common theme of hard-working people who played by the rules, did everything right, only to put their trust in bad advisors who wronged them. Now their so-called “golden years” are not as golden as they were hoping they would be.

I assume you would agree with me that that is the theme of those stories?

Mr. PEIFFER. That is the theme of the stories, and that is what we see every day, are these people that are just absolutely shattered, and the loss of dignity is almost as bad as the loss of the money, frankly.

Ms. MANNING. The humiliation of having known that you relied on someone you should not have relied upon. I know it is too late for the Department of Labor’s Retirement Security Rule to help the folks that you talked about, but do you think the rule would have spared them harm had it been in effect back when they were investing their retirement savings?

Mr. PEIFFER. I absolutely think that they would have been helped by this rule.

Ms. MANNING. Great. I want to focus the rest of my time on clarifying a key point. We have heard a lot of talk about the SEC's regulation Best Interests, and the NAIC's Model Rule, and it seems that some of my Republican colleagues believe that these would be fully sufficient to protect retirement savers.

I disagree. There is one big gap, at least one big gap, in the SEC's Reg. BI and the NAIC's Model Rule, and that is when it comes to advise to retirement plan sponsors. Can you talk about that for a minute?

Mr. PEIFFER. Sure. As of now, advice that are given to retirement plan sponsors, people that are electricians that employ other electricians, people that are plumbers that employ other plumbers. People that are even that are accountants, that employ other accountants. Employers, the advice to them on their plan, meaning what the workers can choose from, is not covered by a fiduciary duty. I cannot think of anything more important to be covered by a fiduciary duty because it impacts not just that person, but their workers.

For instance, if someone was giving me advice, and it was on securities, it might be covered by Regulation BI. In my capacity, as the owner of my law firm, it would not be covered by Regulation BI.

Ms. MANNING. Do most people assume when they go to a retirement advisor that that advisor has their best interests at heart?

Mr. PEIFFER. Absolutely. I see it every single day. We heard a little bit from Mr. Roberts about professional salespeople. There is not a single person that has ever come into my office that said, you know, this guy was a professional salesperson, and introduced himself as such.

These people trust their advisor, and they do it because they were induced to.

Ms. MANNING. According to the Research and Financial Services Firm Morning Star, thanks to the Retirement Security Rule, workers covered by small plans would save over 55 billion dollars in fees in the first 10 years, and over 130 billion dollars in the subsequent 10 years.

Now, there has been a lot of talk about different rules and regulations this morning, and in the testimony, but I think we need to keep our eye on the ball. The existence of these rules is no substitute for the DOL's Retirement Security Rule. In fact, gaps still exist making the DOL's Retirement Security Rule essential to fully protect workers and small businesses. All I can ask in my remaining 7 seconds is—is that right, Mr. Peiffer?

Mr. PEIFFER. That is correct.

Ms. MANNING. Thank you very much, and I yield back.

Chairman GOOD. Thank you, Ms. Manning. We will now recognize Dr. Foxx for 5 minutes.

Mrs. FOXX. Thank you, Mr. Chairman, and I want to thank our witnesses for being here today. Commissioner Ommen, the proposed Fiduciary Rule attempts to regulate sales of annuities to retirement investors, which is currently regulated by the states. The Department of Labor claims its fiduciary proposal is necessary to fill loopholes and gaps in the regulations.

Is there evidence that gaps or loopholes exist, and are being exploited to harm constituents?

Mr. OMMEN. No, Madam Chairwoman. The answer to that is no. We do not have any data, or actual evidence of harm that there are gaps in the NAIC rules because they are relatively new. That the states have undertaken an implementation examination of all the carriers in the country, but the answer to that question is no. It would be premature to suggest there is any actual data that our rules are inadequate.

Mrs. FOXX. Great. I think you would agree with me that the proposed Fiduciary Rule is a solution in search of a problem?

Mr. OMMEN. I would agree with that assessment.

Mrs. FOXX. Thank you. Mr. Roberts, DOL's constantly shifting regulatory efforts on what constitutes an investment advice fiduciary have created ongoing confusion. How has this uncertainty impacted costs and compliance for retirement products and services?

Mr. ROBERTS. The DOL's shifting positions on this have sent compliance costs skyrocketing. Financial institutions and professionals who have established business models are on a regular basis being asked to re-engineer them, to retool them, to come into conformity with exceedingly complex technical rules and regulations that seemingly appear out of nowhere.

The Department's estimates of the costs in my view, are dramatically understated. There are tremendous systems, programming costs, operational costs, legal compliance costs, and all those costs to some extent get passed through. The cost-benefit ratio of the zigging and zagging that the Department has taken is not productive.

Mrs. FOXX. Thank you very much. Mr. Berkowitz, the Federal Reserve reports that 28 percent of Americans do not have any retirement savings. This Committee worked on a bipartisan basis to draft and pass Secure 2.0, with the goal of expanding retirement savings for the American workforce.

Would DOL's latest proposed Fiduciary Rule undermine the bipartisan efforts of this Committee by reducing access to retirement investment products for low-and middle-income Americans, and if you—please explain your answer?

Mr. BERKOWITZ. Thank you very much, Chair Foxx. Yes. We definitely do believe that this will undermine the objectives and the goals of the Secure and Secure 2.0 regimes. Thank you for your leadership in helping to drive those through Congress and getting those over the finish line.

The Secure Act and Secure 2.0 had numerous provisions that are designed to make it easier for retirement savers to access and use annuities and other protected lifetime income products. They were focused on expanding access, whereas this proposal is focused on restricting access.

Secure Act, for example, established a new safe harbor to provide guidance for plan sponsors that are looking to put annuities in their plans, so that there is greater clarity around the obligations that they have to live up to. There has also been changes in Secure 2.0 to the rules governing the use of longevity annuities, known as qualifying longevity annuity contracts, and many other positive changes.

By changing the rules about who can provide advice to retirement savers by restricting that advice to only those who are willing to serve as fiduciaries, you are going to lose the ability to access the advice that you need to learn how to take advantage of those improvements that were developed through Secure and Secure 2.0.

Mrs. FOXX. Thank you.

Chairman GOOD. Thank you, Dr. Foxx. We will now recognize Ms. Hayes from Connecticut for 5 minutes.

Mrs. HAYES. Thank you. Thank you to our witnesses for your testimony today, and to our friends from AARP, who I see in the audience. Thank you for being here, for amplifying this issue all the time. People expect that if you work hard and save diligently, you can expect to be able to retire with dignity.

The retirement process has gotten substantially more complex since the current rules were designed. Unfortunately, ERISA was enacted nearly 50 years ago and has not been updated since. The five-part test used to determine whether someone is an investment advice fiduciary under ERISA predates the 401K by 3 years and widespread investments in IRAs by more than two decades.

Many will need assistance with retirement, especially if they have limited savings. It takes tremendous trust to provide your personal financial information to someone else and give them control over your future by making investments on your behalf.

Mr. Peiffer, in your testimony you pointed to multiple studies that showed the vast majority of investors, as many as 97 percent, already believe their financial professionals were also their fiduciaries. How would this rule protect those with smaller investment portfolios? In particular, what does it do for investors with limited access to professional financial advice?

Mr. PEIFFER. Well, it ensures that they get good advice. Frankly, the argument that well, the financial services industry is just going to stop giving advice to people if they cannot give them conflicted advice, or rip them off, is offensive to good financial advisors.

It is not borne out by what happened after the last DOL rule. After the last DOL rule, like I said, the industry came in and said that everything is going to fall apart and we are not going to be able to provide advice to small investors. What happened? 82 percent of broker dealers did not reduce their services at all.

When Cetera for instance, the broker dealer opened \$1,000.00 minimum account. They adapt.

Mrs. HAYES. I want to be clear. Many financial advisors are working in the best interests of their clients. In fact, one third of the advisors, including more than 1,500 from my State of Connecticut, voluntarily certified as a fiduciary through the Certified Financial Planners Board. Many fiduciaries are also educators, helping their clients to learn about their savings, their investments, and why certain decisions make the most sense.

Mr. Peiffer, can you also describe how the behavior of unscrupulous advisors can make it more difficult for all professionals to offer the best advice to investors?

Mr. PEIFFER. Sure. If you are living up to a fiduciary standard, say as a CFP, a certified financial planner, and you have someone down the street that can put their interest in making a huge com-

mission over the interest of the retiree of living a long and happy retirement, you are on an uneven playing field.

Mrs. HAYES. Thank you. I believe that regardless of income, Americans deserve access to retirement investments that are in their best interest. We have lots of people who are trying to piece together a retirement, and really rely on the savings that they have put in to be working for them in their best interests.

We are not talking about large investors who have multiple portfolios and retirement is not an issue. It is the people who work every day and put away little by little in anticipation of retirement. This rule is long overdue, an important step toward ensuring that every American can retire with dignity. Thank you all for your time, and for your comments, and with that, I yield back.

Chairman GOOD. Thank you, Ms. Hayes. Now will recognize my good friend from Virginia, Mr. Scott, for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman. Mr. Peiffer, we have had a general discussion. I think it is important to note what we are talking about. Somebody who had \$100,000.00 to invest, and the fees were 1 percent, how would that differ if you got a fund that charged only .1 percent over 10 years?

Mr. PEIFFER. Well, it is an enormous difference, and it is the difference between being able to retire a year early, or not being able to retire, or 2 years early. If you compound that over 20, 30 years of investment, it is a tremendous, hundreds of thousands of dollars in difference.

Mr. SCOTT. If the broker were able to get a higher fee for putting you in a 1 percent fund, rather than a .1 percent fund, and some of these are like S&P 500, so you are getting the same returns, that would be the conflicted advice we are talking about. Is that right?

Mr. PEIFFER. That is right. It does not sound like much when you talk about .1 percent and 1 percent, what is 1 percent between friends? Well, it is the difference between being able to retire or not being able to retire. Down in Louisiana, where I am from, they call that death by 1,000 duck bites.

You just ultimately do not get to where you need to be.

Mr. SCOTT. Thank you. Mr. Ommen, you indicated that 42 states have enacted the Best Interest Standard. How does that differ from the Biden Rule in terms of being able to provide conflicted advice?

Mr. OMMEN. The 42 states that have adopted it is not the top end of that, but I think your question relates to the issues surrounding compensation, and how it is that the states chose to treat compensation. We do believe, as a matter of principle, that compensation of any structure will present conflicts. I mean if it has a fee-based structure, it still can present conflicts. We viewed it as to permit the wide distribution that there would be good and accurate disclosure with regards to conflict states.

Mr. SCOTT. Well, the conflict is that you can be put in a 1 percent fund or a .1 percent fund. If you make more money gouging the client, that has a conflict of interest. You should have put them in a better deal. Is that legal in the 42 states?

Mr. OMMEN. Well, I think what you are referring to now is not necessarily an annuity transaction. It sounds to me like what you are describing is a fund, is a mutual fund, which would be under



the securities regiment, and I as the State insurance regulator also have that authority, but I do not think that that applies to annuities in the same manner.

Mr. SCOTT. Well, Mr. Peiffer, are annuities covered by any of these rules?

Mr. PEIFFER. Well, they would be covered by the DOL Rule, and it is the same deal. The commission paid on annuity, is directly related to how good or bad it is for the investor. The higher the commission, the worse it is for the investor. The longer the surrender period, the higher the costs, and so it is absolutely directly related.

Mr. OMMEN. May I now explain now that I understand.

Mr. SCOTT. The gentleman.

Mr. OMMEN. Our rule does deal with that. It deals with it in terms of the costs associated with that product because often times what you described as fees, are built within the structure of the contract. Under our best interest requirement, that is appropriate and required consideration to make sure that the consumers' interests are first and foremost.

Mr. SCOTT. The broker could not put the person in the 1 percent fund and get a higher commission, rather than the .1 percent fund and get a lower commission?

Mr. OMMEN. Again, sometimes costs—your example again, I would say the answer to that would be no. They should not. Again, some of these contracts have other features, so it is hard for me to give you an absolute answer. What is clear in our rule is that the consumers' interests, including those issues concerning costs, must be primary.

Mr. PEIFFER. It is just not the same standard. Of course, we talk about it being in solely in the best interest of the retiree. Of course, it should be solely in the interest of the retiree. It is the most important decision that any retiree could possibly make. Any person, it is their most important financial decision, and it deserves the protection of the highest duty known to law under ERISA, which is what the DOL rule does.

Mr. SCOTT. Mr. Peiffer, in the last few seconds, what happens to services to be provided, account minimums, and that kind of thing?

Mr. PEIFFER. Well, we have like I said, real world examples after the last DOL Rule and with Reg. BI, and small savers are still able to access financial services advice.

Mr. SCOTT. Thank you, Mr. Chairman.

Chairman GOOD. Thank you, Mr. Scott. We now recognize—

Mr. DESAULNIER. Yes.

Chairman GOOD [continuing]. Mr. DeSaulnier for 5 minutes.

Mr. DESAULNIER. It is an old comedy routine. It is probably appropriate for this hearing. Mr. Peiffer, we have talked, and we have heard about this is a solution searching for a problem. Clearly your experience does not speak to that. I look at this consistent with your opening comments that we are not after a class of people, we are after bad behavior amongst that.

As a former small business owner, it always bothered me that I was competing against people who were not abiding by the rules and were being more aggressive. Could you speak to that a little bit about in your personal experience and professional experience, how there is a problem out there that we are trying to address in

a manner that is very targeted and efficient in terms of a rule-making, the Biden administration Rule.

Mr. PEIFFER. Absolutely. There are a lot of good financial advisors out there that are trying to do the right thing, that live up to a fiduciary duty voluntarily already. There are those that do not put the client's interest first, and this is an extremely narrowly targeted rule that gets at people that call themselves fiduciaries, that have control over accounts, or give advice, specifically on the retirement.

This is not a solution in search of a problem. This is a problem that needs a definite solution, and this DOL Rule gives that solution.

Mr. DESAULNIER. Yes. I was never married to a financial advisor, unlike my colleague, Ms. Wild, but I have heard from friends in my district, and around the Bay area in Northern California. I could see that they are concerned because they are worried about over regulation, especially when it is a small firm, an individual firm.

It is complicated, and they assume the worst. Could you speak a little bit about that again to the targeted, that people who are playing by the rules, dealing with the rules in good faith, which I think we all agree we want for the industry's sake, should not worry about this, and we will be watching DOL if this rule were to be effected and sustained.

I assume it is going to be challenged, as the previous rule was. That this is what we want. We want to get rid of the bad behavior, which if it is done right, and I have concerns about that. I think this rule is if it is done right, it benefits everybody who wants to abide by the rules.

Mr. PEIFFER. I think that is right. I mean there is a lot of onerous rules for lawyers, and nothing makes me more angry than scumbag lawyers that break those rules, frankly, because we do not. They should not, and they make all of us look bad. Every financial advisor should have a duty to put their clients' interests first, especially with something that is so sacred as retirement money.

It is all they got, most of these people. They really, they have this, and maybe they have got a little bit of equity in their house. That is what they have to live out the rest of their lives. That is what they have so they do not have to rely on their children, after a lifetime of hard work and doing the right thing.

Mr. DESAULNIER. The Biden administration, it strikes me—has worked very hard to anticipate this being challenged again. In your opinion, as opposed to some of the comments I have heard that this is just the Obama administration's Rule all over again, it is not.

Mr. PEIFFER. No.

Mr. DESAULNIER. It is very much being mindful of what the Fifth Circuit said and ruled and anticipates another challenge.

Mr. PEIFFER. Absolutely. It is not like the Department of Labor is engaging in rulemaking for the fun of it. They are doing it because they want to address a serious problem, and they want to do it in a serious way that addressed the Fifth Circuit's problems with the rule, and they did that.

They do not have a contract. They do not have a contract requirement in this. It has a much more narrow definition of who is a fiduciary. I think they have addressed the Fifth Circuit's problems.

Mr. DESAULNIER. If this rule were not implemented, what do you see in the near future? We have heard what I would think is fairly hyperbolic language about what might happen if this rule is applied. What do you think if it does not? If we continue this way, is it going to get worse, or just?

Mr. PEIFFER. Well, it is absolutely going to get worse because there is really, the defined benefit pension is going away. Everyone has got to rely on 401K's, and you expect people that were electricians, or plumbers, or even brain surgeons that I have represented, to then become portfolio managers. They cannot do it, and they need advice.

In order for that advice to be good advice, it needs to be non-conflicted advice.

Mr. DESAULNIER. Thank you very much. I yield back.

Chairman GOOD. Thank you to our Ranking Member. Now we will recognize Ms. Bonamici from Oregon for 5 minutes.

Ms. BONAMICI. Thank you, Mr. Chairman and Ranking Member. Thank you for allowing me to waive on to the Subcommittee. This is not a new issue to the Committee. We have talked about it a lot. I want to go to the big picture for a minute here. I am not married to a financial advisor, but in my former work as a consumer protection attorney, I dealt with people, individuals, families, who had invested money based on trust and lost it.

Different situations, not necessarily with a fiduciary rule, but in situations where for example, my clients spent their whole life savings to buy a franchise because the franchisor assured them, and they relied on that, that their franchise would be successful. Situations where people took a second mortgage on their home because they were promised that that would automatically refinance, and then they lost their homes.

Mr. Peiffer, your testimony is really poignant in describing these stories. This is a consumer protection issue, and I am a bit baffled by the argument that I heard on the other side of the aisle that this going to hurt individuals and working families. This is designed to help them.

I know some of my colleagues were not born in 1974, but I was around then, and things have changed since then. It looks very different in the financial market. 401K's did not exist. People like my dad had a pension, and a pension that was going to last their lifetime. It is very different today.

To the extent that workers participate in a retirement savings plan, it is most likely a defined contribution plan, and they have to manage it. Like you said, make investment decisions. This is not to say that people are not smart or that we are looking down on them. These are complicated products.

The difference between a fixed annuity and a variable, there is just a lot of complication in these products that people who do not have the background need to rely on someone they trust. As you said in your testimony, Mr. Peiffer, that most people believe that their advisor is acting as a fiduciary.

The advisors build that trust for a reason because they are holding themselves out to that. I know that AARP study said about 89 percent of people over 50, and one study said about 97 percent. This is the trust that is established with their life savings.

Again, a lot has changed, but we still have the same rule from 1974 when the products and the world was much less complicated. I also want to reiterate that most advisors are doing the right thing. We are not criticizing or saying all financial advisers are cheating their consumer. That is not the case.

There are some who are taking advantage. We know that. We see it. You see it in your clients, Mr. Peiffer. Your written testimony did an excellent job in talking about the harm that workers and their families face, and you know, the suicides, the suicidal ideation because people feel they have lost their life savings. It is really tragic, and this is again, a rule that is designed to protect consumers.

I know we heard in the last rounds the sky was going to fall, and it did not. I also want to followup on Mr. Courtney's point about Mr. Ommen, your quote that the DOL overstepped its statutory authority and that rests with Congress not the DOL. I agree with Mr. Courtney, that that is just not the case. For years, the Department of Labor has appropriately exercised clear statutory authority to regulate investment advice affecting retirement savers.

We need that. It started in 1975 with the regulation, you know, still on the books. Continues through the issuance of the Biden administration's proposed rule. Mr. Peiffer, would you agree that the Department of Labor has clear and explicit statutory authority under ERISA to promulgate this rule?

Mr. PEIFFER. Absolutely. That is what they are there for.

Ms. BONAMICI. Exactly. That is what they are there for, right? Some have mentioned the SEC's regulation Best Interest and the National Association of Insurance Commissioner's Model Rule would be sufficient. Mr. Peiffer, in my remaining time, will you please explain how neither of these is an acceptable substitute for the Department of Labor's Retirement Security Rule?

Mr. PEIFFER. Absolutely. Regulation BI does not cover advice to plan sponsors, nor does it cover non-securities, and the Model Rule for the State insurance Commissioners does not cover compensation as a conflict, and compensation is the No. 1 conflict that advisors have with their clients.

Ms. BONAMICI. If this rule were in place, advisors who were following the rule would still be able to make a living. Is that correct?

Mr. PEIFFER. Can and would.

Ms. BONAMICI. Thank you very much. I yield back.

Chairman GOOD. Thank you, Ms. Bonamici. I now recognize myself for 5 minutes. Mr. Roberts, throughout today's hearing a number of different terms have been used to describe standards that financial advisors have to follow, including best interest, fiduciary and sole interests. Can you explain the distinction between these standards, and whether the best interest standard is sufficiently protective?

Mr. ROBERTS. I am so glad you asked that question, Chairman because we are circling around this very issue, and I think we are missing each other a little bit on this one. Mr. Peiffer, in his testi-

mony, repeatedly talked about how under the DOL standard financial professionals would be required to act solely in the interest.

We repeatedly heard references to any compensation, any whatsoever being “conflicted advice.” Well, that is a fiduciary standard. A fiduciary has a conflict whenever he or she has a financial interest. Now the Department of Labor proposes an exemption that will relieve a prohibited transaction rule, and at the bottom of their exemption they write that they have written in every single one, nothing in this exemption provides any relief to the requirement in ERISA that one must act—a fiduciary must act solely in the interest.

The question is raised folks, do professional salespeople get to have any interest? Are they permitted to be compensated? Mr. Peiffer says yes. On the other hand, Mr. Peiffer says they must act solely in the interest, and that they are conflicted whenever they are compensated.

Versus a best interest standard. A best interest standard, NAIC Reg. 275 says that the mere fact that a professional sales person receives some compensation in and of itself, is not a conflict with their best interest obligation. It is so important to realize that there is a best interest obligation in that regulation.

They are not absolved from acting in the best interest of their clients. They are duty bound to do so. They are duty bound to consider cost, and whether or not the product, and the cost features the product are a match for the consumer’s needs. I think, you know, a best interest standard is an appropriate standard for a professional sales person.

A fiduciary standard, one which would deprive the sales person of having any financial interest in his or her activities, is inappropriate. I did—I also want to address, you know, there is a great deal of umbrage being expressed about well, how dare anyone suggest that the Department of Labor not have the full authority to regulate the securities industries and the insurance industries.

The Fifth Circuit decision made exactly that point, that Congress had reserved regulation of the securities industry to the SEC. It is reserved regulation of the insurance industry to the states, and the DOL has the power to regulate the operation of plans. There is some overlap amongst the three, but they belong in separate regulatory spheres, thank you.

Chairman GOOD. Thank you for bringing some wonderful common-sense perspective to that. I appreciate you making, you know, you could argue that every business broken down to the very base level is in conflict with every consumer’s interest. If you have a restaurant, when the customer walks in he wants to get the absolute best meal, the absolute best price, with the absolute best service.

The business wants to make money off the transaction, but they also have a—the business has a shared interest that they want to make that customer happy, so that customer comes back again and again, and tells their friends, and enjoys that experience. They want it to be a healthy meal.

They want it to be a satisfying meal, so it really is a devoid of understanding on the other side of that, that there is a long-term shared best interest for businesses that want to succeed and thrive and help those whom they serve. Do you believe that the State, the

SEC's regulation best interest and the state's rules are effectively protecting retirement investors?

Mr. ROBERTS. I do. I do. I mean and we have been fortunate to hear from Commissioner Ommen this morning, and Commissioner Ommen has shared with us how his office protects consumer interests actively, weeds out and disciplines bad actors for not adhering to a best interest standard of conduct, as does the SEC and FINRA on the securities side.

One point Mr. Ommen made also in his written testimony is that bad actors can be found in the fiduciary space. Bernie Madoff, for example, was a so-called unconflicted fiduciary.

Chairman GOOD. Well said. I would suggest, I was going to ask you, but the costs of implementing the proposal, the proposed Fiduciary Rule is not justified. With that, I am out of time, and so I am going to recognize our Ranking Member, Mr. DeSaulnier, for a closing statement.

Mr. DESAULNIER. Thank you. I want to thank the witnesses, and I also want to thank the Chairman for the reference to the restaurant business. As he knows, I used to be in the restaurant business, I use to own them, but being from the Bay, San Francisco Bay area, I just did it for my masochistic fulfillment until I became a politician.

The analogy is a good one. I do think, you know, this is well, Madison, one of my favorite quotes from Madison was that if people were angels there would be no need for government. I think this is sort of the sentiment of what we are getting at in good faith from all the witnesses, is how do we make people professionally get the standards whether that conflict is based on enumeration, or other beliefs-.

We are trying to get that. I really believe the administration particularly as a result of the Fifth Circuit's decisions, is doing that in a targeted way. Mr. Peiffer, I would ask you for the record, to respond to some of the, I will not use your termination about lawyers that you used earlier, and I am not relating this to anyone on the panel, but maybe you could submit for the record a response to what we heard from Mr. Roberts, versus the technical legal aspects.

You do not need to respond now, this is my closing, so you could submit it for the record, and our staff will be happy to help you with that. Let me just conclude with that I really hope we can get this right. I believe this is right. As I said earlier, I do not believe in doing regulation for regulation's sake, which I have heard from the republican witnesses.

We just want to get at the bad behavior, and I have heard that, as I have said, from friends and financial advisors in my district, both on this rule and the Obama Rule. What we are really looking for, and I disagree with Mr. Banks in this regard, from my perspective, and our perspective, and the Biden administration's perspective, and DOL's perspective, is that a lot of workers are suffering right now.

There is more pressure on middle income people than ever, and thanks for all our supporters of this regulation in the room. I would love to go to the AARP store after to get a jacket, so I can appropriately be affiliated with you, besides my age. The people who are

being abused have less disposable income. A lot of people in my area are—in my generation—are completely dependent on their home investment for their retirement.

Subsequently, to helping their kids with that, so this rule getting right and protecting their retirement is really important. Neither the SEC's regulation, in our opinion, on best interest, nor the far weaker NAIC Rule again, in our model rule comes close to fixing the problem. In my estimation, the Biden administration's proposed Retirement Security Rule is necessary, narrowly tailored, and responsive to the Fifth Circuit's decision.

This rule is not the same as the Obama era Fiduciary Rule, and the Department of Labor acted well within its statutory authority under ERISA when proposing it. The Biden administration proposed rule will significantly reduce costs to help small businesses, including restaurants, and benefit small savers who are most vulnerable to conflicted advice.

There is no credible study on this rule that suggests otherwise. The proposed rule will level the playing field to ensure that workers, retirees, and plan sponsors receive advice that is in their best interest. That is what they expect and deserve. I very much support this Biden administration's Retirement Security Rule, and encourage the Department of Labor to promptly finalize it.

Finally, I ask unanimous consent to enter into the record statements from our friends at AARP and the Consumer Federation of America in support of the Retirement Security Rule. Thank you, Mr. Chairman, and I yield back the balance of my time.

Chairman GOOD. Without objection.

[The information of Mr. DeSaulnier follows:]



AARP Statement for the Record

Hearing on  
“Protecting American Savers and Retirees From DOL’s Regulatory Overreach”

before the

House Committee on Education & the Workforce  
Subcommittee on Health, Employment, Labor, and Pensions

February 15, 2024

For more information, contact:  
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AARP appreciates the opportunity to comment for the record on the House Committee on Education & the Workforce's hearing to discuss the much-needed Retirement Security Rule recently released by the Department of Labor. At AARP, we work very hard to empower Americans to save and give them the tools to ensure they have a secure retirement.

When Americans seek out financial advice for their retirement savings, they expect the advice they get will be in their best interest, not in the best interest of their financial advisor. This is very simply what the Retirement Security Rule does. Families need to be able to trust the advice they get from financial advisors.

According to the Federal Reserve's 2022 Economic Well-Being of Households Survey, only 31% of non-retirees thought their retirement saving was on track, down from 40% in 2021.<sup>1</sup> A lack of fundamental protections for retirement savers is exacerbating this crisis. Regulatory loopholes allow some financial advisers to recommend their clients invest their retirement savings in products simply because the adviser will get higher fees and commissions for doing so. This conflicted advice eats into retirement savings, and lessens peoples' ability to retire securely, ultimately resulting in further costs to state and federal budgets.

The Department of Labor (DOL) Retirement Security Rule proposal would require financial professionals providing advice to retirement savers to put their clients' best interests before their own. This is a commonsense requirement and AARP supports its implementation – as do voters.

According to a December 2023 poll conducted by AARP, 89% of adults 50+ say that they expect professional financial advice to be in their best interest, and a similarly large share (87%) say that they use professional financial advice to make important financial decisions. Further, 90% agree that financial professionals should be *required* to give advice in the best interest of the retirement savings account holder. In fact, two-thirds (66%) of adults ages 50-plus say that they would be less likely to vote for their member of Congress if they were to overturn a rule requiring financial professionals to provide advice in the best interest of their clients.<sup>2</sup>

*This Proposal Is Critical to Closing Existing Regulatory Gaps and Providing Retirement Savers the Protections They Deserve*

When Employee Retirement Income Security Act (ERISA) was enacted in 1974, individual retirement accounts (IRAs) had just been introduced, and 401(k) plans were not yet a reality. At that time, the primary method of ensuring retirement security was through Defined Benefit plans, commonly known as traditional pensions. These pensions offered a guaranteed income for retirees that was designed to last throughout their retirement. They were advantageous because they pooled assets and were managed by a fiduciary, leading to cost efficiencies and pooled risk.

<sup>1</sup> Board of Governors of the Federal Reserve System, "Economic Well-Being of U.S. Households in 2022," May 2023, <https://www.federalreserve.gov/publications/files/2022-report-economic-well-being-us-households-202305.pdf>.

<sup>2</sup> AARP Research, "Unbiased Financial Advice About Retirement Is Important to Older Adults," January 2, 2024, <https://www.aarp.org/pri/topics/work-finances-retirement/financial-security-retirement/fiduciary-duty-retirement/>.

Today, the share of workers with traditional pensions has significantly declined. Defined contribution plans now hold the largest portion of retirement assets. For example, in 1975, 27.2 million people participated in private sector defined benefit plans and just 11.2 million in defined contribution plans. By 2019, these numbers had shifted dramatically, with 12.6 million people participating in private sector defined benefit plans and 85.5 million in private sector defined contribution plans.<sup>3</sup>

With the shift from pensions to individual accounts, the onus of retirement planning has largely fallen on individuals. They must navigate complex financial products and depend on professional advice, which unfortunately isn't always provided with their best interests at heart. This has frequently left individuals with the ultimate responsibility for assessing economic and market risks, sifting through complex financial products, and determining contribution levels, all over a decades-long time horizon.

Currently, retirees and future retirees face an investment landscape in which the advice they receive from their financial professionals about their retirement investments may not align with their best interests. This situation can lead to excessive fees, investments in underperforming or illiquid assets, and unnecessary risks.<sup>4</sup> According to some estimates, this conflicted advice can cost retirement savers up to 20 percent of their retirement savings over a lifetime.<sup>5</sup> Such circumstances are untenable, potentially delaying retirement or diminishing living standards post-retirement.

*The Department of Labor Proposal Will Address Existing Regulatory Loopholes and Provide Retirement Savers with Essential Protections*

The proposed Department of Labor rule proposal addresses the many regulatory loopholes that result in retirement savers receiving conflicted advice that affects their long-term financial security and ability to retire with dignity. When implemented, the rule will help to ensure workers have access to high-quality advice and aims to eliminate conflicted advice, both of which are essential in the current retirement landscape. The proposed rule would create uniform fiduciary standards to safeguard retirees and their hard-earned assets. It proposes a “best interests” standard for investment advice, broadening the scope of what constitutes an investment recommendation. This change is crucial in empowering workers to effectively manage the increased responsibility and risk associated with saving for retirement.

<sup>3</sup> CRS, “A Visual Depiction of the Shift from Defined Benefit (DB) to Defined Contribution (DC) Pension Plans in the Private Sector, December 27, 2021, <https://crsreports.congress.gov/product/pdf/IF/IF12007>.

<sup>4</sup> Retirement Security Rule: Definition of an Investment Advice Fiduciary, RIN 1210–AC02 (Oct. 24, 2024) (“Fiduciary Release”) (“Overall, evidence demonstrates that the combination of inexperienced customers and conflicted advisers results in investment underperformance and negative outcomes for investors. According to a 2015 report by the Council of Economic Advisers, approximately \$1.7 trillion of IRA assets were invested in products with a payment structure that generates conflicts of interests. A substantial body of research has shown that IRA holders receiving conflicted investment advice can expect their investments to underperform by approximately 50 to 100 basis points per year.”), <https://www.dol.gov/sites/dolgov/files/ebsa/temporary-postings/retirement-security-rule-definition-of-an-investment-advice-fiduciary.pdf>.

<sup>5</sup> The White House, “FACT SHEET: President Biden to Announce New Actions to Protect Retirement Security by Cracking Down on Junk Fees in Retirement Investment Advice,” October 31, 2023, <https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/31/fact-sheet-president-biden-to-announce-new-actions-to-protect-retirement-security-by-cracking-down-on-junk-fees-in-retirement-investment-advice/>.

This proposal is a balanced approach, reflecting significant changes in our retirement system since 1975. It would address loopholes in existing regulations that allow financial professionals to take advantage of their clients and recommend they invest in ill-suited, high-fee products by focusing on the expectations of retirees – that their financial advisers will put their clients’ best interests before their own. It aligns with standards set by other regulators, notably the Securities and Exchange Commission’s (SEC) Regulation Best Interest (Reg BI) and puts forth the necessary consumer protections for retirement savers.

First, the proposal will do what Congress expected, and provide a uniform standard for those falling within the definition of investment advice fiduciary. In adopting ERISA, Congress sought to implement “uniform fiduciary standards” designed to “prevent transactions which dissipate or endanger” retirement assets.<sup>6</sup> Those providing investment advice for compensation would be subject to the best interests standard when retirees expect and trust that this is the case. The uniform standard would apply to advice providers who hold themselves out as fiduciaries, exercise discretionary control over retirement assets, or are in the business of making such recommendations on a regular and particularized basis.

Second, it closes a glaring loophole that allows some advisors to offer very bad advice to their clients, as long as they only do it once. The current, outdated regulation creates a “one time” exception, which is not in the statute Congress passed. So an advisor can give advice to convert the *entire balance of your retirement savings* and not have to do that in a retiree’s best interest, simply because it was one single recommendation rather than a series of recommendations. No senior would expect that making such a substantive and critical decision would somehow be exempted from basic consumer protections.

Third, the proposal would fill gaps in the existing regulatory regime by better aligning the Labor Department’s approach with what other regulators have already done. The proposal is very similar to the SEC’s Reg BI, which governs the standards applicable to broker-dealers when dealing with retail clients. The proposal will apply the best interests standard to recommendations concerning plan distributions, decisions not to engage in transactions, and investment strategies.

Fourth, the definition of “recommendation” will explicitly include rollovers, even when not accompanied by a specific recommendation concerning the investment of the assets.<sup>7</sup> Those deciding on whether to pull assets from a retirement plan and put them in an IRA will know that the recommendation must be in their best interests.

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<sup>6</sup> Statement by Hon. Harrison A. Williams, Jr., Chairman, Senate Committee on Labor and Public Welfare, introducing the Conference Report on HR 2, 120 Congressional Record S 15737 (August 22, 1974) (“the legislation imposes strict fiduciary obligations on those who have discretion or responsibility respecting the management, handling, or disposition of pension or welfare plan assets. The objectives of these provisions are to make applicable the law of trusts; to prohibit exculpatory clauses that have often been used in this field; to establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets; and to provide affective remedies for breaches of trust.”).

<sup>7</sup> Fiduciary Release, *supra* note 4 (“The Department continues to believe that advice provided in connection with a rollover decision, even if not accompanied by a specific recommendation on how to invest assets, should be treated as fiduciary investment advice.”).

Fifth, the effect of fine-print disclaimers will be limited. Under the proposal, disclaimers will not automatically control an investment advice fiduciary's status, at least where inconsistent with "the person's oral communications, marketing materials, applicable State or Federal law, or other interactions with the retirement investor." Where such an inconsistency arises, the disclaimer will be "insufficient to defeat the retirement investor's legitimate expectations."

Finally, the proposal also makes clear that platform providers have the same duty, at least where they make specific recommendations about the securities to be offered. As the Department knows, small employers often are sold such platforms with representations that the platform will satisfy the employer's fiduciary obligations.

*The Impact of These Loopholes Affect Real People*

Janice Winston testified at the December 13<sup>th</sup> hearing before the Department of Labor on the Retirement Security Rule. Ms. Winston explained that she had worked for 29 years as a telecommunications engineer for Verizon. When she retired, her retirement plan gave her the choice of an annuity or a lump sum payout. Not feeling prepared to make this decision on her own, she picked an advisor based on recommendations from coworkers, family, and friends. As she testified, "my most important concern was trust. What I thought was that anyone I paid to advise me would be guided by what was best for me, given my retirement and savings goals."<sup>8</sup>

The advisor she chose recommended that she take a lump sum from her defined benefit plan and roll her 401(k) plan into two individual retirement accounts. The advisor then steered her toward investing a quarter of her total assets in a variable annuity product. They did not explain the product, why they were recommending it, nor the complex features and fees it featured.

Ms. Winston has since had her retirement investment portfolio independently evaluated by another investment advisor who showed her that she was paying fees that she did not know about, let alone understand. According to their analysis, even without the high fees, Ms. Winston's total investment proposal was not well designed in accordance with her best interest - her investments were high cost, and her overall allocation was inappropriate for her long-term goals. The analysis was most critical of the placement of 25% of her assets in a variable annuity, which had annual fees equal to 3.3% of her investment. Some of those fees purchased complex features that had no value to her. The high annual cost to maintain these investments resulted in a return of barely 0% and Ms. Winston would face financial penalties if she decided to move money out of the annuity.

As Ms. Winston put it, "I worked long and hard, and saved over my career, so that I could enjoy a decent retirement. And I should have been able to assume that investment advice given to me was crafted solely in my best interest. I've since learned that there are investment advisors who put aside their monetary interests and focus on the best interest of their clients... When regular

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<sup>8</sup> Janice Winston, Testimony before Employee Benefits Security Administration Public Hearing on the Retirement Security Rule: Definition of an Investment Advice Fiduciary, Wednesday, December 13, 2023, <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AC02/hearing-transcript-day-2.pdf>.

people like me are getting advice about how to access our money in retirement we should be able to depend on our financial advisors acting in our best interest, even if that sometimes means they cannot recommend a product that pays them the most compensation. And honestly, I don't see how anyone could argue with that, or who would want advice from someone not subject to that standard...For the current and future generations of retirement savers I ask you to please adopt these proposed regulations so that those who give my daughter, my grandchildren, my great-grandchildren investment advice must put their client's interest ahead of maximizing their own profit.”<sup>9</sup>

The existing gaps in current law hurt real people who seek out advice, assuming that it will always be made in their best interest, only to be provided advice that does not suit their financial best interest. People expect that when they go to a financial advisor, just as when they go to a doctor or a lawyer, the advice they receive will be made in their best interest, and they deserve for this to be a requirement.

*Criticisms of the Proposed Rule are Based on Faulty Research and Baseless Claims*

Those opposing this important and commonsense rule have made baseless claims and do not support a requirement to put their clients' best interests before their own financial interests. We would like to dispel any misconceptions about the proposal.

Some have argued that this rule is not necessary, as the SEC's Reg BI has already addressed all conflicts of interest in financial advising. This is not true. Under Reg BI, implemented in 2019, broker-dealers registered with the SEC are subject to a “best interests” requirement.<sup>10</sup> Reg BI, however, has limited application. First, it only applies to retail investors and therefore does not extend to all recommendations made to retirement plans. For another, the standard applies only to “investment securities.” As a result, the standard does not generally include such investments as real estate, certificates of deposit, certain insurance products, or commodities. Even more complex, the same investment may or may not be a security depending upon the circumstances, such as gold coins or interests in limited liability companies.

Annuities further illustrate the complexity. Variable annuities are subject to the federal securities laws; fixed annuities are not. The status of fixed index annuities, according to the SEC, “may or may not” be a security.<sup>11</sup> Broker-dealers providing recommendations on an array of annuities could find themselves subject to Reg BI for some of them but not others. And in the case of fixed index annuities, even the advice provider may not be sure whether the best interests standard applies.

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<sup>9</sup> Id.

<sup>10</sup> Securities and Exchange Commission, “Regulation Best Interest: The Broker-Dealer Standard of Conduct, Exchange Act Release No 86031,” June 5, 2019 (effective Sept. 10, 2019), <https://www.sec.gov/files/rules/final/2019/34-86031.pdf>.

<sup>11</sup> See Annuities, Investor.gov, SEC, last visited Nov. 27, 2023, <https://www.investor.gov/introduction-investing/investing-basics/glossary/annuities> (“Variable annuities are securities regulated by the SEC. An indexed annuity may or may not be a security; however, most indexed annuities are not registered with the SEC. Fixed annuities are not securities and are not regulated by the SEC.”).

Some have argued that the National Association of Insurance Commissioners (NAIC) Model Rule is sufficient regulation for the insurance industry – despite its gaping limitations. The NAIC Model Rule – which states adopt voluntarily, and which has not been adopted by all states – would impose some obligations on those selling fixed annuities. However, while the NAIC uses the words “best interests”, it does not reflect a “best interests” standard. For example, it does not apply to all annuities or other insurance products, and it excludes cash and non-cash compensation in determining material conflicts (which is the very source of many conflicts).<sup>12</sup> It is clear this Model Rule does not provide consumers with sufficient protections and falls far short of the protections generally included in plans covered by ERISA.

Recommendations to rollover plan assets into an IRA likewise may or may not be subject to a best interests standard under the current regulation’s 5-part test. This is true even though the “decision to roll over assets from a plan to an IRA is often the single most important financial decision a plan participant makes, involving a lifetime of retirement savings” and the fact that these recommendations “carry with them an inherent conflict of interest.”<sup>13</sup> And while rollovers are more common among retirees exiting from defined contribution plans, those entitled to defined benefit pensions may also be in a position to rollover assets when receiving a lump-sum pay out.

Conflicted advice in rollovers can significantly eat into retirement savings. According to a study from the Pew Charitable Trusts, “in 2018 alone, investors rolled \$516.7 billion from employer retirement plans into traditional IRAs. An analysis of fee differentials suggests that over a hypothetical retirement period of 25 years, those retail investors could see an aggregate reduction in savings of about \$45.5 billion—just from that single year of rollovers.” Failure to ensure best interest advice for rollovers is a glaring gap that can harm the long-term financial security of retirement savers.<sup>14</sup>

Another important gap left by the current 5-part test that must be addressed is the lack of protections for plan sponsors. The requirement that a relationship with an investor be regular or ongoing for it to be subject to a fiduciary standard has resulted in this standard not applying to advice provided to small businesses. These plan sponsors are also not protected under Reg BI, because advice to them is considered “plan-level”, which falls under “institutional advice” and is

<sup>12</sup> See National Association of Insurance Commissioners, “Suitability in Annuity Transactions Model Regulation,” Spring 2020, <https://content.naic.org/sites/default/files/inline-files/MDL-275.pdf>, (“Section 6. Duties of Insurers and Producers... (A)(1)(d) “The requirements under this subsection do not create a fiduciary obligation or relationship and only create a regulatory obligation as established in this regulation.” And Section 5(1)(2) ““Material conflict of interest” does not include cash compensation or non-cash compensation.”).

<sup>13</sup> Fiduciary Release, *supra* note 4 (“Financial institutions face an innate conflict of interest, in that a financial institution that provides a recommendation or advice concerning a rollover to a retirement investor may expect to earn transaction-based compensation such as commissions and/or receive an ongoing advisory fee that it likely would not receive if the assets were to remain in an ERISA-covered plan. Further, under the 1975 rule, if an investment advice provider makes a one-time recommendation that the worker move the entire balance of their retirement plan into an IRA and invest it in a particular annuity, then the advice provider has no fiduciary obligation under ERISA to honor the worker’s best interest unless this recommendation is part of an ‘ongoing’ advice relationship. The resulting compensation represents a significant revenue source for investment advice providers.”).

<sup>14</sup> Pew Charitable Trusts, “Small Differences in Mutual Fund Fees Can Cut Billions From Americans’ Retirement Savings,” June 30, 2022, <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2022/06/small-differences-in-mutual-fund-fees-can-cut-billions-from-americans-retirement-savings>.



therefore exempt. The NAIC Model Rule also excludes from its suitability requirements the purchase of annuity-based retirement plans by small business owners. It is unclear why those small businesses managing retirement plans on behalf of their employees should not receive the same protections as individual investors.

Some have argued that in its passage of SECURE 2.0, Congress intended to expand access to annuities, indicating that the industry should not be regulated further. This is flawed logic – the fact that greater access to annuities was provided in SECURE 2.0 does not indicate that Congress intended for consumers to receive substandard protections. In fact, it underscores the need for greater protections and ensuring these products and the people recommending investments in them are held to a higher best interests standards.

Finally, some have argued that lower- and middle-income savers will lose access to financial advice, despite no hard evidence. Indeed, similar arguments were made before the SEC implemented its own best interest standard, and no access problems have arisen. Some have pointed to limited industry “research” provided by Deloitte. But Deloitte itself states: “The findings presented are based on the analysis of information and data provided to Deloitte. Deloitte has analyzed, aggregated and summarized the information provided, but was not asked to and did not independently verify, validate or audit the information provided during the course of the engagement.”<sup>15</sup> Indeed, the methodology for this “analysis” is not provided, nor was the underlying data made available to independent parties so that the conclusions found could be analyzed and tested – in spite of repeated requests by the Department of Labor.<sup>16</sup> In fact, the findings of this report are based on interviews with just 21 of hundreds of firms, with no information provided as to how these firms were chosen, whether they are representative of the market, or what questions were asked.<sup>17</sup> In short, it lacks academic rigor and transparency.

A more recent study from the National Association of Insurance and Financial Advisors (NAIFA) similarly lacks rigor or transparency. It does however, shed light on the degree to which the members selected for participation in the survey provide conflicted advice to their clients. In the survey, 23.58% of participants agreed and 43.47% strongly agreed that they would have to stop or reduce sales of fixed annuities or non-securities investment products if the rule were implemented.<sup>18</sup> This underscores the importance of implementing this rule and ensuring that consumers have the protections they deserve.

Further, as noted, this proposed rule aligns with Reg BI, which was implemented in 2019. There has been no evidence that Reg BI has reduced lower- and middle-income workers’ access to

<sup>15</sup> Deloitte (commissioned by SIFMA), “The DOL Fiduciary Rule: A study on how financial institutions have responded and the resulting impacts on retirement investors,” August 19, 2017, <https://www.sifma.org/wp-content/uploads/2017/08/Deloitte-White-Paper-on-the-DOL-Fiduciary-Rule-August-2017.pdf>.

<sup>16</sup> Consumer Federation of America, “Comment Letter Re: RIN 1210-AB82, Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions,” October 24, 2017, <https://consumerfed.org/wp-content/uploads/2017/10/cfa-dol-fiduciary-response-to-industry-rule-opponents.pdf>.

<sup>17</sup> Id.

<sup>18</sup> NAIFA, “Impact of the Proposed DOL Fiduciary-Only Rule on NAIFA Members,” December 2023, <https://2635471.fs1.hubspotusercontent-na1.net/hubfs/2635471/NAIFA%20Members%20Response%20to%20the%20Proposed%20US%20DOL%20Rule.pdf>.

investment recommendations. When looking abroad to the United Kingdom, we see that the application of similar standards has actually *increased* access to financial advice, rather than decreased access. The UK's Financial Conduct Authority (FCA) found that "[in 2021] approximately 8% (4.1m) of all UK adults have received financial advice, an increase from 6% (3.1m) in 2017."<sup>19</sup> Rather than the new proposed rule having a negative effect on retirement savers, the rule will instead improve their investing outcomes.

Under existing requirements, it is the lower- and middle-income retirement savers who suffer the most from conflicted advice, as wealthier investors tend to work with advisers who are already fiduciaries and put their clients' best interests before their own. As one of today's witnesses, Kamila Elliott, put it when she testified before the Department of Labor on the proposed rule: "*The wealthy receive financial advice that is best for them. Why shouldn't those with moderate incomes be treated the same?*"<sup>20</sup> There is no reason that lower- and middle-income retirement savers do not merit the same consumer protections as wealthier investors.

While there may be a transition period during which advisers work through the requirements of this proposal, currently, 1 in 3 financial advisors (97,000 advisors) in the United States are Certified Financial Planner (CFP) Board certified. As part of the CFP certification, these financial planners make a commitment to act as a fiduciary when providing financial advice and to put their clients' best interests first. Many financial professionals are already operating under a fiduciary standard and put their clients' best interests before their own and will not have to make operational changes as a result of this rule.

Stronger consumer protections ultimately will result in better financial advice as those advisers who would rather put their own interests before their customers will either raise their standards or lose access to those clients. All retirement savers deserve to have their financial advisers make investment recommendations to them under a best interests standard – anything less is not serving retirement savers and will harm their ability to retire securely and with dignity.

### *Conclusion*

This is a common-sense rule – and most people are surprised to learn it isn't already a requirement for financial professionals. AARP polling shows that 9 in 10 adults over the age of 50 support the requirement that financial professionals act in their best interest.<sup>21</sup> Retirement savers rely on financial professionals to make important investment decisions and need to be able to trust these advisers are acting in their best interest.

When people go to a financial advisor with questions about their life savings, they need to be able to trust they are getting good advice. The United States spends hundreds of billions on tax benefits to encourage retirement savings, and those dollars should not be wasted when families

<sup>19</sup> FCA, "FCA publishes evaluation of its work on the financial advice market," November 29, 2021, <https://www.fca.org.uk/news/press-releases/fca-publishes-evaluation-financial-advice-market>.

<sup>20</sup> Kamila Elliott, "CFP BOARD 2022 CHAIR KAMILA ELLIOTT, CFP® TESTIFIES AT DOL HEARING ON RETIREMENT SECURITY RULE," December 18, 2023, <https://www.cfp.net/news/2023/12/kamila-elliott-testimony>.

<sup>21</sup> AARP Research, *supra* note 2.



get conflicted advice from a professional. Where advice providers are not required to observe a best interest standard, retirement security is undermined, and retirees suffer the consequences. Monetary losses can be staggering, and retirement may be delayed or postponed. The quality-of-life post-retirement can be significantly reduced.

We urge members of Congress to support this proposal, oppose any efforts to defund it, and to ensure the Department of Labor implements this Rule swiftly. Thank you for considering AARP's perspective, and the perspective of millions of older Americans who have saved for retirement throughout their working lives, on this crucial proposal.



**Consumer Federation of America**

**Statement for the Record of Micah Hauptman, Director of Investor Protection  
Consumer Federation of America<sup>1</sup>**

Hearing on the DOL Retirement Security Proposal  
House Education and Workforce Committee  
Subcommittee on Health, Employment, Labor, and Pensions  
Scheduled for February 15, 2024

Dear Chairman Good, Ranking Member DeSaulnier, and distinguished Members of the Subcommittee,

**Consumer Federation of America (CFA) strongly supports the Department of Labor's (DOL's) Retirement Security Proposal. This rulemaking is necessary for the protection of retirement savers.**

As we all know, retirement investing can be complicated, and many retirement savers turn to financial professionals for investment advice. Retirement savers reasonably expect and believe the financial experts they turn to will act in their best interests, and retirement savers trust and rely on the investment advice they receive. Retirement savers' beliefs and expectations about the relationships they are in and the services they receive isn't misplaced. It's because everything financial professionals and their firms do is designed to send the message that they are in relationships of trust and confidence with investors and they provide advice in investors' best interests that should be relied upon. From the titles they use, to how they describe their services and relationships, to how they function, any reasonable person would view these as trusted advice relationships.

No retirement saver would support being steered to overpriced, suboptimal products or services that aren't in their best interest by financial professionals who seek to evade their regulatory obligations and accountability, all so they can get a big payday.

Unfortunately, that's what the 1975 five-part test defining fiduciary investment advice allows. It allows financial professionals to function as advice providers, to occupy positions of trust and confidence with retirement savers, and to foster reliance on the advice they provide, while evading the fiduciary duty appropriate to their advisory role. The five-part test is inconsistent

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<sup>1</sup> CFA is a non-profit association of more than 250 national, state, and local pro-consumer organizations. It was formed in 1968 to represent the consumer interest through research, advocacy and education.

with the text of ERISA and it defeats retirement savers' reasonable expectations about the relationships they are in and the services they are receiving.

The proposed redefinition of fiduciary investment advice, on the other hand, is faithful to the statute and would honor retirement savers' reasonable expectations when receiving advice from financial professionals who hold themselves out and function as trusted advice providers. It would appropriately cover rollover recommendations, plan advice, and advice about non-securities, ensuring that regardless of the type of financial professional a retirement saver works with or the type of product the professional recommends, their advice would be subject to a strong best interest framework that ensures conflicts of interest do not taint their advice.

#### **Other Regulators Have Not Fully Addressed the Problem of Conflicted Retirement Advice.**

First, the SEC has not fully solved the problem. While the Securities and Exchange Commission (SEC) finalized Regulation Best Interest (Reg. BI) in 2019 to enhance the standard of conduct for broker-dealers, this standard does not apply to all financial professionals, all products, or all accounts. Specifically, Reg. BI is limited to recommendations to retail customers about securities. Thus, to the extent a financial professional provides recommendations about non-securities, such as some insurance products, bank products, real estate, commodities, or cryptocurrencies, Reg. BI simply doesn't apply. Similarly, to the extent a financial professional provides recommendations to retirement plans, which do not meet Reg. BI's definition of retail customer, Reg. BI doesn't apply. As a result, there is a lack of uniform protections for retirement savers, which leaves them vulnerable to harmful conflicts of interest.

Second, the NAIC Model Rule for annuities provides weak protections. While the National Association of Insurance Commissioners (NAIC) adopted updates to its Annuity Transactions Model Regulation (#275) in 2020, it is a best interest in name only standard. Unlike Reg. BI, which imposes an explicit best interest obligation on broker-dealers, the NAIC Model Rule states that an insurance producer "has met" their best interest obligation if they "have a reasonable basis to believe the recommended option effectively addresses the consumer's financial situation, insurance needs, and financial objectives." This "effectively addresses" standard is a lower standard than the one Reg. BI places on broker-dealers and is largely a restatement of the previous annuity suitability rule.

In addition, unlike Reg. BI, which defines "material conflict of interest" broadly to include all forms of compensation and requires firms to mitigate conflicts of interest that create incentives for financial professionals to place their or their firm's interest ahead of the retail customer's interest, the NAIC Model Rule remarkably excludes both cash and non-cash compensation from its definition of "material conflict of interest." As a result, the NAIC Model Rule does not require financial professionals recommending annuities to mitigate their compensation-related conflicts. This fractured regulatory environment has created uneven protections for retirement savers and loopholes in the regulation of annuities, where annuities that are regulated as securities are subject to Reg. BI while annuities that are not regulated as securities are subject to the weaker NAIC Model Rule.

**This Proposal is Substantially Different From the 2016 Rule and is Responsive to the 5th Circuit Court of Appeals' Concerns.**

This proposal defines fiduciary retirement investment advice much more narrowly than the 2016 rule. According to the 5th Circuit Court of Appeals, the 2016 fiduciary rule was overbroad in defining who was an investment advice fiduciary because it captured certain interactions where an investor might not have placed their trust and confidence in the financial professional. In response to these concerns, the proposal provides that fiduciary status would attach only if compensated recommendations are made in certain specified contexts where a retirement saver can and should reasonably place their trust and confidence in the advice provider.

In addition, this proposal does not require firms to execute contracts warranting compliance. The 2016 fiduciary rule required firms to execute best interest contracts with warranties guaranteeing that they and their financial professionals would comply with certain protective conditions. The contract created an enforcement mechanism for harmed IRA investors, allowing them to sue for a firm's breach of the warranties. Because the 5th Circuit held that the DOL was prohibited from creating this private right of action, the new proposal neither includes a contract requirement nor requires firms to warrant that they will comply with certain protective conditions. The only enforcement mechanism for violating the rule with regard to IRA investment recommendations, consistent with already-existing law, is an IRS imposition of an excise tax.

**Industry Opponents' Arguments Against the Rule are Groundless.**

Some industry opponents have argued that small savers, those with low account balances or of modest means, would lose access to investment advice under this rule and would be worse off. This is an industry scare tactic that has no basis in fact. Many financial professionals support a strong fiduciary standard and operate under it very successfully, while serving clients all along the income spectrum. If some firms were to decide to pull out of the market, others would step in to provide high quality products and services without harmful conflicts.

Small savers are especially vulnerable to the detrimental effects of conflicted advice. With fewer economic resources, small savers can least afford to lose any of their retirement savings due to harmful conflicts of interest. Small savers have the most to gain from receiving high quality advice that serves their best interest rather than the interests of financial professionals or their firms.

Also, as discussed above, to the extent any industry claims about a potential loss of access to advice are based on industry opponents' assumptions about the 2016 rulemaking, that rule was substantially different from the current rulemaking. As a result, any comparisons to the 2016 rule are not applicable to the current proposal. We also urge members of Congress to be skeptical of any "evidence" against the rule that industry opponents repackage from 2016. Most of what they have offered are biased industry surveys based on opaque, non-verifiable information.

In addition, the proposal broadly aligns with the SEC's Reg. BI. We are not aware of any evidence that Reg. BI has reduced small savers' access to investment recommendations from broker-dealers. Just the opposite, Reg. BI showed that financial professionals and firms can be subject to an explicit best interest standard that requires conflicts of interest to be mitigated, while still allowing financial professionals to be paid by commission. We expect the

Department's rule and exemptions to operate similarly, aligning and extending these protections to retirement plans and their participants and to retirement savers who invest in non-securities.

Finally, to the extent industry claims about a loss of access to advice are made by the same groups who challenged the 2016 rule, it's important to note that these groups claimed in court that they don't provide advice, they provide arms-length sales recommendations like car dealers. While we strongly disagree with that assertion, these are mutually inconsistent arguments. Also, if one were to accept their legal argument, then retirement savers wouldn't lose access to advice, they'd lose access to self-interested sales pitches deceptively disguised as advice.

**In conclusion, this is an important regulatory initiative that it deserves strong support.**

Thank you,



Micah Hauptman  
Director of Investor Protection

Chairman GOOD. Thank you, Mr. DeSaulnier. In my experience, from 17 years in the financial services industry on the lending side, mind you, but almost no new regulation that I saw over my 17 years, almost no mandate, no rule from the Federal Government, often for the State government as well, was truly in the consumer's best interest.

Whether it is the Privacy Rule, I was working in the industry when we had the new privacy rule, where now every year, you have got to send every consumer in the country the stacks of paper to throw away, telling them what their privacy rights are. The redundancy of paperwork and repetitive requirements, increased pass-through costs, from an administration by the way, that says literally the President said, "Don't pass on your increased costs to your consumers." "Don't pass those on to your customer."

When your costs go up don't pass them on to the customer. Having no understanding, after 50 years in government where a business where an organization gets their revenues, is the only way to pass through to their customers.

The unnecessary delays and less efficiency that results from these mandates, regulations and rules, the explosion as a result of the compliance and legal departments, or what we used to call the business prevention department, that small firms by the way cannot afford, like the large firms can.

I worked for a Fortune 100 company that could afford those, but I guess it did provide job growth and security for the examiners and the auditors that I had to enforce these things. Federal rules and regulations are costing consumers thousands of dollars a year. It has exploded, particularly in the last 3 years. Who does that hurt most?

These are hidden taxes, hidden fees that are regressive in nature, that do not hurt the big investor, but they do hurt the small savers, the small investors, the seniors, the regular income folks and so forth. Bureaucrats, and they do not know best.

Ronald Reagan famously said you know, the nine scariest words in the English language was hey, I am here from the Federal Government, I am here to help you. That is so rarely the case. Busi-

ness and industry professionals have again, long-term shared interests perspectives.

Truly one of the best for those who they assist, those whom they serve. They recognize that everybody wins when that is the case, and they want to stay in business for a long time, and have satisfied repeat clients and consumers. We should not punish everyone. Quality firms and professionals should not be punished, and the costs that impair—the increased costs and fees and the impaired service for investors, that should not happen.

Everyone should not be punished because of the very few bad actors that helps lawyers enrich themselves via class action lawsuits by the way. The Biden administration's fiduciary rule purports to address unfair sales practices by retirement advisors. However, more overregulation industry is not the answer.

Implementing the proposed Fiduciary Rule would disrupt an industry that is already making progress in protecting consumers. In fact, in the last few years the SEC, and 42 states have implemented new standards to protect consumer interests. The rule discussed today is a classic case of heavy-handed regulatory overreach by the Biden administration.

Americans of all income levels should be free to choose sound financial advice on how to best save for their retirement. It really is offensive, the contempt for the consumer. If you are low-income, or if you are regular income, or you are blue collar, then you just do not know how to make choices for yourself.

That's really an offensive thing for some to suggest. We know this rule will negatively impact millions of Americans' ability to receive the investment advice that they need, so I urge the Department of Labor to take note of our hearing and withdraw the rule. Without objection, there being no further business, the Committee stands adjourned.

United States House of Representatives  
House Committee on Education and the Workforce  
Subcommittee on Health, Employment, Labor and Pensions

Hearing entitled:  
“Protecting American Savers and Retirees From DOL’s Regulatory Overreach”

Supplemental Testimony for the Record

Joseph C. Peiffer  
President, Public Investors Advocate Bar Association

February 28, 2024

Thank you to the committee for the opportunity to supplement my testimony with this response for the record. Throughout my testimony I discussed the fact that investors' beliefs that their financial professionals have their best interest in mind is due at least in part to the marketing of advisors and trade professionals.

As I further discussed, the Department of Labor Retirement Security Rule (DOL Rule) would help close the disclaimer loophole. The DOL Rule will significantly limit the impact of fine-print disclaimers by preventing them from automatically controlling an investment advice fiduciary's status where it is inconsistent with the investor's oral communications or interactions with the financial professional.<sup>1</sup>

In Mr. Roberts' testimony, it appeared that he was confused on my position with respect to financial advisors, who are insurance agents. Mr. Robert's talked about "professional salesman." I have never met an investor who handed over their life savings to a financial advisor that referred to himself as a "professional salesman." Instead, they refer to themselves as "Financial Advisors," "Investment Advisors," "Retirement Specialists," or even "Wealth Architects." Only when they are called to account for their conflicted advice are "Financial Advisors" suddenly transformed into "Professional Salesmen." It's no wonder why investors don't know the difference.

Mr. Robert's and other industry representatives claimed that the NAIC Model rule would cure the problem of conflicted advice for financial advisors, who are insurance agents. They further claimed that the DOL Rule would prevent these agents from earning commissions. Neither is true.

First, the NAIC Model rule does not solve the problem of conflicted advice. The NAIC Model Rule states that an insurance professional "has met" their best interest obligation 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 have to 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 suitability rule. That's not a true best interest standard. Indeed, the NAIC Model Rule excludes a huge source of conflicts – the advisor's commissions and other non-cash compensation – from its definition of conflicts of interest.

Second, the DOL Rule would still allow financial advisors acting as insurance agents to receive compensation for their advice. It would simply require them to act in their clients' best interest when giving advice on which investment vehicles to buy.

Further the DOL Rule would align with the SEC's 2019 Regulation Best Interest. The proposed rule is seeking to correct the disconnect of advisors who are required to follow the best interest standard and retirement savings providers who hold themselves out as financial consultants, financial planners, or wealth managers. The narrowly tailored focus of the proposed rule is directly responsive to the concern of the Fifth Circuit Courts of Appeals, which held that the 2016 fiduciary

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<sup>1</sup> AARP, [Letter to DOL Assistant Secretary Liza M. Gomez re: Proposed Retirement Security Rule](#) (Jan. 2, 2024), at 8.



rule was overbroad.<sup>2</sup> The Department is striking a careful balance in the proposed rule, avoiding breadth of concerns while improving upon the rigid, outdated five-part test, which the District Court of the District of Columbia said was more “difficult to reconcile” than the 2016 proposal.<sup>3</sup>

The DOL Rule provides that fiduciary status would only attach if compensated recommendations are made in certain specified contexts where a retirement investor can and should reasonably place their trust and confidence in the advice provided. The DOL Rule established new criteria addressing the Fifth Circuit’s view that investment advice fiduciary definition must incorporate elements of trust and confidence.<sup>4</sup> This is done by ensuring that the financial advisor is generally in the business of providing recommendations to clients and that the recommendations are individualized and may be relied upon as the basis for the interest of the investor.<sup>5</sup>

I appreciate the Committee allowing me to supplement my testimony.

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<sup>2</sup> Chamber of Com. of United States of Am. v. United States Dep’t of Lab., 885 F.3d 360 (5th Cir. June 21, 2018).

<sup>3</sup> National Association for Fixed Annuities v. Perez, 217 F. Supp.3d 1, 6, 7 (D.D.C., 2016).

<sup>4</sup> Better Markets, letter to Office of Regulations and Interpretations. (Jan. 2, 2024), at 14.

<sup>5</sup> *Id.*

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**Statement for the Record**

*On Behalf of the*

**American Bankers Association**

*Before the*

**Subcommittee on Health, Employment, Labor, and Pensions**

*Of the*

**House Committee on Education and the Workforce**

**February 15, 2024**



**Statement for the Record**

*On Behalf of the*

**American Bankers Association**

*Before the*

**Subcommittee on Health, Employment, Labor, and Pensions**

*Of the*

**House Committee on Education and the Workforce**

**February 15, 2024**

The American Bankers Association<sup>1</sup> (ABA) appreciates the opportunity to provide a Statement for the Record for this hearing titled: Protecting American Savers and Retirees from DOL’s Regulatory Overreach.”

**Summary**

The ABA strongly supports the committee’s interest in examining the proposed amendments to the Department of Labor’s (Department) investment advice regulation (Fiduciary Rule) and related prohibited transaction exemptions (collectively, Fiduciary Proposal or Proposal) regarding the expanded circumstances under which a person is considered to be a “fiduciary” under the Employee Retirement Income Security Act of 1974, as amended (ERISA) and the Internal Revenue Code of 1986, as amended (Code).<sup>2</sup>

The ABA shares the Department’s goal of providing plans and individuals with the ability and means to maximize their retirement investment opportunities, options, and returns. We believe, however, that the Fiduciary Proposal’s wholesale restructuring of the marketing, products, services, compensation, administration, and eligibility of the retirement services industry is a misguided approach fraught with serious risks, costs, and uncertainties for retirement investors and for the banks and other organizations that supply their services. We recommend therefore that the Department **withdraw the Fiduciary Proposal** in its entirety.

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<sup>1</sup> The American Bankers Association is the voice of the nation’s \$23.4 trillion banking industry, which is composed of small, regional, and large banks that together employ approximately 2.1 million people, safeguard \$18.6 trillion in deposits, and extend \$12.3 trillion in loans. Learn more at [www.aba.com](http://www.aba.com).

<sup>2</sup> See 29 C.F.R. § 2510.3-21 (2023) (Definition of “Fiduciary”). Section 2510.3-21(c) covers the definition of fiduciary for purposes of rendering investment advice.

## I. Introduction

The Fiduciary Proposal provides (i) a new regulatory definition of “fiduciary” when a person renders investment advice for a fee or other compensation for purposes of Title I and Title II of ERISA, and (ii) related proposed amendments to Prohibited Transaction Exemption 2020-02 (PTE 2020-02) and several other administrative exemptions from the prohibited transaction rules applicable to fiduciaries under ERISA.<sup>3</sup>

Retirement investors have long looked to and relied on their bank to provide retirement services, including investment products, retirement planning, and investor education, in order to achieve a secure financial retirement. When acting in an ERISA fiduciary capacity, banks have always sought the best interest of their retirement customers and take great pride and satisfaction in successfully serving their customers’ retirement needs. We agree with the Department that retirement service providers, when acting as ERISA fiduciaries, should act in the best interest of customers and that such customers deserve protection from financial abuse. We also believe that regulations should be carefully crafted to meet their objectives without stifling the delivery of retirement products and services to customers, or capturing communications, conversations, or relationships that are not appropriately regarded as fiduciary in nature.

The definition of “fiduciary” is a foundational element of ERISA. Consequently, any structural, transformative change to the definition will fundamentally affect the availability and delivery of retirement products and services provided by our member banks. This calls for measured, targeted, and sensible rulemaking, since agencies must “propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.”<sup>4</sup> Any proposed rule, therefore, should (i) convincingly demonstrate a “compelling need” for such a change, and (ii) employ the “least burdensome tools” to accomplish its objective(s).<sup>5</sup>

The ABA believes that the Fiduciary Proposal neither demonstrates a compelling need to undertake a drastic regulatory reset nor employs the least burdensome tools to effect such change. On the contrary, we believe that the Proposal is overbroad and overreaching, and that it captures numerous persons and entities who provide valuable services to plans, plan fiduciaries, plan participants and beneficiaries, and IRA owners but who should not be viewed as, nor reasonably considered to be, a “fiduciary” under ERISA and the Code. If adopted in its current form, the Proposal is likely to harm the very plans, plan participants and beneficiaries, and IRA

<sup>3</sup> See U.S. Department of Labor, Retirement Security Rule: Definition of an Investment Advice Fiduciary, 88 *Fed. Reg.* 75,890 (2023) (Fiduciary Rule); 88 *Fed. Reg.* 75,979 (PTE 2020-02); 88 *Fed. Reg.* 76,004 (PTE 84-24); 88 *Fed. Reg.* 76,032 (PTEs 75-1, 77-4, 80-83, 83-1, and 86-128).

<sup>4</sup> OMB Circular No. A-4 (Nov. 9, 2023), quoting Executive Order 12866, Regulatory Planning and Review § 1(b) (Oct. 4, 1993).

<sup>5</sup> Executive Order 13563, Improving Regulation and Regulatory Review § 1 (Jan. 18, 2011).

account owners that the Department is seeking to protect by making it extremely and unnecessarily difficult, complex, and costly for banks to make and deliver the products, services, and information necessary, helpful, and appropriate for achieving a financially sound retirement. As a result, the retirement planning benefits provided to these institutions and individuals will be significantly reduced or altogether eliminated.

We note that the Department has focused its attention and much of its regulatory analysis on retail customers and the retail IRA marketplace. We question, however, whether the Department has adequately analyzed the need for, and cost of, the Fiduciary Proposal in the *institutional* marketplace. We believe the Proposal could cause a massive disruption to the institutional marketplace, particularly by failing to provide any exemptions or safe harbors to accommodate longstanding, prudent, and proven industry practices that safeguard retirement investor goals and expectations. We further believe that the Department has not presented sufficient evidence of the need for such a monumental shift in the investment management of institutional retirement plan relationships where the parties' abilities to contract for services and allocate fiduciary risks should be respected.

We recommend therefore that the Department **withdraw the Fiduciary Proposal** and, following the suggested procedures described herein, research, analyze, and evaluate regulatory alternatives that are less burdensome and costly, and re-submit for public review and comment an amended Proposal that is more appropriately targeted to achieve the Department's regulatory objectives. If the Department proceeds with the Proposal, then we recommend that the Department adopt all of the recommendations described herein.<sup>6</sup> We believe these recommendations, if implemented in full, not only would provide tangible benefits to retirement investors but also would work to mitigate the compliance uncertainty, excessive administrative costs, and liability risks presented by the Fiduciary Proposal.

## II. The Fiduciary Proposal

Section 3(21)(A) of ERISA and section 4975(e)(3) of the Code each provides that a person is a "fiduciary" with respect to a "plan" (defined to include IRAs) to the extent such person (i) exercises any discretionary authority or discretionary control with respect to management of such plan or exercises any authority or control with respect to management or disposition of its assets; (ii) *renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so*; or (iii) has any discretionary authority or discretionary responsibility in the administration of such plan.<sup>7</sup>

The Department proposes to expand part (ii) above of the statutory definition by re-interpreting what it means for a person to render "investment advice for a fee or other compensation" under

<sup>6</sup> See Sections IV(A) through IV(P), *infra*.

<sup>7</sup> ERISA § 3(21)(A); *see also* Code, 26 U.S.C. § 4975(e)(3). [Emphasis added.]

ERISA and the Code. The Proposal provides that a person becomes a fiduciary when such person provides investment advice or makes a recommendation to a “retirement investor” (defined to include a plan, plan fiduciary, plan participant or beneficiary, and IRA and its owner and fiduciary) for a direct or indirect fee or other compensation, and one of the following is true:

- (1) The person directly or indirectly (*i.e.*, through or together with any affiliate) has discretionary authority or control (whether or not pursuant to an agreement, arrangement, or understanding) with respect to purchasing or selling securities or other investment property for the retirement investor; OR
- (2) The person:
  - Directly or indirectly makes investment recommendations to investors on a regular basis as part of such person’s business, and
  - Provides a recommendation to a retirement investor under circumstances indicating that the recommendation:
    - (i) is based on the particular needs or individual circumstances of the retirement investor, and
    - (ii) may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor’s best interest, OR
- (3) The person making the recommendation represents and acknowledges that it is acting as a fiduciary when making investment recommendations.<sup>8</sup>

The Proposal would replace the current five-part test of the Department’s regulations,<sup>9</sup> which the Department continues to believe allows a number of investment professionals, consultants, and advisers to be free of any obligation to adhere to ERISA’s fiduciary standards or to the prohibited transaction rules governing fiduciary conduct, although the Department has not cited to any such

<sup>8</sup> See Proposal, 29 C.F.R. § 2510.3-21(c)(1) (proposed), 88 *Fed. Reg.* at 75,977.

<sup>9</sup> The Department’s current regulation creates a five-part test for determining whether a person should be treated as a fiduciary by reason of rendering investment advice. See 29 C.F.R. § 2510.3-21(c). For advice to constitute “investment advice,” an adviser who does not have discretionary authority or control with respect to the purchase or sale of securities or other property for the plan must – (1) render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing, or selling securities or other property, (2) on a regular basis, (3) pursuant to a mutual agreement, arrangement, or understanding, with the plan or a plan fiduciary, that (4) the advice will serve as a primary basis for investment decisions with respect to plan assets, and that (5) the advice will be individualized based on the particular needs of the plan. See *id.*

incidents in the preamble.<sup>10</sup> The proposed reworked definition, the Department argues, “better reflects the text and the purposes of the statute and better protects the interests of retirement investors.”<sup>11</sup> The Proposal also would provide amendments to PTE 2020-02, which provides relief for certain compensation received by investment advice fiduciaries. The Proposal further would amend certain other related administrative exemptions designed to migrate retirement providers rendering investment advice from these other exemptions to PTE 2020-02 for appropriate administrative relief.

The Department states that these proposed changes collectively are “intended to protect the interests of retirement investors by requiring investment advice providers to adhere to stringent conduct standards and mitigate their conflicts of interest.”<sup>12</sup> In doing so, the Department believes that the Proposal “fills an important gap in those advice relationships where advice is not currently required to be provided in the retirement investor’s best interest, and the investor may not be aware of that fact.”<sup>13</sup> We believe that the Proposal fails to achieve its stated goals and will, in practice, be harmful to retirement investors, and we must therefore respectfully disagree with the Department’s assertions.

### III. General Concerns

Rather than adopting a targeted approach that concentrates on industry bad actors, the Fiduciary Proposal manifests an indiscriminate policy that would fundamentally reshape familiar, secure, and longstanding institutional and retail customer relationships, without attaining the Department’s goal of financial protection for retirement investors. Moreover, the revamped regulatory structure would appear to allow little leeway for the establishment or continuation of traditional non-fiduciary retirement services and programs that under the Proposal likely would be labelled as “fiduciary.” The result would be a dramatic restructuring of the banking and financial services business model that would be precariously founded on the implausible notion that customers will somehow retain the same level of access to investment information or education, and presumably at a substantially reduced cost and with added legal protection. The Proposal, however, does not account for the significant compliance burden placed on the retirement industry, along with its attendant increased liability exposure, labor, and costs. This will likely result in *less* availability of these services, and at a *greater* cost.

For example, it is not evident that the Department has fully considered the complexity of how the Proposal would apply to institutional investors that are responsible for managing multiple, significant pools of assets that comprise plan and non-plan assets, both those plan and non-plan pools that are separately managed as well as pools of combined plan and non-plan assets, such as

<sup>10</sup> Specifically, the Department believes that the elements of the five-part test “too often work to defeat legitimate retirement investor expectations of impartial advice and allow some advice relationships to occur where there is no best interest standard.” Proposal, 88 *Fed. Reg.* at 75,899.

<sup>11</sup> Proposal, 88 *Fed. Reg.* at 75,890.

<sup>12</sup> *Id.* at 75,891.

<sup>13</sup> *Id.* at 75,890.

those found in certain commingled funds. Indeed, if the Department takes the position that all financial or investment conversations with institutional investors that have any plan assets would subject the bank or adviser to ERISA fiduciary status with respect to the entire conversation, then the Department comes very close to supplanting the Securities and Exchange Commission and the federal banking agencies as the primary regulator of the financial markets and market participants, as the broad scope of the Proposal may result in the bank assuming that every conversation could result in the bank becoming a fiduciary, no matter how remote.

We are particularly concerned that the Fiduciary Proposal oversteps the bounds of agency interpretive rulemaking into regulatory legislation of new standards and requirements for providing IRA services. The Department not only is implementing these changes through the investment advice regulation -- which changes appear inconsistent with ERISA and applicable judicial precedent -- but also through a series of amendments to a number of exemptions that are, on their face, “voluntary” but as a practical matter are mandatory. Such agency action can reasonably be viewed as expanding the Department’s regulatory authority beyond congressional intent, a failing the Fifth Circuit Court of Appeals identified when it vacated the Department’s 2016 fiduciary rulemaking.<sup>13</sup>

The Department points to its “experience in the current marketplace” as a basis for concluding that the Proposal is warranted.<sup>14</sup> We are not told what this “experience” is and how it culminated into a Proposal that drastically reshapes fiduciary status under Department regulations. The Department does not cite a single contemporary authoritative source or body of evidence that demonstrates systematic retirement investor abuse or which otherwise would support a sweeping revamp of retirement services operations. Accordingly, the Proposal fails to demonstrate compliance with the Executive Orders on agency rulemaking.<sup>15</sup> Lacking hard evidence for its far-reaching proposed amendments, the Department should withdraw the Fiduciary Proposal as described in our recommendation below.

#### **IV. ABA Recommendation: Withdraw Fiduciary Proposal**

**The Department should withdraw the Fiduciary Proposal, seek broad public input on the necessity for revisions, and then (assuming there is sufficient justification) re-propose amendments to the current investment advice regulation, consistent with existing industry standards and retirement investor expectations.**

The ABA believes that the Department does not need to take any regulatory or other agency action on the current investment advice regulation since the Department has not provided compelling evidence of any systemic failings or abuses of the current regulation or PTE 2020-02.

<sup>13</sup> See *Chamber of Commerce of the United States of America v. United States Department of Labor*, 885 F.3d 360 (5<sup>th</sup> Cir. 2018) (*Chamber*).

<sup>14</sup> See Proposal, 88 *Fed. Reg.* at 75,899.

<sup>15</sup> See Executive Orders 12866 and 13563, *supra*.



We further believe that the Department already possesses the tools necessary to enforce PTE 2020-02's conditions and thereby address any such failings to abuses that may arise. Consequently, we believe that the Department should withdraw the Fiduciary Proposal in its entirety.

If the Department believes that amendments to the investment advice regulation, PTE 2020-02, or related PTEs are warranted, then it should withdraw the Fiduciary Proposal and undertake a comprehensive independent study and assessment of the investment advice regulation and related PTEs.<sup>16</sup> After this study is concluded, the Department would be better equipped to determine whether or not amendments would be necessary or appropriate.

If after review and evaluation of the completed study, the Department reasonably concludes that amendments to the investment advice regulation, PTE 2020-02, or related PTEs are warranted, then the Department should (i) first issue an Advance Notice of Proposed Rulemaking (ANPR) to provide full opportunity for public comment and subsequent public hearings that would assess the need for the proposed amendments, and (ii) after completion of the ANPR process, ensure that any subsequent proposed rulemaking provides specifically tailored and workable improvements to the investment advice regulation, PTE 2020-02, and/or related PTEs.

#### **V. ABA Recommendations for Issues Raised by the Fiduciary Proposal**

Without limiting the foregoing, ABA offers the following recommendations on issues raised in the Fiduciary Proposal that are of particular concern to our members and which the Department should consider fully in its evaluation of the Proposal, including any re-proposal in this area.

##### **A. Definition of Investment Advice Fiduciary: "Recommendation"**

Revise the Department's Interpretation of "recommendation" to read "a communication that is a clear, affirmative statement of unqualified endorsement and support for the retirement investor to engage in or refrain from making a specific investment decision that is based on the individual needs of the retirement investor."

##### **B. "Recommendation" Resulting from Aggregating Exempt Statements and Actions**

Withdraw the Aggregation Policy from the preamble and refrain from using this policy as a metric for determining whether a "recommendation" has been made and replace with a general anti-evasion provision that better serves efficient and prudent administration of the Fiduciary Rule.

##### **C. Definition of Investment Advice Fiduciary: "Regular Basis"**

<sup>16</sup> This step should include a public hearing and roundtable discussions with stakeholders and interested parties to discuss the need for revisions (if any) to the current regulation on fiduciary investment advice that would be consistent with existing industry standards and retirement investor expectations, while appropriately achieving the Department's regulatory goal of filling any perceived gap(s) in the investment advice regulation.

Retain the current “regular basis” prong of the investment advice fiduciary definition and clarify with language consistent with ERISA and judicial precedent.

D. Institutional Retirement Investors

Amend the Fiduciary Proposal to expressly exempt institutional investors from its coverage.

E. Requests for Proposals (RFPs)

Clarify that when a bank or other entity is responding to an RFP and the bank (i) provides investment or portfolio information, or (ii) offers itself or an affiliate to provide additional services to the retirement plan, that this action would not be considered “investment advice” under the Fiduciary Proposal.

F. “Hire Me” Exclusion

Clarify that bidding for a discretionary manager role comes within the “hire me” exclusion and does not constitute “investment advice” under the Fiduciary Rule.

G. Foreign Exchange (FX) Transactions

Confirm that FX transactions conducted in accordance with section 408(b)(18) of ERISA (or the conditions of another applicable prohibited transaction exemption) would not be treated under the Fiduciary Proposal as constituting investment advice.

H. Securities Lending

Confirm that marketing, offering, or otherwise making available a securities lending service or strategy is not a “recommendation,” and therefore, not investment advice under the Fiduciary Proposal.

I. Health Savings Accounts (HSAs)

Exclude HSAs from the Fiduciary Proposal’s definition of IRA and clarify in the preamble that HSAs are exempt from the Fiduciary Proposal’s coverage, and further limit the Proposal’s applicability only to those accounts whose primary purpose is for retirement savings.

J. Investment Education

The Department should (i) retain Interpretive Bulletin 96-1 in its current form and (ii) clarify that as part of investment education, a retirement provider may reference specific investments to a retirement investor without triggering fiduciary status under the Proposal.

K. PTE 2020-02: Eligibility

1. Focus a fiduciary’s ineligibility to rely on PTE 2020-02 on criminal conduct that involves the investment advice regarding and management of retirement assets

and that involves only (I) the fiduciary and (II) an affiliate that the fiduciary controls or over which the fiduciary exercises a controlling influence.

2. Amend the “substantially equivalent” standard for foreign criminal convictions to apply only where the factual record of such conviction, when applied to United States federal criminal law, would highly likely lead to a criminal conviction in the United States.
3. Confirm that the disqualification triggers from eligibility do not commence until the compliance date of a finalized Proposal.

L. PTE 2020-02: Disclosures, Documentation, Reporting, and Recordkeeping.

1. Eliminate the proposed required disclosures on costs, fees, and compensation related to recommended transactions.
2. Eliminate the proposed rollover documentation and disclosure.
3. Do not amend the recordkeeping requirements that among other things would authorize other fiduciaries and individuals to access a financial institution’s records.

M. PTE 2020-02: Policies and Procedures

1. Delete the proposed language on incentive compensation in the policies and procedures section.
2. Delete the requirement that fiduciaries provide to the Department the fiduciary’s policies and procedures within 10 business days of request.

N. PTE 86-128: Reliance on Exemption and Recordkeeping Requirements.

1. Retain section IV(a) of PTE 86-128 which exempts discretionary fiduciaries to IRAs from the requirements of section III (Conditions).
2. Delete the proposed requirement making available to retirement investors and their authorized representatives the fiduciary’s records that demonstrate compliance with PTE 86-128, since this requirement does not add materially to the protective provisions already in place and unnecessarily increases regulatory compliance costs.

O. Effective Date and Compliance Date

If the Proposal is finalized, extend the Proposal's effective date by at least 12 months and (assuming an effective date 12 months after the Proposal is finalized) provide a compliance date that is at least 12 months from the effective date.

P. Stay on Enforcement

The Department should provide for a stay on enforcement for at least 24 months from the Effective Date.

**VI. Conclusion**

The ABA shares the Department's goal of providing plans and individuals with the ability and means to maximize their retirement investment opportunities, options, and returns. For the reasons stated above, however, we believe that the Department should immediately withdraw the Proposal and recommence the rulemaking process as described herein. The ABA looks forward to working with the House Committee on Education and the Workforce and the Department of Labor as the Department evaluates whether to act on and how to improve the Fiduciary Proposal, consistent with the federal government's priority that the rulemaking respond to a compelling need and offers the least burdensome tools to accomplish the promotion of retirement savings.



Statement for the Record

Submitted to the

United States House of Representatives  
Committee on Education and the Workforce  
Subcommittee on Health, Employment, Labor, and Pensions

**Protecting American Savers and Retirees  
from DOL's Regulatory Overreach**

February 29, 2024

On behalf of

Susan K. Neely  
President & CEO  
American Council of Life Insurers  
101 Constitution Avenue, NW  
Washington, DC 20001

The American Council of Life Insurers (ACLI) is pleased to submit this statement for the record on *"Protecting American Savers and Retirees from DOL's Regulatory Overreach."* ACLI thanks Chairman Bob Good (R-VA) and Ranking Member Mark DeSaulnier (D-CA) for holding this important hearing.

#### AMERICAN COUNCIL OF LIFE INSURERS

ACLI advocates on behalf of 275 member companies dedicated to providing products and services that promote consumers' financial and retirement security. Financial security is our core business, and retirement security for all Americans is a critical mission. We protect 90 million American families with financial products that reduce risk and increase financial security, including life insurance, annuities, retirement plans, long-term care insurance, disability income insurance, dental and vision benefits, and other supplemental benefits. As society and work change, we are committed to providing financial security solutions that protect all Americans, regardless of where and how they work, their stage in life, or the economic status of their household. Americans are living longer, and financial security in retirement is a big challenge facing our country. Life insurers help people achieve their financial and retirement security goals, through products that are available, accessible, and affordable to all.

ACLI members represent 93 percent of industry assets in the United States. Through a well-crafted partnership of the private solutions ACLI members provide, and public solutions that are necessary, we believe the benefits of financial security can be made available to all Americans. Accordingly, ACLI member companies offer insurance contracts and investment products and services to employment-based retirement plans (including defined benefit pension plans, 401(k), SIMPLE, SEP, 403(b), and 457(b) plans) and to individuals (through IRAs and annuities). Three out of five small employers — those with 99 or fewer employees — rely on life insurers' products and services in their employment-based retirement plans. ACLI members are also sponsors of retirement plans for their own employees. And there are more than 15 million annuity-based IRAs held by individuals. As product and service providers, as well as plan sponsors, life insurers understand that by adequately and consistently saving for retirement, effectively managing assets throughout retirement, and utilizing appropriate financial protection products, Americans can supplement Social Security and ensure retirement and financial security for life.

Americans face significant financial security challenges, and the life insurance industry plays a critical role in helping them plan, save and secure a guaranteed income in retirement. Life insurance companies pay out \$13.3 billion in long-term care claims to cover extra care when needed; \$91.7 billion in life insurance payments so families aren't left on their own after losing a loved one; \$95.5 billion in annuity payments that families use to supplement income in retirement, pay for college, cover medical costs, or handle an unexpected expense; and \$21.6 billion in disability income payments to workers who experience an unexpected illness or injury.<sup>1</sup> No other financial institutions provide Americans with the level of financial guarantees offered by life insurance companies.

#### DEPARTMENT OF LABOR'S MISGUIDED PROPOSED RULEMAKING EXERCISE

Given Congress' recent bipartisan legislative successes to ensure lifetime income products are an option for Americans, it is troubling that the DOL continues to attempt to restrict access to vital retirement savings options, specifically with their proposed rulemaking on ERISA's definition of investment advice fiduciary.

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<sup>1</sup> ACLI analysis of 2022 NAIC Annual Statement data.

Since 2010, the DOL has sought to fundamentally expand the definition of ERISA fiduciary investment advice that has been in place since 1975. The DOL's initial attempt, in 2010, was withdrawn in response to the more than 100 senators and representatives from both parties who urged DOL to coordinate rulemaking with the Securities and Exchange Commission (SEC) and provide a robust economic analysis, as well as workable ERISA prohibited transaction exemptions.

The DOL then proposed new regulations in 2015 and issued a final rule in April 2016 that reclassified nearly all financial professionals working with retirement savers as ERISA investment advice fiduciaries. Aspects of the final rule were delayed under the Trump administration. Then in June 2018, the Fifth Circuit Court of Appeals vacated the fiduciary rule noting the "unreasonableness" of the DOL's interpretation of ERISA and that the DOL's implementation of the rule constitutes "an arbitrary and capricious exercise of administrative power."

Since that time, the SEC adopted Regulation Best Interest in June 2019, a rule that imposed enhanced obligations on broker-dealers that directly focused on addressing conflicts of interest. Then, the National Association of Insurance Commissioners (NAIC) in February 2020, adopted revisions to its annuity transactions model regulations that include enhanced standards for the sale of annuities and closely align with the SEC's Regulation Best Interest.

These initiatives impose an enhanced standards for broker-dealers and insurance producers that appropriately and effectively address potential financial conflicts of interest — the same potential conflicts the DOL was attempting to address in its flawed 2016 rulemaking. What's important to note is that both the SEC and NAIC expressed rejected a fiduciary standard because they recognized the importance of preserving affordable non-fiduciary professional financial assistance. Thus, unlike the 2016 DOL approach and the current DOL approach, the SEC and NAIC best interest models address potential financial conflicts of interest without denying those with low and moderate savings access to and guidance and information about a variety of financial savings products. Protecting consumer access is of vital importance.

Both the NAIC model, which has been adopted in 43 states, and the SEC's Regulation Best Interest, support the right of all consumers to access commission-based support or, when they can afford it, choose to pay for ongoing investment advice. It is highly likely that all 50 states will have an enhanced standard by the end of 2024. The effect of these state initiatives is to provide strong consumer protections no matter which state a consumer calls home. In fact, nearly 80 percent of U.S. consumers are now covered by enhanced consumer protections — without losing access to retirement options. By 2025, ACLI expects coverage to be 100 percent. Together, the NAIC best interest model and SEC Regulation BI provide a robust consumer protection for Americans planning for retirement. Yet, despite the advancement of these significantly enhanced consumer protections, the DOL discounted this progress and again released their proposed fiduciary regulatory package which will seriously disrupt everyone selling not only a lifetime income product, but potentially many other types of products in the course of their business.

It is unfortunate that the DOL continues to commit significant governmental resources for this controversial and unnecessary project. This "new" proposal incorporates many of the same inappropriately expansive and overly broad concepts as were included in the 2016 regulation that the Fifth Circuit vacated as inconsistent with the statutory text of ERISA. Like the 2016 regulation, the current fiduciary regulatory package proposal has several significant fatal flaws, is similarly inconsistent with the statutory text and, therefore, must be withdrawn. Specifically:

- It places an impermissible barrier between low- and moderate-income savers and financial professionals, denying them access to savings opportunities and retirement income solutions they want and need.
- It is contrary to current law in several respects, including:
  - It is contrary to congressional intent and violates the statutory limits Congress has placed on the department.
  - It improperly attempts to restructure the statute through the exemption process, imposing Title I fiduciary duties on Title II fiduciaries.
  - It provides IRA investors the ability to bring a private right of action not authorized by Congress.
  - It violates the First Amendment as a content-based, overbroad regulation of truthful sales speech about annuity products.
  - It violates the McCarran–Ferguson Act.
- It attempts to expand the definition of “investment advice fiduciary” under ERISA beyond the scope of what Congress intended when it promulgated ERISA, thereby implicating the Major Questions Doctrine.
- Its Regulatory Impact Analysis is flawed, incomplete, uses stale data, and fails to provide a credible basis for additional rulemaking.
- Its abbreviated comment period and the DOL’s unprecedented holding of a hearing prior to the end of the comment period fail to provide stakeholders with a meaningful opportunity to participate in the rulemaking process, thereby violating the Administrative Procedure Act.
- The DOL ignored the changes in regulatory standards applicable to financial professionals selling retirement products that have been implemented since its last failed rulemaking attempt.
- Moreover, given the Fifth Circuit’s clear and compelling decision as to the appropriate scope of ERISA’s statutory definition, there is no legitimate basis for the DOL to engage in further rulemaking initiatives under section 3(21)(A)(ii) of ERISA, the definition of an investment advice fiduciary.

ACLI and our member companies have asked the department to withdraw the proposal and focus instead on partnering to implement retirement policy that helps – not hurts – Americans saving for a secure retirement.

#### **REAL WORLD IMPLICATIONS: DOL’S PROPOSAL WOULD DENY ACCESS TO ANNUITIES**

Many Americans turn to annuities to provide monthly pension-like income in retirement. Annuities are a product sought and used by middle-income Americans. The median household income among annuity owners in 2022 was \$76,000 a year while median household income in the U.S. is \$63,000.<sup>2</sup> Annuities are the only financial product in the marketplace that guarantees income throughout retirement, distinguishing them from mutual funds and other investments. There are a wide variety of annuities available in the marketplace. Some provide immediate income and others provide income later in life. Some annuities offer market exposure and liquidity. Others provide

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<sup>2</sup> ACLI analysis of the Federal Reserve Survey of Consumer Finances, 2022.



protection against loss of principal. There are costs to providing lifetime income guarantees and retirement savers pay for the financial certainty of lifetime income when they purchase annuities.

Americans learn about the benefits and features of annuities from financial professionals who are typically compensated by commissions for the sale of the annuity from insurers. Life insurers have long sought to structure their compensation arrangements in a way that encourages insurance agents and broker-dealers to devote appropriate time and attention to consumers in the sale of annuities. For that reason, insurers typically pay a sales commission upon the completion of an annuity sale to compensate agents and broker-dealers for the significant effort involved in learning about and marketing and selling annuity products. Most annuities today are sold on a commission-based compensation structure.

The DOL's proposed fiduciary regulatory package would upend the marketplace for commission-based sales by broadly expanding the definition of fiduciary investment advice under ERISA to include virtually all financial service interactions in the retirements savings setting that could be construed to involve a "recommendation" of almost any investment product, strategy or service. Under this proposal, Americans would be forced to either forgo retirement information and guidance or engage a fiduciary investment adviser for any help with retirement finances, from taking the first steps to save for retirement to addressing their income needs in retirement.

Before the DOL's 2016 regulation was vacated by the Fifth Circuit, the response by the financial services industry to the imposition of the regulation's fiduciary-only approach on non-fiduciary transactional sales activity resulted in more than 10 million American workers' accounts, with \$900 billion in savings, losing access to professional financial guidance, according to a 2018 Deloitte study. These results should not surprise anyone. It was never appropriate to impose a fiduciary duty on persons engaged in traditional transactional sales speech.<sup>3</sup> Congress, the SEC and the NAIC have therefore specifically declined to do so. It should not be surprising that financial professionals and the firms for whom they worked moved away from the business of selling products and services following the release of the 2016 regulation that sought to de-incentivize sales and marketing activities.

Since 2018, a Quantria Strategies study found the 2016 fiduciary regulation would have:

- reduced the projected accumulated retirement savings of 2.7 million individuals, comprised of American workers with incomes below \$100,000, by approximately \$140 billion over 10 years; and
- leveled the most adverse effects on Blacks and Hispanics, reducing projected accumulated IRA savings by approximately 20 percent over 10 years and contributing to an approximately 20-percent increase in the wealth gap attributable to IRAs for these individuals.<sup>4</sup>

It is critical to understand what the actual implications of a fiduciary-only approach are on Americans, as demonstrated by the Quantria Strategies review of actual data. ACLI cautions against reliance on studies that assume that all financial professionals will agree to serve in a fiduciary capacity, that they will accept increased litigation risk and lower compensation for this

<sup>3</sup> In the Department of Labor's 2010 proposal to amend the definition of fiduciary (75 FR 65263), the Department recognized the dichotomy between advice for a fee and sales and marketing activities by providing a "sellers exception."

<sup>4</sup> Hispanic Leadership Fund, *Analysis of the Effects of the 2016 Department of Labor Fiduciary Regulation on Retirement Savings and Estimate of the Effects of Reinstatement*, November 8, 2021.

risk. Like the DOL's own analysis, efforts to analyze the potential impact of the DOL's proposed rule must avoid a static and narrow focus on a reduction in explicit fees with all else remaining constant. That disregards how or even if the proposed rule would impact the overall availability of information about or supply of financial security products, and instead assumes that somehow the supply of these is inelastic. This assumption is clearly wrong, as demonstrated in ACLI's comment letter.<sup>5</sup>

#### JURISDICTIONAL REGULATORY OVERREACH

The McCarran-Ferguson Act, passed by Congress and signed into law in 1945, entrusts states with the authority and responsibility for the regulation of the business of insurance. The sales and marketing of insurance products fits squarely within the boundaries of the "business of insurance" for a company to be in business and to market and sell goods and services. The preemptive authorities under ERISA do not extend to the business of insurance.

Furthermore, DOL has no authority to regulate agents compensated solely for the sale of insurance products. Under the McCarran-Ferguson Act, the "business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business" and "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance...."

To that end, the state regulatory oversight of insurance products and enforcement of insurance sales regulations is comprehensive. Oversight is achieved through the NAIC, whose members are chief insurance regulators from the 50 states, the District of Columbia, and the U.S. territories. Additionally, the states' enforcement regimes also extend to the entire insurance marketplace for products including disclosure requirements, professional standards for agents, and supervisory controls.

The NAIC's significant updates to the Suitability in Annuity Transactions Model Regulation (#275), in which they established a best interest standard that harmonized with the SEC's regulation best interest, was comprehensive. It was also a process that the DOL had direct interactions with. In contrast, the DOL's own proposed regulation process failed to engage or coordinate substantively with the NAIC and its members. The NAIC in its comment letter to the DOL specifically states: "The rationale and justification for DOL's work should stand on its own as complementary to robust state efforts and should not mischaracterize differences in regulatory philosophy as an absence of regulatory competence or efficacy in this space."<sup>6</sup>

#### CONGRESSIONAL INTENT AND PUBLIC POLICY TO ADDRESS RETIREMENT CHALLENGES

Congress was specific and intentional in the passage of ERISA in 1974. Should there need to be statutory adjustments to key ERISA definitions, it is Congress, not DOL, who should consider whether to revise the law to impose a fiduciary status on commission-based sales activities. It is Congress that has the authority to determine whether the SEC's Regulation Best Interest and the states' best interest efforts implementing the NAIC model rule adequately protect consumers while preserving commissioned-based services. Forty-one state legislatures and state insurance departments under existing authorities have adopted the NAIC Model. The states did so with rules

<sup>5</sup> ACLI Comment Letter on DOL Fiduciary Rule found at: <https://www.acli.com/-/media/public/pdf/leadership-initiatives/consumer-protection/acli-trdofiduciary010224.pdf>

<sup>6</sup> National Association of Insurance Commissioners, comments to the Department of Labor on their proposed amendments to the Definition of "Fiduciary" at 29 CFR Part 2510.3-21(c), and proposed amendments to each of Prohibited Transaction Exemptions 84-24 and 2020-02, 2023, found at: <https://content.naic.org/sites/default/files/government-affairs-rin-1210-ac02-def-fiduciary.pdf>

tailored to preserve the role of sales professionals selling commission-based products to consumers. It is Congress that has the role to examine whether federal laws should change and the costs and benefits of such change for investors and service providers.

Additionally, the passage of the Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019 and the SECURE 2.0 Act in 2022 were the most comprehensive retirement packages passed since the *Pension Protection Act* in 2006 and are expected to prove instrumental in increasing access to retirement plans. Additionally, they took numerous steps to not only improve access to lifetime income, but to ease burdensome regulations that overcomplicated the use of these products. Still, there is more work to be done.

Lawmakers from both the House and Senate are working to build upon this progress, and we ask policymakers to continue to look to public and private collaborators that can help implement the recently enacted public policy proposals that address savings challenges and help Americans ensure a secure retirement. We also ask policymakers to continue providing incentives to retirement savings and promoting guaranteed retirement income products. Focusing on ways to help more people achieve a financially secure retirement — increasing savings rates, access to workplace-based retirement plans and lifetime income security for *all* Americans — are all key to financial security.

As Congress continues to look for opportunities to increase Americans' financial security, one critical element is the removal of barriers to lifetime income products. Removing barriers to annuities, as well as modernizing existing law, provides savers with the option to ensure they have income for life. Public policy changes to increase access to annuities through the workplace help to build a financial safety net that is critical in retirement.

#### CONCLUSION

The life insurance industry is proud to serve retirement savers and play a critical role in offering the only retirement product that provides guaranteed income for life. We take offense to the nefarious characterization that the DOL and Administration have attempted to make of these products and those that sell them. On behalf of the ACLI member companies, we appreciate the subcommittee's interest in this issue, and we hope that our input provides clarity and perspective as to why the DOL's proposal has significant fatal flaws and should be completely withdrawn.



**America's  
Credit Unions**

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February 15, 2024

The Honorable Bob Good  
Chairman  
Committee on Education and the Workforce  
Subcommittee on Health, Employment,  
Labor, and Pensions  
U.S. House of Representatives  
Washington, DC 20515

The Honorable Mark DeSaulnier  
Ranking Member  
Committee on Education and the Workforce  
Subcommittee on Health, Employment,  
Labor, and Pensions  
U.S. House of Representatives  
Washington, DC 20515

**Re: Today's Hearing: "Protecting American Savers and Retirees from DOL's Regulatory Overreach"**

Dear Chairman Good and Ranking Member DeSaulnier:

On behalf of America's Credit Unions, I am writing regarding the Committee's hearing entitled, "Protecting American Savers and Retirees from DOL's Regulatory Overreach." America's Credit Unions is the voice of consumers' best option for financial services: credit unions. We advocate for policies that allow the industry to effectively meet the needs of their nearly 140 million members nationwide.

On October 31, 2023, the U.S. Department of Labor (DOL) released a proposed rule redefining who is an investment advice fiduciary for purposes of the Employee Retirement Income Security Act (ERISA). The Department also released proposed amendments to class prohibited transaction exemptions (PTEs) available to investment advice fiduciaries, including PTE 2020-02, "Improving Investment Advice for Workers & Retirees."

Credit unions exist to serve their members, and inherent in the credit union movement is acting in a member's best interest. Credit unions offering investment services to their members aim to help American families of all means receive information about saving for retirement and planning for their future. While many large investment firms seek high net worth clients, credit unions seek to provide services to their members in all financial situations and make it easier for these individuals to map out financial plans.

We agree with the DOL that credit union members, and all consumers, deserve the best possible service when seeking information about retirement plans or Individual Retirement Account (IRA) distributions. However, it is important to have rules that encourage and promote retirement savings – rather than potentially chill the ability of credit unions, or other financial institutions, to provide these products and services.

The National Credit Union Administration (NCUA) has traditionally stated that federal credit unions may not act as broker-dealers in securities or provide investment advice of the type that

February 15, 2024  
Page 2 of 2

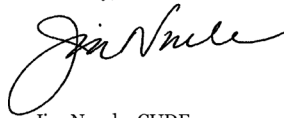
would render them “investment advisers” under state or federal securities laws. While the Fiduciary Duty Rule covers these types of activities, the proposed language also covers transactions and relationships that are significantly broader in scope, including a significant number of transactions and relationships relating to IRAs.

America’s Credit Unions and our members are concerned that the Fiduciary Duty Rule casts a wide net that unfairly burdens credit union activity with complex requirements and potential litigation risk. For example, the requirements of the rule can be triggered when an individual provides a “recommendation,” which is defined as a “a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action.” Without more targeted guidance, the rule may be interpreted to include general advice and explanation of investment-related financial products, such as IRAs, provided by credit union employees.

In light of such possible interpretations, credit unions may decide that it is no longer worthwhile to recommend an investment advisory credit union service organization (CUSO) to a member to either set up an IRA or create an employee welfare benefit plan (if the member is a business). This is concerning since credit unions and credit unions employees have long provided financial products, services, and support to their members. If credit union employees are categorized as financial advisors in the final rule, it could have a negative impact on the credit union industry and may hurt many Americans who seek financial services.

On behalf of America’s Credit Unions and the 140 million credit union members, thank you for holding this important hearing and considering our views on the subject.

Sincerely,

A handwritten signature in black ink, appearing to read "Jim Nussle", written in a cursive style.

Jim Nussle, CUDE  
President & CEO

cc: Members of the Subcommittee on Health, Employment, Labor, and Pensions

**American Retirement Association**  
**Statement for the Record**  
**U.S. House Education and the Workforce**  
**Subcommittee on Health, Employment, Labor, and**  
**Pensions entitled:**  
**“Protecting American Savers and Retirees from**  
**DOL’s Regulatory Overreach”**  
**February 15, 2024**

Thank you, Chair Good, Ranking Member DeSaulnier, and Members of the Subcommittee on Health, Employment, Labor, and Pensions for the opportunity to submit a statement for the record on behalf of the American Retirement Association (ARA) in connection with the Hearing entitled “Examining the DOL Fiduciary Rule: Implications for Retirement Savings and Access.”

The ARA is the coordinating entity for its five underlying affiliate organizations representing the full spectrum of America’s private retirement system – the American Society of Enrolled Actuaries (ASEA), the American Society of Pension Professionals and Actuaries (ASPPA), the National Association of Plan Advisors (NAPA), the National Tax-Deferred Savings Association (NTSA), and the Plan Sponsor Council of America (PSCA). Combined the ARA represents over 35,000 retirement plan professionals nationwide. The ARA’s members and their affiliated organizations support 95 percent of all the defined contribution plans, such as 401(k) plans, in the United States. The ARA and its underlying affiliate organizations are diverse in the roles they play, but united in their dedication to the success of America’s private retirement system.

The ARA’s mission has always been to expand and strengthen the employer-based retirement plan system. Consistent with this mission, the ARA embraced the enactment of ERISA almost fifty years ago in 1974 because it included a principles-based fiduciary standard designed to protect the interests of both plan sponsors and participants. A central component to this protection is that a service provider offering investment advice for a fee to a plan with respect to plan assets must do so consistent with ERISA’s fiduciary standard. The definition of what constitutes “investment advice” under ERISA is thus extremely important.

The regulatory definition of investment advice was first promulgated in 1975. Under the regulation, a service provider is considered to be giving investment advice if the service provider: (1) renders advice to a plan 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 understanding; (4) that such advice will be a primary basis for investment decisions; and that (5) the advice will be individualized to the plan.

This is commonly known as the “five-part test.” Needless to say, the retirement plan landscape has changed dramatically since 1975, including the advent of the participant-directed 401(k) plan which has grown to become the predominant employer-based retirement plan. The regulations, however, have not been updated to reflect the shift and have left a significant population without any fiduciary protection, in clear contrast to the statutory language and intent of ERISA.

#### **A Rulemaking is Needed to Ensure ERISA Continues to Operate as Intended**

The purpose of ERISA is to promote and protect the interests of employees and their beneficiaries enrolled in employee benefit plans, and the fiduciary provisions of the statute were carefully crafted to protect these retirement investors. When ERISA was enacted and the existing regulation was promulgated in 1975 (the 1975 Rule), defined benefit pension plans of large companies represented the vast majority of employer-sponsored retirement plans. In fact, 401(k) plans did not even exist. Individuals enrolled in these plans typically received payments of annuity distributions from their pension plans, and therefore were not making individual investment decisions. Rather, representatives from large companies made these investment decisions on behalf of all participants.

Today, the retirement landscape is almost unrecognizable from its beginnings: 401(k) plans dominate the retirement plan market, the number of small business employers sponsoring plans has skyrocketed, individual investors make most of the investment decisions for their retirement plan assets, and the variety of investment vehicles included in these plans continues to grow. Despite the evolving retirement landscape, ERISA’s statutory protections continue to apply uniformly without any regard to these significant shifts and leaves a significant number of retirement savers and small employers without any fiduciary protection.

#### **Modernizing ERISA’s Definition of Investment Advice**

A significant gap under the 1975 Rule (the current rule) affects advice given to an employer with respect to its retirement plan. Under the 1975 Rule, an advisor must have a regular and ongoing relationship with the investor in order for the advisor to be considered an investment advice fiduciary under Section 3(21) of ERISA. When employers decide to establish a new retirement plan, they often solicit advice from an investment professional who will provide plan-level advice regarding the specific investment options that will be offered to participants. Small businesses seek this one-time, plan-level advice from investment advisors far more frequently than large businesses because smaller companies lack the requisite time and resources to set up retirement plans on their own.

Under the 1975 regulation, “selling” a small business retirement plan to a plan sponsor, including the specific investment options offered to participants, is not considered “investment advice.” This is because, as often is the case with smaller plans, there is no ongoing advice relationship so the “regular basis” prong of the 1975 five-part test is not met. Practically, this means that when most small business retirement plans are established, the advice that they

receive is not subject to ERISA's fiduciary standard of care, which creates significant risk exposure for small business plan sponsors and participants, potentially resulting in a chilling effect on retirement plan participation and adoption in these smaller organizations.

Similarly, small businesses are unprotected by SEC's Regulation Best Interest ("Reg BI") because "plan-level" advice is considered "institutional advice," even when the small business owner is clearly not a sophisticated investor. Although the NAIC Model Rule has increased protections for individual purchasers of annuities in over half the states, it does not apply to the purchase of annuity-based retirement plans for small business owners. Significantly, both SEC Reg BI and the NAIC Model Rule provide investor protections to individuals on a transactional basis whether or not there is an ongoing advice relationship on a so-called "regular basis." It is simply nonsensical to give an unsophisticated small business owner, who is arguably making a more consequential set of investment decisions on behalf of his or her employees, fewer investor protections than that same small business owner would likely get with respect to investment advice received on his or her own personal investments. For these reasons, ARA support efforts by Congress and the Department of Labor to modernize the 1975 regulatory definition of investment advice leading to fiduciary responsibility under ERISA, particularly as it applies to advice to retirement plan sponsors with respect to plan investments (i.e., plan-level advice).

The Department of Labor's proposed rule "Retirement Security Rule: Definition of an Investment Advice Fiduciary" and related exemptions (the Proposal) strive to fix this problem by ensuring that advice given to plan sponsors will be subject to the same fiduciary standard of care, regardless of whether the advice is given once or as part of an ongoing relationship. Under the Proposal, the definition of fiduciary investment advice generally provides that a person acting in a position of trust (whether stated or implied) is a fiduciary when the person provides an investment recommendation for a fee. In enumerating the circumstances under which someone is acting from a position of trust, the Proposal provides three instances when an investment recommendation triggers fiduciary investment advice: (1) the person has discretionary authority or control, (2) the person represents they are acting as a fiduciary, or (3) the person makes investment recommendations on a regular basis as part of their business and makes a recommendation to a retirement investor under certain circumstances that meet the rule. The ARA supports this expanded, transactional definition of fiduciary investment advice and believes that it better aligns with the statutory language and intent of ERISA to protect all retirement investors.

### **Closing the Retirement Coverage Gap**

It is well recognized that the gateway for working Americans to achieve a comfortable retirement is having access to a workplace retirement plan. Moderate income workers are fifteen times more likely to save for retirement when covered by an employer-based retirement plan than on their own in an IRA. The advent of automatic enrollment has made the connection between retirement plan coverage and positive retirement outcomes even stronger. Congress plays a pivotal role in expanding retirement plan



coverage and it should continue to support initiatives specifically designed to provide increased protections and startup incentives for businesses (particularly small employers) who want to begin offering retirement benefits for their workers.

Having access to a workplace-based retirement is the surest pathway to achieving a comfortable retirement for American workers. These plans provide long-term economic growth and build financial security for the middle class. According to recent data, nearly \$10 trillion is housed in employer-based defined contribution plans and retirement assets account for 32 percent of all household financial assets in the United States.<sup>1</sup>

Nearly two-thirds of active participants in 401(k) plans have an adjusted gross income of less than \$100,000 per year.<sup>2</sup> One-third of participants have an income less than \$50,000.<sup>3</sup> The critical factor that determines whether these moderate-income workers save for their retirement is whether they have access to a retirement savings plan at work. Research shows that workers are 15 times more likely to save for retirement when covered by an employer-based retirement plan than on their own in an IRA, primarily because of higher contribution limits and employer matching contributions.<sup>4</sup> The advent of automatic enrollment in these employer-sponsored plans has only improved retirement outcomes for American workers.

Despite these positive developments, far too many Americans still lack access to a retirement plan at work and thus struggle to build their retirement savings. This so-called retirement plan coverage gap impacts tens of millions of working Americans and it tends to disproportionately impact small businesses who often lack the sophistication, time, or money to offer a retirement plan.

Compounding this problem is the fact nearly half of all working Americans are employed by small businesses.<sup>5</sup> According to the Department of Labor's Bureau of Labor Statistics, only 53 percent of employees at smaller businesses (i.e., firms with fewer than 50 workers) have access to a workplace-based retirement plan, compared to 69 percent of those working at organizations with more than 50 workers and 83 percent of those at organizations with more than 100 workers.

This has contributed significantly to the savings inequity among communities of color whose employment skews to smaller businesses. Specifically, data shows that 52 percent of Black

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<sup>1</sup> Investment Company Institute, Quarterly Retirement Market Data, January 10, 2023, available at [https://www.ici.org/statistical-report/ret\\_23\\_q3](https://www.ici.org/statistical-report/ret_23_q3)

<sup>2</sup> Judy Xanthopoulos, PhD of Quantria Strategies, analysis of Internal Revenue Service, Statistics of Income, Individual Income Tax, and IRA Studies, 2017 Tax Year

<sup>3</sup> Ibid.

<sup>4</sup> Jacqueline Salmon, AARP, State Programs, Federal Incentives Spur Rise in 401(k)s, March 2023, available at: <https://www.aarp.org/retirement/planning-for-retirement/info-2023/rise-in-401k-benefits.html>

<sup>5</sup> U.S. Small Business Administration, Frequently Asked Questions, March 2023, available at: <https://advocacy.sba.gov/wp-content/uploads/2023/03/Frequently-Asked-Questions-About-Small-Business-March-2023-508c.pdf>

Americans and 68 percent of Latinx Americans do not currently have access to a workplace-based retirement plan. By contrast, only 40 percent of White Americans lack access to a retirement plan at work.<sup>6</sup>

Congress has made great strides in recent years to address this growing problem. SECURE 2.0 included many provisions designed to help close the gap, including the creation of Starter K plans and robust start-up tax credits for small businesses adopting new retirement plans, but more needs to be done. Ensuring ERISA protections for plan sponsors is critical as we look to increase small business retirement plan coverage. Leaving small business owners looking to provide a retirement plan for their employees with zero regulatory protections when receiving advice related to plan investment options is bad policy and will have severe consequences for American workers saving for retirement .

### **Conclusion**

The ARA appreciates the House Committee on Education and the Workforce's focus on the ongoing challenges confronting the retirement industry. We thank the Congress for its great work on improving America's employer-sponsored retirement system and look forward to working with the Committee as it moves forward with further improvements in the future.

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<sup>6</sup> Monique Morrissey, Economic Policy Institute, The State of American Retirement Savings, December 2019, available at: <https://www.epi.org/publication/the-state-of-american-retirement-savings/>



STATEMENT FOR THE RECORD BY  
THE ERISA INDUSTRY COMMITTEE  
TO THE U.S. HOUSE OF REPRESENTATIVES  
COMMITTEE ON EDUCATION AND THE WORKFORCE  
SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS  
HEARING ON  
“PROTECTING AMERICAN SAVERS AND RETIREES FROM DOL’S REGULATORY OVERREACH”  
*February 15, 2024*

Chairman Good, Ranking Member DeSaulnier, and Members of the Subcommittee on Health, Employment, Labor, and Pensions, thank you for the opportunity to submit a statement for the record on behalf of The ERISA Industry Committee (ERIC). ERIC is a national advocacy organization exclusively representing the largest employers in the United States in their capacity as sponsors of employee benefit plans for their nationwide workforces. With member companies that are leaders in every economic sector, ERIC is the voice of large employer plan sponsors on federal, state, and local public policies impacting their ability to sponsor benefit plans. ERIC member companies offer benefits to tens of millions of employees and their families, and are located in every state, city, and Congressional district.

This Committee has long been at the forefront of protecting and enhancing the private sector retirement system. Bipartisan reforms championed by this Committee were key portions in the SECURE 2.0 Act of 2022. That law was generally intended to improve coverage, simplify administration, and provide plan sponsors flexibility to innovate and participants with more savings opportunities.

The regulatory agencies, including the Department of Labor, the Internal Revenue Service at the Department of the Treasury, and the Pension Benefit Guaranty Corporation, have already provided necessary guidance to implement the law, and more remains to be done. Workers and retirees benefit when Congress, the agencies, and stakeholders work together to identify concrete, discrete issues with the retirement system and enact bipartisan solutions.

Today’s hearing focuses on the Department of Labor’s proposed regulation entitled “Retirement Security Rule: Definition of Investment Advice Fiduciary” and related proposed amendments to prohibited transaction exemptions published in the Federal Register on November 3, 2023.

Attached is the comment letter that ERIC filed with the Department of Labor on this proposal. In its letter, ERIC recommended necessary improvements to the proposal in order to enhance the

ability of large plan sponsors to provide meaningful benefits to tens of millions of working Americans.

### **Conclusion**

Thank you for the opportunity to provide today's statement for the record. ERIC and our member companies appreciate this Committee's leadership in promoting retirement security. We look forward to working with all Members to improve the private sector retirement system, improve opportunities and outcomes for workers and retirees, and improve flexibility and reduce barriers for plan sponsors. We would be pleased to address any questions you may have regarding these comments.



**ANDREW BANDUCCI**  
Senior Vice President, Retirement and  
Compensation Policy

Submitted Electronically

January 2, 2024

Office of Regulations and Interpretations  
Employee Benefit Security Administration  
U.S. Department of Labor  
200 Constitution Ave., NW  
Washington, DC 20210

**Re: RIN 1210-AC02 – Retirement Security Rule: Definition of an Investment  
Advice Fiduciary; ZRIN 1210-ZA32; and Other Related Exemptions**

To Whom It May Concern:

On behalf of The ERISA Industry Committee (ERIC), thank you for the opportunity to comment on the proposed rule (NPRM or proposal) from the Department of Labor (DOL or Department) entitled “*Retirement Security Rule: Definition of Investment Advice Fiduciary*” and related proposed amendments to prohibited transaction exemptions published in the Federal Register on November 3, 2023.<sup>1</sup>

We expect other commenters will comprehensively address the procedural, legal, and economic questions raised by the proposal, including the short comment period and the potential consequences for retirement savings. **As discussed below, ERIC writes to recommend improvements to enhance the ability of large plan sponsors to provide meaningful benefits to tens of millions of working Americans.**<sup>2</sup>

By way of background, ERIC is a national advocacy organization exclusively representing the largest employers in the United States in their capacity as sponsors of employee benefit plans for their nationwide workforces. With member companies that are leaders in every economic sector, ERIC is the voice of large employer plan sponsors on federal, state, and local public policies impacting their ability to sponsor benefit plans. ERIC member companies offer benefits to tens of millions of employees and their families, located in every state, city, and Congressional district.

<sup>1</sup> 88 Fed. Reg. 75890 (Nov. 3, 2023).

<sup>2</sup> The Department asked for comments about whether the proposed effective date of 60 days after the final rule is published in the Federal Register is sufficient. In our view, it is not. To the extent that plan service-providers will again need to amend policies and procedures, implement those changes, communicate them to plans, participants, and other retirement savers, 60 days is an insufficient period, and at least a year may be necessary.

ERIC's comments will be filed on the docket for RIN 1210-AC02 but should be considered in connection with the other aspects of the regulatory package, including ZRIN 1210-ZA32, "Proposed Amendment to Prohibited Transaction Exemption 2020-02," 88 Fed. Reg. 75979 (Nov. 3, 2023), and the other related exemptions included in the proposed regulatory package.

### Background

After more than a decade of controversy,<sup>3</sup> the Department has again proposed amending the definition of "fiduciary" under the Employee Retirement Income Security Act (ERISA). As relevant here, fiduciary status begets the obligation under ERISA to discharge duties with the "exclusive purpose" of providing benefits to benefit plan participants and defraying reasonable expenses of administering the plan, and "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims," and in accordance with the plan documents.<sup>4</sup>

Under the statute, a person or entity is a fiduciary with respect to an employee benefit plan to the extent the person exercises discretionary authority or control respecting plan management or disposition of assets, renders "investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so," or has any discretionary authority or discretionary responsibility in the administration the plan.<sup>5</sup>

The Department elaborated on the "investment advice" prong of the definition in 1975, creating a five-part test.<sup>6</sup> It is this definition that the NPRM proposes to change. Under the proposed definition, a person renders "investment advice" to the extent:

- (1) *the person provides investment advice or make an investment recommendation to a retirement investor (i.e., a plan, plan fiduciary, plan participant or beneficiary, IRA, IRA owner or beneficiary, or IRA fiduciary);*<sup>7</sup>
- (2) *the advice or recommendation is provided "for a fee or other compensation, direct or indirect," as defined in the proposed rule; and,*
- (3) the advice or recommendation occurs in one of the following contexts:

<sup>3</sup> See *id.* at 75893-75896 (reciting the regulatory history).

<sup>4</sup> ERISA Sec. 404.

<sup>5</sup> ERISA Sec 3(21)(A).

<sup>6</sup> 29 CFR 2510.3-21(c).

<sup>7</sup> For these purposes, the retirement investor definition includes plan fiduciaries and the plan. The Department should clarify, however, that a plan sponsor acting in a settlor capacity (e.g. when making plan design decisions) is not a retirement investor under the definition.

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- *The person either directly or indirectly has discretionary authority or control, whether or not pursuant to an agreement, arrangement, or understanding, with respect to purchasing or selling securities or other investment property for the retirement investor;*
- *The person either directly or indirectly makes investment recommendations to investors on a regular basis as part of their business and the recommendation is provided under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest; or*
- *The person making the recommendation represents or acknowledges that they are acting as a fiduciary when making investment recommendations.*<sup>8</sup>

This proposed definition, without further elaboration, would raise questions about whether routine interactions and investment education would newly trigger fiduciary status. As discussed below, the Department has attempted to address these issues, but further clarity is needed.

**The Department Should Not Change the Obligations of Employer Human Resources Services**

ERIC member companies administer retirement programs for their employees in accordance with their existing fiduciary duties. However, the Department has noted the possibility of various routine interactions that may occur between company employees and retirement plan participants that do not –and ought not – rise to the level of fiduciary interactions. The NPRM states that certain investment recommendations may qualify as fiduciary investment advice if the recommendation is made “on a regular basis as part of [the recommendation-maker’s] business...”<sup>9</sup> In this regard, the preamble to the NPRM states:

*“the human resources employees of a plan sponsor would not be considered investment advice fiduciaries under the proposed regulatory definition, because they do not regularly make investment recommendations to investors as part of their business.”*<sup>10</sup>

It is helpful that the Department acknowledges that those providing human resources functions are not in the business of providing investment advice. Similarly, in a footnote, DOL explains that “[t]he Department also would not consider salaries of human resources employees of the plan sponsor to be a fee or other compensation in connection with or as a result of the educational services and materials that they provide to plan participants and beneficiaries.”

<sup>8</sup> Proposal, *supra* note 1, at 75900.

<sup>9</sup> *Id.* at 75900-75902.

<sup>10</sup> *Id.* at 75902.

However, the preamble language is limited to “human resources employees” and does not include contractors of the plan sponsor who are providing human resources services. The language should be expanded to encompass any person providing human resources services on behalf of the plan sponsor. It should also include other employees of the plan sponsor that regularly provide assistance to the plan’s investment committee or plan administrator.

Additionally, a question has arisen about the human resources employees of a plan sponsor that is actually, itself, in the business of providing investment recommendations. Surely the human resources employees of an investment advisory firm were not the target of this expansion of the fiduciary definition, but the preamble would benefit from additional clarification. Finally, the Department should codify this human resources safe harbor in the operative text of the rule, not merely in the preamble.

#### **The Investment Education Interpretive Bulletin Should Not Be Weakened**

ERIC member companies invest in their employees’ holistic financial wellness, including retirement plans, health and welfare plans, paid leave, financial education, and other benefits. As part of this, many employers provide investment education pursuant to DOL Interpretive Bulletin (IB) 96-1, “Interpretive Bulletin Relating to Participant Investment Education.”<sup>11</sup> Under IB 96-1, information and material in the context of a participant-directed individual account plan is not fiduciary investment advice if it falls into one of four categories:

- Plan information
- General financial and investment information
- Asset allocation models
- Interactive investment models

According to the preamble, if the NPRM is finalized:

*“the Department believes that the IB would continue to provide accurate guidance under the proposed regulation. If the proposed rule is finalized, the IB would continue to correctly describe the types of educational information and materials that should not be treated as ‘recommendations’ subject to the fiduciary advice definition. Although the IB specifically applies in the context of participants and beneficiaries in participant-directed individual account plans, the Department believes that the analysis it presents is valid regardless of whether the retirement investor is a plan participant, beneficiary, IRA owner, IRA beneficiary, or fiduciary.”*

There are myriad examples of 96-1-qualifying information that plan sponsors and service-providers routinely provide, such as information about plan participation, increasing

<sup>11</sup> See 85 Fed. Reg. 40589 (July 7, 2020) (reinstating IB 96-1 following the vacatur of the 2016 changes to the fiduciary rule by the U.S. Court of Appeals for the Fifth Circuit).



contributions, and strategies for managing assets in retirement. While generally reaffirming 96-1, the preamble includes cautionary language warning that a service-provider purporting to be engaged in investment education can cross the line into fiduciary investment advice if it relates to a “specific investment or investment strategy.” **The Department should specify that this is not intended to weaken the safe harbor for educational asset-allocation models and interactive investment materials described in 96-1.** Finally, the operative language of the rule should specifically incorporate 96-1.

#### **DOL Should Permit IRS-Approved Non-Bank Trustees to use PTE 2020-02**

The NPRM expands the universe of investment advice fiduciaries and includes health savings accounts (“HSAs”) in its scope. The fiduciary relationship may be created if compensation is received in connection with an HSA-related investment arrangement. As such, certain HSA service providers, like other investment advice fiduciaries, may need to use the provisions of PTE 2020-02 as proposed to receive reasonable compensation in connection with these services. Under that PTE, as proposed to be revised, financial institutions, investment professionals, and their affiliates and related entities may receive reasonable compensation as a result of providing fiduciary investment advice, provided the terms of the exemption are met.

The definition of “Financial Institution” under the proposed revisions to PTE 2020-02 includes registered investment advisers, banks, insurance companies, broker-dealers, and their employees, agents, and representatives.<sup>12</sup> The Department has requested comment on this definition and asked whether any other type of entity should be included.

**This definition of Financial Institution should be expanded to include Internal Revenue Service (IRS)-approved nonbank trustees.** These non-bank trustees are permitted to administer HSAs and are subject to numerous requirements under Treasury regulations and guidance. These IRS- approved nonbank trustees service a meaningful portion of the HSA market, and without eligibility to use PTE 2020-02, may be forced to exit the market. With reduced competition and fewer choices, costs to HSA plan sponsors and participants could increase. Ineligibility for this group does not appear to promote a policy goal and should be remedied by amending the definition of “financial institution.”

<sup>12</sup> “Proposed Amendment to Prohibited Transaction Exemption 2020-02,” 88 Fed. Reg. 75979, 76003 (Nov. 3, 2023).

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**Conclusion**

Thank you for the opportunity to provide comments on this regulatory package. If the Department goes forward with this rulemaking, the operative text should address the recommendations contained herein to ensure that the participants of large retirement plans and HSAs do not receive fewer or more expensive services. We would be pleased to address any questions you may have regarding these comments.

Sincerely,

*Andy Banducci*

**Statement of the Investment Company Institute  
Submitted on February 29, 2024**

**US House Committee on Education and the Workforce  
Subcommittee on Health, Employment, Labor, and Pensions  
February 15, 2024 Hearing:**

**“Protecting American Savers and Retirees from DOL’s Regulatory Overreach”**

The Investment Company Institute (ICI)<sup>1</sup> is pleased to provide this statement regarding the US Department of Labor’s (“Department”) fiduciary proposal,<sup>2</sup> for the hearing “Protecting American Savers and Retirees from DOL’s Regulatory Overreach” in the Subcommittee on Health, Employment, Labor, and Pensions of the House Committee on Education and the Workforce (“Hearing”). We thank Subcommittee Chairman Good and Ranking Member DeSaulnier for the opportunity to provide this statement, and for their willingness to examine the impact that the Department’s proposal would have on American retirement savers.

As a trade association representing the asset management industry, ICI is especially attuned to the needs of retirement savers. Our members play a significant role in US retirement saving by making available the investment products through which pension plans, defined contribution (DC) plans, and individual retirement accounts (IRAs) invest. Total US retirement assets were \$35.7 trillion as of September 30, 2023, with our members managing a large portion of those assets through regulated funds, collective investment trusts, and separate accounts.<sup>3</sup>

ICI understands and appreciates the Department’s interest in ensuring that American workers receive the advice and guidance they need to save for a secure retirement. ICI is deeply concerned, however, that the Proposal will have significant unintended consequences and will harm the very retirement savers it is intended to protect. In our January 2, 2024 Comment Letter

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<sup>1</sup> The [Investment Company Institute](https://www.ici.org) (ICI) is the leading association representing regulated investment funds. ICI’s mission is to strengthen the foundation of the asset management industry for the ultimate benefit of the long-term individual investor. ICI’s members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in other jurisdictions. Its members manage \$33.2 trillion invested in funds registered under the US Investment Company Act of 1940, serving more than 100 million investors. Members manage an additional \$8.5 trillion in regulated fund assets managed outside the United States. ICI also represents its members in their capacity as investment advisers to certain collective investment trusts (CITs) and retail separately managed accounts (SMAs). ICI has offices in Washington DC, Brussels, and London and carries out its international work through [ICI Global](https://www.ici.org/global).

<sup>2</sup> Notice of Proposed Rulemaking – Retirement Security Rule: Definition of an Investment Advice Fiduciary, 88 Fed. Reg. 75890 (November 3, 2023). The Department at the same time proposed amendments to several prohibited transaction exemptions (PTEs) currently available for use by advice fiduciaries. Proposed Amendment to Prohibited Transaction Exemption 2020-02, 88 Fed. Reg. 75979 (November 3, 2023) (“Proposed PTE 2020-02”); Proposed Amendment to Prohibited Transaction Exemption 84-24, 88 Fed. Reg. 76004 (November 3, 2023); Proposed Amendment to Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, and 86-128, 88 Fed. Reg. 76032 (November 3, 2023) (the above rulemakings are referred to collectively as the “Proposal”).

<sup>3</sup> Of this \$35.7 trillion total, DC plan assets were \$9.9 trillion and IRA assets were \$12.6 trillion. Investors held \$5.4 trillion of IRA assets and \$5.4 trillion of DC plan assets in mutual funds. See ICI, The U.S. Retirement Market, Third Quarter 2023 (December 2023), available at [https://www.ici.org/system/files/2023-12/ret\\_23\\_q3\\_data.xls](https://www.ici.org/system/files/2023-12/ret_23_q3_data.xls).

to the Department (attached), we highlighted numerous serious concerns with specific aspects of the Proposal that collectively make it unworkable.<sup>4</sup> We also suggested a number of modifications that we believe would lessen—but by no means eliminate—the harms the Proposal would cause. As detailed in our Comment Letter and as outlined below, we strongly believe that the best way to avoid severe detrimental impacts to savers is for the Department to withdraw the Proposal. Should the Department ignore the legitimate concerns detailed by ICI and numerous other industry participants, ICI would support Congressional efforts to restrict the Department’s ability to move forward.

As explained herein, though well-intended, the Proposal (i) will trigger negative, unintended, and costly consequences for retirement savers if adopted, (ii) is unnecessary due to recent regulatory changes applying best interest standards more broadly, (iii) exceeds the Department’s authority and is inconsistent with the Fifth Circuit Court of Appeals’ 2018 decision in *Chamber of Commerce v. United States Department of Labor*,<sup>5</sup> and (iv) falls well short of applicable standards under the Administrative Procedure Act (APA). The Department would introduce significant uncertainty and confusion in the marketplace if it finalizes a rule that could be overturned again, in part due to failures to identify a need for the Proposal, to realistically ascertain its costs, or to even attempt to quantify its benefits.

**1. The Proposal will trigger negative, unintended, and costly consequences for retirement savers if adopted.**

As we explained in our Comment Letter, the combination of the Proposal’s overly inclusive definition of fiduciary investment advice and misguided changes to the prohibited transaction exemption (PTE) framework for fiduciary advice will harm the very savers it is intended to serve. If adopted, the Proposal will severely limit retirement savers’ access to the guidance, products, and services they need to meet their retirement goals.

**1.1. The proposed definition of fiduciary advice is overly broad and will have negative implications.**

Rules governing fiduciary status must provide clarity and must not impede commonplace financial interactions that help investors make informed decisions. To this end, fiduciary status under ERISA should only apply where, as the Fifth Circuit held, a relationship of trust and confidence clearly exists. The Proposal, however, is not narrowly tailored to cover only relationships of trust and confidence—despite the Department’s claims to the contrary.<sup>6</sup> The Proposal instead sweeps in many of the same types of activities and interactions that led the Fifth Circuit to vacate the Department’s 2016 fiduciary rule (2016 Rule), providing mere lip service to the Fifth Circuit’s holding while ascribing fiduciary status to a broad array of sales activity,

<sup>4</sup> Letter from Eric Pan and Elena Chism, ICI, to Office of Regulations and Interpretations and Office of Exemption Determinations, EBSA, dated January 2, 2024, available at <https://www.ici.org/system/files/2024-01/23-cl-fiduciary-definition.pdf> (“Comment Letter”).

<sup>5</sup> *Chamber of Commerce*, 885 F.3d 360 (5th Cir. 2018).

<sup>6</sup> The Department’s proposed definition of fiduciary advice effectively infers that any suggestion of an investment or investment strategy, communicated by someone in the business of financial services, would be fiduciary advice.

information, and guidance that is crucial to a functioning marketplace and that serves savers well.

If the Department does not modify the Proposal to provide clarity and exclude sales activity and informational resources, among other things, from the definition of fiduciary advice, many financial services providers will have no choice but to curtail the guidance and assistance they currently make available to investors. Investors—particularly those with smaller balances—will have fewer choices for the types of investment professionals, compensation arrangements, and investment products they prefer, leading to poorer results as they save for their retirements.

**1.2. The proposed wholesale revisions to the prohibited transaction exemption framework for fiduciary investment advice will not benefit investors.**

The Proposal would significantly overhaul the PTE framework available to investment advice fiduciaries by expanding PTE 2020-02 to cover virtually all fiduciary investment advice, while at the same time revoking relief for providing fiduciary investment advice under numerous long-standing exemptions. Our members have built substantial compliance programs around these other exemptions in which the Department included robust conditions specifically tailored to protect investors while allowing for the efficient conduct of ordinary and necessary plan transactions. The Department has not demonstrated either a need for, or a benefit from, curtailing existing exemptions in favor of a blunt one-size-fits-all approach. Rather than leveling the playing field as the Department asserts, applying one set of conditions (PTE 2020-02) to all instances of a broad range of industry activities will lead to inefficiencies and higher costs.

Moreover, the Department is prematurely proposing sweeping changes to PTE 2020-02 after barely two years of implementation experience. Among other things, the Proposal would impose unrealistic and impractical presumptions about conflict mitigation and compensation structures that could cause significant disruption to the delivery of advice to investors. Many of the proposed changes to PTE 2020-02 also appear to exceed the Department's authority. More broadly, these exemption changes would impose significant compliance costs on financial services providers that far exceed the Department's estimates, with no clear evaluation by the Department of the need for changes and no demonstrable benefit to investors from these changes.

**2. The Proposal is unnecessary due to recent regulatory changes applying best interest standards more broadly.**

The regulatory landscape today is very different than it was even just five years ago, including significantly bolstered investor protection measures that supplement existing ERISA protections. Other regulatory changes have resulted in the broader application of best interest standards to recommendations outside the context of a fiduciary relationship of trust and confidence. In 2019, the SEC adopted Regulation Best Interest (Reg BI) applicable to broker-dealers recommending securities transactions, or investment strategies involving securities, to retail customers. And in 2020, the National Association of Insurance Commissioners (NAIC) adopted a model best interest standard for annuity product sales, which in turn has been adopted by the vast majority of states. These standards, particularly when added to ERISA's existing five-part test and the

well-established duties applicable to investment advisers under the federal securities law, collectively cover recommendations involving most types of investment products commonly offered to retirement investors.

Reg BI in particular is a robust standard of conduct that significantly enhances the duties to which broker-dealers are subject when they make recommendations to retail customers. Reg BI enhances the existing broker-dealer suitability standard in several critical ways by:

- Requiring that, when making a recommendation, firms and their financial professionals act in the best interest of the retail investor and do not place the financial professionals' interests ahead of the retail investor;
- Applying this new standard of conduct to a broader range of recommendations of securities transactions or investment strategies to retail customers, including rollover recommendations and implicit recommendations to hold, when the broker-dealer has agreed to provide monitoring services;
- Heightening the obligation for broker-dealers to disclose to investors key aspects of the broker-dealer relationship, including conflicts of interest associated with a recommendation;
- Raising the existing suitability obligation to a "best interest" duty of care, which among other things explicitly requires a broker-dealer to consider the costs of a recommendation; and
- Imposing new obligations on broker-dealers to address conflicts of interest, including a requirement to have policies and procedures reasonably designed to (i) *mitigate* conflicts that create an incentive for the firm's financial professionals to place their, or the firm's, interests ahead of the customer's interest; (ii) *prevent* material limitations on offerings, such as a limited product menu or offering only proprietary products, from causing the firm or its financial professionals to place their interests ahead of the customer's interest; and (iii) *eliminate* sales contests, sales quotas, bonuses, and non-cash compensation that are based on the sale of specific securities or specific types of securities within a limited time period.

As ICI explained in our Comment Letter, and as the Subcommittee heard during the Hearing, the recent adoption of these enhanced standards under Reg BI, as well as the NAIC model rule and the Department's PTE 2020-02, continue to realize their intended benefits to investors. Only after the benefits of these regulatory changes have had a chance to fully take effect should the Department then conduct a detailed study of whether further regulatory action on this front is warranted, including the potential costs and benefits of any regulatory action.

**3. The Proposal is inconsistent with the Fifth Circuit's decision overturning the 2016 Fiduciary Rule and exceeds the Department's statutory authority.**

The Proposal appears to ignore the Fifth Circuit's decision by arbitrarily expanding the scope of ERISA fiduciary status beyond that intended by Congress, and by using the Department's deregulatory exemptive authority to apply ERISA Title I standards of conduct on Title II fiduciaries.

The Fifth Circuit in *Chamber of Commerce* confirmed the importance of maintaining a distinction between brokers (who are compensated on a transactional basis) and investment advisers (who typically receive an asset-based fee as part of an ongoing relationship). Indeed, the SEC recognized this distinction when finalizing Reg BI, which imposes on broker-dealers a standard of conduct that is distinct from the fiduciary standard applicable to investment advisers under the Investment Advisers Act. The Proposal, however, intentionally treats brokers subject to Reg BI as investment advice fiduciaries under ERISA. The Proposal, if finalized, would disrupt the lawful functioning of the securities markets by subjecting broker-dealers to different and conflicting standards when transacting with clients, depending on the type of account. This would undermine both the Department's and the SEC's stated policy goals of preserving investor choice regarding the advisory services they receive and how they pay for them. We note that while both Reg BI and the Proposal use the term "best interest," this term has far different meanings in these two contexts—Reg BI expressly does not impose a fiduciary standard on brokers, while the Proposal would impose the full range of ERISA Title I's fiduciary responsibilities on both brokers and investment advisers.

The Proposal also pays mere lip service to the importance the Fifth Circuit placed on the need for an underlying special relationship of trust and confidence between a fiduciary and its client—a relationship the court described as the "touchstone" of a common law fiduciary relationship that Congress intended to incorporate in ERISA. While the Proposal uses the terms "trust" and "confidence" in the preamble, it fails to actually include this requirement in the rule text. The Department's exceedingly broad proposed definition of fiduciary advice ignores this judicial and Congressional intent. Instead, the Proposal boldly declares (in contravention of this intent) that it would only cover those advice providers in whom investors may reasonably place their trust and confidence—notably ignoring the critical importance of a relationship. Furthermore, while the Fifth Circuit highlighted the important distinction between mere sales conduct and investment advice for a fee in the retail market, the Proposal expressly rejects the "purported dichotomy" between sales and advice. While the Department may disagree with the Fifth Circuit, the Department is not free to ignore the conclusive authority of the courts to determine the meaning of a statute.

To be clear, in asserting that the Proposal exceeds the Department's authority, we are not suggesting that the Department lacks authority to promulgate regulations defining "investment advice fiduciary" under ERISA. Rather, the Proposal *as drafted* exceeds the authority granted by Congress, as confirmed by the Fifth Circuit, with respect to investment advice fiduciaries. The Department cannot expand those parties subject to its jurisdiction by departing from the common law meaning of "fiduciary." In addition, Congress did not intend to extend ERISA Title I fiduciary duties of prudence and loyalty to Title II arrangements such as IRAs, and a regulator's authority is limited to that delegated to it by statute. The Fifth Circuit's 2018 decision confirmed that the Department cannot use its exemptive authority to circumvent Congressional intent and regulate IRAs. The Department in amending the exemptions available for fiduciary investment advice seeks to do exactly this—impose Title I duties of prudence and loyalty on Title II IRA accounts as a condition of PTE 2020-02 relief.

**4. The Proposal fails to meet APA standards for economic analysis or notice and comment requirements.**

Our Comment Letter, in a detailed Appendix, shows that the Proposal’s Regulatory Impact Analysis (RIA) is deficient in numerous ways and does not provide a basis for sound rulemaking that is consistent with the requirements of the APA. It is incumbent on the Department to fully evaluate the Proposal’s costs, including compliance costs, and compare them to the benefits that the Proposal would engender. The Department failed, however, to quantify *any* purported benefits from the Proposal, admitting that it lacks information to assess the quantitative benefits of the Proposal and instead providing only very speculative qualitative benefits. ICI also found that the Department likely materially underestimated the costs to the retirement industry of complying with the Proposal (costs that will be passed on to retirement savers in the form of higher fees and reduced services), as well as the costs to retirement savers of losing access to information and advice that help them successfully save and invest. It is arbitrary for an agency to impose billions of dollars in costs—as it would here—without identifying benefits that warrant such burdens, and without explaining why less costly alternatives are not being pursued instead.

As an aside, we would like to address references made during the hearing to Morningstar’s estimates of “savings” to participants in small plans, which were couched as determinations based on Morningstar’s research on the impact of the Proposal.<sup>7</sup> After careful review, we believe these so-called savings are based solely on highly speculative assumptions. For example, Morningstar simply assumes that 401(k) plans—especially small plans—are unknowingly overpaying for services they receive. It also assumes that the Proposal will address this matter. But Morningstar’s letter provides no evidence that these assumptions are valid. Indeed, there is evidence that these assumptions are invalid. To be sure, small plans can incur higher expenses (as a proportion of their assets) than large plans. But that is primarily because of the relatively fixed costs that all plans incur for services such as compliance and recordkeeping. Contrary to Morningstar’s assumption, these kinds of costs (some of which arise by law) would not magically shrink. In fact, as the DOL itself acknowledges, the Proposal would considerably increase compliance costs, thus likely driving up (not down) the fees incurred by small plans and their participants.

The Proposal also fails to meet the APA’s notice and comment requirements by not allowing adequate opportunity for the public to provide meaningful input. The Department provided a 60-day comment period, which included numerous federal and religious holidays. The Department also took the unprecedented step of holding a public hearing *during* this comment period. We have been unable to identify such an approach by *any* federal executive agency. By way of comparison, the Department in connection with its 2010 fiduciary proposal provided 157 days from the date of the proposal’s publication to the close of the comment period after the public hearing, and for the 2016 Rule, the relevant time period lasted 128 days. For the current

<sup>7</sup> Letter from Aron Szapiro et al., Morningstar, to Office of Regulations and Interpretations, EBSA, dated January 2, 2024, available at <https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AC02/00290.pdf>.



Proposal, the extremely compressed comment period and hearing schedule implies that the Department was interested in only going through the motions of a notice and comment process, rather than seeking meaningful feedback to inform its rulemaking process.<sup>8</sup>

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ICI urges careful consideration of the negative, unintended consequences for retirement savers that we believe the Proposal, if adopted, will trigger. Not only is this rulemaking unnecessary given the changes to the applicable regulatory framework since 2016, but the Department has also fallen short of APA standards by not even attempting to quantify the benefits of the Proposal and by grossly underestimating its costs. To avoid introducing uncertainty and confusion in the marketplace by finalizing a rule that could be overturned again and seemingly ignores the Fifth Circuit's decision, we have urged the Department to withdraw the Proposal and reconsider the need for additional changes at this time.

On behalf of ICI and all of our members, we thank the Subcommittee for its efforts in promoting open, ongoing dialogue in connection with the Department's flawed regulatory effort in this important area. Should you or your staff require any additional information or have questions regarding our comments, please contact Elena Chism, Deputy General Counsel – Retirement Policy, (202) 326-5821, [elena.chism@ici.org](mailto:elena.chism@ici.org); or Sean Collins, Chief Economist, [sean.collins@ici.org](mailto:sean.collins@ici.org), (202) 527-1080.

Attachment

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<sup>8</sup> As further evidence of the Department's rushed process, the Proposal provides that the final rule would be effective only 60 days after publication in the Federal Register. It is a significant understatement to say that a 60-day effective date would not permit sufficient time for parties to prepare for and implement the fundamental and far-reaching changes contemplated by the Proposal. Indeed, in earlier similar rulemakings the Department provided significantly more time for impacted parties to comply with a final rule. The 2010 fiduciary proposal would have been effective 180 days after publication of a final rule. While the 2016 Rule was effective 60 days after publication in the Federal Register, its requirements generally were not applicable for 12 months. Similar, after PTE 2020-02 was finalized its various components were not all effective for another 18 months.



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January 2, 2024

*Submitted electronically to <https://www.regulations.gov>*

Office of Regulations and Interpretations  
Office of Exemption Determinations  
Employee Benefits Security Administration  
Room N-5655  
US Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

*Re: RIN 1210-AC02: Definition of an Investment Advice Fiduciary  
Application No. D-12057: Proposed Amendment to PTE 2020-02  
Application No. D-12060: Proposed Amendment to PTE 84-24  
Application No. D-12094: Proposed Amendments to PTE 75-1, 77-4, 80-83, 83-1,  
86-128*

To Whom it May Concern:

The Investment Company Institute<sup>1</sup> appreciates the opportunity to comment on the Department of Labor's (the "Department") proposed regulation defining who is a "fiduciary" of an employee benefit plan under the Employee Retirement Income Security Act of 1974 (ERISA), or an individual retirement account (IRA) under section 4975 of the Internal Revenue Code of 1986 ("Code"), as a result of giving investment advice to a plan or its participants or beneficiaries, or

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<sup>1</sup> The [Investment Company Institute](https://www.ici.org) (ICI) is the leading association representing regulated investment funds. ICI's mission is to strengthen the foundation of the asset management industry for the ultimate benefit of the long-term individual investor. ICI's members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in other jurisdictions. Its members manage \$31.9 trillion invested in funds registered under the US Investment Company Act of 1940, serving more than 100 million investors. Members manage an additional \$8.5 trillion in regulated fund assets managed outside the United States. ICI also represents its members in their capacity as investment advisers to certain collective investment trusts (CITs) and retail separately managed accounts (SMAs). ICI has offices in Washington DC, Brussels, and London and carries out its international work through [ICI Global](https://www.ici.org/global).

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an IRA or IRA owner (the “Proposed Fiduciary Rule”).<sup>2</sup> In addition to the Proposed Fiduciary Rule, the Department is proposing amendments to several prohibited transaction exemptions (PTEs) currently available for use by advice fiduciaries.<sup>3</sup> These include PTEs 2020-02, 84-24, 75-1, 77-4, 80-83, 83-1, and 86-128 (the Proposed Fiduciary Rule and the proposed amendments to the PTEs are referred to collectively as the “Proposal”).

We understand and appreciate the Department’s interest in ensuring that American workers receive the advice and guidance they need to save for a secure retirement. ICI is deeply concerned, however, that the Proposal will have significant unintended consequences and will harm the very retirement savers it is intended to protect. If the Proposal is adopted without significant revisions, retirement savers and plan sponsors will have access to less investment information at many critical points—when considering, for example, establishing a plan or retirement account, how to invest retirement assets among available investment products or strategies, whether or not to roll account balances to an IRA or keep assets invested in a current plan, and what type of lifetime payment option or distribution strategy may be appropriate. Retirement savers also will have fewer choices for the type of investment professional they want to work with. Such an outcome will not serve the needs of the millions of Americans saving for their future.

This letter highlights our concerns regarding the Proposed Fiduciary Rule and the proposed PTE amendments. For the reasons explained in more detail below, for the benefit of American savers, we respectfully urge the Department to withdraw the Proposal.

In the unfortunate event the Department decides to move forward with the Proposal rather than withdraw it as we ask, we recommend a series of modifications to the Proposal that are essential to avoid a dramatically detrimental impact on retirement savers. Even with these modifications, however, we do not believe that the Proposal is justified, as the Department has not met its burden under the Administrative Procedure Act (APA)<sup>4</sup> to fully evaluate the Proposal’s costs, including compliance costs, and compare them to the benefits that the Proposal would engender.

#### Executive Summary

Our comments and recommendations include the following:

- **The Department has not shown a need for the Proposal and should withdraw it.** Although well-intended, this rulemaking (i) will trigger negative, unintended, and costly

<sup>2</sup> Notice of Proposed Rulemaking – Retirement Security Rule: Definition of an Investment Advice Fiduciary, 88 Fed. Reg. 75890 (November 3, 2023).

<sup>3</sup> Proposed Amendment to Prohibited Transaction Exemption 2020-02, 88 Fed. Reg. 75979 (November 3, 2023) (“Proposed PTE 2020-02”); Proposed Amendment to Prohibited Transaction Exemption 84-24, 88 Fed. Reg. 76004 (November 3, 2023) (“Proposed PTE 84-24”); Proposed Amendment to Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, and 86-128, 88 Fed. Reg. 76032 (November 3, 2023).

<sup>4</sup> 5 U.S.C. § 706(2)(A).

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consequences for retirement savers, (ii) is unnecessary due to recent regulatory changes applying best interest standards more broadly, (iii) exceeds the Department's authority and is inconsistent with the Fifth Circuit Court of Appeals' 2018 decision in *Chamber of Commerce v. United States Department of Labor*,<sup>5</sup> and (iv) falls well short of applicable APA standards. The Department would introduce significant uncertainty and confusion in the marketplace if it finalizes a rule that could be overturned again, in part due to failures to identify a need for the Proposal, realistically ascertain its costs, or even attempt to quantify its benefits. As detailed in section 1, we urge the Department to withdraw the Proposal and reconsider the need for additional changes.

- **The proposed definition of fiduciary advice is overly broad and will have negative implications.** Rules governing fiduciary status must provide clarity and must not impede commonplace financial interactions that help investors make informed decisions. To this end, fiduciary status under ERISA should only apply where, as the Fifth Circuit held, the existence of a relationship of trust and confidence is clear. The Proposal is not narrowly tailored to cover only relationships of trust and confidence, despite the Department's claims to the contrary.
  - **The Department is repeating the same mistakes it made in 2016.** The Proposal effectively sweeps in many of the same types of activities and interactions that led the Fifth Circuit to vacate the 2016 Rule. Under a plain and literal reading, the Proposal would ascribe fiduciary status to a broad array of sales activity, information, and guidance that are crucial to a functioning marketplace and serve savers well. It strongly implies that any suggestion relating to an investment or investment strategy, communicated by someone in the business of financial services, would be fiduciary advice. In section 2 we explain the specific aspects of the proposed definition of fiduciary investment advice that lead to this ambiguity and to an overly broad application of fiduciary status.
  - **If finalized, the Proposal could result in investors losing access to crucial investment information and guidance and having fewer choices in the marketplace.** If the Department does not modify the proposed definition of fiduciary investment advice to provide clarity and exclude sales activity and informational resources, many financial services providers will have no choice but to curtail the guidance and assistance they currently make available to savers. Many investors, particularly those with smaller balances, would enjoy fewer choices for the types of investment professionals and compensation arrangements they prefer, leading to poorer results as they try to save for their retirements.

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<sup>5</sup> *Chamber of Commerce*, 885 F.3d 360 (5th Cir. 2018).

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- **If the Department finalizes the Proposal, it should exclude certain institutional recommendations and provide clarifying examples to illustrate its intent.** The Proposal lacks important carveouts and exclusions that the Department included in the 2016 Rule, such as exceptions for arm's length institutional transactions and for platform providers. Section 2 of our letter recommends certain changes that are necessary if the Department moves forward. Among other things, the Department should clearly exclude from the rule recommendations to institutional and sophisticated investors who are well equipped to understand the limits of their interactions with investment professionals. The Department also should adopt clarifying examples in the final rule's regulatory text, as outlined in section 2.2, to clarify the limits of the rule.
- **The proposed wholesale revisions to the prohibited transaction exemption framework for fiduciary investment advice will not benefit investors.** We explain in section 3.1 that the Department should not shoehorn all fiduciary investment advice into one exemption, PTE 2020-02, while revoking relief under numerous long-standing exemptions such as PTE 77-4. Our members have built substantial compliance programs around these other exemptions, in which the Department included robust conditions specifically tailored to protect investors while allowing for efficient conduct of ordinary and necessary plan transactions. The Department has not demonstrated either a need for, or a benefit from, curtailing these existing exemptions in favor of a blunt one-size-fits-all approach. Rather than leveling the playing field as the Department asserts, applying one set of conditions to all instances of a broad range of industry activities will lead to inefficiencies and higher costs.
- **The changes to PTE 2020-02 would create an unnecessarily complicated, costly, and burdensome compliance framework.** We describe in sections 3.2 through 3.7 our concerns with proposed changes to the policies and procedures, documentation and disclosure, and retrospective review requirements, as well as the troubling proposed expansion of the exemption's ineligibility provision. Among other things, the Department imposes unrealistic and impractical presumptions about conflict mitigation and compensation structures that could cause significant disruption to the delivery of advice to investors who seek and need it. In addition, many of the proposed changes to PTE 2020-02 appear to exceed the Department's authority. More broadly, these exemption changes would impose significant costs on the retirement industry that far exceed the Department's estimates, with no clear evaluation of the need for changes and no demonstrable benefit to investors. Furthermore, it is far too soon to overhaul an exemption that has been in use for less than three years.
- **The Proposal does not comport with the Fifth Circuit's decision and exceeds the Department's authority.** As explained in section 4, the Proposal appears to ignore the Fifth Circuit's decision by arbitrarily expanding the scope of ERISA fiduciary status

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beyond that intended by Congress and by using its deregulatory exemptive authority to apply ERISA Title I standards of conduct on Title II fiduciaries.

- **The Proposal improperly imposes fiduciary status onto relationships in which advice is provided on a solely incidental basis.** As discussed in section 4.1, the Proposal contravenes the Fifth Circuit’s holding by failing to maintain the critical distinction between brokers and investment advisers, including by treating brokers subject to Reg BI as “fiduciaries” under ERISA. This treatment will undermine both the Department’s and the SEC’s stated policy goals of preserving investor choice regarding the advisory services they receive and how they pay for them, which will have detrimental implications for retirement savers and retail investors generally. At the same time the Department pays lip service to the Fifth Circuit’s emphasis on the importance of an underlying relationship of trust and confidence for fiduciary status to attach, the Department flatly rejects the court’s “purported dichotomy” between sales and advice in the retail market.
- **Although the Department has authority to define “investment advice fiduciary” for purposes of Title I and Title II of ERISA, the Proposal exceeds this authority by arbitrarily expanding the concept of fiduciary beyond that intended by Congress and by imposing Title I duties on Title II arrangements.** Section 4.2 explains that the Department’s authority over the provision of investment advice is limited to ERISA “fiduciaries,” and that it cannot expand those subject to its authority by departing from the common law concept of “fiduciary.” The Department also exceeds its authority by using the Proposal (particularly through the elimination of other exemptions in favor of proposed PTE 2020-02) to impose ERISA Title I duties of prudence and loyalty upon Title II arrangements (i.e., IRAs). The Fifth Circuit’s 2018 decision confirmed that the Department cannot use its exemptive authority to circumvent what Congress made clear when it chose to *not* impose these duties under Title II.
- **The Proposal has not been issued consistent with the APA.** The Proposal would not meet the APA’s standards for the economic analysis or notice and comment requirements, as detailed in section 4.3.
  - **The Department’s Regulatory Impact Analysis (RIA) is deficient.** It is incumbent on the Department to fully evaluate the Proposal’s costs, including compliance costs, and compare them to the benefits that the Proposal would engender. The Department has not met this standard. As described in section 4.3 and the Appendix, the RIA fails to quantify any purported benefits of the Proposal, while likely grossly underestimating the costs of the changes—both the direct costs of implementation and the costs to investors from loss of access to information and assistance. It is arbitrary for an agency to impose billions of

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dollars in new costs—as the Department would here—without identifying benefits that warrant such burdens, and without explaining why less costly alternatives are not being pursued instead. While the Department does list some qualitative benefits, as the Appendix details, these supposed qualitative benefits are speculative in the extreme.

- **The Department fails to meet the APA’s notice and comment requirements by not allowing adequate opportunity for the public to provide meaningful input on the Proposal.** The 60-day comment period, which included numerous Federal and religious holidays, was insufficient considering the complexity of the Proposal (including changes to seven different exemptions) to allow stakeholders time to adequately analyze the Proposal’s implications. Additionally, the Department took the unprecedented step of holding a public hearing *during* the abbreviated comment period. By setting the hearing date before the close of the comment period, the Department implied that this was merely a “check the box” exercise, rather than an effort to receive meaningful feedback to inform the rulemaking process. Finally, the RIA relies on certain information that the Department did not make available to the public until mid-way through the comment period, which hindered ICI’s and others’ fair assessment of the Proposal.
- **The proposed effective date is wholly inadequate and unreasonable.** As set forth in section 5, an effective date only 60 days after publication of the final rule in the Federal Register would not permit sufficient time for parties to prepare for and implement the fundamental and far-reaching changes contemplated by the Proposal. Financial institutions would need significantly more time to review every aspect of their businesses—including websites, compliance programs, call center training, fund materials, support provided to intermediaries, and other arrangements with intermediaries—to determine what activities would fall under the scope of the fiduciary definition and determine whether to change or scale back those activities. For any ongoing activities determined to be fiduciary advice, firms would need to make extensive changes to their compliance programs and operating systems, and in many cases design and build brand new ones, to accommodate the expanded definition of investment advice, the numerous changes to PTE 2020-02, and the elimination of several existing advice exemptions firms have used for decades. Operating systems also must undergo testing to ensure changes are operating as intended. Extensive new training of employees would be necessary prior to the effective date, too. The Department should also consider the fact that the financial services industry will be forced to simultaneously implement several new rules adopted by other agencies such as the SEC; these rules involve many of the same employees and systems. Adding new changes to systems already facing substantial modification brings risks. The Department must allow sufficient time for an orderly

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implementation. Accordingly, if the Department determines to proceed with the Proposal despite its significant issues, the Department should delay the Proposal's effective date at least by 24 months.

### Introduction and Background

The current regulatory definition of investment advice fiduciary, further defining ERISA's statutory definition of "fiduciary,"<sup>6</sup> was adopted by the Department in 1975. Under this definition, known as the "five-part test" (described in 29 CFR §2510.3-21(c)(1)), a person is an advice fiduciary only if they: (1) render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing, or selling securities or other property; (2) on a regular basis; (3) pursuant to a mutual agreement, arrangement, or understanding with the plan or a plan fiduciary that; (4) the advice will serve as a primary basis for investment decisions with respect to plan assets; and that (5) the advice will be individualized based on the particular needs of the plan.

In October 2010, the Department first proposed amendments to the definition of investment advice fiduciary ("2010 Proposal").<sup>7</sup> Following a 90-day comment period and a subsequent public hearing, the Department announced that it would withdraw the 2010 Proposal and re-propose the rule.<sup>8</sup> In 2015, the Department again proposed a comprehensive overhaul of the 1975 rule, eliminating the five-part test and greatly expanding the scope of the definition,<sup>9</sup> and in 2016, the Department finalized the package (the "2016 Rule").<sup>10</sup> On March 15, 2018, the Fifth

<sup>6</sup> ERISA § (3)(21)(A) ("Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.").

<sup>7</sup> 75 Fed. Reg. 65263 (October 22, 2010).

<sup>8</sup> See EBSA news release, US Labor Department's EBSA to Re-Propose Rule on Definition of a Fiduciary, (Sept. 19, 2011), available at <https://www.dol.gov/newsroom/releases/ebsa/ebsa20110919> ("Today's decision to re-propose means that this important consumer protection initiative will benefit from additional input, review and consideration. The agency agrees with stakeholders and lawmakers that more public input and greater research will strengthen the rule.").

<sup>9</sup> In addition to the 2015 proposed regulatory definition, the regulatory package of materials proposed by the Department included (1) two new PTEs: a "Best Interest Contract" exemption ("BIC Exemption"), and a "Principal Transactions" exemption, (2) amendments to several other existing PTEs, and (3) a separate Regulatory Impact Analysis (the proposed regulation, new PTEs and proposed amendments to the PTEs are referred to collectively as the "2015 Proposal").

<sup>10</sup> Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20946 (April 8, 2016); Best Interest Contract Exemption, 81 Fed. Reg. 21002 (April 8, 2016); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and



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Circuit Court of Appeals issued a decision in *Chamber of Commerce v. United States Department of Labor*,<sup>11</sup> vacating the 2016 Rule in its entirety. The court found that the rule conflicted with the underlying statutes (ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B)), and that the rule failed the reasonableness test of *Chevron v. NRDC*<sup>12</sup> and violated the APA.<sup>13</sup> In its opinion, the Fifth Circuit emphasized the importance of the existence of a relationship of trust and confidence between the fiduciary and client in order for a fiduciary relationship to exist.<sup>14</sup> The court also noted the important difference between mere sales conduct, which does not usually create a fiduciary relationship under ERISA, and investment advice for a fee, which does.<sup>15</sup>

Following the vacatur, the Department reinstated the 1975 five-part test in 2020. In conjunction with the reinstatement, the Department proposed and later finalized PTE 2020-02. ICI supported the development of PTE 2020-02,<sup>16</sup> agreeing that there was a need for a permanent exemption based on Field Assistance Bulletin (FAB) 2018-02,<sup>17</sup> and we appreciated the Department's effort

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IRAs, 81 Fed. Reg. 21089 (April 8, 2016); Amendments to Class Exemptions 75-1, 77-4, 80-83 and 83-1, 81 Fed. Reg. 21208 (April 8, 2016); Amendment to Prohibited Transaction Exemption (PTE) 75-1, Part V, Exemptions From Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Certain Broker-Dealers, Reporting Dealers and Banks, 81 Fed. Reg. 21139 (April 8, 2016); Amendment to and Partial Revocation of Prohibited Transaction Exemption 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters, 81 Fed. Reg. 21147 (April 8, 2016); Amendments to and Partial Revocation of Prohibited Transaction Exemption 86-128 for Securities Transactions Involving Employee Benefit Plans and Broker-Dealers; Amendment to and Partial Revocation of PTE 75-1, Exemptions From Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefits Plans and Certain Broker-Dealers, Reporting Dealers and Banks, 81 Fed. Reg. 21181 (April 8, 2016).

<sup>11</sup> *Chamber*, 885 F.3d 360 (5th Cir. 2018).

<sup>12</sup> *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).

<sup>13</sup> *Chamber*, 885 F.3d 360, 379, 388 (5th Cir. 2018).

<sup>14</sup> *Id.* at 370.

<sup>15</sup> *Id.* at 374.

<sup>16</sup> While ICI supported the adoption of PTE 2020-02, we disagreed with the Department's statements in the preamble to the proposed and final PTE, articulating new interpretations of the five-part test.

<sup>17</sup> According to the Department, "FAB 2018-02 announced that, pending further guidance, the Department would not pursue prohibited transaction claims against fiduciaries who were working diligently and in good faith to comply with the Impartial Conduct Standards for transactions that would have been exempted in the BIC Exemption and Principal Transactions Exemption, or treat such fiduciaries as violating the applicable prohibited transaction rules. In adopting the temporary enforcement policy, the Department cited uncertainty about fiduciary obligations and the scope of exemptive relief following the court's opinion that could disrupt existing investment advice arrangements to the detriment of retirement plans, retirement investors, and financial institutions, as well as the significant resources some financial institutions had devoted towards compliance with the BIC Exemption and the Principal Transactions Exemption." 88 Fed. Reg. at 75895.

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to align PTE 2020-02 with the SEC’s Regulation Best Interest (“Reg BI”) and the fiduciary duty of investment advisers as codified under the Investment Advisers Act of 1940 (“Advisers Act”).<sup>18</sup>

Despite the Fifth Circuit’s admonition, the Department now proposes another sweeping overhaul of the fiduciary advice definition and the elimination of the five-part test.

#### Section 1: The Department Should Withdraw the Proposal

ICI strongly supports efforts to promote retirement security for US workers. Our members play a central role in helping retirement savers by making available the investment products through which pension plans, defined contribution (DC) plans and IRAs invest. As fiduciaries, our members manage retirement assets to the highest standard, whether it be ERISA fiduciary standards for plan asset vehicles or under the fiduciary duty standard that applies to investment advisers to regulated funds and other clients.

ICI supports the principle underlying the Proposal—that a financial adviser should always put the interests of its clients first when making recommendations. But there is a difference between this principle and what the Proposal appears to do, which is to impose ERISA fiduciary status on virtually any communication regarding an investment product or strategy made by someone in the financial services business. The fiduciary standard brings considerably higher liability exposure and greater compliance obligations that necessarily increase the costs of providing services, and it should apply only in the context of an established relationship of trust and confidence. **By applying the fiduciary standard too broadly, the rule as proposed will limit investors’ access to needed financial and market information, including information about the fund products that our members manage, and could ultimately raise the costs investors bear while saving and investing for retirement.**

The Proposal would make fundamental and far-reaching changes to the existing regulatory framework for advice to retirement plans and IRAs that will impact access and choice for retirement savers, without any meaningful evidence that changes are needed. The following factors weigh against moving forward with the Proposal.

- First, the Department only a few years ago issued a new protective exemption setting parameters around advice to retirement investors—PTE 2020-02. The Department has not provided any evidence demonstrating that this exemption is not working as intended. The Department should let the regulated community continue to use PTE 2020-02 without

<sup>18</sup> The SEC adopted Reg BI and the Form CRS Relationship Summary (“Form CRS”) in 2019 and, in Commission interpretations the same year, confirmed the fiduciary duty applicable to investment advisers (“IA Fiduciary Standard”) and when a broker-dealer’s advisory services are “solely incidental” to its primary business as a broker-dealer. See Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 Fed. Reg. 33318 (July 12, 2019); Form CRS Relationship Summary; Amendments to Form ADV, 84 Fed. Reg. 33492 (July 12, 2019); Commission Interpretation Regarding Standard of Conduct for Investment Advisers, 84 Fed. Reg. 33669 (July 12, 2019); Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer Exclusion from the Definition of Investment Adviser, 84 Fed. Reg. 33681 (July 12, 2019).

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prematurely making significant changes to it—and we do view the proposed changes as significant. As the Department stated only three years ago, PTE 2020-02 “provides clear regulatory standards that ensure American workers and retirees have access to high-quality, affordable investment advice.”<sup>19</sup>

- Second, as the Proposal notes, the regulatory landscape today is very different than it was even just five years ago, including significantly bolstered investor protection measures that supplement the existing ERISA protections. Other regulatory changes have resulted in the broader application of best interest standards to recommendations even outside the context of a relationship of trust and confidence. In 2019, the SEC adopted Reg BI applicable to broker-dealers recommending securities transactions or investment strategies involving securities to retail customers. And in 2020, the National Association of Insurance Commissioners (NAIC) adopted a model best interest standard for annuity product sales, which in turn has been adopted by the vast majority of states.<sup>20</sup> These standards, particularly when added to ERISA’s existing five-part test and the well-established duties applicable to investment advisers under the federal securities law, collectively cover recommendations involving most types of investment products commonly offered to retirement investors. Consequently, any supposed benefits associated with expanding the application of the Department’s definition of fiduciary investment advice are greatly and necessarily diminished compared to 2016. These supposed benefits would be outweighed by the costs of reducing access to financial information and the burdens of complying with the proposed revisions to PTE 2020-02. Despite this, the Department’s RIA fails to comprehensively account for the significant changes that have occurred since 2016 or to provide a benefit estimate for the Proposal. Additionally, even while estimating significant costs, the Department still significantly underestimates these costs. A thorough cost-benefit analysis that properly accounts for changes to the regulatory baseline would not support the Proposal.
- Third, given the number of major regulatory projects and studies required of the Department by the SECURE 2.0 Act, the Department should not continue to divert significant resources away from Congressionally mandated SECURE 2.0 work that is intended to help Americans save for a more secure retirement.<sup>21</sup>

<sup>19</sup> See EBSA news release, U.S. Department of Labor Announces Exemption to Improve Investment Advice and Enhance Financial Choices for Workers and Retirees (Dec. 15, 2020), *available at* <https://www.dol.gov/newsroom/releases/ebsa/ebsa20201215>.

<sup>20</sup> NAIC Suitability in Annuity Transactions Model Regulation, Spring 2020, *available at* <https://content.naic.org/sites/default/files/inline-files/MDL-275.pdf>.

<sup>21</sup> On December 29, 2022, the President signed the Consolidated Appropriations Act, 2023 (H.R. 2617), which includes the SECURE 2.0 Act of 2022 (“SECURE 2.0 Act”). SECURE 2.0 Act § 319, Consolidated Appropriations Act, 2023, Division T, Pub. L. 117-328, 136 Stat. 3559 (2022). Many SECURE 2.0 Act provisions require the

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- Fourth, the Department’s prior attempts to expand the fiduciary advice definition have encountered extensive judicial scrutiny. As explained in section 4, we believe the Proposal does not adequately account for the Fifth Circuit’s 2018 decision,<sup>22</sup> and once again exceeds the trust and confidence standard the Fifth Circuit looked to. As written, the Proposal’s language is no more narrowly tailored than the 2016 Rule. If the Proposal is finalized, its strong resemblance to the 2016 Rule would seem to risk that the rule would be vacated once again by a court following the precedent set by the Fifth Circuit.
- Finally, the Proposal may well be plagued by additional vulnerabilities relating to the RIA, which as mentioned above contains numerous flaws. There would be a strong basis for a court to find the RIA fails to meet the applicable standards under the APA. It is incumbent on the Department to fully evaluate the Proposal’s costs, including compliance costs, and compare them to the benefits that the Proposal would engender.<sup>23</sup> Further, it is arbitrary for an agency to impose billions of dollars in costs—as it would here—without identifying benefits that warrant such burdens, and without explaining why less costly alternatives are not being pursued instead. Indeed, the Department’s RIA fails to quantify any purported benefits, while grossly underestimating the costs of the changes, in terms of both the direct costs of implementation and the costs to investors from losing access to information and assistance. The Appendix to this letter shows that the RIA does not provide a basis for sound rulemaking that is consistent with the requirements of the APA.

**ICI strongly urges the Department to consider the negative, unintended consequences for retirement savers that we believe the Proposal, if adopted, will trigger. Not only is this rulemaking unnecessary given the changes to the applicable regulatory framework since 2016, but the Department has also fallen short of APA standards by not even attempting to quantify the benefits of the Proposal and by grossly underestimating its costs. To avoid introducing uncertainty and confusion in the marketplace by finalizing a rule that could be overturned again and seemingly ignores the Fifth Circuit’s decision, we urge the Department to withdraw the Proposal and reconsider the need for additional changes at this time.**

## **Section 2: Proposed Amendments to the Definition of Fiduciary Investment Advice**

Under the Proposed Fiduciary Rule, a person is an investment advice fiduciary if (1) they make a covered recommendation (of any securities transaction or other investment transaction or any

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Department to engage in rulemaking and issue further guidance and reports under prescribed deadlines. A recent letter from the US Senate Committee on Health, Education, Labor and Pensions (“HELP Committee”) requested that the Department “effectively and expeditiously implement the SECURE 2.0 Act.” See letter from Bernard Sanders Chairman of the HELP Committee and Bill Cassidy, M.D., Ranking Member of the HELP Committee, to The Honorable Julie A. Su, Acting Secretary of Labor (May 30, 2023).

<sup>22</sup> See *supra* note 5.

<sup>23</sup> See *Michigan v. EPA*, 576 U.S. 743, 752-53, 759 (2015).

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investment strategy involving securities or other investment property),<sup>24</sup> (2) the recommendation is made to a retirement investor, (3) the recommendation is provided for a fee or other compensation, direct or indirect (including to an affiliate), and (4) the person makes the recommendation in one of three alternative contexts discussed below. The Department explains that the threshold element is determining whether a recommendation has been made, and that even if an action rises to the level of a recommendation the advice is only fiduciary advice if the rest of the regulatory test is met.<sup>25</sup>

For purposes of clause (2) above, the Proposal defines “retirement investor” broadly, as did the 2016 Rule, to include a plan, a plan fiduciary, a participant or beneficiary, an IRA, an IRA owner or beneficiary, or an IRA fiduciary.<sup>26</sup> For purposes of clause (3) above, the Proposal defines the phrase “for a fee or other compensation, direct or indirect” broadly, and nearly identical to the definition in the 2016 Rule, to include essentially any amount received, direct or indirect, from any source.<sup>27</sup>

The three contexts noted in clause (4) above that would, in conjunction with the other elements of the above, turn a recommendation into “fiduciary advice” are:

- (i) the person either directly or indirectly (e.g., through or together with any affiliate) has discretionary authority or control, whether or not pursuant to an agreement, arrangement, or understanding, with respect to purchasing or selling securities or other investment property for the retirement investor (we refer to this as the discretionary authority context);
- (ii) the person either directly or indirectly (e.g., through or together with any affiliate) makes investment recommendations to investors on a regular basis as part of their business and the recommendation is provided under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor’s best interest (we refer to this as the facts and circumstances context); or

<sup>24</sup> The phrase “recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property” is defined in paragraph (f)(10) of the Proposal, using language that almost exactly tracks language in paragraph (a)(1)(i) and (ii) of the 2016 Rule.

<sup>25</sup> 88 Fed. Reg. at 75904.

<sup>26</sup> *Id.* at 75977. We note that this definition is found in paragraph (c)(1) in the main text of the Proposal, rather than in the definition section (paragraph (f)).

<sup>27</sup> The Department in the preamble to the Proposed Fiduciary Rule explains that “compensation is treated as paid ‘in connection with or as a result of’ the provision of advice only if it would not have been paid but for the recommended transaction or the provision of advice, or if the investment advice provider’s eligibility for the compensation (or its amount) is based in whole or part on the recommended transaction or the provision of advice.” 88 Fed. Reg. at 75909.

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- (iii) the person making the recommendation represents or acknowledges that they are acting as a fiduciary when making investment recommendations (we refer to this as the acknowledged fiduciary context).

As explained below, this proposed definition of fiduciary investment advice, like the definition in the 2016 Rule, sweeps too broadly and captures relationships and transactions that simply are not meant to be (nor are understood by the affected parties to be) fiduciary in nature.

## **2.1 The Proposed Definition of Fiduciary Investment Advice is Overly Broad and Will Have Negative Implications**

The Department explains in the preamble that it intended to craft a definition of fiduciary “investment advice” that is more narrowly tailored than the definition in the 2016 Rule.<sup>28</sup> Although the wording of the proposed functional tests differ from the 2016 Rule, the Proposal effectively would sweep in many of the same types of conversations and interactions that led the Fifth Circuit to vacate the 2016 Rule.

**The Department’s view of the proposed definition is at odds with a plain and literal reading of the text of the Proposal. In fact, the proposed definition may sweep even broader because it lacks the carveouts and exclusions that the Department included in the 2016 Rule.**<sup>29</sup> It is clear that we are assessing the Proposal with a much different lens than the Department,<sup>30</sup> and we

<sup>28</sup> *Id.* at 75901. While much of the operative language in the Proposed Fiduciary Rule is nearly identical to the 2016 Rule (for example, most of the definitions used are nearly identical), the actual functional test is different than the functional test used in the 2016 Rule. “The 2016 Final Rule generally covered: (1) recommendations by a person who represents or acknowledges that they are acting as a fiduciary within the meaning of ERISA; (2) advice rendered pursuant to a written or verbal agreement, arrangement or understanding that the advice is based on the particular investment needs of the retirement investor; and, most expansively, (3) recommendations directed to a specific retirement investor or investors regarding the advisability of a particular investment or management decision with respect to securities or other investment property of the plan or IRA.” *Id.* at 75894.

<sup>29</sup> For example, one important exclusion in the 2016 Rule for “transactions with independent fiduciaries with financial expertise” was intended to cover advice to a fiduciary of a plan or an IRA who is independent from the advice provider, with respect to an arm’s length sale, purchase, loan, exchange, or other transaction related to the investment of securities or other property. The Department declined to include a similar exclusion in the Proposal, explaining that “[t]o the extent counterparties wish to avoid fiduciary status, they can avoid structuring their relationships to fall within the circumstances described in [proposed paragraph (c)(1)(ii)].” *Id.* at 75907. The 2016 Rule also included an exception from the definition of “recommendation” for platform providers.

<sup>30</sup> Many of our members, as product manufacturers, do not intend to become investment advice fiduciaries under ERISA, and do not hold themselves out as being ERISA fiduciaries. While the Department’s focus is ensuring that financial institutions and professionals cannot simply avoid fiduciary status at will, the goal of many of our members is to ensure that they are not inadvertently subject to the rule through interactions like selling products and working with intermediaries. The severe consequences associated with a service provider’s inadvertently engaging in a prohibited transaction under ERISA cannot be overstated. See Letter from David Blass and David Abbey, ICI, to Office of Regulations and Interpretations, EBSA (July 21, 2015), at note 9 (addressing the proposed definition of the term fiduciary) (“2015 Letter on Proposed Definition”).

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explain below why this functional test is not narrowly tailored to capture only established relationships of trust and confidence.

#### **2.1.1 The Department Should Make Clear that a Recommendation Is an Individualized Call to Action**

The Department explains that whether a person has made a “recommendation” will serve as “a threshold element in establishing the existence of fiduciary investment advice.”<sup>31</sup> While the Department does not define the term “recommendation” in the text of the Proposal, in the preamble it explains: “the Department views a recommendation as a communication that, based on its content, context, and presentation, would reasonably be viewed as a *suggestion* that the retirement investor engage in or refrain from taking a particular course of action.”<sup>32</sup> The Department intends this to be an objective rather than subjective inquiry.<sup>33</sup> There are two aspects of this threshold determination—whether a communication is a recommendation—that we believe the Department should clarify or emphasize.

**First, the Department should emphasize that to be a recommendation, a communication must be a “call to action.”** We appreciate that the Department’s articulation of what constitutes a recommendation is generally consistent with SEC and FINRA guidance on determining whether a broker-dealer has made a recommendation. We note, however, that for purposes of triggering application of Reg BI, the Reg BI release focuses more on the communication being a “call to action” rather than a mere “suggestion.”<sup>34</sup> Given the duties and liability associated with becoming an ERISA fiduciary, the Department should move away from the notion that a mere suggestion should trigger application of this rule.

**Second, due to other elements of the proposed test, it is crucial that the Department further emphasize the need for a communication to be individually tailored to be a recommendation.** In the preamble, the Department explains that “the more individually tailored the communication is to a specific retirement investor..., the more likely the communication will be viewed as a recommendation; however, the Department cautions that the fact that a communication is made to a group rather than an individual would not be dispositive of whether a recommendation exists.”<sup>35</sup> We recommend the Department clarify that a greater level of individualization would be required for application of the ERISA fiduciary standard to a recommendation. This is important because the two status-based tests set forth in paragraphs

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<sup>31</sup> 88 Fed. Reg. at 75904.

<sup>32</sup> *Id.* (emphasis added).

<sup>33</sup> *Id.*

<sup>34</sup> The Reg BI release cites underlying FINRA guidance that uses language similar to the Proposal’s preamble commentary referring to a “suggestion,” but the Reg BI release itself focuses more on the communication being a call to action. 84 Fed. Reg. 33318, 33335, at note 161 (July 12, 2019).

<sup>35</sup> 88 Fed. Reg. at 75904.

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(c)(1)(i) and (iii) of the Proposal (i.e., the discretionary authority context and the acknowledged fiduciary context), both are triggered merely by the making of a recommendation. In these two contexts, fiduciary status apparently would apply without any inquiry into the circumstances surrounding the recommendation and whether it is personalized in any way. Furthermore, as explained below, these status-based tests are overly broad in scope. Discretionary authority status, for example, would apply where an affiliate of the party making the “recommendation” manages assets for the investor completely unrelated to the plan or account at issue. Therefore, it appears that a general recommendation that is not personalized in any way could be covered under a literal reading of the proposed definition, even in situations where the Department does not intend fiduciary status to apply.

#### **2.1.2 Incidental Recommendations in the Context of a “Hire Me” Discussion Should not Be Covered**

In the Department’s discussion regarding what constitutes a recommendation, it explains that it does not intend to cover recommending one’s own services (i.e., “hire me” recommendations). The Department believes that this view is made clear by the language in proposed paragraph (f)(10)(ii) that extends to recommendations of “other persons” to provide investment advice or investment management services.<sup>36</sup> The Department cautions, however, that although the “hire me” recommendation itself would not be advice, anything beyond the touting of one’s services, such as a description of what the professional would do if hired, *would* be included in the definition. The Department notes its view that this approach is consistent with the SEC’s approach in Reg BI regarding recommendations that accompany a “hire me” conversation. Even if that were the case, we believe there is an important distinction worth considering. Under the SEC’s rules, the accompanying recommendation will be subject to Reg BI and its associated compliance obligations, which are significantly different from the heightened conditions of PTE 2020-02, as proposed to be amended. **Applying PTE 2020-02 to a relationship that has not yet been established would create significant compliance challenges.** This is particularly true where the investment professional’s services will be provided using a different PTE, as would be the case if the proposed services are discretionary management. Financial institutions would incur significant unnecessary expense if they have to comply with PTE 2020-02 simply for seeking to be hired, and then a separate PTE for the services they ultimately provide.

While the 2016 Rule did not include a broader carveout for “hire me” discussions, this concern is of heightened importance here as the Proposal lacks a carveout for sophisticated investors such as the 2016 exception for transactions with independent fiduciaries with financial expertise. This carve-out would have excluded from the 2016 Rule’s coverage many “hire me” discussions in

<sup>36</sup> 88 Fed. Reg. at 75906 (“Under this proposal, the Department does not intend to suggest, however, that a person could become a fiduciary merely by engaging in the normal activity of marketing themselves as a potential fiduciary to be selected by a plan fiduciary or IRA owner, without making a recommendation of a securities transaction or other investment transaction or any investment strategy involving securities or other investment property. Touting the quality of one’s own advisory or investment management services would not trigger fiduciary obligations.”).



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the institutional market. **The Department should at a minimum clarify that responses to RFPs and other plan inquiries are not considered “recommendations,” even if the response is tailored (or individualized) to a particular plan.** Broader language that makes clear that the selling of plans and plan investment products, including discussions with independent fiduciaries, is not covered by the definition would also be very helpful.

### **2.1.3 The Three Proposed Tests are Confusing and Capture Communications that Should Not Be Treated as Fiduciary Advice**

As the Department affirms in the preamble, fiduciary status is determined on a functional (and, therefore, transactional) basis.<sup>37</sup> The statute makes this clear by providing that a person is fiduciary *to the extent* their activity meets the functional test. Further, we understand from comments by Department staff that the proposed definition is intended to be applied on a recommendation-by-recommendation basis. However, the commentary seems at odds with the actual proposed definition. Beyond the threshold inquiry of whether there is a recommendation, the three alternative tests comprising the proposed definition are essentially based on a person’s status, rather than on their actions relating to a specific transaction.

Paragraph (c)(1) of the Proposal sets forth three different contexts, described above, in which a person making a covered recommendation would be an advice fiduciary. As described below, two of the contexts (paragraphs (c)(1)(i) and (c)(1)(iii)) are overtly status-based. The other context (paragraph (c)(1)(ii))—intended as a modified version of the five-part test—suggests that working in the financial services industry and engaging with clients on investments or investment strategies would be sufficient to bring a person within the definition. Each of these contexts look to the status of the person providing the recommendation rather than whether there exists an established relationship of trust and confidence.

The Department explains that in each of these three contexts, “the Department believes that retirement investors could reasonably place their trust and confidence in the advice provider.”<sup>38</sup> But as described below, this definition is circular and outcome driven.

#### **a. The Proposed Discretionary Authority Context Will Lead to Nonsensical and Harmful Results**

Under context (i), fiduciary status would attach to a recommendation if the person either directly or indirectly (e.g., through or together with any affiliate) has discretionary authority or control, whether or not pursuant to an agreement, arrangement, or understanding, with respect to purchasing or selling securities or other investment property for the investor.

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<sup>37</sup> 88 Fed. Reg. at 75901.

<sup>38</sup> *Id.*

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This context is a modified version of a provision in the current definition that applies to discretionary managers with authority or control “with respect to purchasing or selling securities or other property *for the plan*.”<sup>39</sup> The Proposal would broaden the existing provision by referencing securities or other investment property *of the retirement investor*, not just an investment *for the plan*.

The Department explains that, like the current rule, “the [P]roposal would extend to circumstances in which the person making the recommendation ‘indirectly (e.g., through or together with any affiliate)’ has discretionary authority or control over securities or other investment property; in this context, the use of ‘indirectly’ generally refers to an arrangement in which an affiliate has discretionary authority or control.”<sup>40</sup>

The Department considers the proposed formulation of context (i) to be a logical expansion of the current regulation’s discretionary authority provision.<sup>41</sup> The Department observes that parties with discretionary authority or control over assets of the investor “necessarily are in a relationship of trust and confidence with” the investor.<sup>42</sup> **But what seems logical at first blush would result in an overreaching application of fiduciary advice status to situations the Department likely did not consider. The extension to discretionary authority over *any investment property of the investor, combined with the retained reference to affiliates and the lack of any distinction between sales and true fiduciary advice, will lead to nonsensical and harmful results.*** Under the proposed change, if a company, or any affiliate of the company, has any discretionary authority over assets of the investor, then it seems that any recommendation made by any person within the control group of the entity *will* be considered fiduciary advice, regardless of whether the recommendation was individualized in any way or even related to the assets over which the company has discretion. There seems to be no ability to define the contours of the relationship or to limit the application under this context.

The examples below illustrate the concerns our members have about activities that could (possibly unintentionally) be pulled into the definition under this context:

**Example 1:** A financial institution or its affiliate manages a CIT (or other plan asset vehicle) that the plan happens to invest in. Under the Proposal, any “recommendation” to that plan (or plan sponsor, or fiduciary to that plan or plan sponsor), including sales pitches by the manager or its

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<sup>39</sup> Emphasis added. Under this aspect of the current rule, a person will be an ERISA fiduciary if (i) Such person renders advice to the plan as to the value of securities or other property, or makes recommendation as to the advisability of investing in, purchasing, or selling securities or other property; and (ii) Such person either directly or indirectly (e.g., through or together with any affiliate)— (A) Has discretionary authority or control, whether or not pursuant to agreement, arrangement or understanding, with respect to purchasing or selling securities or other property for the plan. 29 C.F.R. § 2510.3-21(c)(1).

<sup>40</sup> 88 Fed. Reg. at 75901.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

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affiliates, could be automatically treated as fiduciary advice, whether or not it is related to the CIT. It could even potentially include a non-personalized recommendation made to a plan participant who is invested in the CIT.

***Example 2:*** Similarly, if a financial institution or its affiliate provides discretionary management, then any interaction between the asset manager and a financial intermediary who is acting as a fiduciary to a plan or IRA is treated as fiduciary advice. This would include wholesaling activity, because “suggestions” will be made to the intermediary in a sales capacity. The Department expresses belief that wholesaling would not be fiduciary advice under the definition, “because [wholesaling activities] would not involve recommendations based on the particular needs or individual circumstances of the plan or IRA serviced by the intermediary.”<sup>43</sup> However, context (i) (and context (iii) described below) does not appear to require any amount of personalization in order for a recommendation to be covered, because all that is needed is the status of being a discretionary fiduciary.<sup>44</sup>

***Example 3:*** A financial institution provides discretionary management to a pension plan. Under the Proposal, any discussions regarding investment strategies such as pension de-risking or liability driven investing risk being captured as fiduciary advice if “suggestions” in these areas are made, irrespective of whether the information is being provided at the request of the pension client or is being relied on by the pension client.

The Department must narrow this context to avoid such overreaching results. We do not agree that having discretionary authority over some assets of an investor should automatically result in fiduciary status for any recommendation made in relation to other assets. We find it an even bigger stretch to assert that an affiliate relationship (broadly defined to include even familial relationships)<sup>45</sup> with a party providing discretionary services with respect to wholly separate assets should result in fiduciary status for recommendations that otherwise have no characteristics of being fiduciary advice.

**One important step in narrowing this context is to exclude discretionary management of commingled funds, such as CITs.** Under ERISA section 3(21)(B), managing the assets of an investment company registered under the Investment Company Act of 1940 (e.g., a mutual fund) in which a plan invests would not by itself cause the fund’s adviser to become an advice fiduciary under ERISA. CITs and other commingled funds used in plans today should be treated

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<sup>43</sup> *Id.* at 75907.

<sup>44</sup> The SEC solves this issue by not covering recommendations to financial intermediaries under Reg BI. Only recommendations to retail investors are covered.

<sup>45</sup> Although the existing discretionary authority provision of the current advice definition does reference affiliates, we note that the contours of this provision are not well defined. There is virtually no guidance on the provision’s application. It would be appropriate for the Department to reconsider this aspect of the provision in light of the current landscape of financial services and the implications noted above.

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similarly. We do not believe plan fiduciaries (or even plan participants)<sup>46</sup> would view the management of a CIT any differently than a mutual fund in terms of whether the investment manager of that fund is in a general relationship of trust and confidence with the investor such that all recommendations would be considered fiduciary advice. The fact that CITs are considered plan asset vehicles should not necessitate different treatment from mutual funds in this context, as there would be no reasonable expectation that unrelated sales recommendations by the manager or its affiliate are being provided on a fiduciary basis.

If the Proposal moves forward and includes the discretionary authority test, the Department should provide an exclusion for CITs and other commingled funds, and/or otherwise narrow the test so that it applies only to recommendations pertaining to the same plan or account under that party's discretionary authority or control.

**b. The Proposed “Facts and Circumstances” Context Would Capture Virtually All Financial Professionals**

Under context (ii), fiduciary status would attach to a recommendation if:

- the person either directly or indirectly (e.g., through or together with any affiliate) makes investment recommendations to investors on a regular basis as part of their business, and
- the recommendation is provided under circumstances indicating that the recommendation:
  - is based on the particular needs or individual circumstances of the retirement investor and
  - may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest.

We have concerns with all aspects of this proposed facts and circumstances test. The Department frames this test as an updated version of the five-part test and as “an objective test based on the totality of facts and circumstances.”<sup>47</sup> We are at a loss as to how this test can be viewed as objective.

First, the Proposal modifies the “regular basis” prong of the current test to instead capture individuals who make investment recommendations to investors “on a regular basis as part of their business.” The Department's stated goal with this modification is to avoid sweeping in those who do not provide advice as part of their business (e.g., human resources employees), while not wholesale excluding one-time advice from the definition. **But the clear failure of this prong is that it has nothing to do with the retirement investor who receives the advice. This**

<sup>46</sup> The Proposal is ambiguous as to whether the discretionary authority test would apply to a recommendation made to a participant in a plan that invests in a CIT.

<sup>47</sup> 88 Fed. Reg. at 75902.

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**inventive re-phrasing of the regular basis prong appears intended to merely give a nod to the existing rule while serving no legitimate purpose.**

Under the current five-part test, the “regular basis” prong functions to capture true relationships of trust and confidence (because it is meant to serve as a proxy for the existence of a relationship between a financial professional and a client). While the Proposal uses the same words, as applied it would include anyone who works in the business of financial services, regardless of whether the person has any actual relationship with the recipient of the recommendation.<sup>48</sup> **In this way, the test suffers the same problems as the 2016 Rule highlighted by the Fifth Circuit: “[c]ritically, the new definition dispenses with the ‘regular basis’ and ‘primary basis’ criteria used in the regulation for the past forty years. Consequently, it encompasses virtually all financial and insurance professionals who do business with ERISA plans and IRA holders.”<sup>49</sup>**

In addition, the Proposal does not describe how to determine whether investment recommendations are made on a regular basis, other than to state that “[w]hether someone gives investment recommendations on a regular basis as part of their business is an objective test based on the totality of facts and circumstances.”<sup>50</sup> This is a vague and open-ended standard. For example, it is not clear whether a firm (such as an asset manager) that does not generally make investment recommendations to retail investors as part of its main business, would be viewed as meeting this criterion if a small part of its overall business involves making recommendations.

Another problematic aspect of this context is its incorporation of affiliates.<sup>51</sup> Rather than focusing on the “regular basis” job functions of the individual providing the recommendation, it looks to not just the entity that employs the individual but the entire control group. If any division of the entity or of an affiliate of the entity is in the business of providing recommendations, fiduciary status would apply automatically to a recommendation by any individual within the entire group. In other words, every employee of the entire controlled group could be found to meet the proposed regular basis prong.

Our members are concerned that applying this evaluation on a firm wide basis would be problematic, requiring coordination across otherwise unrelated lines of business. The implications of incorporating affiliate activities become even more absurd when one considers

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<sup>48</sup> The Department explains that “this proposed provision is properly focused on whether the advice provider is in the business of providing investment recommendations.” 88 Fed. Reg. at 75902.

<sup>49</sup> *Chamber*, 885 F.3d 360, 366 (5th Cir. 2018).

<sup>50</sup> 88 Fed. Reg. at 75902.

<sup>51</sup> We understand that the existing definition in 29 C.F.R. § 2510.3-21(c)(1)(ii) includes persons who indirectly (through an affiliate) meet the five-part test. We urge the Department to take a fresh look at the implications of ascribing fiduciary status to a person based on affiliate activities, especially in light of the broader definition of fiduciary advice under the Proposal and the complexity of the financial services business as it exists today.

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that the definition of affiliate includes a “relative”<sup>52</sup> of the person making the recommendation. Regardless of the practical difficulties involved, it is unclear why affiliate activities should have any bearing on the facts and circumstances surrounding a recommendation. Applying the presumption in this way simply is not a logical application of the meaning of “regular basis.”

In regard to the second part of the proposed test, the Proposal asserts that it “improves upon” the “mutual agreement or understanding” and “primary basis” prongs of the current test by replacing them with a requirement that the advice be provided “under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor’s best interest.”<sup>53</sup> This formulation eliminates any notion that the parties agree on the nature of the recommendation. More importantly, virtually anything *may* be relied on by an investor, watering this element down from the “primary” basis standard of current law.

We do not view this new formulation of the test for fiduciary investment advice as an improvement. **Indeed, stripped down to its core—the Department has substituted a two-part test for the five-part test: (1) a party makes a covered recommendation that is (2) individualized. If that is the Department’s intent, it should say so. Instead, the Department’s formulation seems intended to hide the low bar it has set for fiduciary status.**

The Department states that it intends this new test to apply as an objective standard that focuses on the circumstances surrounding the recommendation, including how the investment professional holds themselves out to the investor and describes the services offered.<sup>54</sup> However, the proposed text and other commentary in the preamble provide mixed signals as to whether the standard is based on what a reasonable third party would think or what the actual investor involved would think, and whether the reasonable expectations of the financial professional are even relevant. It is also unclear whether the test would consider the extent to which the provider actually went through a process of basing the recommendation on the particular needs and circumstances of that individual, or whether only the perception of the recommendation being individualized matters.

<sup>52</sup> Proposed paragraphs (f)(1) and (12). The term “relative” includes a spouse, ancestor, lineal descendant, spouse of a lineal descendant, brother, sister, or a spouse of a brother or sister.

<sup>53</sup> “Instead of the ‘mutual agreement, arrangement, or understanding’ requirement—which over time has encouraged investment professionals to hold themselves out as trusted advisers while disclaiming fiduciary status in the fine print—the proposal would focus on the objective ‘circumstances’ surrounding the recommendation, including how the investment professional held themselves out to the retirement investor and described the services offered. The Department believes that the proposed language will better avoid loopholes and fine print disclaimers, while properly focusing on a reasonable understanding of the nature of their relationship.” 88 Fed. Reg. at 75902.

<sup>54</sup> *Id.*

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Given this confusion, it is not surprising that vast segments of the regulated community have concluded that if a financial institution employee makes a recommendation to an investor that could be viewed as personalized in any way, it will be considered an advice fiduciary under the proposed facts and circumstances test. **The Proposal seems to lock investment professionals and their firms into only one model of service in the retirement space.** If they work for an organization that provides recommendations, it appears they will not be able to provide any non-fiduciary assistance to retirement plans or participants or IRA owners. We believe this context would capture most broker interactions, which raises problems as discussed in section 4.1 below.

We note below some concerning examples of activity that may be covered by the facts and circumstances test.

- **Platform providers.** Platform providers may design and offer a menu of funds that they have determined to be broadly appropriate for a typical DC plan or a DC plan with certain demographics or characteristics. Under the 2016 Rule, the Department made clear that marketing or making available a platform to a plan fiduciary is not considered a recommendation, provided that the plan fiduciary is independent of the person marketing the platform and the person marketing the platform discloses in writing that the person is not undertaking to provide advice in a fiduciary capacity.<sup>55</sup> There is no such language in the Proposal. The Department explains in the preamble that the inquiry (turning on the threshold question of whether a recommendation has been made) “may turn on whether the provider presents the investments on the platform as having been selected for and appropriate for the investor.”<sup>56</sup> Under this formulation, it would seem that simply communicating the suitability of a given menu for a plan with certain characteristics (i.e., essentially just describing the product) could be treated as fiduciary advice. Our members, however, view such activity as no more than building and then selling a product. While the provider may describe what type of investor the product generally is designed for, it is up to the plan fiduciary to determine whether the product is right for its plan. Moreover, while the Department has expressed its dislike for disclaimers, in certain situations—including the services described here—a clear disclosure would further help clarify a provider’s role as a non-investment advice fiduciary.<sup>57</sup>
- **Pooled Employer Plan (PEP).** The Department explains that it would apply a similar analysis in the case of a PEP, as an off the shelf product being sold to a plan sponsor. Similar to the platform provider discussion, our members believe that simply describing the product and marketing it to a plan sponsor should not be considered fiduciary advice

<sup>55</sup> Paragraph (b)(2)(i) of the 2016 Rule.

<sup>56</sup> 88 Fed. Reg. at 75908.

<sup>57</sup> Given the language of paragraph (c)(1)(v) of the Proposal, firms may not have sufficient comfort that such a disclosure would be controlling.

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but rather purely selling activity. The Department did not include language excluding the marketing of PEPs in the 2016 Rule because the SECURE Act<sup>58</sup> had not yet created them.

- **Educational models and tools.** The Department confirms in the preamble that it does not intend to change the guidance of Interpretive Bulletin (IB) 96-1, under which providing asset allocation models and interactive investment materials is considered investment education rather than fiduciary advice.<sup>59</sup> While we welcome the Department's confirmation that IB 96-1 survives the Proposal, that conclusion is hard to square with the overly broad definition of fiduciary investment advice since these models are presented to investors, might be relied on, and are individualized.

It appears that the Department must nonetheless believe that these individualized asset allocation models are not a recommendation. If so, we ask that the Department explain its analysis in the preamble to a final rule so that similar logic can be applied to other individualized circumstances. In addition, if educational models and tools identify specific investment options and are offered to plan participants or IRA owners, it appears this may be enough to cross the line into fiduciary investment advice under the Proposal. Our members share the goal of increasing financial literacy and helping to educate investors. IB 96-1 has long been a vitally important piece of guidance to encourage these efforts. However, many firms will err on the side of providing less information, out of fear of crossing the line into fiduciary advice. Further, we would argue that more generalized tools such as an asset allocation model that does not identify how a plan's investment options fit into the model would not be of much help to participants.

- **Call centers and websites.** Like the 2016 Rule, the Proposal threatens to severely reduce the commonplace exchanges of information currently provided at no cost to millions of retirement savers through call centers, walk-in centers, and websites. Even the most basic information could trigger ERISA fiduciary status, in particular if a mutual fund has an advisor affiliate. As discussed above, while IB 96-1 is helpful and would cover many of the exchanges at issue, firms may see the need to take a conservative approach given the severe consequences of inadvertently becoming an ERISA fiduciary.<sup>60</sup>

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<sup>58</sup> On December 19, 2019, the US Senate approved the Fiscal Year 2020 Consolidated Domestic and International Assistance Package (H.R. 1865), which includes the Setting Every Community Up for Retirement Enhancement Act (the "SECURE Act"). SECURE Act §101 allows otherwise unrelated employers (of any size) to band together and participate in open multiple employer plan (MEP) arrangements (referred to in the bill as "pooled employer plans" or PEPs).

<sup>59</sup> 88 Fed. Reg. at 75911.

<sup>60</sup> See *supra* note 30.



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- **Education for plan fiduciaries.** Many plan fiduciaries with financial expertise request information from financial institutions on market and investing trends—often outside the context of a formal request for proposal. These discussions involving investment strategies may include discussions of products and services offered by the financial institution relevant to a given investment strategy, and the plan fiduciary often will provide background information about the plan in the course of these discussions. It is up to the independent plan fiduciary to determine whether to engage in any particular investment strategy or to work with the financial institution or to purchase any of its products or services. These parties should be permitted to clearly agree that the financial institution is not providing advice in a fiduciary capacity.

**c. The Proposed Acknowledged Fiduciary Status Context Sweeps Too Broadly**

Under context (iii), fiduciary status would attach to a recommendation if the person making the recommendation represents or acknowledges that they are acting as a fiduciary when making investment recommendations.

With this context, the Department seeks to ensure that if an investment professional holds themselves out as a fiduciary they cannot subsequently deny their fiduciary status, but rather must “honor their words”<sup>61</sup> (i.e., if you say you are a fiduciary with respect to the advice, the Department will hold you to it).<sup>62</sup> Further, the Department seems concerned that a retail investor will not appreciate the difference between an ERISA fiduciary and a fiduciary under a different law or standard. While we agree that a person should not be able to tell an investor that they are acting as an advice fiduciary and then disclaim this status when held to it, context (iii) sweeps too broadly and its language is both flawed and imprecise.

The Department states: “[i]t is enough that the investment advice provider told the retirement investor that the investment advice or investment recommendations were or will be made in a fiduciary capacity.”<sup>63</sup> The Department seemingly envisions a scenario where an individual financial professional is sitting across the table (or a computer screen) from an individual investor, advising them for example on whether to roll their retirement account from the 401(k) plan to an IRA. However, the Department appears to not have realized how a literal reading of

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<sup>61</sup> 88 Fed. Reg. at 75903.

<sup>62</sup> We note that the Fifth Circuit opined on a solution to this concern. “To the extent . . . that some brokers and agents hold themselves out as advisors to induce a fiduciary-like trust and confidence, the solution is for an appropriately authorized agency to craft a rule addressing that circumstance, not to adopt an interpretation that deems the speech of a salesperson to be that of a fiduciary, and that concededly is so overbroad that . . . it must be accompanied by a raft of corrections.” See *Chamber*, 885 F.3d 360, 379 note 13. (5th Cir. 2018).

<sup>63</sup> For purposes of the Proposal, paragraph (c)(1)(iii) is not limited to the circumstances in which the person specifically represents that they are a fiduciary for purposes of Title I or Title II of ERISA, or specifically cites any particular statutory provisions. It is enough that the investment advice provider told the investor that the investment advice or investment recommendations were or will be made in a fiduciary capacity. 88 Fed. Reg. at 75903.

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context (iii) could apply much more broadly than in this specific scenario. For example, nothing in the text of context (iii) limits its application to any specific advice or recommendation (i.e., I've acknowledged that I am a fiduciary *with respect to this advice*). Rather, the context only requires that an investment professional has acknowledged they are acting as a fiduciary *when making investment recommendations* (i.e., when making recommendations generally, not necessarily the instant recommendation). Therefore, it seems that once an investment professional has acknowledged their status as a fiduciary for *any* investment recommendations, under *any* law or standard, context (iii) would be satisfied with respect to any recommendation made to the investor. It is not clear that there are any limits to this fiduciary status, or any ability to define the relationship between the investment professional and the investor any differently.

First, while the language of the Proposal refers to “the person making the recommendation,” we understand this to mean the *entity*, rather than just the individual professional or even just the business unit. For example, assume that investment management company X manages a CIT in which plan Y invests. X may confirm to Y that they are acting as an ERISA fiduciary for purposes of managing the CIT. A separate division of X, unrelated to the CIT business, may be involved in selling a new product to plan Y. An acknowledgment of ERISA fiduciary status for purposes of managing the CIT should not mean that for all purposes, entity X would be presumed to satisfy context (iii).

Second, acknowledging that one is acting as a fiduciary outside of the ERISA context should not by itself be sufficient to make one a fiduciary under ERISA. For example, asset managers may act as Advisers Act fiduciaries to financial intermediaries by creating models that incorporate a mix of the asset manager’s fund products. The asset manager may then provide these models to the intermediary to help them understand how the funds are best used in combination. The models are not personalized to any one investor. The intermediary may decide to put the models on its platform for use by its representatives working with retirement investor clients. If the representative using one of these models is an advice fiduciary to a client plan or IRA owner, this should not cause the asset manager itself to become an ERISA fiduciary under context (iii). But applying the Proposal as written, the asset manager has acknowledged fiduciary status (under the Advisers Act) and could therefore be viewed as making a recommendation to the fiduciary of a plan or IRA (i.e., the intermediary). This unfortunate result stems from the absence in context (iii) of any requirement for personalization or individualization for an (even indirect) interaction to be considered a fiduciary recommendation. Moreover, the preamble indicates that a communication to a group of investors could be considered a covered “recommendation.”<sup>64</sup> This is another example of how the Proposal creates a “daisy chain” problem given the lack of a carveout for sophisticated investors.

Third, acting as a fiduciary for one aspect of the relationship with an investor should not make a person a fiduciary for all purposes. For example, if investment adviser C is managing a non-

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<sup>64</sup> 88 Fed. Reg. at 75904.

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ERISA account for individual D (e.g., a taxable advisory account), and advisor C sends D a Form CRS which notes that they are a fiduciary under federal securities law, this should not mean that D is entitled to fiduciary services for every interaction, including with respect to an IRA. But this is precisely what context (iii) appears to do. Exacerbating this situation is the fact that even a clear disclaimer of fiduciary status for the IRA would not be effective. While the Department states that it intends to permit parties to define the nature of their relationship,<sup>65</sup> it is not clear how that can be done when all that is needed for non-disclaimable fiduciary status is a non-personalized recommendation and an acknowledgement of any brand of fiduciary status by any part of an adviser/financial institution.

We understand that a major concern of the Department is the potential to mislead investors. As the above examples illustrate, however, the Department's formulation raises issues even when there is no intent to mislead. Under context (iii), fiduciary status for any given purpose would automatically result in ERISA fiduciary status for any recommendation made on a retirement investment. But it must be possible for a person or entity to act as a fiduciary for some purposes and not others.

Context (iii) also seems to contradict the Department's own assertion that fiduciary status is determined on a transactional basis and (as stated in ERISA section 3(21)) a party is a fiduciary only to the extent they meet the functional test. All that the Department would require here is a non-personalized recommendation and an acknowledgement that the provider is a fiduciary under any standard. As explained earlier, it is not even clear (in either the text of the Proposal or the preamble) that the acknowledgement must relate to the specific recommendation in question. The language of proposed paragraph (c)(1)(iii) sweeps far too broadly—perhaps more broadly than intended. **The Department must make the language more precise and should not equate fiduciary status under another law or regulatory framework to ERISA fiduciary status.**

#### **2.1.4 The Department Should Exclude Recommendations to Institutional and Sophisticated Investors from the Scope of the Rule**

As noted in our discussion of the Proposal's three contexts for ascribing ERISA fiduciary status to a recommendation, a literal reading of the text of the Proposal would result in ERISA fiduciary status for many interactions between a financial institution and a financial intermediary where neither party intends a fiduciary relationship. This is a direct result of both the breadth of the three contexts and the Proposal's definition of "retirement investor" in paragraph (c)(1) to

<sup>65</sup> The Department explains that its "intent in including [paragraph (c)(1)(v) in the Proposal is to permit parties to define the nature of their relationship, but also to ensure that any disclaimer be consistent with oral communications or actions, marketing material, State and Federal law, and other interactions based on all relevant facts and circumstances. When the disclaimer is at odds with the investment advice provider's oral communications, marketing material, State or Federal law, or other interactions, the disclaimer is insufficient to defeat the retirement investor's legitimate expectations." 88 Fed. Reg. at 75903. According to footnote 108, "[t]his discussion of disclaimers applies to the regulation proposed herein, defining an investment advice fiduciary, and would not extend to a circumstance in which a financial professional has investment discretion over a retirement investor's assets." *Id.*

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include a plan fiduciary or IRA fiduciary. We understand, based on the preamble's discussion of wholesaling activities by product manufacturers to financial intermediaries,<sup>66</sup> that the Department may not intend for the proposed definition to cover all interactions between financial institutions. **Rather than relying on commentary in the preamble to clarify this intent, we urge the Department to provide a broad exclusion from the fiduciary advice definition for recommendations to institutional and sophisticated investors. At a minimum, however, the Department should narrow the definition of retirement investor so that it does not include an intermediary (i.e., a professional fiduciary hired to act on behalf of the retirement investor).**<sup>67</sup>

We believe the Department's intent with the Proposal is to provide stricter protections to retail investors. Clarifications providing comfort that interactions in the institutional space (especially those between asset managers and intermediaries) will not be covered should not frustrate this goal. Department staff have informally indicated that sophisticated parties ought to be able to define and agree on the terms of their relationship (and therefore avoid application of the fiduciary advice rule). Despite this, many financial institutions would not be comfortable relying on these assurances given the text of the Proposal, including the clear inclusion of plan and IRA fiduciaries in the definition of retirement investor and statements in the Proposal drawing negative inferences around disclaimers. In addition, as explained at length in the discussion of proposed paragraphs (c)(1)(i) and (c)(1)(iii), in the discretionary authority context and acknowledged fiduciary context, there is no requirement to consider the facts and circumstances surrounding the communication and whether it was based on the individual needs of the investor. This only adds to the ambiguity surrounding institutional conversations.

An important example of where this concern comes into play is the creation and use of model portfolios. As described above in section 2.1.3, asset managers often create model portfolios as a

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<sup>66</sup> 88 Fed. Reg. at 75907 ("In the context of 'wholesaling' activity, which involves communications by product manufacturers or other financial service providers to financial intermediaries who then directly advise plans, participants, beneficiaries, and IRA owners and beneficiaries, the Department believes that communications to financial intermediaries would typically fall outside the scope of proposed paragraph (c)(1)(ii) because they would not involve recommendations based on the particular needs or individual circumstances of the plan or IRA serviced by the intermediary. There may also be other circumstances in which application of proposed paragraph (c)(1)(ii) would not result in a covered recommendation being treated as fiduciary investment advice. In general, however, the Department envisions that proposed paragraph (c)(1)(ii) would apply broadly to recommendations to plan and IRA fiduciaries acting on behalf of plans and IRAs.").

<sup>67</sup> The SEC took a similar approach in Reg BI by defining "retail customer" as: "a natural person, or the legal representative of a natural person, who: (A) receives a recommendation of any securities transaction or investment strategy involving securities from a broker-dealer; and (B) uses the recommendation primarily for personal, family, or household purposes." § 240.151-1(b)(1). The SEC clarifies that for purposes of this definition, a "legal representative" is only a "non-professional legal representative." 84 Fed. Reg. at 33343.

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service to the intermediaries who sell their products.<sup>68</sup> An intermediary, such as a broker-dealer firm, may then make these models available on its platform for use by its representatives when working with investor clients. It is not clear whether the Department would consider the creation and provision of a model portfolio by the asset manager to be a recommendation under the Proposal. If providing a model to an intermediary (who is a plan fiduciary or IRA fiduciary) is deemed to be a recommendation, then under a literal reading of the proposed test for determining whether a recommendation constitutes fiduciary advice, the model provider could become an ERISA advice fiduciary. This could occur if the asset manager represented that it is a fiduciary in any context (e.g., providing the model as a fiduciary under the Adviser's Act), or if it manages any other assets of an intermediary's retail investors.

We find this result to be unreasonable. The asset manager's creation of a model portfolio for use by financial intermediaries working with their clients is not individualized for any one retirement investor. In fact, the asset manager will not know the identity of the intermediary's underlying investor clients. The asset manager and the intermediary will have a clear understanding that the creation and provision of the model is not intended to be fiduciary advice under ERISA. And the investor has no relationship to or expectation of the asset manager. For these reasons, the Department should clearly exclude this type of asset manager activity from the scope of the investment advice fiduciary definition.

Revising the definition of retirement investor to not include intermediaries acting as fiduciaries to investors would be helpful but would not go far enough. As explained above, a broader exclusion for recommendations to institutional and sophisticated investors would lead to greater efficiencies in the marketplace while not excluding interactions the Department appears concerned about. Prior to crafting such an exclusion, the Department should meet with stakeholders to gather input on possible approaches and then propose a solution for public comment. Engaging in a discussion with the regulated community before finalizing an exclusion would help avoid the type of unfortunate situation caused by the 2016 Rule's exclusion for transactions with independent fiduciaries with financial expertise. That exclusion resulted in disruption to well-functioning institutional relationships through representations and warranties that both were of little value and required significant resources. We urge the Department not to recycle that exclusion here.

To be clear, while we urge the Department to clarify that institutional/sophisticated investor recommendations (including recommendations to "hired" fiduciaries) are outside the scope of this fiduciary definition, such a clarification would not cure all defects in the Proposal. The

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<sup>68</sup> In addition to the scenario described in section 2.1.3, an asset manager may create a model that replicates an index or other specifications of a third party, that is then made available on the intermediary's platform for use by a retirement investor client directly or a third-party intermediary's advisor. Generally, this would be a nondiscretionary recommendation under the Advisers Act.

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Proposal would still be inconsistent with the Fifth Circuit decision, would fail to meet the requirements of the APA, and would embody the numerous other concerns detailed in this letter.

## **2.2 If the Department Finalizes the Proposal, It Should Include Clarifying Examples**

The Proposed Fiduciary Rule is overly broad and fails to account for the important changes to the regulatory landscape since the 2016 Rule. However, to the extent that the Department still chooses to move forward with the Proposed Fiduciary Rule, we urge the Department to adopt clarifying examples in the final rule's regulatory text. The Department routinely includes examples in its regulations and such examples in the regulation itself will supply needed certainty to the regulated community as opposed to preamble discussion or subsequent FAQs. Moreover, the examples are not exceptions or exclusions that might be viewed skeptically in the context of a fact intensive definition. Instead, they are simply the Department's application of the regulation to facts, and as such would provide helpful clarity and certainty to the regulated community.

Set out below are a number of common fact patterns that we believe do not constitute fiduciary advice. We request that the Department include them in a final rule to the extent that the rule moves forward. To be clear, ICI is not suggesting that the inclusion of these examples will cure the significant faults of the Proposal.

### **Clarifying Example 1: Communications Between Investment Professionals**

X, a representative of a mutual fund complex, discusses with Y, a registered investment adviser, which of its mutual funds, including which share class, are appropriate for small retirement plans, including specific small retirement plans. X has not represented to Y that it is providing investment advice or acting as a fiduciary. Has X provided fiduciary advice to Y?

No. These types of communications between institutional parties are not provided under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions.

### **Clarifying Example 2: Providing Financial Education to Groups #1**

A representative of a mutual fund complex, X, is speaking to a group at a conference, one member of which is Y, a fiduciary of an employer sponsored plan. X provides a presentation on target date funds that can be integrated into a defined contribution plan line up, including a target date fund sponsored by X. X states that this particular suite of target date funds is well suited for plans looking to manage investments through retirement rather than simply to retirement. Y is looking to offer target date funds that manage assets through retirement. Has X provided fiduciary advice to Y?

No, despite knowing that some members of the audience might be retirement investors seeking to offer target date products that manage assets through retirement, the statement made in the

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context of a conference is not provided under circumstances indicating that it is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in Y's best interest.

**Clarifying Example 3: Providing Financial Education to Groups #2**

Representative of recordkeeper X is meeting with a group of plan participants Y, for an employer that utilizes the recordkeeper's services, including its investment platform. In meeting with the employees, X discusses the importance of asset allocation and how the target date fund in the employer's plan is designed to appropriately allocate assets over time and recommends the fund for those participants that do not wish to spend time actively monitoring their portfolio allocation. These target date funds are affiliated with the recordkeeper. Has X provided fiduciary advice to Y?

No, although some plan participants may elect a target date fund as a result of the meeting with X, the statement made by X is not provided under circumstances indicating that it is based on the particular needs or individual circumstances of Y.

**Clarifying Example 4: Discretionary Manager Recommending Itself #1**

X is a discretionary manager with no existing relationship to plan Y. Y has issued an RFP seeking an investment manager for a separately managed account with Y. In connection with the RFP, and during finalist meetings with the investment committee for Y, X touts its expertise, performance history and quality of services in fulfilling similar investment mandates to that requested by Y and includes investment ideas for Y to consider. Has X provided fiduciary advice to Y?

No. In this context, X's presentation is not a "recommendation." Covered recommendations under the rule do not include recommending oneself. Moreover, marketing presentations including RFP responses are not provided under circumstances that indicate the interaction may be relied upon by the retirement investor as a basis for investment decisions.

**Clarifying Example 5: Discretionary Manager Recommending Itself #2**

Same fact pattern as clarifying example 4, except that X is a discretionary manager that already offers a CIT to plan Y.<sup>69</sup> In connection with its participation in the RFP for a new investment mandate with Y, has X provided fiduciary advice to Y?

No. X's presentation is not a "recommendation." Covered recommendations under the rule do not include recommending one's own investment management services (including affiliates).

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<sup>69</sup> This example assumes that offering a CIT would cause the manager to satisfy the discretionary authority test under proposed paragraph (c)(1)(i). As explained earlier, we believe the Department should provide an exception under this test for offering CITs.

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#### **Clarifying Example 6: Platform Recommendations #1**

X is a defined contribution plan recordkeeper that has no existing relationship to plan Y. Y has issued an RFP seeking proposals for recordkeeper services. In connection with the RFP, and during finalist meetings with the investment committee for Y, X discusses the various investment platforms it offers to plans of this size and type. X discusses the range of investment products offered on the different platforms and their relevant fees and share classes and notes which platform option may provide the best choice for Y. X does not recommend any particular investment products available on its platform as being the right one for Y. Has X provided fiduciary advice to Y?

No. X's presentation is not a "recommendation." Covered recommendations under the rule do not include recommending oneself (including affiliates). Moreover, marketing presentations including RFP responses are not provided under circumstances that indicate the interaction may be relied upon by the retirement investor as a basis for investment decisions.

#### **Clarifying Example 7: Platform Recommendation #2**

Same fact pattern as clarifying example 6, except that X is a discretionary manager that already offers a CIT to plan Y.<sup>70</sup> In connection with its participation in the RFP for recordkeeping services, has X provided fiduciary advice to Y?

No. X's presentation is not a "recommendation." Covered recommendations under the rule do not include recommending oneself (including affiliates).

#### **Clarifying Example 8: Recommending an Advisory Program**

X has established a self-directed IRA with Y. X is assigned a representative of Y and meets annually to receive investment education within the meaning of IB 96-1. During one of the annual meetings, Y notices that the asset allocation strategy selected by X is not consistent with the models presented to X under IB-96-1. Y suggests that X consider a managed account program offered by Y's affiliate that invests in mutual funds and adjust allocations over time. Has Y provided fiduciary advice to X?

No. In this context, Y's presentation is not a "recommendation" that is covered by the rule. Covered recommendations under the rule do not include recommending oneself (including affiliates) to provide investment advisory services.

#### **Clarifying Example 9: Existing Discretionary Manager Relationship**

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<sup>70</sup> Like clarifying example 5, this example assumes that offering a CIT would cause the manager to satisfy the discretionary authority test under proposed paragraph (c)(1)(i). As explained earlier, we believe the Department should provide an exception under this test for offering CITs.



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Employer X is a fiduciary to its defined benefit plan. Investment manager Y is a discretionary manager to such plan and is a fiduciary under ERISA section 3(21)(A)(i). Z is an affiliate of Y and sends unsolicited emails and marketing materials to many businesses, including X, suggesting that interest rates are favorable for any pension plan to consider a pension risk transfer. The communication contains information that the communication is marketing. Has Z provided fiduciary advice to X?

No. The provision of marketing materials by Z does not constitute a recommendation under the rule (it is not a call to action in this context).

### Section 3: Discussion of Proposed PTE Amendments

PTE 2020-02 was adopted, and came into effect, in a fluid regulatory environment. The SEC in 2019 adopted Reg BI and Form CRS. The NAIC in 2020 adopted a model best interest standard for annuity product sales, which in turn has been adopted by the vast majority of states. In the face of these numerous changes—the full impacts of which are yet to be felt—the Department nonetheless has seen fit to overturn the apple cart by proposing systemic changes to the fiduciary investment advice exemptive framework only three years after PTE 2020-02 was finalized, and where its various requirements have only been fully in effect for 18 months.

We are extremely concerned about the significant adverse market impacts that will result from this effort. Most importantly, the 2023 proposal has the same framework as 2016—it expands the definition of advice and then forces all advisers into a single restrictive exemption, a beefed-up PTE 2020-02—by significantly narrowing numerous long-standing class exemptions that financial institutions have long relied on. **The Department is undertaking this effort despite the fact that there has not been sufficient time to determine the true effectiveness of (to say nothing of the costs and benefits of) the adoption of PTE 2020-02 and other recent regulatory changes noted above.**<sup>71</sup>

Financial institutions faced with the new, expanded regulatory and exemptive regime proposed by the Department may seek to minimize the situations in which they become investment advice fiduciaries under ERISA by pulling back much of the guidance and education and planning tools currently offered to investors. Firms also may impose or increase account minimums for relationships that would newly require the firm to use PTE 2020-02, as well as some relationships currently falling under PTE 2002-02.<sup>72</sup> These changes may be needed to ensure

<sup>71</sup> ICI's review of the Department's Regulatory Impact Analysis, enclosed as an Appendix, details several errors in the Department's Regulatory Impact Analysis. These errors materially underestimate the significant burden of costs to the asset management sector, as well as the retirement services sector in general, of the Proposal.

<sup>72</sup> NAIFA Survey, Expected Minimum Thresholds Will Change if DOL Rule Implemented (Dec. 2023), available at <https://2635471.fs1.hubspotusercontent-na1.net/hubfs/2635471/NAIFA%20Members%20Respond%20to%20the%20Proposed%20US%20DOL%20Rule.pdf> (finding that whereas 70% of financial security professionals surveyed currently impose no minimum asset

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they will be able to recoup significantly higher compliance costs and compensate for increased risk. These costs are amplified by the fact that companies currently relying on PTE 2020-02 only recently finished building the systems needed to comply with the exemption. As discussed further below, many of the proposed changes to PTE 2020-02 and other exemptions would require these companies to revise—or completely rebuild—their systems at great cost and with an indeterminate benefit to investors from the Department’s proposed changes. These changes will not be protective of plans and other investors. Plans and other retirement investors instead will enjoy fewer options for investment advice and guidance, whether fiduciary in nature or not, and those options that are available will be at higher cost. Moreover, this will disproportionately impact smaller balance investors. To this end, we also are concerned that the expansion and wholesale revision of the fiduciary investment advice exemptive regime may have the effect of negating many of the benefits to Main Street investors from the SECURE Act and the SECURE 2.0 Act.

Contrary to the Department’s assertion in the preamble to Proposed PTE 2020-02,<sup>73</sup> many financial institutions already complying with PTE 2020-02 and Reg BI will not find the Department’s proposed changes easier to implement than if they were starting from a blank slate. In many cases financial institutions built a PTE 2020-02 compliance framework to serve the needs of a particular business unit. In addition to needing to update systems to meet any new requirements, these frameworks may not be well-suited to broader adoption without significant revisions or even wholesale rebuilding. Similarly, as discussed below many financial institutions structured their businesses to not be investment advice fiduciaries subject to PTE 2020-02, but still built PTE 2020-02 compliance systems as a backstop to cover situations where they may inadvertently find themselves providing fiduciary investment advice for a fee (hence their use of “to the extent” language in their fiduciary acknowledgements). Without wholesale rebuilding, these systems are ill-equipped to handle a financial institution’s entire volume of business that would now be considered fiduciary investment advice subject to an expanded PTE 2020-02.

The Department discounts the fact that the framework set out in Proposed PTE 2020-02 differs significantly from the current SEC regulatory framework. While Reg BI may be *similar* in many ways to Proposed PTE 2020-02, in practice these two frameworks are substantively different. A financial institution currently complying with Reg BI for business units that would find themselves newly subject to PTE 2020-02 will face significant challenges in building the systems to comply with Proposed PTE 2020-02. **Beyond these challenges, we urge the Department to consider the confusion and increased cost for both investors and financial**

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threshold for potential clients, if the Proposal is adopted only 28% would continue to not impose an assets minimum for potential clients). We note that there was a similar response to the 2016 Rule. See Letter from Brian Reed and David Blass, ICI, to Office of Regulations and Interpretations, EBSA, note 13. (March 17, 2017). The industry responses to the 2016 Rule are discussed in further detail in section 4.4 of this letter.

<sup>73</sup> 88 Fed. Reg. at 75984, 94.

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**professionals of having to comply with two different compliance regimes for providing essentially the same services with respect to retirement and non-retirement accounts.**

As discussed in more detail below, we urge the Department to reconsider its ill-timed and ill-advised proposed revision to the fiduciary investment advice exemptive framework, as well as the proposed amendments to the definition of fiduciary investment advice. The Department should withdraw the entire Proposal and go back to the drawing board, considering modifications to the current regulatory framework only after the retirement market has had an opportunity to fully realize the benefits of recent changes, including the still-new PTE 2020-02. Only then can the Department properly determine whether changes are truly needed, and if the significant costs of such expansion are warranted in light of the benefits that would be realized. We note that while ICI believes this is the appropriate course of action, we nonetheless have suggested modifications to Proposed PTE 2020-02 and other proposed amended class exemptions should the Department elect to pursue a different path.

**3.1 The Department Should Not Apply an Ill-Suited, One-Size-Fits-All Exemption to Fiduciary Investment Advice**

ICI disagrees with the Department's clear intention to provide a one-size-fits-all class exemption for investment advice fiduciaries. This approach will lead to a less effective, and more inefficient and burdensome, exemptive framework. The one-size-fits-all nature of Proposed PTE 2020-02 is exacerbated by the absence of important exclusions in the Proposal, such as those for recommendations to sophisticated investors and investment experts, discussed above. The absence of such exclusions here further highlights the challenges different industry segments will face when complying with Proposed PTE 2020-02.

It is important that prohibited transaction class exemptions be tailored to fit the provision of specific products and services. Class exemptions are more effective at both protecting the rights of participants and beneficiaries and enabling the efficient delivery of necessary services to plans and other retirement investors if they are tailored to specific situations. Industry participants face different challenges in how they mitigate conflicts and risks, as well as manage product offerings when providing fiduciary investment advice. These different challenges may be due to the structures of the products offered, different models for service delivery, a focus on different market segments, and different overlapping regulatory regimes (*e.g.*, securities law, state insurance regulation, etc.).

The Department proposes to amend PTEs 75-1, 77-4, 80-83, 83-1, and 86-128 to make them unavailable for the provision of investment advice. These exemptions are designed to cover specific types of transactions that financial services firms commonly undertake for plan or IRA investors. The conditions built into these exemptions are specifically tailored to protect investors, while allowing for efficient conduct of ordinary and necessary plan transactions. For example, PTE 77-4 (available for a plan's purchase or sale of shares of a mutual fund where the fund's investment adviser is also a fiduciary to the plan) prevents charging multiple layers of advisory

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or management fees, and provides no relief for the receipt of a sales commission. It also requires disclosures to a second plan fiduciary (who is independent of the adviser) specifically addressing issues relevant to the plan fiduciary's decision-making. In contrast, **Proposed PTE 2020-02 would act like a drag net in capturing a wide range of transactions across multiple product segments. The efficiencies associated with the current more tailored exemptions the Department proposes to amend would be lost, resulting in higher costs and fewer benefits to investors.**

One example of these higher costs is that the Proposal would require a party relying on one of the other exemptions in question (such as PTE 77-4) to now rely on a second exemption—PTE 2020-02—in connection with the same services. While the current exemptive relief in PTE 77-4 would continue to be available for providing discretionary management services, the firm would need to build a second process to comply with PTE 2020-02 for the initial recommendation in connection with its hiring. (Currently PTE 77-4 is available for both initial recommendations of proprietary funds and for ongoing discretionary management.) The Department appears to have not factored this significant additional compliance burden or its attendant costs into its regulatory impact analysis, further understating the cost both to build PTE 2020-02 compliance structures and to comply with PTE 2020-02 on a go-forward basis.

The Department has applied a more tailored approach to PTEs for decades. The Department here proposes to deviate from its historical practice by applying one set of conditions not only to financial institutions that occupy materially different market segments, but also collapsing different products currently covered by seven class exemptions into one class exemption—PTE 2020-02. Rather than leveling the playing field as the Department asserts, applying one set of conditions to all instances of a broad range of industry activities will lead the industry to offer fewer tools and less assistance to plans, participants, and IRA owners, and fewer options in the marketplace. Such a result would make PTE 2020-02 less protective of, and less in the interests of, plans and plan participants.

The Department also has not demonstrated either a true need for, or a benefit from, curtailing numerous long-standing exemptions in favor of an omnibus PTE 2020-02. We view the Proposal and its attendant effects detailed herein as an effort by the Department to leverage its deregulatory exemptive authority to impose additional regulatory burdens on retirement industry. This is the same impermissible “backdoor regulation” the Fifth Circuit called the Department out for in connection with the 2106 Rule.<sup>74</sup>

### **3.2 The Proposed Restrictions on Differential Compensation Are Unreasonable and Conflict with the SEC's Approach**

Proposed PTE 2020-02 would significantly expand the limitations on permitted compensation practices in connection with providing fiduciary investment advice by reverting to the language

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<sup>74</sup> *Chamber*, 885 F.3d 360, 387-88.

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previously used in the now-vacated BIC Exemption. In addition to banning numerous forms of compensation commonly utilized in the industry, the Department proposes to apply a presumption against differential compensation<sup>75</sup> in stark contrast to the Department's past practice and the SEC's approach under Reg BI.

As amended, section II(c)(2) would provide that "Financial Institutions may not use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, *differential compensation*, or other similar actions or incentives that are intended, or that a reasonable person would conclude are likely, to result in recommendations that are not in Retirement Investors' Best Interest" (emphasis added).<sup>76</sup> When PTE 2020-02 was adopted only three years ago, the Department was clear that there is a benefit to allowing different compensation arrangements.

This exemption will generate several benefits. It will provide Financial Institutions and Investment Professionals with flexibility to choose between this new exemption or existing exemptions, depending on their needs and business models. In this regard, the exemption will help preserve different business models, compensation arrangements, and products that meet different needs in the market. This can, in turn, help preserve the existing wide availability of investment advice arrangements and products for Retirement Investors.<sup>77</sup>

**The proposed restrictions are inconsistent with the Department's long-standing principles-based approach to the regulatory framework around fiduciary investment advice.<sup>78</sup> Blanket proscriptions can be—and here are—unnecessarily overbroad. Indeed, a proscriptive approach incorrectly implies that certain practices are "right" or "wrong," irrespective of the circumstances.** ICI is concerned that the use of proscriptive rules will result in less innovation, higher costs, and a narrower range of options for investors. Moreover, to the extent that the explicit inclusion of proscriptive language in the policies and procedures provisions of PTE 2020-02 could be read to require levelized compensation across different types of products, it could lead to the elimination of the full-service brokerage business model in the retirement space. This is contrary to the Department's stated goal when adopting PTE 2020-

<sup>75</sup> Neither Proposed PTE 2020-02 nor any other portion of the Proposal defines "differential compensation." When we discuss differential compensation, we are referring to any compensation that differs depending on the investment advice provided.

<sup>76</sup> Proposed PTE 2020-02 § II(c)(2), 88 Fed. Reg. at 76001.

<sup>77</sup> 85 Fed. Reg. at 82847.

<sup>78</sup> The preamble to PTE 2020-02 describes the exemption as principles based. *Id.* at 82800 ("this new exemption provides relief for multiple categories of Financial Institutions and Investment Professionals, and extends broadly to their receipt of reasonable compensation as a result of the provision of fiduciary investment advice. The conditions are principles-based rather than prescriptive, so as to apply across different financial services sectors and business models.").

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02 of preserving differential compensation models.<sup>79</sup> The Department specifically declined to include specific mandates regarding conflict mitigation as it wanted to avoid reducing the utility of PTE 2020-02.

Financial Institutions that continue to offer transaction-based compensation would focus on both financial incentives to Investment Professionals and supervisory oversight of investment advice to meet the standards. The exemption lacks additional specific mandates regarding conflict mitigation in order to accommodate the wide variety of business models used throughout the financial services industry. The type and degree of conflicts is susceptible to change over time. The Department believes that prescriptive conflict mitigation provisions would decrease the utility of the exemption, now and in the future.<sup>80</sup>

ICI considers this approach a well-reasoned balancing of the Department's concerns with the commercial realities of a varied marketplace. As a practical matter, different compensation structures have different impacts depending on the market and the product, as well as the nature of the target investor. Moreover, the SEC in adopting Reg BI wisely adopted a similar approach, declining to dictate a laundry list of prohibited forms of compensation.<sup>81</sup> As SEC staff has applied and further interpreted Reg BI, they have confirmed that firm-level conflicts, with some exceptions, generally can be addressed by disclosure (as opposed to mitigation).<sup>82</sup> Importantly, Reg BI focuses on the mitigation (and potential elimination) of conflicts at the individual broker level, recognizing that the primary concern with regard to conflicts of interest is those that "create an incentive for an associated person to place his or her interests ahead of the interest of the retail customer," and therefore "removing [from the final rule] the affirmative mitigation requirement at the firm level."<sup>83</sup> The SEC also recognized the need for a flexible framework, as some firm-level conflicts of interest may require policies and procedures for mitigation or elimination. As the SEC further noted in adopting Reg BI: "[w]e believe that this approach appropriately balances our goal of reducing the potential harm conflicts of interest may have on

<sup>79</sup> E.g., *Id.* at 82835 (noting that "establishing differential compensation based on neutral factors" is a mitigation strategy that financial institutions can look to in compensating investment professionals).

<sup>80</sup> *Id.* at 82834.

<sup>81</sup> Exchange Act rule 15c-1(a)(2)(iii)(D), 17 CFR § 240.15c-1(a)(2)(iii)(D) (specifically limiting types of compensation only as follows: "[i]dentify and eliminate any sales contests, sales quotas, bonuses, and non-cash compensation that are based on the sales of specific securities or specific types of securities within a limited period of time").

<sup>82</sup> SEC Staff Bulletin, *Standards of Conduct for Broker-Dealers and Investment Advisers Conflicts of Interest*, modified Aug. 3, 2022, available at <https://www.sec.gov/tm/iabd-staff-bulletin-conflicts-interest> ("Firms also may find that there are some conflicts that they are unable to address in a way that will allow the firm or its financial professionals to provide advice or recommendations that are in the retail investor's best interest. In such cases, firms may need to determine whether to eliminate the conflict or refrain from providing advice or recommendations that could be influenced by the conflict to avoid violating the obligation to act in the retail investor's best interest.").

<sup>83</sup> 84 Fed. Reg. At 33387.

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broker-dealers' recommendations to retail customers and preserving retail access (in terms of choice and cost) to brokerage products and services.”<sup>84</sup>

In sharp contrast to the approach and reasoning of PTE 2020-02 and Reg BI, the Department now effectively proposes to require the *elimination* of differential compensation without any consideration of the fact that compensation practices differ depending on the specific facts and circumstances—not only the products and services at issue, but also the market segments being served.<sup>85</sup> These market segments include not only retail versus institutional, but also larger versus smaller plans. Moreover, the Department in Proposed PTE 2020-02 provides no meaningful justification for this significant shift in its approach.

ICI views this extreme approach as far beyond what is reasonably required to effectively mitigate conflicts of interest due to differential compensation. As Reg BI highlights, conflicts arising from differential compensation can reasonably be addressed short of eliminating differential compensation. To the extent the Department is concerned about an outsized adverse impact from specific types of differential compensation, we urge the Department to adhere to its traditional principles-based approach. This approach would place the entities best situated to evaluate the impacts of forms of differential compensation in the position of actually doing so, subject to Department guidance. To this end, the Department should accord wide latitude as to how financial institutions mitigate the potential effects of differential compensation in their policies and procedures.

When PTE 2020-02 was adopted, the preamble explained that financial institutions should look to conflict mitigation strategies identified by their other regulators. The SEC explicitly eschews a one-size-fits-all approach, recognizing that different firms face different circumstances that warrant flexibility in crafting reasonable policies and procedures. To that end, the SEC provides a number of potential mitigation methods that a firm could utilize, which the Department included as examples in the preamble to PTE 2020-02:

- avoiding compensation thresholds that disproportionately increase compensation through incremental increases in sales;
- minimizing compensation incentives for employees to favor one type of account over another; or to favor one type of product over another, proprietary or preferred provider products, or comparable products sold on a principal basis, for example, by establishing differential compensation based on neutral factors;

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<sup>84</sup> 84 Fed. Reg. at 33390.

<sup>85</sup> This highlights the dangers, discussed above, of pursuing a one-size-fits-all exemption approach.

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- eliminating compensation incentives within comparable product lines by, for example, capping the credit that an associated person may receive across mutual funds or other comparable products across providers;
- implementing supervisory procedures to monitor recommendations that are: near compensation thresholds; near thresholds for firm recognition; involve higher compensating products, proprietary products or transactions in a principal capacity; or, involve the roll over or transfer of assets from one type of account to another (such as recommendations to roll over or transfer assets in an ERISA account to an IRA) or from one product class to another;
- adjusting compensation for associated persons who fail to adequately manage conflicts of interest; and
- limiting the types of retail customer to whom a product, transaction, or strategy may be recommended.<sup>86</sup>

The Department should not deviate from this approach.

ICI also questions the Department's assertion that differential firm level compensation poisons the well for investment professionals whose compensation may be based in part on the financial institution's profit. The Department in the preamble to Proposed PTE 2020-02 describes its concern as follows.

The Financial Institution must pay close attention to any Conflicts of Interest that may exist within the Financial Institution itself. For example, it is not enough merely to pay Investment Professionals the same percentage of the Financial Institution's compensation for a recommended investment product, as for other products, if the Financial Institution receives more compensation from recommending that product rather than other products. In such cases, the "level" compensation percentage effectively directly transmits the Financial Institution's conflict of interest to the Investment Professional, as the Investment Professional's compensation is increased in direct proportion to the profitability of the investment to the firm. Thus, Section II(c) requires the Financial Institution to look carefully at its own incentives and ensure that all recommendations are focused on the Retirement Investor's Best Interest rather than the Financial Institution's interests.<sup>87</sup>

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<sup>86</sup> SEC, *Frequently Asked Questions on Regulation Best Interest* (modified Aug. 4, 2020), available at <https://www.sec.gov/tm/faq-regulation-best-interest> (recognizing that this is not intended to be an exhaustive list of potential mitigation practices).

<sup>87</sup> 88 Fed. Reg. at 75987.



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By this logic, any profit inuring to a financial institution in connection with fiduciary investment advice would create an incurable conflict.

The fact that a financial institution receives different compensation in different scenarios and for different products does not by definition create a conflict that is then transferred to the investment professional when they provide advice to an investor. As the SEC observed in deciding to not unduly restrict firm-level compensation in Reg BI: “rather than requiring mitigation of all firm-level financial incentives, we have determined to refine our approach by generally allowing firm-level conflicts to be generally addressed through disclosure.”<sup>88</sup> At the same time, the SEC recognized that some—but not all—firm level conflicts may in fact require firm-level mitigation.<sup>89</sup> **The SEC’s acknowledgement that conflicts are not equal in all situations reflects a balanced approach that is lacking in Proposed PTE 2020-02.** In situations where the SEC decided that disclosure alone is insufficient, the need to mitigate versus eliminate the conflicts is appropriately left to the discretion of the institution.<sup>90</sup> This approach recognizes that conflict mitigation is not a one-size-fits-all solution, but rather one that requires consideration of each firm’s specific facts and circumstances.

In addition, section 22(d) of the Investment Company Act of 1940 limits a broker-dealer firm’s ability to establish the price at which mutual fund shares are sold. Specifically, section 22(d) prohibits a mutual fund, the fund’s principal underwriter, and dealers in the fund’s shares from selling the fund’s shares at a price other than a current public offering price disclosed in the fund’s prospectus.<sup>91</sup> This public offering price includes any front-end sales load, deferred sales charge, or 12b-1 fee charged by the mutual fund. As a result of section 22(d) and other legal and practical limitations, it may not be possible for a broker-dealer firm to levelize the compensation it receives from different funds for selling their shares. While a broker-dealer firm can, under certain circumstances<sup>92</sup> in its discretion, charge uniform commissions on so-called “clean shares” offered by different fund families,<sup>93</sup> this approach is not always possible or preferable and would not permit the broker-dealer firm to receive fund-level compensation, such as sales loads and 12b-1 fees. Further, not every fund family offers clean shares, and other classes of shares may be

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<sup>88</sup> 84 Fed. Reg. at 73390.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> 15 U.S.C. § 80a-22(d). See 17 C.F.R. § 270.22d-1.

<sup>92</sup> The broker-dealer firm must be acting solely as a broker (i.e., in an agency capacity).

<sup>93</sup> The restrictions of section 22(d) do not apply where a firm is acting solely as a broker, on behalf of its customers. In these circumstances, the SEC staff has taken the position that a broker may charge its customers commissions (determined in its discretion) for effecting transactions in “clean shares,” which are a class of mutual fund shares without any front-end load, deferred sales charge, or other asset-based fee for sales or distribution. Capital Group, SEC Staff Interpretive Letter (Jan. 11, 2017), *available at* <https://www.sec.gov/divisions/investment/noaction/2017/capital-group-011117-22d.htm>.

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beneficial for certain fund investors. More generally, it is not practical for each fund family whose shares the broker-dealer offers to agree to align its sales load schedule, breakpoints, and 12b-1 fees paid to the firm with those paid by other fund families. Such a requirement also would raise a question as to whether, to achieve levelized firm compensation, the firm's compensation for other comparable products, such as ETFs, would need to be similarly levelized with the mutual fund compensation the firm receives.

In light of the above as well as more generally, we also are concerned that a requirement to levelize firm compensation could reduce competition by introducing an artificial barrier on how different investment products compete in the marketplace. The Department in reducing price competition could reduce investor choice and make it more difficult for retirement investors to distinguish among investment products and solutions. ICI views it as important that regulators seek to foster, rather than reduce, competitive investor choice.

Proscriptive rules such as those in proposed section II(c)(2) also have an adverse collateral effect of restricting or eliminating forms of compensation that are beneficial to investors. One such example is rights that may be acquired appurtenant to specific types of investments. Class A share mutual funds, for example, may include upon acquisition rights of appreciation ("ROA") and/or rights of exchange ("ROE"), both of which an investor would have decided to pay for up front as part of their decision to invest in the share class. ROA enable an investor to aggregate purchases within a given fund family to realize lower commissions as they make additional purchases. ROE grant an investor the right to sell the acquired shares and then acquire additional shares of another fund in the same fund family without paying a commission on the purchase. These rights have meaningful value to investors.

Our members are concerned that to the extent the above restrictions on forms of compensation and differential compensation are interpreted to prohibit the use of such rights going forward, investors will have lost value that they have already paid for. For example, an investor with ROE granted when they acquired a fund may consider selling their position and investing in another fund. As a result of the ROE they previously acquired, if they use the proceeds to purchase another fund in that family the broker will receive zero commission. If, however, the investor uses the proceeds to purchase a fund in a different fund family, the broker would receive a commission on that purchase. The ROE in this scenario results in differential compensation to the broker; it would be an unfortunate and, we assume, unintended result of Proposed PTE 2020-02 to prohibit such an arrangement.

ICI recommends the Department revert to the principles-based approach to policies and procedures embodied in current PTE 2020-02. Short of this, the Department should confirm that, irrespective of any prohibition in PTE 2020-02, differential compensation that is beneficial to an investor is permitted. Such an exception would be consistent with the Department's stated goal of furthering retirement investors' best interest. At a bare minimum we urge the Department to

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provide grandfather treatment to existing arrangements (such as ROA and ROE) that would result in differential compensation but provide rights to the investor.

### **3.3 The Enhanced Documentation and Disclosure Requirements Are Both Unnecessary and Unduly Burdensome**

ICI understands the Department's focus on providing investors with appropriate information. However, the significant increase in the amount of information provided to investors under Proposed PTE 2020-02 will add minimal, if any, incremental value for investors while imposing significant additional costs on the retirement system. **We are increasingly concerned that as more disclosures are provided to investors (both under PTE 2020-02 and in many other contexts under ERISA and the securities laws), there is less likelihood that these additional disclosures will be effective.** Indeed, both the Department and Congress have acknowledged this concern.<sup>94</sup> Our concerns are amplified by the undue burden that would be imposed on the retirement industry from the new requirements in Proposed PTE 2020-02 and other exemptions.

We highlight below a few specific concerns.

#### **3.3.1 Requiring an Unqualified Acknowledgement of Fiduciary Status Is at Odds with Both the Proposed Fiduciary Rule and the Realities of the Marketplace**

ICI is concerned that the proposed changes to the fiduciary acknowledgement are at odds both with ERISA and with the Proposed Fiduciary Rule, and moreover completely ignore the realities of how parties manage their businesses in delivering unconflicted advice. ERISA § 3(21) provides that:

a person is a fiduciary with respect to a plan *to the extent* (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.<sup>95</sup>

The preamble to the Proposed Fiduciary Rule takes pains to emphasize that the Proposal purportedly preserves the statutory requirement that fiduciary status is determined on a transactional basis:

<sup>94</sup> DOL in the preamble to Proposed PTE 2020-02 has noted this concern, observing that “[d]ue to the complexity of some disclosures as well as investors’ propensity to ignore lengthy disclosures, disclosures often fail to accomplish their goals.” 88 Fed. Reg. at 75962. See SECURE 2.0 Act § 319.

<sup>95</sup> ERISA § 3(21) (emphasis added).

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It is important to note that each required component of the new proposed regulatory definition would have to be satisfied with respect to any particular recommendation for the recommendation to constitute fiduciary investment advice. In accordance with the statute, fiduciary status is determined on a transactional basis. Under the statutory text, a person is a fiduciary with respect to advice “to the extent . . . [they] render[] investment advice for a fee or other compensation, direct or indirect.” The proposed rule, like the statute, applies fiduciary status on a transaction-by-transaction basis. One is only a fiduciary “to the extent” the person making the recommendation meets the rule’s requirements with respect to the particular advice transaction at issue.<sup>96</sup>

Unfortunately, this reference in the preamble to the statutory limitation does not carry through to Proposed PTE 2020-02. Sections II(b)(1) and (2) of Proposed PTE 2020-02 would require that prior to engaging in a transaction covered by Proposed PTE 2020-02, a financial institution provide a retirement investor with, among other items:

- (1) A written acknowledgment that the Financial Institution and its Investment Professionals are providing fiduciary investment advice to the Retirement Investor and are fiduciaries under Title I, the Code, or both when making an investment recommendation;
- (2) A written statement of the Best Interest standard of care owed by the Investment Professional and Financial Institution to the Retirement Investor....<sup>97</sup>

While the Department properly couches the acknowledgement as relevant “when making an investment recommendation,” this qualification reads hollow in the context of the Proposed Fiduciary Rule. First, to the extent the financial institution or investment professional has *any* discretion or control under the “discretionary authority or control” context of the Proposed Fiduciary Rule test, they may well be deemed an investment advice fiduciary in all instances. Second, when viewed alongside the Proposed Fiduciary Rule, these disclosures under Proposed PTE 2020-02 may improperly create an impression on the part of an investor that fiduciary investment advice is being provided, even when such a result is not intended. In short, the above acknowledgement and written statement would themselves define one’s status as an investment advice fiduciary. We view it as inappropriate for the Department to construct an exemption that effectively declares fiduciary status under the Proposed Fiduciary Rule, going well beyond those situations where the exemption properly should apply only “to the extent” such advice is provided.

In a similar vein, the Department misconstrues the reasons financial institutions provide qualified acknowledgements of fiduciary status. While the Department implies parties utilize “artful

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<sup>96</sup> 88 Fed. Reg. at 75901.

<sup>97</sup> Proposed PTE 2020-02 § II(b), 88 Fed. Reg. at 76000-01.

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phrasing”<sup>98</sup> to sidestep fiduciary status, as noted above fiduciary status under ERISA section 3(21) is accorded only “to the extent” that one meets the statutory definition. Our members have indicated that in addition to reflecting the statutory language, parties utilize conditional language to reflect business realities. Specifically, a firm may construct its business model to reflect that it does not intend to provide fiduciary investment advice. However, as no processes are perfect, an employee in a business unit may inadvertently cross the threshold of providing fiduciary investment advice. To avoid a non-exempt prohibited transaction, the firm may have built a “backstop” PTE 2020-02 compliance process that is triggered only if fiduciary investment advice is inadvertently provided.<sup>99</sup>

### **3.3.2 The Requirement to Provide Enhanced Fee Disclosures Upon Request is Unwarranted**

Proposed PTE 2020-02 would impose a new requirement on financial institutions to provide retirement investors, upon request, detailed information about how the financial institution and investment professional are compensated in connection with their recommendations.<sup>100</sup> However, the Department offers no explanation as to why this significant new requirement is warranted. Additionally, as detailed in the Appendix, the Department greatly underestimates the costs associated with this requirement.<sup>101</sup>

The Department in its RIA incorrectly notes: “the Department expects that many financial institutions’ disclosures, as required by the existing PTE 2020-02, already substantially comply with this regulation or would require modest adjustments to do so.”<sup>102</sup> Moreover, the RIA makes numerous incorrect assumptions that significantly underestimate not only the effort required to build systems to comply with this requirement, but also the burden of complying.<sup>103</sup>

Contrary to the Department’s assumption that many firms already have the necessary systems in place, our members have informed us that systems for complying with PTE 2020-02 may not exist for the institutional market, as many firms do not currently use PTE 2020-02 in that context. Depending on a financial institution’s current infrastructure, it may be very challenging, costly, and time consuming to build capabilities to comply with this proposed requirement.

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<sup>98</sup> *Id.* at 75984.

<sup>99</sup> This backstop differs from the Department’s criticism of backup methods of compliance in the preamble to PTE 2020-02. 85 Fed. Reg. at 82828. Here, the party does not intend to provide fiduciary investment advice.

<sup>100</sup> 88 Fed. Reg. at 75985. Proposed PTE 2020-02 § II(b)(4), *id.* at 76000.

<sup>101</sup> See Appendix pages 34-5.

<sup>102</sup> 88 Fed. Reg. at 75994.

<sup>103</sup> As discussed in the Appendix, DOL’s cost estimates represent only a fraction of the actual implementation and compliance costs of the requirement. For example, DOL estimates only 10 requests per financial institution per year, and a total industry implementation and compliance cost in the first year of ~\$2.85 million.

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Additionally, while as contemplated by the Department this enhanced fee disclosure need not detail the costs and fees generated by each transaction with an investor, it nonetheless must provide extensive details beyond the standard disclosure. Indeed, it is unclear from the preamble where the balancing point is between not needing to detail compensation for individual recommendations and “demonstrat[ing] how the Financial Institution and its Investment Professionals are compensated in connection with their recommendations”—especially where recommendations may be made in different circumstances and across product lines. And for certain products, a detailed picture of a firm’s compensation cannot be accurately conveyed in dollar terms at a single point in time.

We urge the Department to remove this proposed new requirement, as it is not supported by an adequate cost-benefit analysis.

### **3.3.3 The Enhanced Rollover Documentation and Disclosures Are Impractical and Unduly Burdensome**

Proposed PTE 2020-02 would require a detailed disclosure in advance of either engaging in a rollover or recommending the post-rollover investment of assets. The proposal would add into the text of the exemption certain factors relevant to a rollover recommendation that were identified in the preamble to current PTE 2020-02:

(5) *Rollover disclosure.* Before engaging in a rollover, or making a recommendation to a Plan participant as to the post-rollover investment of assets currently held in a Plan, the Financial Institution and Investment Professional must consider and document the basis for their conclusions as to whether a rollover is in the Retirement Investor’s Best Interest, and must provide that documentation to the Retirement Investor. Relevant factors to consider must include but are not limited to:

- (A) the alternatives to a rollover, including leaving the money in the Plan or account type, as applicable;
- (B) the fees and expenses associated with the Plan and the recommended investment or account;
- (C) whether an employer or other party pays for some or all of the Plan’s administrative expenses; and
- (D) the different levels of services and investments available under the Plan and the recommended investment or account.<sup>104</sup>

The addition of these enumerated factors into the text of the exemption raises concerns. In a plan-to-IRA rollover, it is not practical to require in every case that an investment professional must both consider, and provide documentation to an investor addressing, the investments, fees

<sup>104</sup> Proposed PTE 2020-02 § II(b)(5), 88 Fed. Reg. at 76000.

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and expenses, and service levels of the plan from which assets would be transferred.<sup>105</sup> These concerns come to light when comparing this proposed requirement with the plan-to-IRA rollover requirements of Reg BI. While Reg BI generally flags the same considerations as Proposed PTE 2020-02, the SEC importantly retained a principles-based approach in not mandating the factors a broker-dealer must consider. Rather, the SEC observed that “certain factors may have more or less relevance, or not be relevant at all, depending on the particular facts and circumstances of each recommendation.”<sup>106</sup> Unlike the Department, the SEC recognized that the relevant considerations in a plan-to-IRA rollover may differ depending on the nature of the recommendation and the investor.

Another significant difference between the Reg BI approach and the Proposed PTE 2020-02 approach is that Proposed PTE 2020-02 mandates a detailed disclosure to the investor. Financial institutions will incur significant expense to build potentially large and complex systems both to gather this information and to export it to notices to investors.<sup>107</sup> To the extent firms currently collect this information, it generally is not maintained in a format that would facilitate meeting this new proposed disclosure requirement. We urge the Department to consider the significant costs, time, and effort that would be required to comply with this requirement, to say nothing of the additional expense to investors (discussed below).

The preamble to PTE 2020-02 provides an alternative path for financial institutions that cannot obtain plan-specific information from an investor, suggesting that the institution instead look to alternative resources such as Form 5500 filings or benchmarks of typical plan fees or expenses—and that these alternative sources then be used in preparing the disclosure to the investor.<sup>108</sup> The use of such generalized or non-plan specific information significantly undercuts the value to an investor of the rollover disclosure, as the plan comparator information would not be accurate as to any specific plan. To that end, we question the utility in this case of requiring a financial institution to compare retaining assets in what is effectively a hypothetical plan with hypothetical fees, versus moving to a proposed IRA investment.

Were the Department to nonetheless continue down this path, rather than encouraging firms to provide inaccurate rollover disclosures based on estimates, we recommend the Department consider requiring a comparison to the current plan only where the investor has provided the necessary information to the financial institution, which information should be limited to that

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<sup>105</sup> This detailed, individualized discovery and analysis on an investor’s plan also will require many financial institutions to make significant modifications to the systems they only recently built to facilitate PTE 2020-02 compliance.

<sup>106</sup> 84 Fed. Reg. at 33383.

<sup>107</sup> See Appendix pages 30-33.

<sup>108</sup> 88 Fed. Reg. at 75986.

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contained in a plan's annual participant fee disclosure.<sup>109</sup> When one considers that a rollover disclosure is being provided for the benefit of the investor, it strikes us as inapposite to require a financial institution to go to additional effort to provide an inaccurate rollover disclosure based on estimates where the retirement investor has declined or is unable to provide the information. Instead, the rollover disclosure could note that a comparison to the plan was not provided because the investor declined to provide the needed information. We believe that this approach would properly balance the investor's interests while not unduly burdening a financial institution with providing an inherently inaccurate rollover disclosure.

We are concerned that the practical effect of the enhanced documentation and disclosure requirements for a plan to IRA rollover will result in less guidance and assistance to plan participants seeking help in connection with the decision of whether to roll over, stay in the plan, or take a distribution. We appreciate the Department's recognition in the preamble to Proposed PTE 2020-02 that a financial institution may charge reasonable compensation for this plan comparison,<sup>110</sup> as this comparison will involve additional effort warranting incremental compensation to the financial institution. Moreover, we believe that such compensation is necessary to both ensure that financial institutions will be in a position to provide this review, and to provide clarity to investors as to the costs of this requirement. We are concerned, however, that this new requirement—and the necessary associated fees—could have a disproportionate impact on lower- and middle-income investors with smaller plan balances, because these fees would represent a proportionately larger share of their account balances.

Providing this “rollover” disclosure for IRA-to-IRA or account to account transfers may be of less value to investors than providing the information in connection with a plan-to-IRA rollover. We believe these other types of transfers also should be of lesser concern to the Department. Where monies have already been rolled out of a plan and are sitting in a non-ERISA IRA account, we believe it is more appropriate for other regulatory regimes such as the SEC to take the lead in regulating the investor-adviser relationship. And as a practical matter, a financial institution may face greater challenges in obtaining the requisite information than in the plan-to-IRA-rollover context, as the information would be that of a direct competitor.

We are also concerned that Proposed PTE 2020-02 would require a comparison with the current investment of assets in a range of situations where a comparison may not be warranted.

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<sup>109</sup> While the Department observes that information regarding a plan may be available to an investor in the various participant fee disclosures required under 29 C.F.R. § 2550.404a-5, even if that is the case the theoretical availability of information is a far different matter than the practical ability and/or desire of a participant to locate the information and transmit it to the financial institution. Moreover, were the Department to require additional information regarding a plan beyond the annual participant fee disclosure, we believe it would materially lower the chances that a financial institution would receive the information, and also would significantly increase the costs and time required for financial institutions to train personnel to evaluate the information to determine what information is acceptable for comparison purposes.

<sup>110</sup> 88 Fed. Reg. at 75985.



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Retaining assets in their current location may not be an option, such as in the case of a plan termination, a mandatory distribution under Code section 411(a)(11), or where an IRA account is being transferred/terminated. In cases such as this, the Department should make clear that a comparison to alternatives to the rollover recommendation—including any comparison to plan information—is not required.

#### **3.3.4 The Department Should Not Implement an Additional, Duplicative Website Disclosure**

Proposed PTE 2020-02 seeks feedback as to whether the Department should require, as part of PTE 2020-02, financial institutions to maintain certain website disclosures.<sup>111</sup> These disclosures would be available both to retirement investors and to the investing public in general. The contemplated website disclosure would include the required pre-transaction disclosure, a description of the financial institution's business model, associated conflicts of interest (including arrangements that provide third-party payments), and a schedule of typical fees;<sup>112</sup> and would be in addition to other required disclosures. While the Department does not elaborate on how frequently the website would need to be updated, we assume that regular updates could be required as the website would include details on a wide range of relationships with product manufacturers and other parties. As we note elsewhere in this comment letter, the Department in the Proposal acknowledges that increased disclosures may not be effective.

Our members view this contemplated website disclosure as duplicative and overly costly. Proposed PTE 2020-02 already would mandate new disclosures addressing, among other things, services provided and conflicts. Moreover, many clients already receive the disclosures required under PTE 2020-02 electronically. As such, this requirement would not drive better outcomes for investors while imposing significant additional expenses on financial institutions.

Beyond the above concerns, we are troubled by the fact that the Department is contemplating disclosure targeting the “investing public,” as stated in the preamble to Proposed PTE 2020-02.<sup>113</sup> This goal is a significant regulatory overreach by the Department beyond ERISA governed plans. Moreover, we struggle to understand the import to the “investing public” in general of information regarding commercial relationships within the ERISA regulated plan space to justify what would be a significant undertaking for financial institutions.

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<sup>111</sup> 88 Fed. Reg. at 79585.

<sup>112</sup> 88 Fed. Reg. at 75986.

<sup>113</sup> 88 Fed. Reg. at 75986.

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In short, while we appreciate the Department's desire to explore additional ways to provide investors with transparency as to the fees they pay, the contemplated web disclosures are not an appropriate or reasonably administrable solution.

### **3.3.5 The Heightened Requirements for Limited Menus of Proprietary Products or Products that Generate Third-Party Payments Create an Inappropriate Presumption Against Limited Menus**

The Department in the preamble to Proposed PTE 2020-02 confirms that restricted menus of proprietary products and products that generate third-party payments would still be permitted.<sup>114</sup> However, the Proposal infers a strong presumption that such limited menus are inherently conflicted and warrant heightened scrutiny by requiring that, to limit its offerings, a financial institution must adopt special and more robust policies and procedures. In the preamble, the Department provides an example of a framework that would suffice.<sup>115</sup> Our members are concerned that this enhanced policies and procedures framework misconstrues the nature of limited investment menus—particularly limited menus of proprietary products.<sup>116</sup> Practically speaking, all fiduciaries limit the scope of their duties and the universe of products they recommend. It is not feasible for *any* fiduciary to be in a position to prudently evaluate the entire range of offerings in the marketplace. Rather than providing a detailed prescriptive example of compliant policies and procedures, we urge the Department to reaffirm the principles-based approach outlined in the preamble to current PTE 2020-02. This approach properly accords financial institutions flexibility in how they comply with the best interest standard of PTE 2020-02 for restricted menus of proprietary products and products that generate third-party payments.

### **3.3.6 The Requirement to Provide Financial Institution Policies and Procedures to the Department Within 10 Business Days is Unreasonable**

Proposed PTE 2020-02 would restate section II(c)(3) to require that financial institutions provide their complete policies and procedures to the Department within 10 business days upon request.<sup>117</sup> While this requirement may seem straightforward to the Department, in practice it may be challenging for financial institutions to comply with.

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<sup>114</sup> 88 Fed. Reg. at 75987.

<sup>115</sup> *Id.*

<sup>116</sup> The Department in the preamble to PTE 2020-02 recognized these considerations. 85 Fed. Reg. at 82837. We urge the Department to confirm these views should it determine to move forward with a final amended exemption.

<sup>117</sup> 88 Fed. Reg. at 76001.

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In most instances, an institution's policies and procedures do not exist as a stand-alone document that can be pulled off a shelf upon request. Rather, they are maintained in a manner so as to be of most use to the business. Policies and procedures more commonly are integrated into processes across different business segments. Compiling these documents for a Department request may require reprogramming, as well as meaningful personnel time to translate them into a format for the Department.<sup>118</sup>

At a minimum we would request that the Department extend the time frame for compliance to 30 business days, with additional flexibility to the extent a financial institution reasonably requires more time to comply with a request. This would be a modest and reasonable extension. Absent such an extension and accommodation, many financial institutions will have no choice but to implement costly new procedures and build new processes in order to be able to comply with a potential Department request. We also request that the Department clarify in the text of PTE 2020-02 that a financial institution would not be required to provide a copy of its policies and procedures to a party other than the Department under any other provision of PTE 2020-02, such as the recordkeeping amendments the Department is considering. In addition to the time and expense such a requirement would entail, a financial institution's policies and procedures contain confidential proprietary business information that would be inappropriate to share with parties beyond the Department.

#### **3.4 The Expanded Retrospective Review Imposes Unrealistic Burdens on Financial Institutions While Arguably Exceeding the Department's Authority**

**The expanded retrospective review exceeds what is reasonably warranted to foster compliance with PTE 2020-02. Among other things, the Department appears to exceed the scope of its regulatory authority in proposing to require that a financial institution confirm to the Department its compliance with certain Code requirements.** Moreover, some of the requirements are at odds with applicable law. The Department proposes to require, as a condition of PTE 2020-02, that a financial institution confirm it has filed Form 5330 with IRS to report any non-exempt prohibited transaction related to the provision of fiduciary investment advice under the Code, has corrected these transactions, and has paid any resulting excise taxes. Under applicable guidance, Form 5330 reporting and payment/collection of excise taxes are matters reserved for IRS.<sup>119</sup> While the Department cites the Fifth Circuit's decision in *Chamber of Commerce v. DOL* to support this proposed requirement, the cited portion is an inapposite discussion relating to the absence of a private lawsuit provision in Title II of ERISA.<sup>120</sup> The Department's attempt to coopt enforcement authority that is exclusively the realm of

<sup>118</sup> For example, policies and procedures may live on an Intranet in a format not conducive to being simply printed out.

<sup>119</sup> President's Reorganization Plan No. 4 of 1978, §§ 102, 105, 43 Fed. Reg. 47713 (Oct. 17, 1978) (expressly reserving for IRS/Treasury enforcement of the excise tax provision of 26 U.S.C. § 4975).

<sup>120</sup> 88 Fed. Reg. at 75988.

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IRS/Treasury is inappropriate. We urge the Department to eliminate the new section II(d)(3)(B) of proposed PTE 2020-02.

Specific to the requirement that a financial institution confirm it has filed Form 5330 for each non-exempt prohibited transaction, this requirement also overstates the scenarios in which Form 5330 is required. A taxpayer is not required to file Form 5330 if it self-corrects a failure and no excise tax is due. Again, we urge the Department to remove this requirement to review and confirm Form 5330 filings.

Beyond proposed section II(d)(3)(B), we are concerned that the Department's expectations of financial institutions do not comport with how real-world compliance operates. For example, proposed section II(d) states that the retrospective review must be "reasonably designed to assist the Financial Institution in detecting and preventing violations of, and achieving compliance with, this exemption..."<sup>121</sup> While this requirement (which is essentially the same as current PTE 2020-02) may appear a straightforward element of a reasonable compliance program, the Department states in the preamble that if certain failures are discovered, both (i) correcting transactions and (ii) revising policies and procedures would be expected in short order.<sup>122</sup> This requirement incorrectly implies that any failure is a fatal flaw in the policies and procedures. Policies and procedures are not guarantees—to expect such a result would lead to policies and procedures that are unworkable in the real world. The Department should clarify that a compliance failure under PTE 2020-02 does not necessarily mean that the policies and procedures are inadequate.<sup>123</sup>

The Department also seeks to impose unrealistic requirements on the senior executive officer providing the certification in connection with proposed section II(d)(3)(B). While the language of proposed section II(d)(3)(B) requires confirmation of the financial institution's actions, the Department in the preamble expands on this by explaining that it proposes to require the certifying officer to "carefully review transactions, correct violations, and pay any required excise taxes."<sup>124</sup> But the responsibility to correct violations and pay any required excise taxes lies with a financial institution, and not an individual. Additionally, larger organizations can have many *de minimis* errors that occur in the ordinary course. It is unreasonable to expect that a senior executive officer would be in a position to review each transaction. While we believe—as discussed above—that this section is inappropriate in the context of a Department exemption, to the extent the Department determines to retain it we urge the Department to reasonably and

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<sup>121</sup> *Id.* at 76001.

<sup>122</sup> *Id.* at 75988.

<sup>123</sup> A violation could mean, for example, that additional or revised training is warranted, or that individual personnel action may address the issue.

<sup>124</sup> 88 Fed. Reg. at 85988.

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appropriately delineate parties' responsibilities by clarifying in the preamble that the certifying senior executive officer is not expected to conduct such a review.

We note that the retrospective review is effectively an annual policies and procedures review. Rather than continue to require a separate, often duplicative, process in the form of a retrospective review, we recommend the Department provide alternative paths for complying with the retrospective review requirement. For example, the Department could achieve its goals by providing that a financial institution's retrospective review can be satisfied by a policies and procedures review that provides similar effectiveness, testing, and review and potential updates to policies and procedures. Similarly, as the Department noted in finalizing PTE 2020-02: "Financial Institutions that are subject to the FINRA regulation should already be conducting a similar type of review."<sup>125</sup> In the spirit of encouraging efficiency and avoiding duplicative and overlapping regulatory requirements, we urge the Department to consider also providing that a FINRA review that meets the aforementioned requirements would satisfy the retrospective review element of PTE 2020-02.<sup>126</sup> The Department's concerns of fostering a culture of compliance should be well addressed through the comprehensive FINRA annual review process.

We also reiterate our earlier request<sup>127</sup> that the Department remove the requirement that the report, certification, and supporting data be provided to the Department within 10 business days of a request. The requirement to quickly turn over documents is unnecessary because the Department already has well-established enforcement mechanisms that allow it to obtain documents from financial institutions through voluntary requests and subpoenas.<sup>128</sup>

### **3.5 The Department Should Not Expand Access to Records to Parties Other Than the Department and IRS**

When the Department adopted PTE 2020-02 it observed that the exemption struck a balance in limiting access to records demonstrating compliance with PTE 2020-02 to the Department and IRS, while also requiring that investors be provided with documentation explaining the reasons a rollover recommendation was in their best interest.<sup>129</sup> ICI believes this approach represented a proper balancing of interests, and appropriately considered the concerns of financial institutions. As the Department noted: "[t]he Department accepts that financial institutions may have concerns about internal compliance records, particularly the record of their retrospective reviews, becoming widely accessible."<sup>130</sup>

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<sup>125</sup> 85 Fed. Reg. at 82839.

<sup>126</sup> Importantly, the FINRA annual review process entails direct hands-on involvement by a FINRA examiner.

<sup>127</sup> Letter from Susan Olson and David Abbey, ICI, to Office of Exemption Deters., EBSA (Aug. 6, 2020), at 12.

<sup>128</sup> See ERISA § 504.

<sup>129</sup> 85 Fed. Reg. at 82845.

<sup>130</sup> *Id.*

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The proposed updated Section IV described in the preamble to Proposed PTE 2020-02 would completely ignore these previously acknowledged financial institution concerns. While the Department notes that it “believes that most parties will likely not request records,”<sup>131</sup> this is of little comfort considering the heightened risk of litigation such access would create. As such, we recommend that the Department retain the current language of Section IV.

The Department has ample other authority to enforce and oversee compliance with the terms of the exemption with respect to ERISA plans. Extending availability of compliance records to employers, unions, and participants, beneficiaries and IRA owners and their authorized representatives (i.e., plaintiff’s lawyers), raises the specter of unnecessary litigation. In addition, such a requirement would appear to grant plan sponsors (or contributing employers with respect to a multiple employer plan) access to records of a financial institution’s recommendations to individual participants. We do not believe the Department intends for such a result. **Given the Department’s statement in the preamble to Proposed PTE 2020-02 that it does not intend to create a private right of action as between a financial institution or investment professional and an investor,<sup>132</sup> limiting access to records to the appropriate regulators should be sufficient.**

Should the Department determine to adopt the proposed revised Section IV notwithstanding these concerns, at a minimum we urge the Department to clarify in the text of PTE 2020-02 that a financial institution would not be required to provide a copy of any materials to the extent they contain confidential proprietary business information that would be inappropriate to share with parties beyond the Department and IRS.<sup>133</sup>

As a corollary to the litigation risk that expanding access to internal compliance records would engender, our members have indicated that the heightened risk of litigation will make firms less willing to avail themselves of PTE 2020-02. As firms structure their business to not fall under PTE 2020-02, retirement investors will find it harder to obtain investment advice.

### **3.6. Proposed PTE 2020-02 May Create a Private Right of Action for IRA Owners, Despite Department Claims to the Contrary**

The Department in the preamble to Proposed PTE 2020-02 states that it does not intend to create any new causes of action for retirement investors:

Neither the existing PTE 2020-02 nor the proposed amendment creates any new causes of action or requires Financial Institutions to provide enforceable

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<sup>131</sup> 88 Fed. Reg. at 75990.

<sup>132</sup> *Id.* at 75980

<sup>133</sup> While the Department references privileged information in proposed section IV(a)(3), 88 Fed. Reg. at 75990, this term typically is not used in the context of confidential business information and trade secrets other than when legal advice is implicated.

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warranties to Retirement Investors. The primary penalty for an IRA fiduciary that engages in a nonexempt prohibited transaction by failing to satisfy the exemption conditions of amended PTE 2020-02 would be the prohibited transaction excise tax imposed under Code section 4975 and enforced by the Department of the Treasury and the Internal Revenue Service (IRS).<sup>134</sup>

**While ICI appreciates the Department's stated intent, we are concerned that Proposed PTE 2020-02 would inadvertently create a private right of action for IRA owners.**

Proposed PTE 2020-02 would require that retirement investors be provided with a statement of the best interest standard of care, which embodies the standard of care set forth in ERISA section 404. As such, it may be the case that the standard could be legally imposed and enforced without a written contract.<sup>135</sup> For IRAs, established contract law precedents and the doctrine of promissory estoppel may provide for enforceability of a unilateral contract acknowledged by the advice provider. In a unilateral contract, only one of the contracting parties makes a promise; the other party manifests assent by performance.<sup>136</sup> The unilateral contract is supported by the same consideration that would support a signed bilateral contract.<sup>137</sup> The components of a unilateral contract are clearly compatible with Proposed PTE 2020-02, where only the advice provider and not the investor is assuming new duties and responsibilities. The advice provider is affirmatively acknowledging acceptance of such duties and responsibilities and agreeing to act in a manner consistent with those duties and responsibilities in a notice provided to the investor at the times services are offered. The investor accepts the advice provider's offer by proceeding to use the firm's services, thereby forming an enforceable agreement under basic principles of contract law.<sup>138</sup>

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<sup>134</sup> 88 Fed. Reg. at 75980

<sup>135</sup> This would also be true for standards adopted by the SEC and FINRA.

<sup>136</sup> *Corbin on Contracts* § 1.23 (3d ed. 2004); see also *United States ex rel. Modern Elec., Inc. v. Ideal Elec. Security Co.*, 81 F.3d 240, 241 (D.C. Cir. 1996) (citing the "well-recognized" principle that "in a unilateral contract, performance constitutes acceptance of an offer"). Accordingly, "[t]he legal result is that the promisor is the only party who is under an enforceable legal duty. The other party to this contract is the one to whom the promise is made, and this promise is the only one in whom the contract creates an enforceable legal right." *Corbin on Contracts* § 1.23.

<sup>137</sup> *17A Am. Jur. Contracts* § 173; see also *Allen v. National Video, Inc.*, 610 F. Supp. 2d 612, 631 (S.D.N.Y. 1985) citing *Williston, Law of Contracts* § 90A ("[A] written contract need not be signed to be binding against a party, so long as the party indicates through performance of its terms or other unequivocal acts that it intends to adopt the contract"); see also *Wells v. JPC Equestrian, Inc.*, No. Civ.A.13-2575, 2015 U.S. Dist. LEXIS 3776 (M.D. Pa. Jan. 13, 2015) citing *Sullivan v. Allegheny Ford Truck Sales, Inc.*, 423 A.2d 1292 (Pa. Super. Ct. 1980) ("A document signed by one party may be enforceable as long as both accept and act under its terms.")

<sup>138</sup> See *Corbin, supra*; see also *Coulter v. United Airlines, Inc.*, 2015 WL 2452393, at \*5 (S.D. Tex. May 21, 2015) (the portion of defendant's website guaranteeing lower price for tickets purchased on the website was a "unilateral

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This is buttressed by the doctrine of promissory estoppel, pursuant to which a party that acts or refrains from acting in reliance upon a clear and unambiguous promise can enforce the promise even though the essential elements of a contract are not present.<sup>139</sup> These well-established legal principles may be sufficient to bind the advice provider to the ERISA duties and responsibilities embodied in Proposed PTE 2020-02.

This potential newly created private right of action for IRA investors may not be limited to contract claims. The potential application of ERISA Title I's fiduciary duties of prudence and loyalty to IRA assets beyond the rollover of assets from a Title I plan may carry with it the ERISA section 502 civil enforcement remedies for breaches of these duties. Specifically, section 502(a)(2) provides for actions brought by a participant, beneficiary, or fiduciary of a plan for a fiduciary's breaches of its fiduciary duties under ERISA—including of the duties of prudence and loyalty. As such, the Department may be (we assume unintentionally) exposing Title II IRA plans to private actions brought under ERISA section 502(a)(2).

**The Fifth Circuit in vacating the BIC Exemption provisions regarding lawsuits held that providing a private right of action for IRA owners violates the separation of powers.**<sup>140</sup> The court stated that:

[o]nly Congress may create privately enforceable rights, and agencies are empowered only to enforce the rights Congress creates. In ERISA, Congress authorized private rights of action for participants and beneficiaries of employer sponsored plans, 29 U.S.C. § 1132(a), but it did not so privilege IRA owners under Title II. DOL may not create vehicles for private lawsuits indirectly through BICE contract provisions where it could not do so directly.<sup>141</sup>

This is precisely what we believe the Department is inadvertently doing in Proposed PTE 2020-02—creating a private right of action for IRA owners. This result runs directly at odds with the

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contract that the customer must accept by performance"); *Edquist v. Bidz.com, Inc.*, at \*1 (D. Mass. Mar. 29, 2013) ("[A] person such as the plaintiff who accepts the terms offered by the defendant on its website by participating in an online auction governed by those terms has entered into a contractual relationship with the defendant.").

<sup>139</sup> Restatement (Second) of Contracts § 90; see also Williston on Contracts § 8:7 (4th ed. 2008) ("[B]oth versions of the Restatement recognize that in certain circumstances, a promise might be enforced despite the absence of consideration – and, according to some courts, despite the absence of other elements necessary to form a traditional contract – based on the promisee's foreseeable, reasonable, justified and detrimental reliance on the promise"); *Allen v. A.G. Edwards & Sons, Inc.*, 606 F.2d 84, 87 (5th Cir. 1979) (recognizing promissory estoppel where broker-dealer, "[h]aving benefitted from oral agreements transacted through local agents, appellant cannot now be heard to complain of failure to observe formalities").

<sup>140</sup> 885 F.3d at 377.

<sup>141</sup> *Id.* (citing *Alexander v. Sandoval*, 532 U.S. 275 (2001), and its progeny. *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1387-88 (2015)) (citation omitted).



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Fifth Circuit's decision.<sup>142</sup> The likelihood that the Department is creating a private IRA cause of action under ERISA, as well as state law contract claims, is heightened by the various enhanced disclosures in Proposed PTE 2020-02. Indeed, it may well be that these disclosures end up being of far more use to the plaintiffs' bar than to investors. The plaintiffs' bar will likely be attracted by this new opportunity to flesh out untested standards, knowing that defending such suits will be expensive and raise the potential for large settlements.

### **3.7 The Expanded Ineligibility Provisions Are Both Unnecessary and Inappropriate**

Proposed PTE 2020-02 also expands the circumstances under which a financial institution or investment professional no longer could rely on PTE 2020-02. While the Department describes these expanded circumstances as "mostly for clarity,"<sup>143</sup> they would represent a significant broadening of the ineligibility provisions. The import of this expansion is all the greater in light of the proposed elimination (via amendment) of alternative exemptions under which an investment advice fiduciary would be able to receive compensation.<sup>144</sup>

#### **3.7.1 The Expanded List of Criminal Convictions Triggering Loss of Eligibility Is Beyond Those Reasonably Related to PTE 2020-02**

ICI is concerned with the Department's proposed expansion of those criminal convictions triggering a loss of eligibility for PTE 2020-02. Currently, PTE 2020-02 provides for ineligibility due to "a conviction of any crime described in ERISA section 411 arising out of such person's provision of investment advice to Retirement Investors...."<sup>145</sup> Proposed PTE 2020-02 would significantly expand this to convictions:

by a U.S. Federal or state court as a result of any felony involving abuse or misuse of such person's employee benefit plan position or employment, or position or employment with a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company or fiduciary; income tax evasion; any felony involving larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime in which any of the foregoing

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<sup>142</sup> 885 F.3d at 381-84.

<sup>143</sup> 88 Fed. Reg. at 75988.

<sup>144</sup> DOL's reference to the availability of other available administrative prohibited transaction exemptions in proposed section III(d) is a hollow assurance, considering DOL's proposed amendments to numerous class exemptions to make them unavailable for the provision of fiduciary investment advice.

<sup>145</sup> PTE 2020-02 § III(a)(1), 85 Fed. Reg. at 82864.

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crimes is an element; or a crime that is identified or described in ERISA section 411....<sup>146</sup>

We appreciate that PTE 2020-02 currently provides a mechanism for a convicted party to petition the Department for “a determination that the Financial Institution’s continued reliance on the exemption would not be contrary to the purposes of the exemption.”<sup>147</sup> **Unfortunately, the combination in Proposed PTE 2020-02 of a litany of crimes triggering loss of eligibility, the loss of an opportunity to be heard in many instances, and the structure of the opportunity to be heard all call into question the true utility of Proposed PTE 2020-02.**

The expanded list of crimes triggering loss of eligibility is unreasonably broad. The preamble asserts that this expanded list will, in the Department’s view, “help foster a culture of compliance throughout the organization in recognition of the importance of investment advice to Retirement Investors.”<sup>148</sup> However, the purpose of the various requirements of PTE 2020-02 itself is to promote a compliance culture within the firm providing investment advice. In a large organization, unrelated convictions (including those on the Department’s proposed expanded list) may occur irrespective of robust processes and checks in connection with the provision of investment advice to retirement investors.

Including these additional crimes as triggers for a loss of eligibility takes PTE 2020-02 well beyond the regulation of investment advice to an attempt to broadly police the culture and behavior of entire organizations, including affiliates that have nothing to do with the provision of investment advice. For example, it is unclear why the conviction of an employee of a foreign affiliate with no connection (other than an indirect ownership link) to the US business unit and the investment professional providing advice to a US retirement investor would be relevant to the qualification of the business unit or the investment professional to provide such advice. The Department has no authority to promote a “culture of compliance” in entities it cannot regulate directly. We respectfully request that the Department retain the current scope of crimes triggering ineligibility.

In this vein, we also recommend that the Department restrict such convictions to those committed by an entity relying on PTE 2020-02, and to not include convictions of affiliates of the entity. The Department in explaining this proposed expansion to affiliates notes that it “remains concerned that a Financial Institution facing ineligibility for its actions affecting retirement investors could merely change its corporate form and continue to rely on the exemption.”<sup>149</sup> However, there are less burdensome ways in which the Department could address this concern. At a minimum, we would ask that the Department clarify in the language of the

<sup>146</sup> Proposed PTE 2020-02 § III(a)(1)(A), 88 Fed. Reg. at 76001.

<sup>147</sup> PTE 2020-02 § III(c)(1)(A), 85 Fed. Reg. at 82864.

<sup>148</sup> 88 Fed. Reg. at 75989.

<sup>149</sup> 88 Fed. Reg. at 75989.

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exemption that affiliate crimes where the conviction date is prior to the effective date of amended PTE 2020-02 would not be grounds for ineligibility.

Moreover, as we noted in our comment letter when PTE 2020-02 was originally proposed,<sup>150</sup> the Department already has the ability to limit use of prohibited transaction exemptions through its well-established enforcement mechanisms. In this respect, the Department has authority under ERISA to enter into settlement agreements with financial institutions and investment professionals providing services to ERISA plans requiring them to structure their advice programs in reliance on other exemptions (or to not engage in prohibited transactions), or to pursue judgments or consent decrees requiring them to do so.<sup>151</sup>

Proposed PTE 2020-02 clarifies in section III(a)(1) that a conviction triggers ineligibility as of the conviction date, irrespective of the pendency of appeals, in a departure from the current exemption. We request that an opportunity to be heard be reinstated for determinations of ineligibility due to such convictions.

We would also ask that the Department clarify in the language of the exemption that crimes that occurred prior to the effective date of amended PTE 2020-02 would not be grounds for ineligibility.

### **3.7.2 The Department Should Exclude Foreign Criminal Convictions from the List of Disqualifying Crimes**

Proposed PTE 2020-02 would expand the criminal convictions that trigger ineligibility for PTE 2020-02 to include criminal convictions “by a foreign court of competent jurisdiction as a result of any crime, however denominated by the laws of the relevant foreign or state government, that is substantially equivalent to” the above-referenced domestic criminal convictions.<sup>152</sup> The Department provides no explanation for the inclusion of foreign criminal convictions, other than the aforementioned goal of fostering a culture of compliance throughout an organization. The proposed inclusion of foreign criminal convictions as triggering ineligibility is unnecessarily broad.

Proposed PTE 2020-02 would disqualify a financial institution from using PTE 2020-02 even where the only connection between the investment advice entity and the entity convicted of a foreign crime is a small, indirect ownership interest (e.g., 5%). Similarly, automatic disqualification can occur because of foreign convictions that involve conduct completely unrelated to the provision of fiduciary investment advice. **These proposed modifications to**

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<sup>150</sup> Letter from Susan Olson and David Abbey, ICI, to Office of Exemption Deters., EBSA (Aug. 6, 2020).

<sup>151</sup> ERISA § 504.

<sup>152</sup> 88 Fed. Reg. at 76001.

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**Section III(a) are overly broad and, thus, are likely to disqualify more entities than is reasonably necessary to achieve the Department’s stated objective.**

The proposed changes to Section III(a) also raise serious questions of fairness, national security, and US sovereignty.<sup>153</sup> Not all countries have fair criminal justice systems and independent judiciaries. For example, Secretary of State Blinken has raised “significant concerns with Russia’s legal system . . . to advance its own agenda, using individuals as political pawns.”<sup>154</sup> Yet the proposed amendment grants Russia and all other foreign jurisdictions the ability to leverage their courts to negatively impact the operations of domestic US financial institutions and the financial markets.

Indeed, in our view disqualifying a financial institution based on foreign convictions under legal systems that may have vast differences from the US legal system raises substantial due process concerns. The Department is ill equipped to judge the fairness of foreign legal systems, or to assess the comparability of provisions of foreign criminal laws to disqualifying US convictions. Moreover, the inclusion in Proposed PTE 2020-02 of foreign criminal convictions would impermissibly expand the Department’s jurisdiction extraterritorially.<sup>155</sup> Congress in enacting ERISA specifically enumerated that convictions by federal or state courts—not foreign courts—form a basis for ineligibility to act as a fiduciary under ERISA. The policy implications of this position deserve consideration by other relevant agencies within the Administration, including the State Department, the Justice Department, and the Department of Commerce.

**Given the foregoing, we urge the Department to exclude foreign criminal convictions from the list of disqualifying crimes.** If the Department nonetheless determines it is necessary and appropriate to make some foreign criminal convictions disqualifying, we encourage the Department at a minimum to (i) reduce the resulting cost and disruption by more narrowly tailoring the list of disqualifying foreign criminal convictions to those where there is a clear and direct nexus between the conduct that resulted in the foreign conviction and the fiduciary investment advice that is the subject of PTE 2020-02 and (ii) provide that ineligibility due to foreign convictions would not be triggered until all applicable appeals have been exhausted. As

<sup>153</sup> These issues also have been raised by members of Congress both in Congressional hearings and in correspondence with DOL. See Letter from Sen. Bill Cassidy to Acting Sec’y of Labor Julie Su (Nov. 29, 2023) (criticizing the inclusion in proposed amended PTE 84-14 of foreign convictions as potentially disqualifying an entity from relying on the exemption).

<sup>154</sup> Press Statement of US Secretary of State Blinken (Aug. 4, 2022), available at <https://www.state.gov/convictionand-sentencing-of-u-s-citizen-brittney-griner-in-russia/>. See also Fact Sheet entitled “Issuance of a Hong Kong Business Advisory,” Office of the Spokesperson, US Department of State (July 16, 2021), available at <https://www.state.gov/issuance-of-a-hong-kong-business-advisory/> (“Businesses operating in Hong Kong may face heightened risks and uncertainty related to PRC retaliation against companies that comply with sanctions imposed by the United States and other countries, including through enforcement of the PRC’s Countering Foreign Sanctions Law.”).

<sup>155</sup> See *Small v. United States*, 544 U.S. 385 (2005).

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to this last point, delaying a trigger until applicable appeals have been exhausted would help account for the fact that many foreign jurisdictions do not accord due process protections in line with US state and federal courts.

### **3.7.3 The Availability of Individual Exemptions as Alternative Exemptive Relief Following Ineligibility Provides Little Comfort**

Proposed PTE 2020-02 sections III(b)(2)(C) and III(d) provide that if an entity has become ineligible to rely on PTE 2020-02, exemptive relief may be available through an individual prohibited transaction exemption. While we appreciate this acknowledgement, in practice it provides little comfort for parties determined to be ineligible under PTE 2020-02. While subsection (C) is new, the practice of granting an individual exemption where a party no longer satisfies the requirements of a class exemption is not. Asset managers have regularly applied and worked with the Department on individual exemptions, such as when the QPAM Exemption becomes unavailable due to convictions.<sup>156</sup> Until fairly recently, the Department was willing to work with asset managers to come to an agreement regarding workable, appropriate exemption terms.

Our concerns regarding this new subsection are similar to the concerns we voiced in our comment letter to the Department regarding its proposal on procedures governing the filing and processing of prohibited transaction exemption applications (the “PTE Procedures Proposal”).<sup>157</sup> As in the PTE Procedures Proposal, the Department is increasingly adopting onerous conditions for granting individual exemptions and seems even less likely to grant them in the future.<sup>158</sup> Moreover, the time required to obtain an individual exemption has grown significantly. In the end, we fear that a party disqualified under PTE 2020-02 may be unlikely to receive an individual exemption that is usable, assuming one could even be obtained.

The Department also proposes to reduce the timing of ineligibility from one year to six months after a finding of ineligibility. The Department describes this change as being made to simplify

<sup>156</sup> For example, since the initial grant of the QPAM Exemption DOL has granted 14 individual exemption requests from QPAM applicants in connection with a foreign conviction. See 87 Fed. Reg. at 45216; <https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/exemptions/individual>.

<sup>157</sup> Letter from David Abbey and Shannon Salinas, ICI, to Office of Exemption Deters., EBSA (May 31, 2022).

<sup>158</sup> In recent years, the Department has become increasingly reluctant to grant administrative exemptions. DOL granted four individual exemptions in 2022, three in 2021, and one in 2020, though the Department did grant at least 20 in 2023 (of which eight were related). The Department has only granted three class exemptions in the past 16 years (and those three were all in connection with the Department’s changes to the definition of the term “fiduciary”). This slowdown of the exemption process has discouraged parties from requesting individual relief and prevented plans and service providers from developing new and innovative offerings for retirement savers. See EBSA Index of Individual Exemptions, available at <https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/exemptions/granted>.

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the process and create uniformity.<sup>159</sup> As a practical matter, however, we view this shortened time frame as making the chances of timely obtaining an individual prohibited transaction even more remote. This result is even more significant because the Department is proposing to eliminate alternative paths for exemptive relief for providing fiduciary investment advice under numerous other commonly relied on class exemptions, making PTE 2020-02 the only available class exemption. The consequence is that an ineligible party is much more likely to find itself no longer able to provide fiduciary investment advice for a fee.

We recommend the Department modify Proposed PTE 2020-02 to reflect the realities of the individual prohibited transaction exemption process. Specifically, we recommend the Department revise the dates as of which ineligibility would take effect to provide that, where an ineligible entity has applied for an individual prohibited transaction exemption within 90 days following any of the circumstances outlined in proposed section III(b)(1), the person would not become ineligible under PTE 2020-02 until such time as the application is either (i) granted and effective (at which time the terms of the individual exemption would take effect), or (ii) 180 days after the date such application is rejected. These changes would ensure that a party can avail itself of the administrative individual exemption process, while providing the Department with the means to avoid a result where a party could indefinitely delay ineligibility.

### **3.8 The Department Should Expand the Scope of Covered Principal Transactions to Benefit Retirement Investors**

ICI believes there is a meaningful opportunity for the Department to include additional principal transactions that are beneficial to investors as it considers changes to PTE 2020-02. As an initial matter, PTE 2020-02's limited relief for Covered Principal Transactions is inconsistent with the treatment of principal transactions under SEC rules. Under Reg BI, the SEC does not prohibit principal transactions; rather, Reg BI addresses any conflicts through the rule's disclosure and conflict of interest provisions.<sup>160</sup> Permitting only Covered Principal Transactions involving a specified set of investments as proposed ignores the important safeguards provided under the federal securities laws with respect to principal transactions. It also effectively conflicts with ERISA's prescription against the creation of "legal lists" of permissible investments<sup>161</sup> and the

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<sup>159</sup> 88 Fed. Reg. at 75989.

<sup>160</sup> In the preamble to Reg BI, the SEC explains that the rule does not prohibit a broker-dealer from making recommendations where conflicts of interest are present, including recommending a security underwritten by the broker-dealer or a broker-dealer affiliate, including initial public offerings, and recommending a transaction to be executed in a principal capacity. The broker-dealer must, however, ensure that its interests are not placed ahead of the investor's interest by satisfying Reg BI's requirements. 84 Fed. Reg. at 33334.

<sup>161</sup> Congress explained that it did not intend for ERISA to contain a legal list of investments. S. Rep. No. 93-383, 1974 U.S.C.C.A.N. 4889, 4984 (Aug. 21, 1973).

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Department's historic practice of not designating certain classes of investments as prudent or not prudent for plans.<sup>162</sup>

At a minimum, we urge the Department to reconsider our 2020 request to expand the definition of Covered Principal Transaction to include sales to a plan or IRA of closed-end fund (CEF) shares during an initial public offering (IPO).<sup>163</sup>

CEFs do not present the types of conflicts of interest, valuation, or liquidity concerns that the Department previously raised for securities typically traded in principal transactions.<sup>164</sup> In a typical operating company equity IPO, for example, the issuer consults with its underwriters and sets a specific capital target that the offering must raise at a valuation determined by a negotiation between the issuer and the underwriters. In contrast, the assets raised in a CEF IPO depend solely upon investor demand discerned during the initial offering period. For the CEF IPO, the underwriting syndicate members are committing only to the shares needed to fill their clients' indications of interest—rather than issuer and syndicate goals. Beyond that, the underwriters hold little or no additional inventory.

In addition, no valuation concerns are present as the CEF holds only cash proceeds immediately following the offering, which are then promptly invested in a pool of securities in accordance with the fund's investment mandate. Pricing is known at the outset of the IPO and high transparency and liquidity opportunities continue after launch.<sup>165</sup> CEFs also offer an important choice for long-term investors in IRAs and tax-deferred accounts—they offer investors access to less-liquid investments, increased leverage, and consistent distributions to shareholders. Because these funds are offered at inception through principal transactions, the Department's position

<sup>162</sup> Preamble to ERISA Section 404 Regulation, 44 Fed. Reg. 37221, 37225 (June 26, 1979).

<sup>163</sup> Letter from Susan Olson and David Abbey, ICI, to Office of Exemption Deters., EBSA (Aug. 6, 2020). Like an open-end mutual fund, a CEF is a pooled investment vehicle that offers shares almost exclusively through a public offering registered under the Securities Act of 1933, with applicable fees, expenses, and offering costs fully disclosed in an initial prospectus. CEFs differ from open-end mutual funds in that they are generally not offered continuously and typically have a fixed number of shares issued during the IPO. Notably, CEFs generally do not issue redeemable shares; after the IPO, investors buy and sell shares on the secondary market at prices established through market trading. The exchange and market participants provide investors with price transparency and liquidity throughout the trading day. Because a CEF does not need to maintain cash reserves or sell securities to meet redemptions, the fund has the flexibility to invest in less-liquid portfolio securities. CEFs also may access increased leverage, enabling them to provide enhanced distributions (with relatively higher risk).

<sup>164</sup> 85 Fed. Reg. at 40840.

<sup>165</sup> For example, the Investment Company Act of 1940 subjects CEFs to important investor protections, including board-approved valuation procedures and ongoing board oversight. Similar to open-end funds, CEFs must determine a per share net asset value (NAV) periodically and the vast majority of closed-end funds publish them each business day, which enables investors to effectively compare the CEF's NAV to its market price on any given day. See, e.g., Duvall, James, and Irina Atamanchuk, "The Closed-End Fund Market, 2022" ICI Research Perspective 29, no. 5 (May 2023), available at [www.ici.org/files/2023/pcr29-05.pdf](http://www.ici.org/files/2023/pcr29-05.pdf) (more than 95 percent of exchange-listed closed-end funds calculate the value of their portfolios every business day, while others calculate their portfolio values weekly or on some other basis).

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could hurt both retirement and other investors in ways that cannot be remedied simply by allowing plans and IRAs to purchase CEFs in the secondary market. We therefore urge the Department to modify the Covered Principal Transaction definition so IRA owners and other savers in retirement accounts can have the opportunity to participate in CEF IPOs.

The Department in rejecting the requested expansion of Covered Principal Transactions to CEF IPOs (and other types of potential investments) in 2020 stated it was declining to do so “based on the potentially acute conflicts of interest created by principal transactions” and that it viewed the individual prohibited transaction exemption process as a more appropriate means to obtaining exemptive relief for such transactions.<sup>166</sup> For the reasons noted above, the Department’s concerns are misplaced in the case of CEF IPOs. Moreover, due to the timing of CEF IPOs and the amount of time required to obtain an individual prohibited transaction exemption from the Department, offering the prospect of individual exemptive relief has the effect of shutting plans and IRAs out of the CEF IPO market.

### **3.9 Amended PTE 84-24 Should Retain Relief for Pre-Approved Plan Providers**

The Department in the preamble to Proposed PTE 84-24 requested comments on whether parties will use the relief in proposed section II(a) for the transactions outlined in section III(a)-(f). It also asks whether parties are currently relying on section III(f) for pre-approved plans. ICI members have indicated that section III(f) is still relied on in the marketplace, and that it is important that this relief continue to be available. For pre-approved plan providers where the plan offers the sponsoring investment company’s funds, loss of section III(f) relief would make it difficult to continue to offer these products to the marketplace.

On a separate note, we also have concerns with proposed section IX that are similar to those expressed above in connection with the recordkeeping provisions of PTE 2020-02. As discussed in detail above, we believe it is inappropriate for the Department to provide parties other than the Department with access to detailed records, here of a principal underwriter or investment company, in connection with PTE 84-24. Should the Department nonetheless determine to provide such access, we urge the Department to restrict access to records that contain confidential business, commercial, or financial information.<sup>167</sup>

### **3.10 The Department Should Permit Investment Advice Under PTE 77-4**

We have serious concerns with the Department’s proposed changes to PTE 77-4. As the Department is aware, PTE 77-4 has been in place for over 40 years, and it provides strong investor protections. Eliminating the availability of PTE 77-4 for fiduciary investment advice

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<sup>166</sup> 85 Fed. Reg. at 82817.

<sup>167</sup> While the Department does propose to restrict access to “privileged” commercial and financial information, this term is typically utilized only in connection with information that contains or reflects legal advice and not confidential information.



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would be highly disruptive and would create material new costs which will ultimately be borne by plans and participants.

PTE 77-4 already provides robust protections for plans and participants. It prohibits financial institutions from “double dipping” by charging multiple layers of advisory or management fees. It also includes “safeguards [that] require that appropriate disclosure be made to a second plan fiduciary... with particular emphasis on the nature of the investment advisory and other fees paid by the mutual fund to its investment adviser and how such fees differ from the fee paid directly by the plan to its fiduciary.”<sup>168</sup> **Importantly, PTE 77-4 does not provide relief for the receipt of sales commissions, effectively addressing a conflict of particular interest to the Department. PTE 77-4’s protections are so robust that they have served as the basis for dozens of individual exemptions issued by the Department over the past four decades.**

The Department has not provided any enforcement or other data indicating that PTE 77-4 is not sufficiently protective of investors. The Department’s primary concern with PTE 77-4 appears to be that the availability of multiple exemptions creates an “unlevel playing field,” and the Department would prefer that most financial institutions move to PTE 2020-02. As discussed above this single-exemption approach is inconsistent with the framework of ERISA, which has always included a patchwork of custom-tailored exemptions, and it fails to account for the fact that some financial institutions will still be able to rely on existing individual or statutory exemptions instead of PTE 2020-02.

In addition, as explained earlier in section 3.1, the proposed change would result in firms needing to use two different exemptions for services where currently one exemption covers the activity. As proposed by the Department, a financial institution would need to use Proposed PTE 2020-02 for the initial advice element, and would still need to use PTE 77-4 for discretionary management services.

In sum, the proposed changes to PTE 77-4 will require financial institutions to change longstanding business practices and create entirely new compliance regimes. These changes will have costs that the Department has failed to properly identify, analyze, and account for. In our view, the costs of the disruption alone far outweigh any theoretical benefit to plans and participants.

#### **Section 4: The Proposal Violates the Administrative Procedure Act (APA) and Does Not Comport with the Fifth Circuit’s Decision**

As discussed in greater detail in the Appendix, the Department has failed to adequately analyze the tremendous cost of this overly broad Proposal. Moreover, the Proposal raises the same concerns expressed by the Fifth Circuit in 2018. As the Fifth Circuit explained, this regulation

<sup>168</sup> Notice of Pendency of Proposed Class Exemption Requested by T. Rowe Price Associates, 41 Fed. Reg. 50516, 17 (Nov. 16, 1976). See also DOL Adv. Op. 93-12 (Apr. 27, 1993).

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must withstand APA review, ensuring it is not arbitrary, capricious, contrary to law, or in excess of statutory authority.<sup>169</sup> As we describe below, the Proposal does not meet any of these thresholds. Rather, the Proposal is unnecessary<sup>170</sup> and would have detrimental consequences for the very investors the Department seeks to protect.

#### **4.1 The Proposal Fails to Follow the Fifth Circuit’s Decision by Improperly Imposing Fiduciary Status on Relationships in Which Advice Is Provided on a Solely Incidental Basis**

With the broad proposed definition of an investment advice fiduciary (particularly the facts and circumstances test in proposed paragraph (c)(1)(ii)), the Department intentionally captures investors’ transactions with brokers, as the 2016 Rule also was intended to do. As we have explained to the Department in prior letters, this will lead to the broader adverse effects we warned of in our 2015 comment letters, such as reduced access to various investment products, services, and tools.<sup>171</sup>

The SEC recognized these implications when it crafted Reg BI, which is a robust standard that significantly enhances the existing standard of conduct applicable to broker-dealers providing recommendations to retail customers. The SEC in developing Reg BI intentionally adopted a standard of conduct for broker-dealers that is distinct from the fiduciary standard that applies to investment advisers under the Advisers Act. This was in recognition of the key differences between the broker-dealer and investment adviser business models, consistent with the SEC’s goal of preserving choice for retail investors regarding the advisory services they receive and how they pay for them.<sup>172</sup> Among these differences are that broker-dealers provide recommendations on a transactional basis for a commission or other transaction-based

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<sup>169</sup> 5 U.S.C. § 706(2)(A).

<sup>170</sup> The Department asserts that the Proposal is necessary to cover recommendations of rollovers out of ERISA-covered plans, but the current test already applies to rollovers, provided that the five-part test is met. This is particularly true since the Department has withdrawn DOL Advisory Opinion 2005-23A (the “Deseret Letter”). (Under the Deseret Letter, the Department stated that it is not fiduciary advice to make a recommendation as to distribution options even if that advice is accompanied by a recommendation as to how the distribution should be invested.) In assessing the 2016 Rule, the Fifth Circuit observed: “[t]he Rule expressly includes one-time IRA rollover or annuity transactions where it is ordinarily inconceivable that financial salespeople or insurance agents will have an intimate relationship of trust and confidence with prospective purchasers.” *Chamber*, 885 F.3d 360, 380 (5th Cir. 2018). Because the Proposal aims to cover rollover recommendations in much the same manner as the 2016 Rule, we believe the court’s assessment would continue to hold true. It is worth noting that rollover recommendations that fall outside of the five-part test are covered under other standards—the SEC’s Reg BI, the SEC’s IA Fiduciary Standard, and the NAIC model, as adopted by the majority of states.

<sup>171</sup> See *infra* section 4.3.

<sup>172</sup> The SEC explained that it had “declined to subject broker-dealers to a wholesale and complete application of the existing fiduciary standard under the Advisers Act because it is not appropriately tailored to the structure and characteristics of the broker-dealer business model (i.e., transaction-specific recommendations and compensation), and would not properly take into account, and build upon, existing obligations that apply to broker-dealers, including under FINRA rules.” 84 Fed. Reg. 33318, at 33322 (July 12, 2019).

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compensation and, unlike an adviser who typically has an ongoing relationship for which an asset-based fee is paid, a broker-dealer may provide monitoring only to the extent it is solely incidental to its primary brokerage business.

The SEC cautioned that applying the Advisers Act fiduciary standard to broker-dealers “would result in fewer broker-dealers offering transaction-based services to retail customers, which would in turn reduce choice and may raise costs for certain retail customers.”<sup>173</sup> ICI agreed with this approach and supported Reg BI. The SEC took a well-reasoned, well thought out approach regarding the standard to apply to broker-dealers because it understood the importance of preserving the brokerage business model. **The Department, on the other hand, again has failed to heed warnings that its actions will have the result of limiting choice and reducing access for the very people it seeks to protect.**<sup>174</sup>

The Department should recognize Reg BI as a meaningful and robust standard of conduct for broker dealers that complements—but is distinct from—the investment adviser fiduciary standard of conduct. Consistent with this and to provide strong protections while retaining access to advice for retail investors, we urge the Department to reflect the vital differences between true “fiduciary” relationships and those in which advice is provided on a “solely incidental” basis. Failure to maintain this critical distinction, for example, by treating those persons subject to Reg BI as “fiduciaries” under ERISA, will undermine both the Department’s and the SEC’s stated policy goals and have detrimental implications for retirement savers and retail investors generally.

The Fifth Circuit stressed the importance of this age-old distinction, noting with approval that the five-part test “echoed” the distinction between brokerage and advisory business models.<sup>175</sup> The court found that, with the 2016 Rule, the Department improperly disregarded legitimate

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<sup>173</sup> 84 Fed. Reg. 33318, at 33330 (July 12, 2019). Further, the SEC explained that it did not believe that applying the same standard “would provide any greater investor protection (or, in any case, that any benefits would justify the costs imposed on retail investors in terms of reduced access to services, products, and payment options, and increased costs for such services and products).” *Id.* at 33322. The Department recognizes the SEC’s support for this business model, noting in footnote 24 of the Proposal that “[t]he SEC stated in the Regulation Best Interest release that ‘there is broad acknowledgment of the benefits of, and support for, the continuing existence of the broker-dealer business model, including a commission or other transaction-based compensation structure, as an option for retail customers seeking investment recommendations.’” 88 Fed. Reg. at 75893 (citing 84 Fed. Reg. 33318, 33319 (July 12, 2019)).

<sup>174</sup> The Department refers to the 2016 Rule and notes that it had “cited evidence that holding broker-dealer representatives to fiduciary standards at the State level does not impair access to their services.” 88 Fed. Reg. at 75894. We would note that, generally, while state-level fiduciary rules do affect the standard of conduct itself, they do not impose the prohibited transaction rules, necessitating PTEs, which ERISA imposes on fiduciaries.

<sup>175</sup> “The [1975] regulation also echoed the then thirty-five-year old distinction drawn between an ‘investment adviser,’ who is a fiduciary regulated under the Investment Advisers Act, and a ‘broker or dealer’ whose advice is ‘solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor.’” *Chamber*, 885 F.3d 360, 365 (5th Cir. 2018).

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differences between investment advisers (who have well-settled relationships of trust and confidence with their clients) and brokers and insurance agents (who receive compensation for completed sales). As the court noted, Congress was well aware of this distinction when it enacted ERISA.<sup>176</sup> There is ample evidence Congress did not intend ERISA to disrupt the lawful functioning of the securities markets, prevent retirement investors from accessing information on investments, or turn the “ordinary functions of consultants and advisers” into fiduciary activities.<sup>177</sup>

**As the Fifth Circuit made clear, fiduciary status turns on the existence of a relationship of trust and confidence between the fiduciary and the client.**<sup>178</sup> The Department makes frequent use of the terms “trust” and “confidence” in the preamble to the Proposal. For example, the preamble posits “under each of these three contexts [where fiduciary status applies], the Department believes that retirement investors could reasonably place their trust and confidence in the advice provider.”<sup>179</sup> **But based on the actual elements of the Proposal, Department appears to be paying mere lip service to the Fifth Circuit’s emphasis on the importance of a relationship of trust and confidence for fiduciary status to attach.**

It is not just semantics to point out the flaw in this application of the phrase “trust and confidence” to a relationship. A relationship is a two-way street and cannot be viewed from one side alone. While the Department is focused solely on the perspective of the retirement investor—an important perspective, we agree—the Department makes no effort to address the other side of the equation—that is, whether the party in question intended to enter into a fiduciary relationship. In doing so, the Department has left no viable way for a person or financial institution to define their relationship with an investor by stating clearly and unequivocally (and not in a fine print disclaimer) that it is not acting as a fiduciary.<sup>180</sup> In each of the three alternative contexts comprising the definition of fiduciary investment advice, a

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<sup>176</sup> *Id.* at 372.

<sup>177</sup> See ERISA Conference Report, P.L. 93-406, at 323 (“...the ordinary functions of consultants and advisers (other than investment advisers) may not be considered as fiduciary functions...”); *Id.* at 309 (some otherwise prohibited transactions “nevertheless should be allowed in order not to disrupt the established business practices of financial institutions” and directing the Secretaries of Labor and Treasury to grant an administrative exemption for brokerage services).

<sup>178</sup> *Chamber*, 885 F.3d 360, 370 (5th Cir. 2018). The court further explains: “Moreover, all relevant sources indicate that Congress codified the touchstone of common law fiduciary status—the parties’ underlying relationship of trust and confidence—and nothing in the statute ‘requires’ departing from the touchstone.” *Id.* at 369.

<sup>179</sup> 88 Fed. Reg. at 75901.

<sup>180</sup> The Department states that its “intent in including [paragraph(c)(1)(v)] in the proposal is to permit parties to define the nature of their relationship” and that “[t]o the extent counterparties wish to avoid fiduciary status, they can avoid structuring their relationships to fall within the circumstances described in that subparagraph.” 88 Fed. Reg. at 75903 and 75907. However, as we explained above, the status-based nature of the tests within the definition makes this difficult to do with any certainty.

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financial institution could be unintentionally swept into the proposed definition due to the status-based nature of the contexts.

The Fifth Circuit also noted the importance of the distinction between mere sales conduct, which does not usually create a fiduciary relationship under ERISA, and investment advice for a fee, which does.<sup>181</sup> The Department flatly disagrees, stating: “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.”<sup>182</sup> While the Department may disagree with the Fifth Circuit’s interpretation and its distinction between sales and advice, courts (and not the Department) ultimately have conclusive authority to determine the meaning of a statute.

This position is further evidenced by the lack of exclusions in the proposed definition for any type of selling activity. We acknowledge that the Fifth Circuit criticized the Department’s use of “carve-outs,” as evidence that the definition itself was overly broad. However, we are at a loss to understand how the appropriate solution could be to craft an equally broad rule and simply leave out needed exclusions. The Proposal suffers the same problems as the 2016 Rule, and therefore the same need exists for exclusions.<sup>183</sup> Not including them does not change the need and does nothing to cure the Proposal from its fatal overbreadth.

We also note that the Fifth Circuit disagreed with the Department’s broad interpretation of the statutory language “advice for a fee or other compensation” because it captures payments related to sales activity.<sup>184</sup> The Proposal’s definition of “for a fee or other compensation, direct or indirect” is nearly identical to the definition included in the 2016 Rule, and in our view this expansive language runs afoul of the Fifth Circuit’s decision.

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<sup>181</sup> The court stated, “Congress does not ‘hide elephants in mouseholes.’ ... Had Congress intended to abrogate both the cornerstone of fiduciary status—the relationship of trust and confidence—and the widely shared understanding that financial salespeople are not fiduciaries absent that special relationship, one would reasonably expect Congress to say so.” *Chamber*, 885 F.3d 360, 376 (5th Cir. 2018).

“When enacting ERISA, Congress was well aware of the distinction, explained further below, between investment advisers, who were considered fiduciaries, and stockbrokers and insurance agents, who generally assumed no such status in selling products to their clients. The Fiduciary Rule improperly dispenses with this distinction.” *Id.* at 372.

<sup>182</sup> 88 Fed. Reg. at 75907.

<sup>183</sup> The activities excluded under the 2016 Rule included: transactions with independent fiduciaries with financial expertise, swap and security-based swap transactions, and employees. The 2016 Rule’s exclusions from “recommendation” included: platform providers, selection and monitoring assistance, general communications, and investment education.

<sup>184</sup> The court explains, “Further, DOL’s interpretation conjoins ‘advice’ with a ‘fee or other compensation, direct or indirect,’ but it ignores the preposition ‘for,’ which indicates that the purpose of the fee is not ‘sales’ but ‘advice.’” *Chamber*, 885 F.3d 360, 373 (5th Cir. 2018).

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#### 4.2 The Proposal Exceeds the Department's Authority

Although the Department has authority to define “fiduciary” for purposes of Title I and Title II of ERISA, the Proposal exceeds this authority by arbitrarily expanding the concept of fiduciary beyond that intended by Congress and by imposing Title I duties on Title II arrangements.

After providing an overview of “Other Regulatory Developments” such as the SEC’s 2019 regulatory package and the NAIC’s efforts in this area, the Department asserts that “[a]fter 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.”<sup>185</sup> The difference between the SEC’s issuance of Reg BI and this effort is that Congress gave the SEC express authority in section 913 of the Dodd-Frank Act to create a standard for broker-dealers.<sup>186</sup> Under ERISA, conversely, the Department’s authority over the provision of investment advice is limited to those who are “fiduciaries.” **The Department cannot simply decide who it would like to subject to its authority by departing from the common law concept of “fiduciary.”** As the Fifth Circuit stated: “[a] perceived ‘need’ does not empower DOL to craft de facto statutory amendments [expanding its authority to Title II plans] or to act beyond its expressly defined authority.”<sup>187</sup>

The Department also exceeds its authority by imposing Title I duties upon Title II arrangements. When Congress enacted ERISA, it imposed duties of prudence and loyalty under Title I on parties acting as fiduciaries to ERISA plans (i.e., employer-sponsored retirement plans).<sup>188</sup> Congress purposely declined to impose these duties with respect to non-ERISA arrangements (i.e., IRAs) under Title II (although it did determine it appropriate to apply prohibited transaction rules under both Title I and Title II). As the Fifth Circuit confirmed, “IRA plan ‘fiduciaries,’ though defined statutorily in the same way as ERISA plan fiduciaries, are not saddled with these

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<sup>185</sup> 88 Fed. Reg. at 75893. The Department further explains “If these investment advice providers [who do not meet the current five-part test] are not fiduciaries under Title I or Title II of ERISA, they do not have obligations under Federal pension law to either avoid prohibited transactions or comply with the protective conditions in a prohibited transaction exemption (PTE).” 88 Fed. Reg. at 75892.

<sup>186</sup> The Second Circuit affirmed that the SEC properly issued Reg BI under this authority. *XY Planning Network v. SEC*, 963 F.3d 244 (2d Cir. 2020).

<sup>187</sup> *Chamber*, 885 F.3d 360, 379 (5th Cir. 2018). The court was clear that Congress was aware of IRAs when ERISA was enacted, and “chose not to require advisers to individual retirement plans to bear the duties of loyalty and prudence required of Title I ERISA plan fiduciaries.” *Id.* at 378-9.

<sup>188</sup> ERISA § 404(a)(1) provides that a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan; with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims[.]”

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duties, and DOL is given no direct statutory authority to regulate them.”<sup>189</sup> However, just as the Department did with the 2016 Rule, it has crafted the Proposal to impose Title I duties of prudence and loyalty onto IRAs.<sup>190</sup>

The Department points out several times that, unlike under the BIC Exemption, the Department did not include in Proposed PTE 2020-02 a contract or warranty provision enforceable by IRA owners (provisions which the court had criticized) as a requirement of PTE 2020-02.<sup>191</sup> However, the Department does not provide an explanation for its failure to heed the court’s admonition regarding its imposition of these new duties onto IRAs. While the Department does have authority to exempt prohibited transactions under both Title I and Title II of ERISA, it does not have authority to extend Title I fiduciary duties to actors Congress did not intend to so cover.<sup>192</sup>

The Fifth Circuit, however, was clear on these points, stating: “[e]xpanding the scope of DOL regulation in vast and novel ways is valid only if it is authorized by ERISA Titles I and II. A regulator’s authority is constrained by the authority that Congress delegated it by statute.”<sup>193</sup> And further, “[d]espite the differences between ERISA Title I and II, DOL is treating IRA financial services providers in tandem with ERISA employer-sponsored plan fiduciaries. The [2016] Fiduciary Rule impermissibly conflates the basic division drawn by ERISA.”<sup>194</sup> The Department has repeated this erroneous conflation with the Proposal.

#### **4.3 The Proposal Has Not Been Issued in Conformance with the APA**

We urge the Department to consider that there is a strong basis for a court to find that the Proposal’s RIA (if included in any final rule) fails to meet the applicable standards under the APA. Under the APA, it is incumbent on the Department to fully evaluate the Proposal’s costs,

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<sup>189</sup> *Chamber*, 885 F.3d 369, 381 (5th Cir. 2018). As the court further explained, “[t]hat times have changed, the financial market has become more complex, and IRA accounts have assumed enormous importance are arguments for Congress to make adjustments in the law, or for other appropriate federal or state regulators to act within their authority.” *Id.* at 379.

<sup>190</sup> The Department accomplishes this by crafting an extremely broad definition of “investment advice fiduciary” and then forcing all investment advice fiduciaries to comply with PTE 2020-02, which includes the same “Impartial Conduct Standards” as the BIC Exemption, which the Fifth Circuit objected to, as applied to Title II. See *id.* at 383 (rejecting the Department’s attempt through the BIC Exemption to extend Title I’s prudence and loyalty duties to brokers and insurance representatives selling to IRA plans). The *Chamber* court further criticized the Department for effecting what it described as “dramatic industry-wide changes” due to the impracticality of separating IRA transactions from non-IRA securities advice and brokerage. *Id.* at 385-6. The Department arguably seeks to do the same with the Proposal.

<sup>191</sup> 88 Fed. Reg. at 75962.

<sup>192</sup> *Chamber*, 885 F.3d 369, 381 (5th Cir. 2018).

<sup>193</sup> *Id.* at 379.

<sup>194</sup> *Id.* at 381.

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including compliance costs, and compare them to the benefits that the Proposal would engender.<sup>195</sup> Our review of the rule, focusing on the economic analysis provided within it, finds that the Proposal does not meet this requirement. **Further, it is arbitrary for an agency to impose billions of dollars in costs—as it would here—without identifying benefits that warrant such burdens, and without explaining why less costly alternatives are not being pursued instead.**

As described in more detail in the Appendix, the RIA fails to quantify any purported benefits,<sup>196</sup> while likely grossly underestimating the costs of the changes, in terms of both the direct costs of implementation and the costs to investors from loss of access to information and assistance. While the Department does list some qualitative benefits, as the Appendix details, these supposed qualitative benefits are highly speculative.

Although the Department refuses to quantify any benefits of *this* Proposal, it nevertheless seeks to recycle benefit estimates it cited in its flawed RIAs for the 2015 Proposal and the 2016 Rule. The Department based much of its 2015 RIA on its supposition that funds sold through a broker underperform, contending that such underperformance could cost IRA mutual fund investors \$340 billion over 10 years and nearly \$1 trillion across the next 20 years. The RIA for the 2015 Proposal did not, however, provide an adequate basis for the supposition that broker-sold funds in fact do “underperform,” as ICI pointed out in several comment letters.<sup>197</sup> Nor did the 2015 RIA address the significant net societal harm that could result from the rule by causing investors to pay more for advice and service or by reducing their access to such advice. Thus, the Department’s previous benefit estimates were in large part illusory. The Department cannot refuse to provide updated quantitative benefit estimates in this Proposal, but nonetheless continue to cite its deeply flawed benefit estimates from the 2015 RIA and 2016 Rule.

**As was true of the Department’s RIAs for the prior iterations of the rule, the Proposal’s RIA does not consider or discuss the likelihood that the Proposal would harm retirement investors.** Although the Department dismissed ICI’s concerns that the issuance of its 2016 Rule would harm retirement savers, there can be no denying that the pending application of the final rule was already having a consequential impact on the marketplace by 2017.<sup>198</sup> As we explained to the Department in 2017:

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<sup>195</sup> See *Michigan v. EPA*, 576 U.S. 743, 752-53, 759 (2015).

<sup>196</sup> “The Department is unable to quantify all benefits, costs, and transfers of the proposal but has sought, where possible, to describe these non-quantified impacts.” 88 Fed. Reg. at 75929.

<sup>197</sup> In fact, our findings, based on our own analysis of the actual performance of fund investors in broker-sold funds, contradict the RIA’s “underperformance” claims. See pages 16 to 24 of letter from Brian Reid and David W. Blass, ICI, to Office of Regulations and Interpretations, EBSA (July 21, 2015).

<sup>198</sup> For a more fulsome discussion of the harms to investors caused by the anticipated applicability of the 2016 Rule, see pages 7 through 18 of letter from Brian Reid and David Blass, ICI, to Office of Regulations and Interpretations, EBSA (April 17, 2017) (“ICI’s April 2017 RIA Letter”).



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[a]s has been widely reported, several large intermediaries have announced a variety of changes to service offerings, including firms announcing that they will no longer offer mutual funds in IRA brokerage accounts; others no longer offering any IRA brokerage accounts at all; firms reducing web-based financial education tools; and others announcing that account minimums will be raised or that advisory services for lower-balance accounts will be discontinued.<sup>199</sup>

We also explained to the Department that the pending application of the 2016 Rule was accelerating the shift from commission-based accounts to fee-based accounts, which would cause many investors to pay more for advice.<sup>200</sup> Indeed, in many instances our members were informed by their intermediary partners that they would no longer service certain account holders in light of the 2016 Rule. We noted that some investors, particularly those with smaller account balances, would find themselves unable to find a broker willing to serve them and would be unable to meet the minimum balances required for a fee-based account.

Further, regarding the Department's process for soliciting comments on the Proposal, the APA requires the Department to give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation. While there is not a specified time period under the APA to allow for comment, we would argue that the Department has violated the APA with its compressed comment period.

The Proposal makes significant and novel changes to the current regulatory framework that will require significantly more time for meaningful analysis and comment, and to understand how the Proposal would impact access and choice for retirement savers. As we have explained, while the Proposal effectively sweeps in a broad range of sales, marketing, and educational communications like the 2016 Rule did, many of the details of the proposed changes are different from the 2016 Rule and require extensive and careful review. The Proposal's 60-day comment period is simply insufficient to allow interested parties adequate time to provide meaningful

<sup>199</sup> *Id.* at p. 7, citing "A Complete List of Brokers and Their Approach to 'The Fiduciary Rule'," Wall Street Journal (February 6, 2017), available at <https://www.wsj.com/articles/a-complete-list-of-brokers-and-their-approach-to-the-fiduciary-rule1486413491>. The SEC also noted these harms in explaining its reasons for adopting Reg BI. 84 Fed. Reg. at 33322 ("Our concerns about the ramifications for investor access, choice, and cost from adopting either of these approaches are not theoretical. With the adoption of the now vacated [2016 Rule], there was a significant reduction in retail investor access to brokerage services, and we believe that the available alternative services were higher priced in many circumstances."). See also "Analysis of the Effects of the 2016 Department of Labor Fiduciary Regulation on Retirement Savings and Estimate of the Effects of Reinstatement," Hispanic Leadership Fund (November 8, 2021), available at [https://hispanicleadershipfund.org/wp-content/uploads/2021/11/FINAL\\_HLF-Quantria\\_FiduciaryRule\\_08Nov21.pdf](https://hispanicleadershipfund.org/wp-content/uploads/2021/11/FINAL_HLF-Quantria_FiduciaryRule_08Nov21.pdf).

<sup>200</sup> See page 5 of ICI's April 2017 RIA Letter.

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input on the Proposal.<sup>201</sup> As we explained in our joint request for an extension of the comment period,<sup>202</sup> which the Department denied, the Department provided the public much longer comment periods in prior iterations of this Proposal.<sup>203</sup> In this case, the Department only granted 39 workdays for interested parties to review and comment. This approach significantly limits the utility of public input and results in less fulsome analysis of the implications of the changes. Additionally, the timing of the publishing of the Proposal in the Federal Register means that the comment period fell over multiple federally recognized holidays as well as numerous recognized days of religious observance, with comments due on January 2. This has only further complicated and limited the ability of industry stakeholders and other interested parties to provide meaningful input on the Proposal.

Furthermore, holding the hearing on December 12 and 13 (a mere 39 days after the Proposal's publication in the Federal Register) effectively shortened the 60-day comment period for those who requested to testify at the hearing because they needed to prepare at least some of their comments in time for the hearing. By setting the hearing date before the close of the comment period, the Department implied that this was merely a "check the box" exercise, rather than an effort to receive helpful feedback.<sup>204</sup> Holding the hearing after the end of the comment period

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<sup>201</sup> See letter from Senators Jon Tester, Gary C. Peters, Joe Manchin III, Christopher A. Coons, Benjamin L. Cardin, Margaret Wood Hassan, Kyrsten Sinema, and John Hickenlooper to Acting Secretary of Labor Julie Su, DOL (December 20, 2023) ("Given the broad impacts of this potential rulemaking, we are concerned that you are rushing this process and the people that will be hurt are the ones you are trying to help the most. We believe that a thorough and thoughtful comment processes yield better results for those impacted by rulemakings."). See also letter from Major L. Clark, III and Meagan Singer, Office of Advocacy, U.S. Small Business Administration, to Lisa M. Gomez, Assistant Secretary, EBSA (December 20, 2023) ("Small entities have told Advocacy that they lack the resources necessary to respond to such an extensive proposal within the current time frame....As such, small entities impacted by this rulemaking have been disadvantaged in the process.").

<sup>202</sup> Letter from 18 Associations to Lisa Gomez, Assistant Secretary, EBSA (November 8, 2023). Similar concerns have been expressed to the Department from members of Congress. See letter from Rep. Virginia Foxx, Chairwoman, House Committee on Education and the Workforce, to Julie Su, Acting Secretary, DOL (November 17, 2023).

<sup>203</sup> In connection with the 2010 Proposal, the Department initially set a 90-day comment period that was then extended 14 days. The Department then held a public meeting, followed by a 15-day comment period for response. For the 2015 Proposal, the Department initially allowed for a 75-day comment period and then granted a 15-day extension. A further 15-day comment period followed the public hearing. As such, the Department allowed a total comment period of 129 days in connection with the 2010 Proposal, and 105 days in connection with the 2015 Proposal. Were one to align these time frames with that proposed here by also including the intervening days between the end of the extended initial comment periods and beginning of the post-hearing comment periods, the effective comment periods were 157 days and 128 days, respectively.

<sup>204</sup> In the Department's response letter denying the joint trade request for an extension, Ms. Gomez said, "one benefit of holding the public hearing before the comment period closes is that the testimony will inform the comments EBSA receives. EBSA encourages all interested parties to testify, watch the virtual hearing, and respond to, clarify, and emphasize points that are made during the hearing when submitting their comments by the January 2, 2024 deadline." Letter from Lisa Gomez, Assistant Secretary, EBSA, to Lisa Bleier, SIFMA (November 14, 2023). However, as each organization did not have sufficient time to complete its analysis prior to the hearing, those

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would have allowed for the Department to ask questions about the comments that they had received, fostering clarification and better understanding. Commenters also would have been able to provide feedback to the Department on the input provided by others.

The APA also requires that the Department show its work as part of the RIA.<sup>205</sup> In at least two instances the Department failed to provide underlying documentation, and thereby failed to show its work in a timely manner. In the first instance, the Department references a new consultants' study, cited as an "unpublished draft" from August 2023.<sup>206</sup> ICI was unable to locate this document. Ultimately, we submitted a FOIA request, accompanied by a direct request to the Department, requesting the release of this study.<sup>207</sup> While the Department promptly sent a link to the study after receiving our request (on November 29, 2023), we had no ability to access the study for nearly half of the already short 60-day comment period. This study actually undermines the Department's case for the need for the Proposal. The Department cites the study as showing that investors in load funds improved the timing of their trades after Reg BI took effect and speculates that Reg BI's enhanced standard of conduct caused the improvement. However, the study does not actually support the Department's claim that the Proposal is needed. When we were finally able to obtain and review the study, we found that it confirms that the market has changed significantly, which further limits any potential benefits from this Proposal.<sup>208</sup>

In the second instance, the Department relied on Form 5500 data for 2021 in its discussion of the impact on retirement investors, citing to the "forthcoming" Private Pension Plan Bulletin.<sup>209</sup> Although tabulated using July 2023 data, and labeled as a September 2023 publication, the report was not made available to the public until nearly mid-December 2023—over halfway through the 60-day comment period.

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watching the hearing were only benefiting from partially developed comments. Thus, we are not convinced that holding the hearing before the close of the comment period provided any meaningful benefit.

<sup>205</sup> See *Owner-Operator Indep. Drivers Ass'n v. FMCSA*, 494 F.3d 188, 199 (D.C. Cir. 2007) (citing *Solite Corp. v. EPA*, 952 F.2d 473, 484 (D.C. Cir. 1991), explaining that integral to the APA's notice and comment requirements "is the agency's duty to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules."). See also *Chamber of Commerce v. SEC*, 443 F.3d 890, 900-01 (D.C. Cir. 2006) ("By requiring [that] the 'most critical factual material' used by the agency [in support of its position] be subjected to informed comment, the APA provides a procedural device to ensure that agency regulations are tested through exposure to public comment, to afford affected parties an opportunity to present comment and evidence to support their positions, and thereby to enhance the quality of judicial review.")

<sup>206</sup> Constantijn Panis & Karthik Padmanabhan, *Buy Low, Sell High: The Ability of Investors to Time Purchases and Sales of Mutual Funds*, Intensity, LLC. (August 14, 2023). Unpublished draft, cited in footnote 414, 88 Fed. Reg. at 75943.

<sup>207</sup> See letter from Susan Olson and Elena Chism, ICI, to Office of Regulations and Interpretations, EBSA (November 28, 2023).

<sup>208</sup> See Appendix pages 8-9.

<sup>209</sup> See footnotes 290 and 299 of the Proposal, 88 Fed. Reg. at 75930 and 75931.

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**The Department’s reliance on information not made available to the public until halfway through the unusually short 60-day comment period hindered ICI’s assessment of the Proposal. This, coupled with the premature hearing and the Department’s unwillingness to extend the comment period, is further evidence of the Department’s rush to judgement in issuing the Proposal before it has demonstrated a need for it or a benefit from it.**

**Section 5: The Proposed Effective Date (60 Days After Publication) is Wholly Inadequate and Unreasonable**

Beyond the numerous substantive concerns with the Proposal, we and our members are concerned about the proposed effective dates in the Proposal. The Department proposes that the final package, including both the amended definition and the various amended PTEs, would be effective 60 days after publication in the Federal Register. Irrespective of whether our concerns with the Proposal as outlined in this letter are fully addressed, a 60-day effective date is wholly inadequate to permit sufficient time to prepare for these changes. As the Department is well aware, many of the PTEs that the Department proposes to extensively overhaul have been in use for decades. And other than the three-year-old PTE 2020-02, the exemption regime that many companies have relied on for decades and upon which they have structured their businesses would no longer be available.

An effective date of 60 days after the Proposal is finalized stands in sharp contrast to earlier efforts. The 2010 Proposal (which did not include amendments to PTEs) was proposed to be effective 180 days after publication of the final rule in the Federal Register.<sup>210</sup> While the 2016 Rule became effective 60 days after publication in the Federal Register, the requirements of the final rule (including the BIC Exemption) were generally not applicable until 12 months after publication of the final rule.<sup>211</sup> Similarly, when PTE 2020-02 was finalized in 2020, it had an effective date of 60 days after publication of the final PTE. However, the effective dates of important aspects of the exemption were delayed until, in some cases, more than 18 months after publication of the final PTE.<sup>212</sup> In setting these prior effective and applicability dates, the Department recognized that coming into compliance with major changes like these simply requires time.

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<sup>210</sup> 75 Fed. Reg. at 65269.

<sup>211</sup> 81 Fed. Reg. at 20946; 81 Fed. Reg. at 21002.

<sup>212</sup> 85 Fed. Reg. at 82845. As transition relief to allow financial institutions to develop compliance structures, the Department allowed parties to continue to rely on FAB 2018-02 until December 20, 2021 (one year following publication of the final exemption). See note 17 *supra*. Also see FAB 2021-02 (providing that through January 31, 2022, the Department would not pursue prohibited transaction claims against investment advice fiduciaries who were working diligently, and in good faith, to comply with the Impartial Conduct Standards for transactions exempted in PTE 2020-02; and that the department would not enforce the specific documentation and disclosure requirements for rollovers in PTE 2020-02 through June 30, 2022).

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It is possible that some asset managers would not use the exemptions associated with the Proposal because they do not intend to become ERISA fiduciaries by providing investment advice.<sup>213</sup> Even for these firms, a 60-day period to come into compliance is not sufficient. This is because such financial institutions will need to review every aspect of their business (e.g., websites, call center training, informational and marketing materials regarding offerings and funds, support provided to intermediaries and the relationships with intermediaries, and other lines of business). Further, they must respond to the needs of intermediaries who are relying on the exemptions, in particular the proposed changes to PTE 2020-02 (especially if the proposed restrictions on differential compensation are retained).

**While we recognize that many financial institutions may already be relying on PTE 2020-02 for a part of their business, it is inaccurate to infer from this that these companies can easily port in the significant activities that will be covered under the revised definition of an investment advice fiduciary.** First, many institutions, as explained above, have structured their business (or least significant parts of their business) to not require reliance on PTE 2020-02. Nonetheless, some have established systems for compliance with PTE 2020-02 as a backstop to cover any potential instances where they inadvertently find themselves providing fiduciary investment advice under current law. These existing systems may not be able to accommodate the sudden influx of a large portion of an organization's business, as the Proposal would require. Modifying these systems to accommodate such a change is itself a significant undertaking that cannot reasonably be accomplished in 60 days. Second, those systems that do exist will need to be extensively revised to account for changes to PTE 2020-02. These revisions will require new procedures and extensive reprogramming. Moreover, the systems will need to be revised to account for new interconnections (such as the above-referenced detailed fee disclosures upon request and the Department's ability to request policies and procedures) not currently required. Third, the proposed expanded restrictions on the permissible forms of compensation will require extensive reworking of business models, compensation structures, and internal policies and procedures. Many client relationships also will need to be reexamined and potentially renegotiated to account for forms of compensation that would no longer be permitted.

Further, the Department should consider the fact that the financial services and asset management industries are facing several regulatory changes from the SEC (including several proposals that are pending or planned) that have the potential to fundamentally alter the current regulatory landscape. Many of the systems and people that would be called upon to implement the changes required by the Proposal will be the same ones to implement the various SEC rules, likely together and at the same, or close in, time, resulting in significant enhancements and changes to existing systems or the need to build new systems. The specter of so many new

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<sup>213</sup> See *supra* note 30.

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requirements applying simultaneously raises risks and bears serious consideration to ensure a more orderly implementation which would better serve investors.<sup>214</sup>

**In short, the proposed extensive reworking of the exemptive regime relied on by a significant portion of the retirement industry, combined with forcing numerous new lines of business into PTE 2020-02 and imposing significantly more onerous requirements for its use, will require significantly more than 60 days for impacted companies to address.** As noted in the Appendix, the industry will bear significantly greater expenses to comply with the amended PTEs than the Department has estimated. These costs will be vastly higher if financial institutions are left with no choice but to rely on ad hoc, manual processes while they build the necessary systems and revise their processes and renegotiate relationships as needed to comply with the amended PTEs. Such manual process will only increase the chances of inadvertent breaches. **As such, we urge the Department to delay the Proposal's effective date by 24 months.**

We note that to the extent the Department were to consider non-enforcement relief for a period of time after the effective date, this would not provide meaningful comfort for impacted parties (though such relief would be necessary if the Department proceeds with a 60-day effective date). A party availing itself of this non-enforcement relief may still be in the position of having engaged in a prohibited transaction, and as such would still be liable for excise taxes under the Code. Moreover, the party presumably would be required to report the resulting prohibited transactions in its retrospective review and potentially face disqualification under PTE 2020-02 if the insufficient time to prepare results in a large number of breaches. Importantly, the party would be exposed to potential claims brought by private parties for causing a plan to engage in a prohibited transaction.<sup>215</sup> If the Department moves forward with this flawed Proposal, it is essential to give regulated parties a reasonable time for implementation.

\* \* \*

We respectfully submit the foregoing comments with the objective of assisting in your review of the Proposal and its role in protecting the interests of retirement investors. For the reasons discussed in this letter, ICI strongly opposes the Department adopting the Proposal.

<sup>214</sup> See letter from Eric J. Pan and Susan Olson, ICI, to Chair Gary Gensler, SEC (August 17, 2023), *available at* <https://www.sec.gov/comments/s7-04-22/s70422-246959-547222.pdf>.

<sup>215</sup> Such claims are common in private excessive fee litigation. Our concern here relates to the monetary and reputational costs of defending a lawsuit where the Department may not even intend that a party incur such potential liability for engaging in a prohibited transaction.

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We provide below ICI staff to contact on the matters covered.

If you need additional information or you have questions regarding this letter, please contact Elena Chism, Deputy General Counsel – Retirement Policy at [elena.chism@ici.org](mailto:elena.chism@ici.org), Shannon Salinas, Associate General Counsel – Retirement Policy at [shannon.salinas@ici.org](mailto:shannon.salinas@ici.org), or David Cohen, Associate General Counsel – Retirement Policy, at [david.cohen@ici.org](mailto:david.cohen@ici.org).

For questions regarding the Appendix, please contact Sean Collins, Chief Economist at [scollins@ici.org](mailto:scollins@ici.org), Sarah Holden, Senior Director, Retirement & Investor Research at [sholden@ici.org](mailto:sholden@ici.org), or Jason Seligman, Senior Economist, Retirement & Investor Research at [jason.seligman@ici.org](mailto:jason.seligman@ici.org).

We welcome the opportunity to discuss these comments further or provide additional information to you and your staff.

Sincerely,

/s/ Eric J. Pan

Eric J. Pan  
President and CEO

/s/ Elena Barone Chism

Elena Barone Chism  
Deputy General Counsel – Retirement Policy

Attachment—Appendix

**Appendix: ICI's Economic Analysis of the Department's Proposed Rulemaking on  
Definition of an Investment Advice Fiduciary**

**Summary: Proposal's RIA Lacks Economic Evidence of Need for Rule**

The Department of Labor (the "Department") issued a proposed rulemaking on the definition of an investment advice fiduciary ("Proposal")<sup>1</sup> that, according to the Department's intentions, "better protects the interests of retirement investors" by addressing "an important gap in those advice relationships where the advice is not currently required to be in the retirement investor's best interest."<sup>2</sup>

It is incumbent on the Department to fully evaluate the Proposal's costs, including compliance costs, and compare them to the benefits the Proposal would engender.<sup>3</sup> Further, it is arbitrary for an agency to impose billions of dollars in costs—as it would here—without identifying benefits that warrant such burdens, and without explaining why less costly alternatives are not being pursued instead. **The Proposal is unnecessary<sup>4</sup> and would have detrimental consequences for the very investors the Department seeks to protect.**

Our review of the Regulatory Impact Analysis (RIA) finds that the Proposal does not meet this test because:

- **It fails to factor in the significance of developments in the retirement and fund markets over the past two decades, which vitiate the need for the Department's Proposal.** These market developments include retirement investors incurring substantially lower fees for investing in mutual funds, the rise of head-to-head competition between broker-sold and no-load funds, and a sea-change by financial intermediaries and investors away from load- to no-load share classes (or funds).
- **The RIA does not contemplate that the Proposal may harm retirement investors.** As this appendix details, industry participants indicate that the Proposal, if adopted, could lead them to curtail retirement investors' access to educational materials, product information, and "nudges" to save (such as reminding investors to contribute to their IRAs before April 15, or letting 401(k) plan participants know they are not contributing enough to get the full employer matching contribution).

<sup>1</sup> See *Notice of Proposed Rulemaking – Retirement Security Rule: Definition of an Investment Advice Fiduciary*, 88 Fed. Reg. 75890 (November 3, 2023), available at <https://www.govinfo.gov/content/pkg/FR-2023-11-03/pdf/2023-23779.pdf> ("Proposal").

<sup>2</sup> *Ibid.* at 75890 and 75899.

<sup>3</sup> See *Michigan v. EPA*, 576 U.S. 743, 752-53, 759 (2015).

<sup>4</sup> See note 179 in the main comment letter, *supra*.



- **The Department declines to quantify any benefits of the Proposal.** Nevertheless, the Proposal refers at times to benefit estimates the Department offered in conjunction with the 2015 Proposal and the 2016 Rule. These previous estimates were very large, totaling between \$95 billion to \$189 billion over 10 years and \$202 billion to \$404 billion over 20 years.<sup>5</sup> But as ICI has previously pointed out, these estimates were based on obsolete data and embodied fundamental errors. **The RIA does posit a few “non-quantified benefits,” but as discussed in this appendix, those supposed non-quantified benefits are at best highly speculative, and in our view many components of the Proposal work against achieving them.** In addition, the RIA cites a number of studies as purportedly supporting the need for the proposal. In some cases, however, the RIA misrepresents or overstates these studies’ results. In other cases, the RIA simply recycles previous analyses that have been proved to be erroneous or are no longer relevant.
- **By the Department’s own assessment, the costs of the Proposed Rule included in the RIA would be quite significant, totaling roughly \$220 million per year into the foreseeable future. Still, the Department’s figures are likely greatly understated.** The figures presented are based on many assumptions, which often lack support or are inconsistent with the studies cited within the RIA. Sensitivity exercises based on modest and reasoned adjustments to just a few of the Department’s key assumptions lead to cost estimates *for the first-year alone* that are many times higher than those in the RIA.

**In sum, the Department fails to demonstrate any net benefit from the Proposal.** The Department’s economic analysis offers no quantitative estimated benefits—gross or net. The Proposal omits potential harms associated with the loss of consumer benefits when compared to the regulatory baseline. The Proposal’s supposed “non-quantified” benefits are highly speculative. Finally, the cost of the Proposal, if adopted, will be quite large and vastly larger than the Department suggests.

#### **Section A.1: Markets for Regulated Retirement Products and Investment Advice Have Changed**

Beginning well before and continuing well after the Department embarked in 2010 on its efforts to expand the application of fiduciary advice standards for retirement investors and impose new compliance burdens on those who are fiduciaries, **market developments have worked to vitiate the need for such regulatory changes. The Department’s failure to incorporate and quantify these developments raises serious concerns about the adequacy of the RIA.**

#### **Market Developments Have Eliminated Load Fees as a Justification for the Proposal**

In its 2015 Proposal and 2016 Rule, the Department evinced considerable concern that retirement investors were being harmed by using brokers. Although we have long believed that these claims are baseless—financial professionals, whether brokers or not, provide valuable services to clients—the Department cited a number of academic studies that it claimed supported its view.

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<sup>5</sup> 88 Fed. Reg. at 75894.

However, as we pointed out to the Department in comment letters in 2015 and 2016, the market for distributing mutual funds and paying for investment advice had already undergone a sea-change, effectively rendering obsolete the studies the Department cites.<sup>6</sup> In the late 1990s, mutual fund markets were segregated, with little head-to-head competition between broker-sold funds and direct-sold funds or funds that did not otherwise charge a sales load (“no-load” funds). In particular, in 2000, only about half of the funds with a front-end load share class also had a no-load share class.

Several of the academic papers the Department cited argued that this segmentation led to broker-sold funds having weaker competitive pressures to produce returns. However, this segmentation had disappeared by 2010. By then, 90 percent of funds with a front-end load share class also offered a no-load share class. This created head-to-head competition between broker-sold and no-load funds, transforming the market and the ways that investors could pay for advice. This was significant, because many of the studies the Department had cited in support of its 2015 Proposal and 2016 Rule relied heavily on data before, or early on, in this sea-change period. Thus, for the purposes the Department wished to use them, these studies were already obsolete by 2015 to 2016.

Nevertheless, the current Proposal persists in suggesting that these outdated studies, which rely heavily on load fees, help justify the need for a revised ERISA fiduciary regulation.<sup>7</sup> In fact, market developments since 2016 have rendered this argument even more passé than it was at that time. Assets in back-end load share classes of long-term mutual funds have dwindled to about zero and those in level-load share classes are following close behind. Front-end load share classes have seen net outflows in every single year since 2007 with only one exception (positive but near zero inflows in 2009), and these outflows cumulated to over \$2 trillion by 2022. In

<sup>6</sup> See ICI comment letter from Brian Reid and David W. Blass to EBSA Re: RIN 1210-AB32: Regulatory Impact Analysis, Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice, July 21, 2015; [ICI comment letter from Brian Reid and Sean Collins to Joseph Piacentini, Chief Economist, EBSA, Re: RIN 1210-AB32: Definition of the Term “Fiduciary”](#); Conflict of Interest Rule – Retirement Investment Advice/ZRIN 1210-ZA25: Proposed Best Interest Contract Exemption, December 1, 2015; [ICI comment letter from Brian Reid and David W. Blass to EBSA Re: RIN 1210-AB79: Proposed Rule: Re-examination of Fiduciary Rule, April 17, 2017](#). See also Fed. Reg. at 75927, footnote 272, citing a study by Jasmin Sethi, Jake Spiegel, and Aron Szapiro, Conflicts of Interest in Mutual Fund Sales: What Do the Data Tell Us?, 6(3), The Journal of Retirement 46–59 (Winter 2019); this study updates the findings of the Christofferson, Evans, and Musto (2013) study that the Department cites, concluding that “After 2009, we do not find any statistically significant effect of excess loads [paid by brokers] on excess performance when we control for previous returns.” In other words, with updated data, the results in Sethi et al. (2019) indicate that results in the Department’s 2016 RIA do not hold.

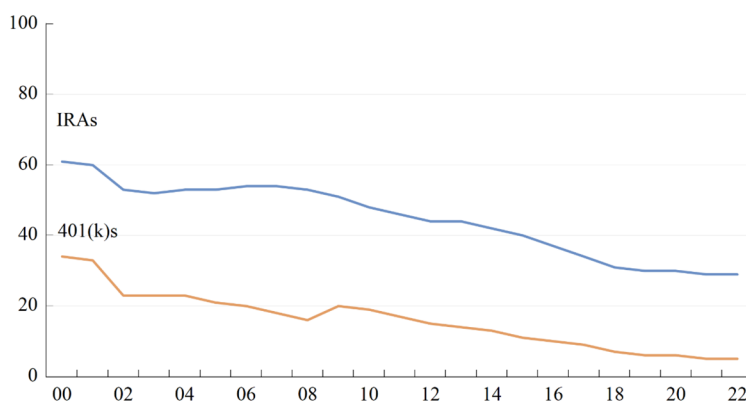
<sup>7</sup> 88 Fed. Reg. at 75939 (footnotes 372 and 373 citing research published in 2002 and 2013), 75942 (footnote 402, showing loads to be relatively inconsequential to the current market); 75943 (footnote 407 citing front-end load funds for which loads were already paid as of 2017 and thus for which a transition to T shares would have negative impacts for investors); 75943 (footnote 411, citing work published in 2008); 75943 (footnotes 412 and 413, both citing work from 2013); and finally at 75943 (footnote 414, citing better transaction timing in work from 2023, a period reflecting current market circumstances). All but one of these citations is from before the current regulatory base line. One is misrepresented (footnote 272), one offers a hypothetical which would harm investors (footnote 407). The one that is relevant (footnote 414) shows load investors to be more adroit, this fails to motivate any concern with front-end load compensation models on the part of the Department and cannot be used as a basis for this Proposal.

contrast, over the same period, in all but three years, no-load share classes saw net inflows, which totaled roughly \$1.5 trillion.<sup>8</sup>

**Figure A.1**

**Proportion of Assets in Load Share Classes Has Fallen Substantially**

*Percentage of mutual fund assets in IRAs or 401(k) accounts that are held in load share classes*



Source: Investment Company Institute

The same trends are apparent in 401(k) plans and IRAs. For example, in 2000, 34 percent of mutual fund assets in 401(k) plans were held in load share classes (front-end load, back-end load, or level load; Figure A.1). That percentage fell to 5 percent by 2022.<sup>9</sup> The share of IRA long-term mutual fund assets in load share classes, although starting at a higher level in 2000 (61 percent), fell about the same amount, ending up in 2022 at 29 percent.

<sup>8</sup> The emphasis on no-load funds is also evident in gross sales. In 2022, 91 percent of gross sales of long-term mutual funds went to no-load funds without 12b-1 fees, compared with 68 percent in 2010, 59 percent in 2005, and 46 percent in 2000. See Figure 4 in Duvall and Rybak, 2023, “Trends in the Expenses and Fees of Funds, 2022,” *ICI Research Perspective* 29(3), available at <https://www.ici.org/system/files/2023-03/per29-03.pdf>.

<sup>9</sup> See Holden, Rybak, and Chism, 2023, “The Economics of Providing 401(k) Plans: Services, Fees, and Expenses, 2022,” *ICI Research Perspective* 29(6), available at <https://www.ici.org/system/files/2023-07/per29-06.pdf>. Specifically, see Figure 5 in the accompanying Supplemental Tables, available at <https://www.ici.org/system/files/2023-07/per29-06-data.xlsx>.

The Department acknowledges these changes only in general terms,<sup>10</sup> but without noting their full extent or significance. In addition, the Department acknowledges that the SEC's adoption of Regulation Best Interest (Reg BI)<sup>11</sup> in 2019 is likely to have mitigated some of its concerns about harms to retirement investors.<sup>12</sup> This is significant because these developments reduce any potential benefits, quantified or not, of this Proposal.

**The Department's acknowledgement that the world has changed is important in a different respect: it demonstrates a lack of consistency between the preamble and the RIA.** The Department acknowledges that changes occurring since at least 2016 have reduced harms to retirement investors. Nevertheless, the preamble states, "*As noted earlier, advisory conflicts ... are very costly for retirement investors. The cost is high both on aggregate and for individual retirement investors.*"<sup>13</sup>

The Department cites analyses it relied on for its 2015 Proposal and 2016 Rule, which relied very heavily on pre-2010 data on load- versus no-load share classes (or funds); in cases the data in those studies date back to 2000 or earlier. What was true in 2015 and 2016 is even more true today: those studies are now extremely obsolete, study a market structure that no longer exists, and cannot form any basis of support for this Proposal.<sup>14</sup>

Moreover, despite the RIA's acknowledgement that the market has changed, it fails to quantify any benefits of this Proposal, and the preamble simply recycles the problematic benefit estimates that the Council of Economic Advisers (CEA) and Department offered up in 2015. Those

<sup>10</sup> 88 Fed. Reg. at 75927, stating that "The 2016 Final Rule and recent SEC actions highlighted inherent conflicts of interest in how broker-dealers or investment advisers are compensated for recommending certain share classes of mutual funds. Since then, share classes without traditional conflicts of interest have increased in popularity."

<sup>11</sup> *Regulation Best Interest: The Broker-Dealer Standard of Conduct*, 84 Fed. Reg. 33318 (July 12, 2019) ("Reg BI").

<sup>12</sup> 88 Fed. Reg. at 75921, stating that "Under the Investment Advisers Act and Regulation Best Interest, investment advisers and broker-dealers must have a reasonable basis to believe both the rollover itself and the account being recommended are in the retail investor's best interest ... [T]he SEC's regulatory framework is likely to mitigate some of the aforementioned harms to retirement investors."

<sup>13</sup> 88 Fed. Reg. at 75938.

<sup>14</sup> Indeed, one of the studies that Department in its [April 2016 RIA](#) as evidence of the need for the 2016 Rule was subsequently redone by one of the authors who found that their earlier results were reversed upon consideration of newer data. The April 2016 RIA states at page 151 that "Del Guercio and Reuter (2014) find that broker-sold funds underperform direct-sold funds by an average of 1.15 percentage points per year after accounting for risk and other factors. The authors identify misaligned incentives in the broker-sold market as the cause of the underperformance." That study used mutual data covering 1992 to 2004 (see Diane Del Guercio and Jonathan, "[Mutual Fund Performance and the Incentive to Generate Alpha](#)," *Journal of Finance*, vol LXIX, no. 4, August 2014, 1673-1704). In a subsequent paper, Jonathon Reuter revisited his earlier analysis with Diane Del Guercio using mutual fund data for 2003-2012 and found results he interprets as indicating that "the average broker-sold fund has become more competitive with the average direct-sold fund." He reports that broker-sold funds underperformed direct-sold funds by only 18 basis points over the period 2003-2012. That was less than one-fifth of the 100 basis point underperformance the April 2016 RIA had assumed in constructing its benefits estimates. See, Jonathan Reuter, "[Revisiting the Performance of Broker-sold Mutual Funds](#)," working paper Boston College and NBER, November 2, 2015. The Department fails to cite Reuter's updated paper in this Proposal.

estimates totaled from \$200 billion to nearly \$1 trillion over 20 years,<sup>15</sup> but were based on data that were well and truly obsolete because the retirement and advice markets had changed so much in the 15 years before 2015.<sup>16</sup> The Department reduced those benefit estimates in the 2016 final rule to \$95 billion and \$189 billion over the next 10 years and between \$202 billion and \$404 billion over the next 20 years.<sup>17</sup> All of these estimates were roundly criticized. Now, in this Proposal, the Department has cannot quantify *any* benefits.

Given that the Department acknowledges the world has changed even more since 2016, the continued reference to these earlier analyses cannot be a substitute for offering a benefit estimate for the current Proposal. The reference is all the more concerning because those earlier benefit estimates were based on obsolete data, partial analyses, and a significant math error.

For example, the Department argues — once again in this Proposal as a supposed basis of the need for a new rule — that “A substantial body of research has shown that IRA holders receiving conflicted investment advice can expect their investments to underperform by approximately 50 to 100 basis points per year.”<sup>18</sup> As support for this idea, the Proposal cites a 2015 paper by the Council of Economic Advisers (CEA).<sup>19</sup> The CEA paper in turn argues that load mutual funds underperform by 100 basis points per year,<sup>20</sup> stating that its conclusions were “based on a careful review of the relevant academic literature.”<sup>21, 22</sup> But their conclusions were based on a number of

<sup>15</sup> See *Federal Register* 80(75): 21952.

<sup>16</sup> See ICI comment letter from Brian Reid and David W. Blass to EBSA Re: RIN 1210-AB32: Regulatory Impact Analysis, Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice, July 21, 2015; [ICI comment letter from Brian Reid and Sean Collins to Joseph Piacentini, Chief Economist, EBSA, Re: RIN 1210-AB32: Definition of the Term “Fiduciary”](#); Conflict of Interest Rule – Retirement Investment Advice/ZRIN 1210-ZA25: Proposed Best Interest Contract Exemption, December 1, 2015; [ICI comment letter from Brian Reid and David W. Blass to EBSA Re: RIN 1210-AB79: Proposed Rule: Re-examination of Fiduciary Rule, April 17, 2017](#).

<sup>17</sup> See *Federal Register* 81(68): 20950.

<sup>18</sup> 88 Fed. Reg. at 75917.

<sup>19</sup> 88 Fed. Reg. at 75917, footnote 192, citing Council of Economic Advisers, 2015, *The Effects of Conflicted Investment Advice on Retirement Savings*, available at [https://obamawhitehouse.archives.gov/sites/default/files/docs/cea\\_coi\\_report\\_final.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_coi_report_final.pdf).

<sup>20</sup> See Table 5 in Council of Economic Advisers, 2015, op cit. supra.

<sup>21</sup> See Council of Economic Advisers, 2015, op cit. supra.

<sup>22</sup> Remarkably, this Proposal goes even farther than CEA did in 2015. 88 Fed. Reg. at 75917, footnote 194. While the CEA estimated a roughly 100 basis point loss, the Department now argues for as much as 2 percentage points (200 basis points) of loss. The 2 percent figure is simply drawn out of thin air, representing as the Proposal argues “a scenario for an individual where the impact of conflicts of interest is more severe than average.” As noted above, the 100 basis point figure is based on highly obsolete studies, so any of these figures —whether 50, 100 or 200 basis points—are devoid of support.

academic papers that were arguably obsolete in 2015 and certainly are now.<sup>23</sup>

In addition, we have elsewhere pointed to a number of problems with the Department's (and the CEA's) conclusion that IRA investors underperform by 50 to 100 basis points per year.<sup>24</sup> For example, even taking as given the academic studies that the Department's 50 to 100 basis point estimates are based on, as we showed in our comment letters to the Department in 2015, 2016, and 2017, those estimates fail to hold if one examines the performance of all mutual funds rather than focusing narrowly on domestic equity mutual funds, which is what key academic studies the CEA cites did. In addition, we demonstrated that the supposed underperformance evaporates for all types of funds when using updated data.<sup>25</sup> Finally, **ICI has shown that the Department's benefit estimates in its 2016 RIA were overstated 15 to 30 times simply because of a math error.** Adjusting for these problems revealed that the Department's 2015 and 2016 benefits inline estimates were sheer hyperbole.<sup>26</sup> In the adopting release for Reg BI, both the SEC and

<sup>23</sup> See Table 4 in Council of Economic Advisers, 2015, op cit. supra.

<sup>24</sup> See ICI comment letter from Brian Reid and David W. Blass to EBSA Re: RIN 1210-AB32: Regulatory Impact Analysis, Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, July 21, 2015; [ICI comment letter from Brian Reid and Sean Collins to Joseph Piacentini, Chief Economist, EBSA, Re: RIN 1210-AB32: Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice/ZRIN 1210-ZA25: Proposed Best Interest Contract Exemption, December 1, 2015](#); [ICI comment letter from Brian Reid and David W. Blass to EBSA Re: RIN 1210-AB79: Proposed Rule: Re-examination of Fiduciary Rule, April 17, 2017](#).

<sup>25</sup> As we noted above, academic studies that have sought to replicate their previous studies with more recent data have found that their earlier results no longer hold. See Jonathan Reuter, "[Revisiting the Performance of Broker-Sold Mutual Funds](#)," working paper Boston College, November 2, 2015, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2685375](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2685375).

<sup>26</sup> See ICI comment letter from Brian Reid and David W. Blass to EBSA Re: RIN 1210-AB32: Regulatory Impact Analysis, Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, July 21, 2015; [ICI comment letter from Brian Reid and Sean Collins to Joseph Piacentini, Chief Economist, EBSA, Re: RIN 1210-AB32: Definition of the Term "Fiduciary"](#). In an earlier analysis of our work, an outside consultant hired by the Department argued that our analysis was incorrect and that the Department's 2015 RIA benefit estimates remained valid. See Karthik Padmanabhan, Constantijn Panis, and Timothy Tardiff, [Review of Selected Studies and Comments in Response to the Department of Labor's Conflicts of Interest 2015 Proposed Rule and Exemptions](#). The consultant also was incorrect and, as was apparent from the consultant's comments, it misunderstood the Department's mistake and our critique of that mistake. Because of this, and because our point was somewhat technical, ICI filed an additional comment letter in 2017 to explain step-by-step why the DOL's analysis is incorrect. See Appendix A in [ICI comment letter from Brian Reid and David W. Blass to EBSA Re: RIN 1210-AB79: Proposed Rule: Re-examination of Fiduciary Rule, April 17, 2017](#).

The Department's error arose because it inappropriately replaced the correct unit of measure (changes in "excess" front-end loads paid to brokers) with an incorrect unit of measure (changes in front-end loads paid to brokers). The two units of measure have very different magnitudes and, though sounding similar, represent very different concepts. A loose analogy is the following: a police officer on the freeway inadvertently sets the radar speed gun to kilometers/hour. The speed limit on the road is 60 miles/hour. The officer records a car going 100 kilometers/hour and arrests the driver for going 40 miles/hour over the limit. As we showed in our 2017 comment letter, taking as given all else in the Department's 2016 RIA — including its reliance on obsolete data — that single mistake alone led the Department to overstate its benefit estimates by 15 to 30 times.



academic experts confirmed ICI's conclusions.<sup>27</sup>

Moreover, as with earlier benefit estimates, the Department's current Proposal does not factor in harms from the loss of tools and advice that some retirement investors (especially those with smaller balances) will experience. When we commented on this problem in 2015 and 2016, we noted that harms from the 2016 Rule would include investors experiencing lower returns because of poor asset allocation decisions, poorly timed investment decisions, penalties for early withdrawals, or incorrectly calculating RMDs (required minimum distributions).<sup>28</sup> Though our earlier comment letters to the Department demonstrate that these kinds of harms can mount up to big losses for investors, the current Proposal yet again fails to consider these kinds of harms, either quantitatively or qualitatively.

In short, the Department simply cannot continue to rely on outdated and flawed benefit estimates from the earlier studies it cites. The world has changed, which means those earlier studies — even if they were flawless — are even more obsolete than they were in 2016 and, hence, do not and cannot represent regulatory impacts of the current Proposal.

Indeed, this point is underscored by a paper the Department commissioned and the Proposal cites.<sup>29</sup> That paper reports findings it interprets as indicating that over the period 2007 to 2016, investors in US equity load mutual funds underperformed investors in US equity no-load mutual funds by 1.12 percent per year. The study, however, finds that the world has changed dramatically. It reports evidence that investors in US equity load funds *outperformed* investors in no-load funds by 0.45 percent from January 2017 to June 2020, and from July 2020 to June 2023

<sup>27</sup> See Securities and Exchange Commission, "Regulation Best Interest: The Broker-Dealer Standard of Conduct," Federal Register, Vol. 84, No. 134 / Friday, July 12, 2019, page 33436, stating that "Commenters also stated that we should have incorporated the approach used by the DOL RIA and the CEA to quantify aggregate investor harm. While both of these analyses surveyed a broad literature on the relative performance of broker-sold versus direct-sold mutual funds, they both relied on a particular study to estimate aggregate investor harm, extrapolating the effect of "excess loads" on the performance of broker-sold funds to total industry-wide AUM. We disagree with this approach because, as noted by commenters, we believe these analyses misapplied the particular study's results. When the results of the study are correctly applied, the aggregate estimate of investor harm obtained using this approach is negligible." See also Craig M. Lewis, *The Flawed Cost-Benefit Analysis Underlying the Department of Labor's Fiduciary Rule* (White Paper, Aug. 2017), available at <https://www.sec.gov/comments/ia-bd-conduct-standards/cll4-2268185-160965.pdf>; Public Interest Comment from Mark Warshawsky & Hester Peirce, George Mason University Mercatus Center (Apr. 17, 2017), available at <https://www.mercatus.org/system/files/warshawsky-dol-fiduciary-rule-pic-v1.pdf>. See also Quinn Curtis, *The Fiduciary Rule Controversy and the Future of Investment Advice* (Univ. of Va. Sch. of Law, Law & Econ. Research Paper Series No. 2018-04, Mar. 2018).

<sup>28</sup> See Figure 11, ICI comment letter from Brian Reid and David W. Blass to EBSA Re: RIN 1210-AB32: Regulatory Impact Analysis, Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, July 21, 2015, available at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/00749.pdf>.

<sup>29</sup> See Panis and Padmanabhan, "[Buy Low, Sell High: The Ability of Investors to Time Purchases and Sales of Mutual Funds](#)," October 5, 2023. As noted in the body of our comment letter, the Department failed to release this study publicly until about 30 days into the comment period and only after ICI filed a request that the Department release the study.

investors in US equity load and no-load funds had roughly similar performance. Thus, the Department's own commissioned study suggests a lack of need for the Proposal.

**The world has also changed because improved disclosures have combined with market forces to reduce costs retirement investors incur to save through funds.** For example, when funds grow — as they have over the past two decades — economies of scale work to push their expense ratios down.<sup>30</sup> Competitive pressures have also worked to lower investors' costs. On the supply side, fund providers have competed intensely for investors' assets. This competition has been fostered by the development of products such as index funds, ETFs, and target date funds. In addition, collective investment trusts (CITs) compete with mutual funds in the employer-sponsored retirement plan market.<sup>31</sup> On the demand side, access to such products has increasingly led investors to concentrate their assets (including 401(k) plan and IRA assets) in lower-cost funds, which in turn has added to competitive pressures in these markets.<sup>32</sup>

#### *Costs of Investing in 401(k) Plans and IRAs Have Fallen*

As a result of these forces, retirement investors today benefit from much lower fees than when the Department began seeking to revise fiduciary standards in 2010. BrightScope analysis — which combines Department of Labor Form 5500 data with other market information on fees — finds that since 2009, total 401(k) plan costs<sup>33</sup> have decreased whether measured on a plan-, participant-, or asset-weighted basis.<sup>34</sup> For example, total plan costs declined from 0.65 percent to 0.51 percent on a participant-weighted basis.<sup>35</sup> Furthermore, smaller plans saw the largest reductions. In addition, analysis of fees paid on mutual funds held in 401(k) plans shows that plan participants have over time concentrated their assets in lower-cost funds, thus pushing down average fees incurred.<sup>36</sup>

<sup>30</sup> See Duvall and Rybak, 2023, op cit. supra.

<sup>31</sup> Indeed, tabulations of the Department's Form 5500 data for large 401(k) plans show that 30 percent of large 401(k) plan assets were invested in CITs in 2021, compared with 19 percent in 2016 and 12 percent in 2010. See Figure 3.12 in Investment Company Institute, 2023, *2023 Investment Company Fact Book: A Review of Trends and Activities in the Investment Company Industry*, available at <https://www.icifactbook.org/>.

<sup>32</sup> See Holden, Rybak, and Chism, 2023, op cit. supra, and Investment Company Institute, 2023, *IRA Mutual Fund Investors Reap the Benefits of Declining Fund Expense Ratios*, op cit. infra, and discussion below.

<sup>33</sup> Total plan cost includes asset-based investment management fees, asset-based administrative and advice fees, and other fees (including insurance charges) from the Form 5500 and audited financial statements of 401(k) plans covered by ERISA. When plans use products registered under the Investment Company Act of 1940, such as mutual funds, expense data from Lipper are used to calculate fees. When plans use non-1940 Act products, such as CITs and pooled separate accounts, BrightScope uses an algorithm to estimate investment management fees.

<sup>34</sup> See Exhibit 4.1 in *The BrightScope/ICI Defined Contribution Plan Profile: A Close Look at 401(k) Plans, 2020* (September 2023), available at <https://www.ici.org/system/files/2023-09/23-rpt-dcplan-profile-401k.pdf>.

<sup>35</sup> Ibid.

<sup>36</sup> See Holden, Rybak, and Chism, 2023, op cit. supra.



Fees that IRA mutual fund investors pay have similarly fallen steadily for at least two decades. For example, asset-weighted average expense ratios IRA investors incurred for investing in equity, hybrid, and bond funds fell from 0.85, 0.80, and 0.63 percent in 2010 to 0.51, 0.53, and 0.37 percent in 2022.<sup>37</sup>

These declines, reflecting longer-term trends in a competitive industry, have continued over the past several years. For example, the Fifth Circuit vacated the Department's 2016 Rule in early 2018.<sup>38</sup> Over the period 2019 to 2022, expense ratios incurred by IRA investors on average fell nearly 10 percent.<sup>39</sup> Given that the trend toward lower fund fees was evident as early as 2000, and has continued more or less steadily year-by-year since then, it seems likely that it will continue quite independently of this Proposal. This, in turn, must reduce any potential benefit of the rule, now and even more so than was the case in 2010 when the Department embarked on these efforts.<sup>40</sup>

## A.2 The Proposal Fails to Consider Harm to Retirement Investors

As was true of the RIA in the Department's 2015 Proposal, this Proposal's RIA does not consider or discuss the likelihood that the Proposal might harm retirement investors. ICI member firms have indicated that they are concerned that educational materials on their websites, information provided by call center reps, and "nudges" currently used to promote retirement saving could trip the fiduciary wire, and therefore, would need to be curtailed.

Financial services firms provide educational materials and information in a wide array of settings, such as for when: individuals change jobs or retire and roll over accumulations in their workplace plans into IRAs and when an employee first enrolls or gets enrolled in their employer-sponsored retirement plan. Financial services firms also provide "nudges" as participants age and

<sup>37</sup> See Figure 1 in Investment Company Institute, 2023, *IRA Mutual Fund Investors Reap the Benefits of Declining Fund Expense Ratios*, available at <https://www.ici.org/system/files/2023-10/23-ira-fees.pdf>.

<sup>38</sup> On March 15, 2018, the Fifth Circuit Court of Appeals issued a decision in *Chamber of Commerce v. United States Department of Labor*, vacating the 2016 Rule in its entirety. See *Chamber of Commerce*, 885 F.3d 360 (5th Cir. 2018).

<sup>39</sup> See tab "figs 2, 3, 4" in *IRA fee data*, available at <https://www.ici.org/system/files/2023-10/23-ira-fees.pdf>.

<sup>40</sup> 88 Fed. Reg. at 75927, footnote 272, which writes "Sethi, Spiegel, and Szapiro (2019) found that the Department's 2016 Final Rule reduced flows into funds with excess loads." The Department misrepresents the authors' findings, and gives the now vacated rule more credit than the authors did. The authors in fact report continued changes "around the time the DOL proposed the fiduciary rule" (underlining for emphasis added). Importantly, the authors do not identify a causal link stemming from the Final Rule, and note that changes began earlier, "after the passage of Dodd-Frank." Further, the data analyzed by these authors extend only through 2017 and cannot account for impacts of adoption of the Final Rule before it was vacated, nor for impacts from Reg BI, nor from PTE 2020-02, nor from the NAIC Model Regulation.

In another place, other authors cite a benefit of the 2016 Rule tied to a 2022 paper by Egan, Ge, and Tang (88 Fed. Reg. at 75943, footnote 416, citing: Egan, Ge, and Tang, "Conflicting Interests and the Effect of Fiduciary Duty—Evidence from Variable Annuities" 35(12) *The Review of Financial Studies* (December 2022)). Though published recently, this paper also depends on the prior regulatory baseline and older market data (88 Fed. Reg. at 75944).

have longer tenure in the retirement plan. This information flows through plan/investor websites, tools and calculators, call centers, or “nudges” including through automatic plan features, emails reminding participants to consider taking advantage of employer matches, catch-up contributions, or automatic increases; or reminders to IRA investors that the April 15 deadline for making contributions is approaching. The loss of these prompts will harm retirement investors.

***Potential Harm to IRA Investors at the Time of Rollover from an Employer Plan***

**Retirement investors will be harmed if financial services and plan sponsor educational materials and information fall into the scope of covered advice and are therefore curtailed,** as ICI’s members fear. Retirement savers looking to roll over assets would face reduced call center availability and website materials to assist them in their decision-making. US households with rollovers in their traditional IRAs indicate that these materials are important factors in their rollover decision. These households research the rollover decision, relying on materials provided by financial professionals, employers (i.e., the plan), and financial services firms’ materials (Figure A.2).

Taking away the tools that these retirement investors rely on to help them make decisions will make their decisions more difficult and will not enhance investors’ trust in their ability to meet their retirement goals.

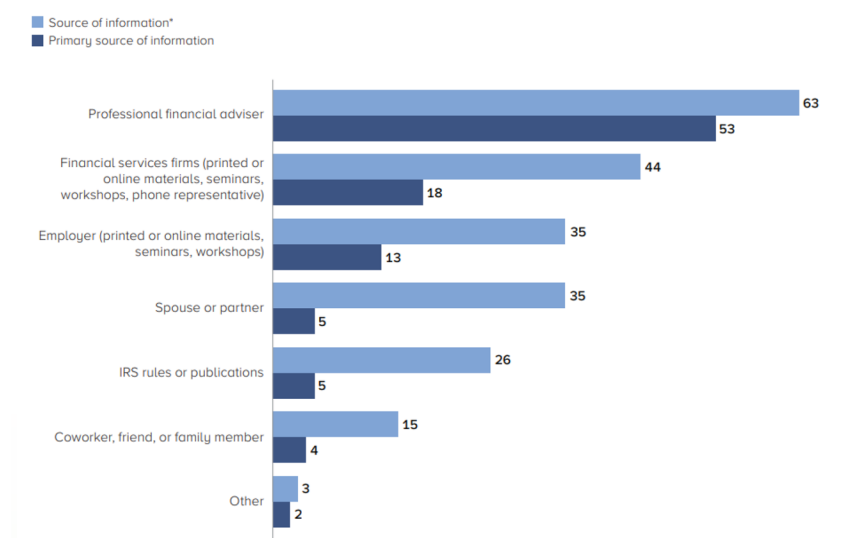
The Proposal seems to describe retirement investors as almost prostrate before investment choices and market forces. In a section entitled “Inexpert Customers,” the Department implies that its Proposal is needed because retirement investors “fail to grasp essential aspects of risk diversification, asset valuation, portfolio choice, and investment fees” and that “such customers appear to be particularly vulnerable to receiving harmful advice.”<sup>41</sup>

It is certainly true that not all retirement investors have a deep understanding of financial markets. Nor should they – they rely on financial professionals for that. **But contrary to the Department’s depiction, the data show that retirement investors respond to market forces, make asset allocations that follow basic principles of investment, and are engaged in the decision-making process around IRA investing.**

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<sup>41</sup> 88 Fed. Reg. at 75916.

**Figure A.2**  
**US Households Research Rollover Decisions Relying on Educational Information from Plan Sponsors and Financial Services Firms**  
 Percentage of households owning traditional IRAs that include rollovers, 2022



\* Multiple responses are included; 63 percent of traditional IRA-owning households with rollovers consulted multiple sources of information when making their rollover decision.

Note: Other responses given included myself, other online information, and banks.

Source: Investment Company Institute IRA Owners Survey

For example, ICI research shows that IRA investors respond to lower fees by concentrating their assets in lower-cost funds.<sup>42</sup> IRA investors also often invest in ETFs,<sup>43</sup> which offer cost-effective diversified portfolios.

Data indicate that IRA investors also understand and follow basic rules of risk diversification, portfolio choice, and investment returns. For example, IRA assets in mutual funds are diversified, across domestic equity (43 percent), world equity (12 percent), hybrid (18 percent),

<sup>42</sup> See Figures 2 and 3 in Investment Company Institute, 2023, *IRA Mutual Fund Investors Reap the Benefits of Declining Fund Expense Ratios*, available at <https://www.ici.org/system/files/2023-10/23-ira-fees.pdf>.

<sup>43</sup> About one-third of households owning traditional or Roth IRAs in 2022 held ETFs in their IRAs. See Figure A23 in Holden and Schraas, 2023, appendix file, available at <http://www.ici.org/files/per29-01-data.xls>.

bond (16 percent), and money market funds (10 percent).<sup>44</sup> Research into the asset allocation of individual IRA accounts finds that retirement investors hold age-appropriate diversified portfolios.<sup>45</sup> Retirement investors also understand that investing involves tradeoffs between risk and reward. For example, survey data indicate that individual investors are willing to accept the risk-reward tradeoff of the stock market in exchange for the chance to earn higher long-run returns.<sup>46</sup>

In addition, retirement investors are actively engaged in asset allocation decisions made during the rollover process. A majority of traditional IRA-owning households with rollovers indicate they are actively involved with the asset allocation decisions. When asked about the selection of the initial asset allocation of rollover assets in traditional IRAs, 22 percent of traditional IRA-owning households with rollovers indicated that their professional financial adviser selected the investments; 44 percent indicated that they worked together with a professional financial adviser to select the investments; and 34 percent reported that the household selected the investments without outside help.<sup>47</sup>

#### ***IRA Investors May Revisit Their Financial Services Firm Choices***

There is additional evidence that IRA investors are actively engaged in decision-making around IRA investing, especially as they edge closer to retirement. Notably, they often revisit their choices of financial services firms as they age toward or into retirement. Rollovers are an important introduction to IRA investing. More than half (53 percent) of the traditional IRA accounts that were opened in 2020 represent rollovers from employer-sponsored retirement plans (Figure A.3).<sup>48</sup>

However, one-third of new traditional IRAs were opened because IRA investors moved from one financial services provider to another (Figure A.3). Because transfers can only occur after an initial account was opened, and because people continue to learn about the IRA market and their needs as they age, transfers increase as a proportion of new account openings as people age.

<sup>44</sup> See data for 2023:Q3 in Table 19 in Investment Company Institute, *Quarterly Retirement Market Data*, available at <https://www.ici.org/research/stats/retirement>.

<sup>45</sup> See The IRA Investor Database, available at <https://www.ici.org/research/retirement/ira-investor-database>.

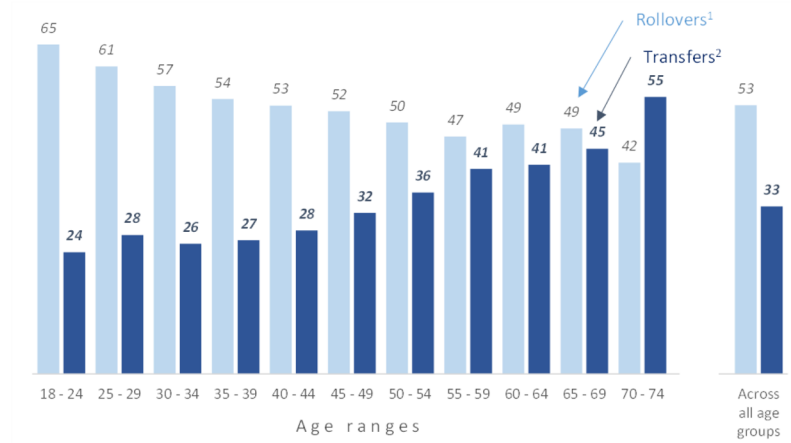
<sup>46</sup> See Holden, Schrass, and Bogdan, 2023, "Ownership of Mutual Funds and Shareholder Sentiment, 2023," *ICI Research Perspective* 29(10), available at <https://www.ici.org/system/files/2023-10/per29-10.pdf>.

<sup>47</sup> See Holden and Schrass, 2023, "The Role of IRAs in US Households' Saving for Retirement, 2022," *ICI Research Perspective* 29(1), available at [https://www.ici.org/system/files/2023-02/per29-01\\_0.pdf](https://www.ici.org/system/files/2023-02/per29-01_0.pdf).

<sup>48</sup> For more information on the IRA Investor Database, see <https://www.ici.org/research/retirement/ira-investor-database>.

**Figure A.3**

**One-Third of New Traditional IRAs Result from Switching Financial Services Firms**  
 Percentage of new traditional IRAs opened in 2020 by age of IRA investor



<sup>1</sup> Includes new traditional IRAs opened with rollovers only (the bulk of the activity), and with rollovers and contributions.

<sup>2</sup> Transfers are new accounts resulting from traditional IRA assets being moved from another financial services firm. Note: New traditional IRAs are accounts that did not exist in the IRA Investor Database in 2019. The sample is 0.5 million new traditional IRA investors aged 18 to 74 in The IRA Investor Database in 2020.

Source: The IRA Investor Database™

***Rule Change Could Harm IRA Investors by Reducing Portability and Preservation of Retirement Accumulations***

The Proposal does not consider the most obvious benefit of rollovers from employer-sponsored retirement plans to IRAs: the preservation of the preferential tax treatment afforded to employer-sponsored retirement plans by Congress.<sup>49</sup>

ICI members, along with other commenters,<sup>50</sup> have noted that the Proposal will increase burdens associated with IRA rollovers, likely resulting in fewer rollovers. The principal risk we see is with respect to rollovers from employer-sponsored retirement plans to IRAs, which offer retirement investors the opportunity to consolidate and keep track of their retirement

<sup>49</sup> The Department is aware of these provisions. 88 Fed. Reg. at 75918, “Congress provided special protections for tax-advantaged retirement savings that don’t apply more broadly.” Nevertheless, the Proposal fails to consider that it may prevent retirement savers from realizing the full benefits Congress intended.

<sup>50</sup> See Warshawsky, 2023, Comment Letter, AEI, available at <https://www.aei.org/wp-content/uploads/2023/11/Comment-Letter-DOL-EBSA-November-2023-MJW.pdf?x91208>.

accumulations as they move from job to job over their careers.<sup>51</sup> If individuals take a distribution from the plan and fail to roll it over within a 60-day window, they must pay income tax on the full balance they failed to rollover, and possibly an additional early distribution penalty. While one can move from one IRA to another IRA at any later date, one cannot remedy the loss stemming from a failure to transact a rollover in a timely manner,<sup>52</sup> nor the beneficial compounding of investment returns on the amount lost. To the extent that retirement savers find it harder or more costly to access advice if the Rule is adopted, they will be harmed by these kinds of tax effects.

***Employer-Sponsored Retirement Plan Participants Face Harm If Educational Materials, Information, and “Nudges” Become Covered Advice***

Depending on the final formulation of the test for investment advice, fund providers and 401(k) plan recordkeepers have voiced concerns that they may have to stop providing certain helpful services to retirement investors, simply because these activities might now (inappropriately) imply fiduciary status. For example, ICI member firms sometimes provide educational and information tools for use on retirement plan participants’ websites. If these activities were to fall within the investment advice definition, or if there were ambiguity about whether they fall within the definition, member firms indicate they would have no choice but to curtail offering such tools in order to avoid that outcome.

Additionally, ICI members have voiced concerns that call center employees may not be able to continue to explain plan investment options and help participants understand their choices because that could be viewed as covered advice. Prompts to “nudge” 401(k) participants also may become covered advice. Alerting plan participants if their contribution levels fall short of the level needed for a full employer match, informing participants if they are eligible for catch-up contributions, and automatic increases in employee contribution rates, could be construed as covered advice, under the Department’s language offered in the preamble. These kinds of interactions benefit retirement investors and promote saving and investing for retirement<sup>53</sup> and could be lost depending on how any final rule defines covered advice.

<sup>51</sup> Rollovers to traditional IRAs often are primarily used to consolidate retirement assets. When traditional IRA-owning households that chose to roll over assets were asked to identify the reasons for the rollover, 64 percent indicated they did not want to leave the assets with their former employer, with 22 percent indicating that was their primary reason; and 61 percent indicated they wanted to consolidate assets, with 22 percent indicating that was of their primary reason. See Figure 5 in Holden and Schrass 2023, *op cit. supra*.

<sup>52</sup> The Department should not fail to consider the risk of a loss of 1,000 to 4,700 basis points if the proposed rule results in increased transactional burdens for IRA rollovers. Marginal US tax rates vary from 10 to 37 percent (1,000 to 3,700 basis points). Additionally, a penalty rate of an additional 10 percent (1,000 basis points) typically applies for those who fail to complete a timely IRA rollover if they are under the age of 59½ years old.

<sup>53</sup> See Swire and Kennedy-Mayo, 2018, *2018 Update to Delivering ERISA Disclosure for Defined Contribution Plans: Why the Time Has Come to Prefer Electronic Delivery*, available at <https://peterswire.net/wp-content/uploads/2018-Update-to-Delivering-ERISA-Disclosure-for-DC-Plans-002.pdf>.

This seems contrary to the Department's stated goal (as indicated in the Proposal) of increasing trust in financial professionals. Taking away tools that help investors evaluate retirement- or investment-related decisions is unlikely to increase investors' trust in financial professionals and their products. Removing nudges that assist retirement savers on their path to retirement also jeopardizes trust and confidence in the retirement system.

### **A.3 Benefits of the Proposal Are Doubtful**

To determine whether the Proposal would result in net benefits to society, the Department must quantify both costs and benefits, and the Proposal does not do this. It is incumbent on the Department to fully evaluate the Proposal's costs, including compliance costs, and compare them to the benefits that the Proposal would engender.<sup>54</sup> As discussed in this section, the RIA explicitly declines to quantify any benefits. Nevertheless, the Proposal continues to hark back to pre-2017 benefit estimates that are large, but as discussed earlier, are based on very obsolete data and embody fundamental flaws. The RIA does offer some "non-quantified" benefits, but as discussed here, these are highly speculative.

**In sum, the Department offers no evidence that this Proposal would be beneficial.**

#### ***The Department Does Not Quantify Any Benefits***

The RIA declines to quantify any benefits of the Proposal.<sup>55</sup> The Proposal does not explain why the Department will no longer provide benefit estimates. This is striking and surprising, given that the Department had no difficulty providing benefit estimates for its 2015 Proposal and, even more significantly, that the Department continues to cite those previous benefit estimates, though (1) they were shown to be flawed, (2) the market has changed (much to investors' benefit), and (3) the regulatory base line has changed.<sup>56</sup>

The Department cannot have its cake and eat it too. It cannot both claim to be unable to produce benefit estimates for this Proposal and yet cite benefits estimates from the 2015 Proposal and 2016 Rule, which rely on obsolete data and embody fundamental errors. The Department cannot both fail to quantify any benefits of this Proposal but be willing to state unequivocally that "there is compelling evidence that retirement investors remain vulnerable to harm from conflicts of interest in the investment advice they receive."<sup>57</sup>

<sup>54</sup> See *Michigan v. EPA*, 576 U.S. 743, 752-53, 759 (2015).

<sup>55</sup> 88 Fed. Reg. at 75929, stating that "The Department is unable to quantify all benefits, costs, and transfers of the proposal but has sought, where possible, to describe these non-quantified impacts. The effects in the RIA's Table 2 reflect non-quantified impacts and estimated direct monetary costs resulting from the provisions of the proposal." Table 2 summarizes the Department's total cost estimates but leaves blank a space for benefit estimates.

<sup>56</sup> The Department notes that the fiduciary duty of investment advisers, as codified under the Investment Advisers Act of 1940, Reg BI, and PTE 2020-02 (20-02) form the regulatory baseline for this proposal. See 88 Fed. Reg. at 75922-75923. Only the first of these three existed at the time the vacated final rule was offered, thus citing prior RIA estimates of benefits is further misleading.

<sup>57</sup> 88 Fed. Reg. at 75914.

*The Department's Non-Quantified Benefits Are Highly Speculative*

The Department was previously able to provide benefit estimates for its 2015 Proposal, which begs the question of why the Department has now changed its mind about its ability to produce benefit estimates. Nevertheless, the Department argues that the Proposal would generate “non-quantified” gains for retirement investors by:

- Increasing uniformity in the regulation of financial advice for retirement investors, across different market segments and market participants;
- Protecting consumers from losses that can result from advisory conflicts of interest (without unduly limiting consumer choice or adviser flexibility);
- Giving retirement investors increased trust and confidence in their advisers and in the reliability of their advice; and
- Facilitating more efficient capital allocation.<sup>58</sup>

These four putative benefits are highly speculative. We discuss each in turn.

First, the Department suggests a non-quantified benefit “increasing uniformity in the regulation of financial advice for retirement investors, across different market segments and market participants”

The Department states that the Proposal would “harmonize” regulations across all markets used by retirement investors, promoting “clarity and efficiency.”<sup>59</sup> **It is unclear why this new Proposal would ameliorate the current patchwork of federal and state regulations rather than adding to it.**

Although the Proposal cites the SEC’s Regulation Best Interest rule (Reg BI) 131 different times, it fails to note that the final Reg BI rule explicitly ruled out a uniform fiduciary standard of conduct because of the harms posed to investors. As the SEC stated in Reg BI’s adopting release, “a ‘one size fits all’ approach would risk reducing investor choice and access to existing products, services, service providers, and payment options, and would increase costs for firms and for retail investors in both broker-dealer and investment adviser relationships.”<sup>60</sup> The SEC went on to say that their “concerns about the ramifications [of a uniform standard] for investor access, choice, and cost[s] ... are not theoretical.” In particular, the SEC stated that “With the adoption of the ... Department of Labor (“DOL”) Fiduciary Rule, there was a significant

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<sup>58</sup> 88 Fed. Reg. at 75937.

<sup>59</sup> 88 Fed. Reg. at 75938.

<sup>60</sup> See Federal Register 84(134) at 33322.



reduction in retail investor access to brokerage services, and we believe that the available alternative services were higher priced in many circumstances.”<sup>61</sup>

Second, the Department suggests a non-quantified benefit of “protecting consumers from losses that can result from advisory conflicts of interest (without unduly limiting consumer choice or adviser flexibility)”

The Proposal states that it will “generate benefits for, and transfers to, savers by reducing conflicts related to one-time advice concerning rollovers.”<sup>62</sup>

As an initial matter, the Department seems to invite readers to assume that “transfers” should be counted as “benefits” in the RIA’s cost benefit analysis. For example, the Proposal offers the statement that “transfers represent a beneficial gain to retirement investors and are a *primary objective of the proposed rule and PTE*” [emphasis added].<sup>63</sup> This is a remarkable statement because transfers (relating to cost-benefit analyses and not to be confused with retirement savers transferring their IRA balances from one financial firm to another) are a zero-sum game where one party benefits to the detriment of another, leaving no net benefit to society. Thus, in a cost-benefit analysis, any transfer that results in a benefit to one party must be offset somewhere in the cost-benefit analysis as a reduced benefit or increased cost to another party. As the OMB has clearly indicated, this means that transfers cannot, in and of themselves, generate net benefits in a cost-benefit analysis.<sup>64</sup> Nevertheless, the Proposal suggests that transfers are effectively equivalent to benefits.

Moreover, the Proposal does not even appropriately identify transfers. According to the OMB’s guidance to agencies on how to conduct cost-benefit analyses, a transfer is appropriate to consider *only if it results from a benefit that is offset dollar-for-dollar by costs identified elsewhere in the cost-benefit analysis*. The RIA does not appear to do this. Based on OMB guidance, the Department could get around the problem of the lack of a matched transfer benefit and transfer cost if the Department could prove that a transfer somehow reduces an economic “externality.” The RIA does not appear to do this, either. The RIA states that “[t]he available data do not allow the Department to quantify the gains to investors or the component social welfare ‘benefits’ and ‘transfers’.”<sup>65</sup> In other words, all of the putative benefits the RIA cites

<sup>61</sup> See Federal Register 84(134) at 33322, where the SEC writes, “Our concerns about the ramifications for investor access, choice, and cost ... are not theoretical. With the adoption of the now vacated Department of Labor (“DOL”) Fiduciary Rule, there was a significant reduction in retail investor access to brokerage services, and we believe that the available alternative services were higher priced in many circumstances. Moreover ... we do not believe that applying the existing fiduciary standard under the Advisers Act to broker-dealers or adopting a new uniform fiduciary standard of conduct ... would provide any greater investor protection (or, in any case, that any benefits would justify the costs imposed on retail investors in terms of reduced access to services, products, and payment options, and increased costs for such services and products).”

<sup>62</sup> 88 Fed. Reg. at 75938.

<sup>63</sup> 88 Fed. Reg. at 75937.

<sup>64</sup> See [OMB Circular No. A-4](#), November 9, 2023, at 57–60.

<sup>65</sup> 88 Fed. Reg. at 75937.

could simply be transfers that result in no net benefit to society, thus being inconsistent with OMB guidance.

As to supposed benefits from potentially reducing conflicts, investors, including retirement investors, are already protected from conflicts of interest by the SEC and FINRA rules. It is an active area for the SEC. For example, the SEC has a dedicated page on its website identifying a range of relevant information and SEC activities related to Reg BI for brokers, advisers, investors and others.<sup>66</sup> A piecemeal or a “silo” approach means an analysis would fail to meaningfully or fairly take account of the protections resulting from existing regulations and ongoing agency actions. The Department has acknowledged the interconnections among the regulatory regimes and thus should be analyzing those benefits.

Related to the claim that the Proposal would not “unduly” limit consumer choice, it is not made clear by what metric the Department would measure the net benefits or costs of any limit to consumer choice, such that they were not “undue.”

The Department attempts to find a benefit by generalizing: “Frequently, participants are better off leaving their 401(k) account in the retirement plan rather than rolling it over to an IRA, particularly if the 401(k) plan has low fees and high-quality investment options. Large 401(k) plans often have lower fees than IRAs, though smaller 401(k) plans sometimes find it difficult to keep fees low.”<sup>67</sup> This generalization actually underscores that there is no one-size-fits-all rollover decision by failing to recognize: (1) both the variety of fee structures paying for services in 401(k) plans and the overlap of the expense ratios charged on institutional and retail mutual fund share classes across the market;<sup>68</sup> (2) the possibility that IRA investors may access institutional mutual fund share classes; and (3) the full range of investment options available in IRAs,<sup>69</sup> including exchange-traded funds (ETFs).<sup>70</sup>

Third, the Department suggests a non-quantified benefit of “giving retirement investors increased trust and confidence in their advisers and in the reliability of their advice”

<sup>66</sup> See Securities and Exchange Commission, *Regulation Best Interest, Form CRS and Related Interpretations*, available at <https://www.sec.gov/regulation-best-interest>.

<sup>67</sup> 88 Fed. Reg. at 75938.

<sup>68</sup> See Brief of Investment Company Institute as Amicus Curiae in Support of Respondents, *Hughes v. Northwestern Univ.*, \_\_\_ U.S. \_\_\_, 142 S. Ct. 737 (2022) (No. 19-1401), (October 2021), available at <https://www.ici.org/system/files/2021-11/33879a.pdf>.

<sup>69</sup> More than half (54 percent) of traditional IRA-owning households (in 2022) with rollovers in their traditional IRAs indicated that one of their reasons for their most recent rollover was because they “wanted more investment options.” See Figure 5 in Holden and Schrass, 2023, *op cit. supra*.

<sup>70</sup> About one-third of households owning traditional or Roth IRAs in 2022 held ETFs in their IRAs. See Figure A23 in Holden and Schrass, 2023, appendix file, available at <http://www.ici.org/files/per29-01-data.xls>.

The Department claims that its Proposal will increase retirement investors' trust in financial professionals. The Department does not document any current lack of trust; indeed, the Proposal is based on the idea that financial professionals are *already* trusted by investors.

In addition, our members expressed concern that investor education and information could fall under covered advice. If so, some financial firms and plan sponsors will eliminate, and others will consider eliminating, offering informational emails documenting decision points such as when an investor (1) does not save in a plan (including when that plan has an employer match that the employee is not benefitting from), (2) reaches age 50 and is eligible for additional catch-up contributions, (3) holds a portfolio that lacks an age appropriate diversification to address short-run market volatility, or (4) faces a distribution decision in retirement.

We have also heard that, because of the Proposal's language, some firms offering Title I plan services would revisit auto-enrollment, auto-escalation, and default investments such as target date funds, and will consider changes to call center scripts to avoid having to respond to investors' broad enquiries about standard portfolio information. Firms are quite concerned that these informational supports could be interpreted as if they "*would influence an investor to trade a particular security or group of securities*,"<sup>71</sup> imposing a fiduciary title, even when a tool is being used by an investor in a limited and self-directed investment exercise.

In lieu of these tools, prompts, and supports, investors who otherwise would have received prompts or nudges, may now discover too late that they are not participating in an employer plan, that their savings have been sitting in cash, or that they were not rebalancing out of higher-risk investments as they near retirement. This would be harmful for retirement investors and would degrade, not increase, their trust in financial professionals.

As support for this supposed benefit, the Proposal references a single study relating to individuals' reactions to different advice scenarios through an online survey of individuals in Australia.<sup>72</sup> Given that retirement and fund markets differ substantially across jurisdictions, in no small part because of differences in laws and regulations, we question the relevance of this study. We again note the cost of the loss of tools from the vacated 2016 Rule documented by SEC as part of their Reg BI.<sup>73</sup>

Fourth and finally, the Department suggests a non-quantified benefit of "facilitating more efficient capital allocation"

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<sup>71</sup> 88 Fed. Reg. at 75904.

<sup>72</sup> 88 Fed. Reg. at 75941–75942.

<sup>73</sup> See Federal Register 84(134) at 33322.

The Department suggests that the Proposal will lead to more efficient allocation of capital. This is by far and away the most speculative of the Proposal's "non-quantified" benefits.

It is far from clear what the Department means by "efficient capital allocation." Although the RIA cites this as a key non-quantified benefit (page 75937), it actually mentions this term only one other time (page 75929). In neither instance does it define the term.

It is possible the Department is suggesting that retirement investors would allocate their individual portfolios more effectively because of the Proposal. The Proposal gives a hint of this on page 75942 claiming — in the context of a discussion that "There is evidence that good advice can improve saving and investing decisions" — that "the proposal may result in a beneficial reallocation of investment capital." However, the Department offers no evidence in support of this claim. It cites two studies, both of which make the point that investors may have better investment outcomes if they use a professional financial adviser. That seems given, but it has no bearing on the need (or not) for this Proposal. The question that the Proposal must answer is not whether retirement investors can benefit from professional financial assistance (most likely so), but whether this Proposal will improve the financial assistance they receive, lower the costs they pay for equally good information/assistance, or lead them to adopt better portfolio allocations. The Proposal provides no evidence that that is the case.<sup>74</sup>

In addition, the RIA is confused or confusing about whether "facilitating more efficient capital allocation" is a benefit or a transfer. It claims that "this proposal would generate economic gains for retirement investors by ... facilitating more efficient capital allocation."<sup>75</sup> But in its Table 2, the RIA classifies "Reallocation of investment capital to different asset classes, share classes, or investment products" as a *transfer*. As discussed above, according to OMB guidance, a "transfer" cannot be included as a net benefit; it must be offset elsewhere in the cost-benefit analysis by an equal fall in a benefit to another party or by an increased cost to some party. In other words,

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<sup>74</sup> It is possible that by "efficient capital allocation" the Department means something broader, such as in how corporations, or even the economy at large, allocate capital. One witness at the Department's December 13, 2023 hearing on the Proposal, Benjamin Edwards (professor at the William S. Boyd School of Law at the University of Nevada, Las Vegas) suggested that "conflicts of interest are absolutely critical for capital flows and for how, you know, our nation as a whole is able to allocate capital." See Department of Labor, EBSA, December 13, 2023, *Public Comment Hearing Retirement Security Rule: Definition of an Investment Advice Fiduciary*, page 97. Although the Proposal does not mention this, it is notable that Mr. Edwards submitted a comment letter to the Department in 2015 regarding the Department's proposed Conflicts of Interest Rule. In that letter, Mr. Edwards argued that the 2015 Proposal would improve "capital allocation in US financial markets." Thus, Mr. Edwards' suggestion seems to relate to a much more expansive suggestion than that this Proposal might cause investors to reallocate their individual portfolios. His discussion in his 2015 comment letter to the Department — although perhaps conflating "capital allocation" at an investor level with "capital formation" at a macroeconomic level — seems to be inviting readers to infer that the Proposal would lead to more efficient IPOs and bond issuance (e.g., "*Issuers* [emphasis added] do raise more capital by offering larger commissions."). See Benjamin Edwards comment letter to EBSA, Re: RIN 1210-AB32: Conflict of Interest Rule. We would caution the Department against accepting this as a definition of "efficient capital allocation" without very compelling evidence that the Proposal would somehow increase or better allocate capital across the economy. After all, the US is generally accepted as having the world's most efficient capital markets.

<sup>75</sup> 88 Fed. Reg. at 75937.

irrespective of what the Department means by “facilitating more efficient capital allocation,” the Department cannot count that as a benefit because it has already classified it in the RIA’s Table 2 as a transfer.

#### **A.4 The Department Consistently Underestimates the Costs of the Proposal**

The Department, although failing to quantify any benefits of the Proposal, does provide cost estimates. These are high, amounting to roughly \$253 million for the first year and \$216 million per year thereafter.<sup>76</sup> Nevertheless, our analysis indicates that the RIA vastly understates the Proposal’s costs.

**The Department repeatedly asks for information on its estimated costs and underlying assumptions, signaling a lack of rigor in the RIA.**<sup>77</sup> To be able to provide the kind of concrete cost data the Department has asked for, it would have been preferable to conduct a proper cost survey of industry participants. Such a survey could have helped the Department understand the importance of various cost factors, such as the number of firms affected; the variation in the impact by firm size; the number of accounts or investors at each firm; the number of contracts or disclosures that would need to be created, reviewed, updated, and distributed; the time involved in each task; wage costs; out-of-pocket costs for printing, postage, mailing; and third party service provider or outside counsel costs. This could have provided the Department with the kind of informative detail it asks for. Regrettably, this was not possible given the short comment period — which, because the Department was unwilling to extend it, ran squarely through the holiday season, effectively shortening the comment period.

**The Department’s cost estimates often are based on ad hoc assumptions and would benefit from actual data, which the Department frequently requests.** Although we were unable to conduct an in-depth assessment of all the Department’s many assumptions and their implications for costs, we conducted some sensitivity analyses using plausible alternative assumptions about some of the key factors affecting the Department’s first-year cost estimates for PTE 2020-02. The Department groups the costs related to PTE 2020-02 into five categories: rule review, general disclosures, rollover disclosures, retrospective review, and policies and procedures (Figure A.4).<sup>78</sup>

**Based on limited exercises employing modest reasonable alternative assumptions, we estimate that first-year costs of the Proposal could well-exceed \$2.9 billion dollars, more than 10 times the Department’s \$253 million estimate** (Figure A.4). This estimate is derived by assuming more plausible labor costs for legal and compliance work, more credible estimates of the number of legal professionals working on the rule, more reasonable amounts of review

<sup>76</sup> 88 Fed. Reg. at 75948, see Table 4.

<sup>77</sup> We count over 75 places in which the Department “requests” or “seeks” comments on specific aspects of the proposal, suggesting further that the Department would benefit from having issued a Request for Information, rather than a proposal that offered a Regulatory Impact Analysis of such low quality.

<sup>78</sup> For the Department’s presentation column in Figure A.4, we use the dollar amounts reported in 88 Fed. Reg. at 75953, footnote 499, which do not always match the Department’s estimates derived earlier in the RIA.

time, some exploration of scope, and a better representation of retail investor disclosure delivery costs, as will be detailed below.

**Figure A.4**  
**Summary of RIA Cost Estimates and ICI Sensitivity Analyses for First-Year Costs**

	Department's presentation	ICI corrections and sensitivity analysis
<b>Costs for PTE 2020-02:</b>		
<b>Rule review</b> <sup>1</sup>	\$27,663,017	\$2,540,377,260
<b>General disclosures</b> <sup>2</sup>	\$6,422,616	\$40,831,124
<b>Rollover disclosures</b> <sup>3</sup>	\$193,788,961	\$247,462,554
<b>Retrospective review</b> <sup>4</sup>	\$907,585	\$6,584,184
<b>Policies and procedures</b> <sup>5</sup>	\$2,736,095	\$2,736,095
<b>Total PTE 2020-02 Costs:</b>	<b>\$231,518,275</b>	<b>\$2,797,160,092</b>
<b>Memo:</b>		
<b>Other PTEs' costs</b> <sup>6</sup>	\$21,722,954	\$21,722,954
<b>Total Proposal first-year cost:</b>	<b>\$253,241,229</b>	<b>\$2,859,714,170</b> <sup>7</sup>

<sup>1</sup> Proposal at Table 4 (and footnote 499) for Department and Figure A.8 for ICI.

<sup>2</sup> Proposal footnote 499 for Department and Figures A.9 and A.10 for ICI, adjusting select components.

<sup>3</sup> Proposal footnotes 485 and 499 for Department and Figure A.4 wage adjustment for ICI.

<sup>4</sup> Proposal footnotes 494 and 499 for Department and Figure A.11 for ICI.

<sup>5</sup> Proposal footnote 498 and 499, where costs for first-year policies and procedures are inconsistent and fail to provide sufficient detail to reconcile them. We were unable to consider costs due to a lack of adequate documentation of the sources and details of costs associated with policies and procedures.

<sup>6</sup> Proposal Tables 4 and 6 for Department. We were unable to assess these costs due to insufficient time.

<sup>7</sup> In line with table notes 5 and 6, above, costs could well exceed \$2.9 billion.

**Although this is a very large difference, we should emphasize that our analysis covers only first-year costs related to some cost components related to PTE 2020-02.** We have had insufficient time to also review the Department's cost estimates and assumptions associated with PTE 2020-02 for ensuing years. Moreover, we have also had too little time to begin analyzing any costs, either first-year or ensuing years, associated with PTEs 84-24, 75-1, 77-4, 80-83, 83-1, and 86-128. For these, Figure A.4 simply takes as given the estimates provided by the Department. But our sensitivity analysis for first-year costs associated with PTE 2020-02 is indicative of the likelihood that the Department has also understated first-year costs for PTEs 84-24, 75-1, 77-4, 80-83, 83-1, and 86-128, as well as ongoing annual costs for all of the PTEs.

The balance of this appendix examines in more detail the Department's first-year cost estimates and assumptions associated with PTE 2020-02.

The Department's estimates rely on a wide array of assumptions. We do not attempt here to consider them all. Instead, we focus on a few key assumptions that lead the Department to substantially understate its first-year cost estimates for PTE 2020-02. These include understated:

- Unit labor costs (dollars/hour), especially for "legal professionals;"
- Number of staff and hours required to complete tasks;
- Scope of the impacts; and
- Costs of delivering disclosures.

In the remainder of this section, we use sensitivity analysis around these four areas to evaluate the Department's cost estimates. Our sensitivity analysis relies on modest reasonable alternative assumptions for unit labor costs, hours required, scope of impact, and costs of delivering disclosures, which are based on conversations with industry experts, or are taken from rulemakings that form the regulatory baseline for the Proposal. Given these (and only these) alternative assumptions, we estimate that first-year costs associated with PTE 2020-02 alone could exceed \$2.9 billion, over 10 times what the Department estimated (Figure A.4).

#### *Department Underrepresents Labor Cost Wage Rates*

The Department turns to its survey data on labor costs to estimate hourly wage rates for various required personnel. **Based on conversations with industry experts and comparison to labor costs used by another regulator, it is safe to conclude that the RIA's wage rates are too low.**

Evidence supporting our members' concerns about the wage rates can be found by comparing the Department's assumed wage rates with those the SEC recently used in Reg BI (Figure A.5).<sup>79</sup> Job titles from the RIA and the SEC do not line up perfectly, but they give a strong sense that RIA's assumed wage rates are too low. For each category we could match, the Department's assumed wage rates are significantly below those used by the SEC.<sup>80</sup>

Legal costs figure importantly in the Department's cost estimates. For example, as seen in Figure A.5, the RIA assumes an hourly cost for a "legal professional" of \$159.34/hour. In contrast, the SEC quoted four estimates for four different legal job titles (e.g., in-house compliance counsel). Given that Reg BI was adopted in July 2019, we adjusted these figures for inflation. In 2023 dollars, the SEC's average cost for a legal professional would have been \$517.85—over three times the rate the Department assumed. However, because conversations with members

<sup>79</sup> See Securities and Exchange Commission, 17 CFR Parts 240 and 275 [Release Nos. 34-97990; IA-6353; File No. S7-12-23] RIN 3235-AN00; 3235-AN14: Conflicts of Interest Associated With the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers at 54009, available at <https://www.govinfo.gov/content/pkg/FR-2023-08-09/pdf/2023-16377.pdf>.

<sup>80</sup> The average wage rate used by the SEC across legal professionals was \$517.85/hour, compared to the Department's \$159.34/hour. ICI member firms focused, however, on compliance-related attorney. Consequently, in our analysis, we use the SEC's hourly rate for in-house compliance counsel of \$438.98/hour as the cost for a "legal professional."

emphasized compliance professionals, we use the lowest rate offered by SEC for “legal professional” tasks as assigned by the Department, \$438.98/hour for in-house compliance counsel (adjusted to 2023 dollars; Figure A.5).

**Figure A.5**  
**Comparison of Labor Wage Rates in this Proposal and SEC’s Reg BI Final Rule**

<i>DOL 2023 Fiduciary Rule Proposal<sup>1</sup></i>		<i>SEC 2019 Regulation Best Interest - Final Rule<sup>2</sup></i>		Adjusted to be in 2023 dollars <sup>3</sup>
Occupation	labor cost per hour	Occupation		labor cost per hour
Clerical personnel	\$63.45	Clerical personnel	-	-
Legal professional	\$159.34	Legal professionals:		
		-- In-house compliance counsel	\$365.39	\$438.98
		-- In-house counsel	\$415.72	\$499.45
		-- In-house general counsel	\$446.04	\$535.88
		-- Outside legal counsel	\$497.00	\$597.10
Top executive	\$128.11	Blended certifying compliance rate		
(as stand in for “certifying officer”) <sup>4</sup>	\$190.63	-- Compliance examiner	\$237.00	\$284.73
		-- Compliance manager	\$309.00	\$371.24
		SEC rate as (1/2 examiner, 1/2 manager)	\$273.00	\$327.98
Insurance sales agent	\$158.94	Insurance sales agent	-	-
Financial manager	\$190.63	Financial manager	-	-
Financial adviser	\$219.23	Financial adviser / broker-dealer / dual registrant -- as “registered representative”	\$233.02	\$279.95
Computer programmer	\$133.05	Computer programmer functions:		
		-- Outside senior programmer or systems analyst	\$284.00	\$341.20
		-- Systems analyst	\$263.00	\$315.97
		-- Programmer	\$271.00	\$325.58
		-- Programmer analyst	\$241.00	\$289.54
		-- Computer operations department manager	-	-

<sup>1</sup> 88 Fed. Reg. at 75949.

<sup>2</sup> See Federal Register 84 at 33456, and otherwise throughout the Final Rule.

<sup>3</sup> Inflation adjustment of wages using CPI All Items series (CUUR0000SA0) between May 2019 (index value: 256.092), and October 2023 (index value: 307.671), United States Bureau of Labor Statistics.

<sup>4</sup> In several places, the Department lists a job function of “Top executive” sometimes this person is paid \$128/hour as at page 75968, other times the person is paid \$191/hour, as at page 75953, footnote 493. The definition at footnote 493 maps to “certifying officer” in the main text of the Proposal.

<sup>5</sup> The SEC used a blended rate for compliance reviews, based on two job functions for compliance. See Federal Register 84 at 33477, footnote 1489.

The overall effect of using the SEC’s (inflation-adjusted) figures for labor costs is significant. The Department estimates that the first-year cost of the entire Proposal to be \$253 million (Figure A.4). Most of that (\$232 million) is associated with PTE 2020-02, of which \$33.4 million arises from wage costs of “legal professionals” (Figure A.6). Using the inflation-adjusted SEC’s \$438.98/hour cost for in-house compliance, (rather than a higher blended rate), and initially holding all of the Department’s other figures and assumptions fixed as in the Proposal, first-year legal costs associated with PTE 2020-02 would rise to \$92 million, this alone increases first-year costs of the Proposal by \$59 million, for a new total of \$312 million.<sup>81</sup>

<sup>81</sup> Calculated as \$253.2 million + \$58.6 million = \$311.8 million. This one change raises overall costs by 23 percent (\$58.6 million/\$253.2 million). If we had instead used a hourly cost of \$517.85, which is the average of the hourly costs for in-house compliance counsel, in-house counsel, in-house general counsel, and outside counsel that the SEC



**Figure A.6**  
**PTE 2020-02 Review and Compliance Cost Adjustments**  
*Correcting for Per-Unit Legal Costs*

	<i>Department 2023 Proposal</i>	<i>SEC Reg BI Final Rule (inflation adjusted)</i>	<i>Difference</i>
Review and compliance activities <sup>1</sup>	"Legal professional"	Compliance attorney <sup>2</sup>	
Labor rate per hour:	\$159.34	\$438.98	\$279.64
Total costs derived from legal work			
First year:	\$33,372,329	\$91,940,410	\$58,568,081

<sup>1</sup> See Proposal at footnotes: 470, 471, 473, 475, 476, 487, 490, 491, 492.

<sup>2</sup> The average wage rate used by the SEC across legal professionals was \$517.85/hour, compared to the Department's \$159.34/hour. ICI member firms focused, however, on compliance-related attorney. Consequently, in our analysis, we use the SEC's hourly rate in-house compliance counsel of \$438.98/hour as the cost for a "legal professional."

In short, a plausible change to just one of the Proposal's many cost assumptions raises first-year estimated costs by nearly 25 percent. However, as we will demonstrate below, further analysis of the sensitivity of the Department's cost estimates to other plausible assumptions raises estimated first-year costs associated with PTE 2020-02 vastly more.

***Department Underestimates Number of Staff and Hours for PTE 2020-02 Review and Compliance***

Figure A.6 takes as given the Department's assumptions on the number of legal professionals' hours that would be associated with PTE 2020-02. According to the RIA, "The Department estimates such a review would take a legal professional, on average, nine hours."<sup>82</sup> In other words, at each individual firm that must review PTE 2020-02, a single legal professional at that firm could complete the review of a final rule in nine hours. Although the Department calls this an "estimate," it is not. An "estimate" would be based on data or some kind of plausible qualitative knowledge. So far as we can tell, this nine-hour figure is based neither on data nor any qualitative knowledge. Thus, it is simply an assumption.

We discussed the plausibility of the Department's nine-hour assumption with member firms. In every case, firms we spoke with had already invested far more than nine lawyer-hours in simply

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assumed in Reg BI, adjusted for inflation as seen in Figure A.5, total first-year costs in Figure A.6 would rise to \$108.5 million, an increase of \$75.2 million relative to the Department's estimates. The impact from this compensation adjustment alone is also larger, 30 percent (\$75.1 million/\$253.2 million).

<sup>82</sup> 88 Fed. Reg. at 75949.

reading the Proposal. This is not surprising. The Proposal, in its entirety, takes up 158 pages in the Federal Register (Figure A.7) and it is not an easy read, even for those versed in the issues.

**Figure A.7**

**Proposals Are Significant in Length, a Prudent Firm Would Review Them in Their Entirety**

	Total pages in PDF	Pages with rule text	Link
Proposed Fiduciary definition	90	88 to 90	<a href="https://www.govinfo.gov/content/pkg/FR-2023-11-03/pdf/2023-23779.pdf">https://www.govinfo.gov/content/pkg/FR-2023-11-03/pdf/2023-23779.pdf</a>
Proposed amendments to PTE 2020-02	25	21 to 25	<a href="https://www.govinfo.gov/content/pkg/FR-2023-11-03/pdf/2023-23780.pdf">https://www.govinfo.gov/content/pkg/FR-2023-11-03/pdf/2023-23780.pdf</a>
Proposed amendments to PTE 84-24	29	22 to 29	<a href="https://www.govinfo.gov/content/pkg/FR-2023-11-03/pdf/2023-23781.pdf">https://www.govinfo.gov/content/pkg/FR-2023-11-03/pdf/2023-23781.pdf</a>
Proposed amendments to other PTEs	14	11 to 14	<a href="https://www.govinfo.gov/content/pkg/FR-2023-11-03/pdf/2023-23782.pdf">https://www.govinfo.gov/content/pkg/FR-2023-11-03/pdf/2023-23782.pdf</a>

ICI member firms indicated that a team of compliance attorneys (team sizes varied across firms we spoke with but were between three and eight, averaging five) would review the rule. All believed that reviewing the rule would take more than nine hours *for each attorney involved*. Most reported that they would also confer with outside counsel. A few referenced their experience with the 2016 Rule; these described the current proposal as broader than the 2016 Rule and thus noted that it could require even more time to review than the prior rule. Some firms indicated that it would take multiple lawyers one to two weeks *each* to finish the work associated with the Proposal.

**Given the liability risks associated with not implementing the rules correctly and completely, a prudent firm would assign multiple attorneys.** Furthermore, a prudent attorney who “reviews” the rule would want to understand the rule and read all documentation associated with the rule and associated PTEs, including any and all preambles, and RIAs. We understand that such a review would be needed to assess the costs that would be incurred and ensure understanding of implementation steps needed to comply with any final rule.

**Plausible alternative assumptions about the number of legal professional hours required to review PTE 2020-02 show that the Department’s cost estimates are massively understated.** The Department’s cost estimates assume a legal professional hourly rate of \$159.34, one legal professional working nine hours, with 19,290 firms needing to review the PTE 2020-02 (Figure A.8). Given those assumptions, the Department estimates that the initial review would cost a total of \$27.7 million for the first year (first column). When, as in Figures A.5 and A.6, we make the plausible alternative assumption that legal professional costs would be \$438.98/hour, total first-year costs rise to \$76.2 million (second column in Figure A.8). Next, allowing for the fact that a prudent firm would likely have several lawyers looking at the proposal each for several hours (five lawyers at nine hours per lawyer), first-year costs increase to \$381.1 million (third column). Finally, if as some firms have suggested, it could take multiple lawyers *each* spending

one to two weeks to complete the work, the costs would be vastly higher.<sup>83</sup> Under this assumption (five attorneys for each firm each spending 60 hours reviewing the Proposal), we estimate that the cost of an initial legal review of PTE 2020-02 would surpass \$2.5 billion (fourth column).

**Figure A.8**

**The Department Grossly Underestimates Cost to Review the Rule PTE 2020-02**  
*Analysis of The Department's Cost Estimate for Initial Legal Review of PTE 2020-02*

Component:	Rate or quantity			
	<i>Department of Labor estimates in gray</i>			
Labor cost per hour	\$159.34		\$438.98	
			<i>Compliance Attorney<sup>1</sup></i>	
Number of attorneys reviewing rule	1	1	5	
			<i>Average of ICI member estimates<sup>2</sup></i>	
Number of hours per attorney	9	9	9	60
			<i>Average of ICI member estimates<sup>2</sup></i>	
REVIEW COSTS PER FIRM	\$1,434	\$3,951	\$19,754	\$131,694
Number of firms	19,290	19,290	19,290	19,290
	<i>Impact relative to baseline:</i>			
		2.8 times	13.8 times	91.8 times
TOTAL ESTIMATED COSTS:	\$27,663,017	\$76,211,318	\$381,056,589	\$2,540,377,260

<sup>1</sup> See Federal Register 88 at 54009.

<sup>2</sup> ICI Members reported that more than one attorney would be required to review the rule, and each would take more than nine hours initially.

This \$2.5 billion cost estimate, though over 90 times higher than the Department's estimate, would be still higher if other factors were considered. For example, the Proposal estimates that it would take a legal professional 30 to 60 minutes per firm to prepare statements in compliance with PTE 2020-02.<sup>84</sup> It estimates that it would take another 30 to 60 minutes per firm to write a second informational statement related to retirement investors' right to more information.<sup>85</sup> Once again, the Department does not provide support for these "estimates." Thus, they are just assumptions. Even supposing, extremely generously, that a seasoned attorney could be assumed to need only 30 to 60 minutes to write each of these documents, running the draft documents through all of a firm's necessary compliance checks would likely increase the total time required

<sup>83</sup> Among members we spoke with, the lowest time estimate offered for a compliance attorney working on initial review in a team will take is one week (40 hours). Every other member we spoke with estimated 80 or more hours, per attorney. The largest number reported to us was based on continuing initial review over the implementation period (eight weeks). Our estimate of 60 hours (1.5 weeks) reflects the minimum report, with partial accommodation for the reports of others. We stress that it is meant to be conservative.

<sup>84</sup> 88 Fed. Reg. at 75951, "the Department estimates that a legal professional for broker-dealers and registered investment advisers would require, on average, 30 minutes to modify existing statements and that it would take insurers, robo-advisers, pension consultants, and investment company underwriters, on average, one hour..."

<sup>85</sup> 88 Fed. Reg. at 75951, footnote 476, mirroring footnote 475.

several-fold. Moreover, these cost estimates do not include burdens for firms that were not previously relying on PTE 2020-02.

At the risk of belaboring the point that the Department's cost assumptions grossly underestimate the costs of adapting to the Proposal, we note in passing that the Department in several places assumes that a particular task should take only 10 minutes to complete.<sup>86</sup> Taking only 10 minutes on a task of legal consequence is imprudent as it increases the likelihood of facing further costs.

***Department Underestimates of Scope of Proposal's Impact***

The Department underestimates substantially the scope of the Proposal's effects. Accounting for the full scope of the Proposal's impact would require a comprehensive data collection effort to determine the entities impacted and the correct unit of analysis on which to base costs (e.g., firm versus number of employees versus number of investor accounts versus number of contracts with plan sponsors).

Nevertheless, we offer two examples that illustrate the Department understates the scope of the Proposal's impact. The first example relates to costs associated with PTE 2020-02 regarding Title I plans, and the second to populations of investors eligible for electronic delivery of disclosures. We emphasize that these are by no means the total of examples we could offer. They do, however, indicate just how significant is the Department's failure to adequately assess "scope," a failure that could have been addressed through a Request for Information.

Our first example relates to having to provide the disclosures required by PTE 2020-02 in the context of a Request for Proposal (RFP) from a Title I plan, a situation where (under existing rules) PTE 2020-02 would not need to be used today. In relevant part, the Proposal states "*The proposed amendment makes minor edits to the written acknowledgment that the financial institution and its investment professionals are fiduciaries.*"<sup>87</sup> While acknowledging not knowing how many firms would need to update disclosures, the Department arbitrarily presumes it to be 10 percent of those currently assumed to be using PTE 2020-02. Based on these assumptions, the Department estimates that total industry costs around this activity would be \$146,035.<sup>88</sup>

The need to use PTE 2020-02 for activities related to Title I plans has meaningful cost impacts that are fully neglected in the Department's presentation. Some firms we spoke with who rely on PTE 2020-02 for just Title II compliance (e.g., IRA rollover advice) shared that neither offering a current disclosure nor one containing "*minor edits*" would suffice. From our discussions, we generally understand that compliance with the Department's 2016 final rule required many firms to devote a large number of people, each working fulltime over an entire six-month period. Work implementing PTE 2020-02 was similarly substantive. When considering the expanded scope of

<sup>86</sup> We count five places in the Proposal where the Department presents estimates of "10 minutes" to perform an annual task of legal consequence under the Proposal.

<sup>87</sup> 88 Fed. Reg. at 75950.

<sup>88</sup> 88 Fed. Reg. at 75950, footnote 471.

the Proposal, some described needing to review a large library of prior requests for proposals (RFPs) to understand what a Title I plan disclosure would require of the firm. Needless to say, any one firm we spoke with would need to spend several times the Department's \$146,035 *total industry estimate*, before beginning to draft Title I plan disclosures. We note that when a single firm's marginal estimated burden, over a mere portion of the scope of the proposed rule, overwhelms the total industry estimate as presented in the RIA (i.e., \$146,035), something is meaningfully wrong with the RIA.

The Department notes that for those currently relying on PTE 2020-02, the cost burdens associated with the Proposal are "incremental" or "not unduly burdensome," yet the Department does not estimate the number of entities that are, or are not, relying on PTE 2020-02, either for Title I or Title II. Instead the Department writes, "*The entities that the Department expects to be affected by the proposed amendments to the PTE are also affected by the existing PTE 2020-02,*" and later the Department is more explicit, "*this analysis does not reflect any change in the number of entities relying on the exemption in response to these amendments.*"<sup>89</sup> The Department has improperly restricted the scope of burdens for its Proposal.

#### ***Department Underestimates Costs of Delivering Disclosures***

The Department underestimates the costs of delivering disclosures, inappropriately assuming that a very high percentage of IRA investors receive disclosures electronically, rather than by mail. The Department assumes "*94.2 percent of the disclosures sent to retirement investors would be sent electronically, and the remaining 5.8 percent would be sent by mail.*"<sup>90</sup> This assumption rests on ERISA-covered plan safe harbors issued in 2002 and 2020 that help promote e-delivery. However, Department safe harbors alone do not determine whether a disclosure would be sent electronically or by mail. In Title I plans, the determination is a function of the safe harbor, the preference of the plan, or the preference of the participant. Outside of employer-sponsored retirement plans, the Department's safe harbors do not apply, and in conversations with members, we have learned that roughly 60 percent of IRA retirement investors receive disclosures electronically, and the remaining 40 percent would be sent by mail. Thus, it would be necessary to mail disclosures to 40 percent of investors rather than the 5.8 percent the Proposal assumes.<sup>91</sup>

The Department in several instances generalizes use of this 5.8 percent assumption beyond the population of retirement investors.<sup>92</sup> In one instance, the 5.8 percent assumption is applied to a

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<sup>89</sup> 88 Fed. Reg. at 75949.

<sup>90</sup> 88 Fed. Reg. at 75949, footnote 465.

<sup>91</sup> The impacted population should be increased from say, "5.8" percent to up-to 40 percent of clients based on language in 88 Fed. Reg. at 75901: "*The proposal would broaden this provision by referencing securities or other investment property of the retirement investor, not just an investment through a plan or IRA.*"

<sup>92</sup> 88 Fed. Reg. at 75949, 75951, 75955, 75959, 75960, 75968, 75969, 75972, and 75975, often in several places on each page cited.

wholly different population (e.g., authorizing fiduciaries of IRAs), generating a total estimated industry expense of nine dollars.<sup>93</sup> The RIA does not explain why the same assumed rate would be applied to very different populations, nor more notably, why the Department would suggest an ability to estimate costs as small as nine dollars when it seems that it cannot offer any estimate of benefits. Charging postage and mailing fees to a smaller percentage lowers the RIAs reported costs. The Department sometimes omits postage costs for these 5.8 percent, lowering costs, as presented, further.<sup>94, 95</sup>

The Department estimates that the costs of printing and delivering the new disclosures are *de minimus*, \$18,464 across the entire industry. (Figure A.9). This number, however, is based on some highly implausible assumptions. Replacing a few of these assumptions with more plausible ones increases first-year costs associated with the delivery of retirement investor disclosures under PTE 2020-02 from \$18,464 to over \$24 million—over 1,300 times the cost represented in the RIA. As discussed below, only a few reasonable alternative assumptions with respect to the costs of printing and distributing new disclosures related to PTE 2020-02 are necessary to change estimated burdens here from \$18,464 to \$21 million.

First, the Department assumes that 5 cents will cover the full cost of producing a printed page of disclosure. This estimate ignores several costs that would be associated with preparing the document; nonetheless we leave them as the Department has them. Second, the Department seems to assume that electronic disclosures can be delivered at no cost. That is incorrect and we address this below. Third, the Department assumes that the relevant population is one-half of rollover investors. We are aware that changes to Title II Plans will require new disclosures to be sent, either by mail or electronically, to as many as *all* current IRA investors, depending on the financial services firm. According to Cerulli Associates, in 2022, there were 67.8 million IRA investors,<sup>96</sup> many of whom would receive new disclosures.

Disclosures, whether delivered by mail or electronically, are costly to provide. The vast majority of retirement investors hold fund shares through intermediaries, generally through omnibus accounts. In such cases, the fund has limited information about the underlying beneficial shareholders. Consequently, it depends on the intermediary to deliver communications to shareholders. Intermediaries virtually always outsource delivery of fund materials to a “fulfillment vendor,” which then invoices the fund for expenses.<sup>97</sup> These expenses are tied to a fee schedule set by the New York Stock Exchange, and also documented under FINRA rule

<sup>93</sup> 88 Fed. Reg. at 75959, footnote 549.

<sup>94</sup> *Ibid.*

<sup>95</sup> 88 Fed. Reg. at 75975, footnote 664, and surrounding text.

<sup>96</sup> 88 Fed. Reg. at 75931, footnote 300, citing Cerulli Associates, *U.S. Retirement End-Investor 2023: Personalizing the 401(k) Investor Experience*.

<sup>97</sup> The Investment Company Institute has a full processing fee resource center that it makes available to the public at no charge, available at <https://www.ici.org/pfrc>.

2251. Processing Unit Fees alone run 15 cents per account for mail and 25 cents per account for electronic delivery.<sup>98</sup> Moreover, the fulfillment vendor will charge the fund “preference management fees” of 10 to 16 cents (per unit) just to determine whether the investor prefers electronic or paper delivery.<sup>99</sup> The Department does not account for these fees.

Figure A.9 illustrates the effects on the Department cost estimates of more plausible assumptions about the number of IRAs that will require the new disclosures, as well as the unit costs of providing those. The second column uses the Department’s assumptions (from the figure’s first column) about the number of IRA investors who will receive disclosures and that 94.8 percent of those will be sent electronically. However, we then factor in the correct unit costs for delivering the disclosures, whether electronically or by mail, and costs rise from \$18,464 to \$1.2 million. The third column additionally corrects for the Department’s faulty 94.2 percent assumption; in keeping with ICI member reports, it assumes that 60 percent of investors will receive disclosures electronically. The cost increases further to \$2 million. The fourth column additionally gauges the sensitivity of the Department’s estimate by assuming that 75 percent of the 6.4 million IRA rollovers will require disclosures. Overall, costs increase further, to almost \$3 million.

Finally, we believe the Department’s estimates of the number of disclosures that will be sent to IRA investors are too low, focusing only on rollovers as they do. In discussions with our members, we learned that many firms will send a new document highlighting changes in their responsibilities to all IRA investors. Cerulli Associates estimates that there are 67.8 million IRA investors.<sup>100</sup> If a few large ICI members interpret a final rule as they have the Proposal, this will result in a one-time disclosure to roughly half of IRA owners. The final column offers an estimated cost for distributing new disclosures to these (34 million) IRA investors. On this basis, total costs related to distributing disclosures increase an additional \$21 million.

In total, these changes increase estimated costs for disclosure for retirement investors rise to \$24.1 million (Figure A.9; fourth and fifth columns). This total is included in the \$40.8 million figure for “General disclosures” in Figure A.4.

<sup>98</sup> See FINRA Rule 2251: *Processing and Forwarding of Proxy and Other Issuer-Related Materials*, available at <https://www.finra.org/rules-guidance/rulebooks/finra-rules/2251>.

<sup>99</sup> See FINRA Rule 2251, under (5) Preference Management Fees.

<sup>100</sup> 88 Fed. Reg. at 75931, footnote 300.

**Figure A.9****Cost Estimates for Provision of Disclosure for Retirement Investors***PTE 2020–02: Corrections and Sensitivity Analysis to Presented Disclosure Distribution Costs*

	Department's presentation <sup>5</sup>	ICI corrections and sensitivity analysis			
Percentage of retirement investors receiving documents electronically <sup>1</sup>	94.2%	94.2%	60.0%	60.0%	60.0%
<b>Cost of provision of disclosures to retirement investors</b>					
Number of IRA investors receiving disclosure <sup>2</sup>	3,183,503	3,183,503	3,183,503	4,775,255	33,900,000
Receiving paper disclosure	184,643	184,643	1,273,401	1,910,102	13,560,000
E-delivered disclosure	2,998,860	2,998,860	1,910,102	2,865,153	20,340,000
Cost of printing two-page paper disclosure (\$0.05 per page)	\$18,464	\$18,464	\$127,340	\$191,010	\$1,356,000
Cost of mailing paper disclosures (as presented) <sup>3</sup>					
Using DOL assumptions (at a postage rate of \$0.66)	Missing	\$121,864	\$840,445	\$1,260,667	\$8,949,600
Using proper postage rate (\$0.68)		\$125,557	\$865,913	\$1,298,869	\$9,220,800
<b>Third Party charges for mail and for electronic delivery of disclosures:<sup>4</sup></b>					
Preference management (at \$0.10 per disclosure)		\$318,350	\$318,350	\$477,525	\$3,390,000
Electronic delivery (at \$0.25 per disclosure)	Missing	\$749,715	\$477,526	\$716,288	\$5,085,000
Postal delivery (at \$0.15 per disclosure)		\$27,696	\$191,010	\$286,515	\$2,034,000
<b>TOTAL COSTS OF PROVISION:</b>	<b>\$18,464</b>	<b>\$1,239,783</b>	<b>\$1,980,139</b>	<b>\$2,970,208</b>	<b>\$21,085,800</b>

<sup>1</sup> The Department assumes that safe harbors cover all but 5.8 percent of retirement investors. However, these safe harbors do not constitute a binding constraint because investors retain the right to receive paper disclosure. ICI members report that roughly 40 percent of investors receive paper disclosures.

<sup>2</sup> The Department assumes that half of the 6.4 million IRA rollovers constitutes the relevant population. We consider that assumption, and an intermediary assumption for sensitivity analysis that splits the difference between the Department's assumption and the full 6.4 million IRA rollover figure. Additionally, we understand that many firms will send a new plan document highlighting changes in their responsibilities to all IRA investors. Additionally, we understand that many firms will send a new document highlighting changes in their responsibilities to all IRA investors. Cerulli Associates estimates 67.8 million such investors.<sup>101</sup> If a few large members determine along the lines we heard, this will generate an additional one-time disclosure to roughly one half that population.

<sup>3</sup> The Department uses an incorrect postage rate in its presentation.

<sup>4</sup> The Department has failed to consider third party charges for distributing disclosures in its presented figures. See Letter to Brent J. Fields of January 17, 2019.<sup>102</sup>

<sup>5</sup> See Proposal at footnotes 478, 480, and 481.

***Cost for Requested Written Descriptions of Policies and Procedures and Information Regarding Costs, Fees, and Compensation***

As indicated above, our analysis is indicative of some of the problems we have spotted in the Department's cost estimates, rather than being a comprehensive review of cost estimates in the RIA. Our review suggests that the RIA relies on several arbitrary assumptions that cause the cost estimates to be greatly understated.

Another area where such understatements arise is with respect to costs for requested written descriptions of policies and procedures and information regarding costs, fees, and compensation.

<sup>101</sup> 88 Fed. Reg. at 75931, footnote 300.

<sup>102</sup> See Letter to Brent J. Fields of January 17, 2019, available at: <https://www.sec.gov/comments/s7-13-18/s71318-4844298-177198.pdf>.



Based on its assumptions, the Department estimates that these would be \$1.0 million (Figure A.10, first column). However, our analysis, which uses a few plausible alternative assumptions, indicates that costs for these requested written descriptions could total at least \$11.4 million (fifth column).

Beginning in the first column of Figure A.10, the Department offers \$1 million in clerical costs and \$8,503 in non-clerical costs. In column two, we correct for missing distribution costs, and incorrect postal rates. Non-clerical costs increase to be nine times those offered in the RIA (\$77,920). In column three, we additionally correct for the Department's flawed electronic distribution assumption, and non-clerical costs increase further to \$119,984.

Columns four and five of Figure A.10 introduce sensitivity analysis regarding the Department's arbitrarily small assumption that 10 retirement investors at each financial institution will request the disclosure. (Many firms have millions of retirement investors.) Increasing the number 10 to be either 50 or 100, increases the percentage of IRA investors requesting the disclosure from the RIA's less than 0.3 percent to be either 1.4 percent or 2.8 percent. These increases in demand for the disclosure envisioned by the Department increase both clerical and non-clerical costs. Across the columns of Figure A.10, clerical and non-clerical costs increase from the RIA's presented figure of \$1 million to over \$11 million.

In sum, correcting for errors and omissions, and restricting considered sensitivity analyses to cases where fewer than three percent of retirement investors request the written descriptions, we observe burdens that are over 11 times the Department's estimate.

**Figure A.10**  
**Cost for Requested Written Descriptions of Policies and Procedures and Information**  
**Regarding Costs, Fees, and Compensation**

*PTE 2020–02: Corrections and Sensitivity Analysis to Presented Disclosure Distribution Costs*

	Department's presentation <sup>4</sup>	ICI corrections and sensitivity analysis			
Percentage of retirement investors receiving documents electronically <sup>1</sup>	94.2%	94.2%	60.0%	60.0%	60.0%
Number of financial institutions	19,290	19,290	19,290	19,290	19,290
Number of investors requesting the disclosure at each firm <sup>2</sup>	10	10	10	50	100
Total number of disclosures requested and sent:	192,900	192,900	192,900	964,500	1,929,000
As a percentage of IRA investors (67.8 million)	0.3%	0.3%	0.3%	1.4%	2.8%
Cost for 5 minutes of clerical time (\$63.45 per hour) per disclosure	\$5.29	\$5.29	\$5.29	\$5.29	\$5.29
<b>Clerical costs for requested disclosures</b>	<b>\$1,019,959</b>	<b>\$1,019,959</b>	<b>\$1,019,959</b>	<b>\$5,099,794</b>	<b>\$10,199,588</b>
Cost of printing (two-pages, \$0.05 per page)	\$1,119	\$1,119	\$7,716	\$38,580	\$77,160
Cost of mailing <sup>3</sup>					
Using DOL assumptions (at a postage rate of \$0.66)	\$7,384				
Using proper postage (\$0.68)		\$7,608	\$52,469	\$262,344	\$524,688
Third party charges for mail and for electronic delivery of disclosures: <sup>4</sup>					
Preference management (at \$0.10 per disclosure)		\$19,290	\$19,290	\$96,450	\$192,900
Electronic delivery (at \$0.25 per disclosure)	Missing	\$48,225	\$28,935	\$144,675	\$289,350
Postal delivery (at \$0.15 per disclosure)		\$1,678	\$11,574	\$57,870	\$115,740
<b>Other distribution costs for requested disclosures</b>	<b>\$8,503</b>	<b>\$77,920</b>	<b>\$119,984</b>	<b>\$599,919</b>	<b>\$1,199,838</b>
<b>Sum of these referenced costs</b>	<b>\$1,028,462</b>	<b>\$1,097,879</b>	<b>\$1,139,943</b>	<b>\$5,699,713</b>	<b>\$11,399,426</b>
	<i>Impact relative to baseline</i>	<i>1.1 times</i>	<i>1.1 times</i>	<i>5.5 times</i>	<i>11.1 times</i>

<sup>1</sup> The Department assumes that safe harbors cover all but 5.8 percent of retirement investors, however these safe harbors are not binding, investors retain a right to receive paper disclosure. ICI members report that roughly 40 percent of investors receive paper disclosures.

<sup>2</sup> The Department assumes that 10 investors at each firm would request this disclosure. This yields a very low percentage of IRA investors (0.3 percent). We believe that sensitivity analysis around this percentage is warranted, and provide estimates centered around 1.4, and 2.8 percent.

<sup>3</sup> The Department has employed an incorrect postage rate in its presentation.

<sup>4</sup> The Department has failed to consider third party charges for distributing disclosures in its presented figures.<sup>103</sup>

<sup>5</sup> See Proposal at footnotes 478, 480, and 481.

In total, these changes increase estimated costs for requested written description to \$11.4 million, which is included in the \$40.8 million figure for “General disclosures” in Figure A.4.<sup>104</sup>

#### **Costs Associated with Annual Report of Retrospective Review for Financial Institutions**

As a final example of the Department understating costs, we consider costs associated with the annual report of retrospective review for financial institutions. The Department suggests that

<sup>103</sup> See Letter to Brent J. Fields of January 17, 2019, op cit. supra.

<sup>104</sup> The Department’s estimated costs for “General disclosures” total \$6.4 million (as seen in Figure A.4). Of this \$6.4 million, the examples in figures A.9 and A.10 ICI adjusts \$1 million, roughly one-sixth of the Department’s total. Our estimates for these components total 35.5 million. The \$40.8 million figure includes \$5.4 of the Department’s \$6.4 million, which are not addressed through the examples ICI has provided, and so are simply carried forward. Given the magnitudes of difference in the examples we have offered (being 34 times those offered in the RIA), it should not be presumed that we in endorse the Department’s work on the remaining \$5.4 million.

these would total \$907,585 the first year (Figure A.11, first column). This understates the true cost by at least \$5 million (Figure A.11, last column, totaling \$6.6 million).

The Department estimates that labor hours for small financial services will be half of those for large financial services firms (five hours for small versus 10 hours for large, regardless of where on the size distribution firms fall; Figure A.11). The Department further assumes that 10 percent of financial services firms will need to create this retrospective report, while 90 percent will update an existing reporting document. We do not address these assumptions.

Column one of Figure A.11 table offers the Department's estimate, which is \$907,585 (also reported in Figure A.4). Moving to column two, adjusts wages, to be in line with wages presented in Reg BI, adjusted for inflation. We take the compliance attorney rate alone, not the blended rate for attorney. For tasks related to the Department's "Certifying officer," we take the SEC's approach of using a blended rate for compliance examiner and a compliance manager. Using these wage rates increases the overall estimated cost from \$0.9 million to \$1.9 million (2.1 times the Department's offered estimate).

Column three of Figure A.11 additionally adjusts numbers of personnel. For attorneys, we use our members' average estimate of five (the prudent firm scenario). For the certification work, we adjust the number of staff from one to two, to reflect the two different tasks, compliance examiner and compliance manager. Costs increase further to \$6.6 million. This \$6.6 million estimate is reflected in Figure A.4 under the line for "Retrospective review." In sum, holding all other assumptions constant (without agreeing to their soundness) adjustments to just these assumptions, yields estimated costs more than seven times those presented by the Department.

**Figure A.11**  
**Costs Associated with Annual Report of Retrospective Review for Financial Institutions**  
*PTE 2020–02: Corrections and Sensitivity Analysis to Presented Disclosure Retrospective Review Costs*

	Department's presentation <sup>1</sup>	ICI corrections and sensitivity analysis	
Total number of firms <sup>2</sup>	1,231	1,231	1,231
Number of large firms	271	271	271
Number of small firms	960	960	960
<i>Legal work to produce new report (related proposing release notes: 491, 494)</i>			
Number of lawyers	1	1	5
Hours to review for large firms	10	10	10
Hours to review for small firms	5	5	5
Legal wage rate	\$159.34	<b>\$438.98</b>	\$438.98
Review cost, per firm for large firms	\$1,593.40	\$4,389.80	\$21,949.00
Review cost, per firm for small firms	\$796.70	\$2,194.90	\$10,974.50
Percentage doing review	10%	10%	10%
Number of affected large firms	27	27	27
Number of affected small firms	96	96	96
<b>Subtotal</b>	<b>\$119,505</b>	<b>\$329,235</b>	<b>\$1,646,175</b>
<i>Lawyer to modify existing reports (related proposing release notes: 492, 494)</i>			
Number of lawyers	1	1	5
Hours to review for large firms	2	2	2
Hours to review for small firms	1	1	1
Legal wage rate	\$159.34	<b>\$438.98</b>	\$438.98
Review cost, per firm for large firms	\$318.68	\$877.96	\$4,389.80
Review cost, per firm for small firms	\$159.34	\$438.98	\$2,194.90
Percentage doing review	90%	90%	90%
Number of affected large firms	244	244	244
Number of affected small firms	864	864	864
<b>Subtotal</b>	<b>\$215,428</b>	<b>\$593,501</b>	<b>\$2,967,505</b>
<i>Certifying officer to review report and certify exemption (related proposing release notes: 493, 494)</i>			
Number of certifying officers	1	1	2
Hours to review for large firms	4	4	4
Hours to review for small firms	2	2	2
Certifying officer wage rate	\$190.63	<b>\$327.98</b>	\$327.98
Review cost, per firm for large firms	\$762.52	\$1,311.92	\$2,623.84
Review cost, per firm for small firms	\$381.26	\$655.96	\$1,311.92
Percentage doing review	100%	100%	100%
Number of affected large firms	271	271	271
Number of affected small firms	960	960	960
<b>Subtotal</b>	<b>\$572,653</b>	<b>\$985,252</b>	<b>\$1,970,504</b>
<b>Total:</b>	<b>\$907,585</b>	<b>\$1,907,988</b>	<b>\$6,584,184</b>
	<i>Impact relative to baseline</i>	<i>2.1 times</i>	<i>7.3 times</i>

<sup>1</sup> 88 Fed. Reg. at 75953.

<sup>2</sup> Total number of firms, as offered by the Department is: 200 robo-advisers + 1,011 pension consultants + 20 underwriters.

### A.5 Summary and Conclusions

It is incumbent on the Department to fully evaluate the Proposal's costs, including compliance costs, and compare them to the benefits the Proposal would engender.<sup>105</sup> Further, it is arbitrary for an agency to impose billions of dollars in costs—as it would here—without identifying benefits that warrant such burdens, and without explaining why less costly alternatives are not being pursued instead. Our review of the Regulatory Impact Analysis (RIA) finds that the Proposal does not meet this test.

The Department and RIA continue to view the world through the lens of a world gone by. Virtually all load funds (funds that have at least one share class that is a load share class) have one or more no-load share classes, which makes it an anachronism to try to cleanly segment “load funds” from “no-load funds.” Virtually all funds, whether “load funds” or “no-load funds” (the latter defined as a fund with no load share classes) are sold through intermediaries, who can be brokers, RIAs, or both. Thus, thus concepts of “direct-sold” and “broker-sold” funds are also rather antiquated. Since 2010, a range of products — including actively-managed funds, index funds, target date funds, ETFs, CITs — have increasingly competed strenuously for retirement savers' dollars, creating robust competition and greater investor choice.

As discussed in this appendix, the RIA provides no quantified benefits relating to *this* Proposal. It does suggestively recycle benefits estimates from its 2015 Proposal and 2016 Rule, estimates that were obsolete at the time, are more obsolete now, and were marred by misimpressions about how funds work and by math errors. We can see no reason for the Department to seek to reuse these pre-2017 figures.

The Department does describe a few “non-quantified” benefits, but as we detailed in this appendix, those supposed benefits are speculative in the extreme. Moreover, one of those supposed benefits is by the Department's own admission a “transfer” that should be excluded from the analysis or offset elsewhere in the RIA because “transfers” by definition cannot provide a net benefit to society.<sup>106</sup>

Finally, the Department provides cost estimates that are very large, totaling about \$220 million per year into the foreseeable future. However, our analysis, which assesses just a few of the assumptions the Department relies on, indicates that the costs will be vastly higher. Here, we showed that making a few modest and reasoned changes to the Department's assumptions leads to first-year cost estimates associated with PTE 2020-02 of over \$2.8 billion. And, we emphasize, our analysis is limited only to first-year costs, only to PTE 2020-02, and only to some of the many assumptions the Department relies on.

<sup>105</sup> See *Michigan v. EPA*, 576 U.S. 743, 752-53, 759 (2015).

<sup>106</sup> See [OMB Circular No. A-4](#), November 9, 2023, at 57–60.



February 27, 2024

The Honorable Bob Good  
Chair  
Subcommittee on Health, Employment,  
Labor, and Pensions  
United States House of Representatives  
2175 Rayburn  
Washington, DC 20515

The Honorable Mark DeSaulnier  
Ranking Member  
Subcommittee on Health, Employment,  
Labor, and Pensions  
United States House of Representatives  
2175 Rayburn  
Washington, DC 20515

RE: NAFA Statement for the Record – Hearing of the House Committee on Education & the  
Workforce – Subcommittee on Health, Employment, Labor, and Pensions  
***Protecting American Savers and Retirees from DOL's Regulatory Overreach***  
February 15, 2024

Dear Chair Good and Ranking Member DeSaulnier:

On behalf of NAFA, the National Association for Fixed Annuities, thank you for the opportunity to provide a statement for the record to the House Committee on Education and the Workforce – Subcommittee on Health, Employment, Labor, and Pensions regarding the U.S. Department of Labor's latest proposal to amend the regulatory definition of persons who render investment advice as fiduciaries for purposes of Title I of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and the parallel regulations under section 4975 of the Internal Revenue Code of 1986, as amended (the "Code"). Comments are also provided concerning the Department's proposals to amend Prohibited Transaction Exemption 84-24 ("PTE 84-24") and Prohibited Transaction Exemption 2020-02 ("PTE 2020-02" and collectively with the proposals to amend the fiduciary investment advice definition and PTE 84-24, the "Proposal").

NAFA is a national trade association exclusively dedicated to promoting improved awareness and understanding of fixed annuities, including the vital role fixed annuities serve in supporting American workers' long-term retirement savings and income needs. NAFA is the only association whose sole purpose is to advocate for the beneficial retirement security mission served by the fixed annuity distribution community. NAFA informs and educates legislators, regulators



and the American public about the unique benefits fixed annuities make available to those who are either planning for or have entered retirement.

Members of NAFA include more than 80 insurance carriers and independent marketing organizations that work with tens of thousands of individual producers who engage in the offer and sale of fixed annuities. Relying on the support of each and every one of them, NAFA helps protect consumers by guiding its members to adhere to applicable standards of market conduct and ethical behavior.

Whether someone needs income today or in the future, fixed annuities are the only products that protect consumers against the risks of investment losses associated with market fluctuations and the risk of outliving one's savings in retirement. NAFA is dedicated to promoting and safeguarding the unique value of fixed annuities and the role fixed annuity products serve in insuring working Americans' retirement savings and income.

*For the reasons described more fully below, NAFA believes the Department's 2023 fiduciary advice Proposal, including proposed amendments to PTE 84-24 and PTE 2020-02, reflects fundamental misunderstandings of fact and law that would, if allowed to proceed, wreak havoc on consumer access to retirement products that are today readily available through well-regulated insurance distribution channels. NAFA believes that the Department's proposed rulemaking package is fatally flawed and should be withdrawn in its entirety.*

This latest rulemaking package represents the Department's fourth attempt at imposing a new fiduciary standard on investment advice. NAFA has been at the forefront of combatting the Department of Labor's continued efforts to move well beyond its rulemaking authority. This fourth iteration of its tired fiduciary rule is the most offensive yet, as it flies in the face of the Fifth Circuit vacatur of the 2016 fiduciary rule that NAFA and other industry groups worked so hard to overturn. Moreover, it seeks to tilt the playing field toward fee-based advice, which would ultimately leave millions of middle- and low-income retirement savers devoid of the products and professional advice they need to retire securely.



Inexplicably, the Department's 2023 Proposal repeats all of the same errors that proved fatal to its 2016 rulemaking. If anything, it enlarges the problem by assigning fiduciary status on an even grander scale than before, inasmuch as the 2023 Proposal contains none of the carve-outs from fiduciary status of the vacated 2016 rule. NAFA is deeply concerned that the Proposal is so sweeping in nature that it calls into question where the dividing line lies to distinguish non-fiduciary sales activity from fiduciary investment advice. Just as the 2016 rule did before it was vacated, the Proposal will limit accessibility to investment products and services by virtue of the lack of any clear lines for parties to use for purposes of structuring their relationship as non-fiduciary when there is a desire to do so.

In the process of crafting this flawed rulemaking package, the Department took direct aim at fixed index annuities, using outdated data and biased conclusions to support its desperate attempts to implement burdensome overreach in the name of "consumer protection" and the elimination of "junk fees." In reality, fixed and fixed index annuities, typically sold on a transaction basis, are the only products that protect consumers against the risks of investment losses associated with market fluctuations and the risk of outliving one's savings in retirement.

The Department advances the mistaken view that sales of fixed products are driven only by sales incentives and reflect a lax regulatory regime. In fact, sales of fixed products are driven by market demand, which is only increasing as retirees seek protection from volatile investment markets. These increases reflect the value consumers place in the product.

In seeking financial security, Americans value and require the freedom to choose the forms of financial advice and the retirement products that are a fit for their individual needs. This is why annuity sales are up – not because of unregulated sales practices – but because people want, need, and are attracted to risk-reducing fixed and fixed index annuity products. Implementing this unnecessary rule will only hurt low-to-middle income workers, retirees and their families.

To be clear, NAFA strongly supports a best interest standard for annuity transactions. To date, 43 states have adopted the enhanced consumer protections for annuity transactions set forth





in the current NAIC best interest model law<sup>1</sup>. Under the NAIC Model, insurance producers and other annuity professionals are required to act in the best interest of their clients when making recommendations to purchase an annuity. The NAIC Model requires an assessment of the consumer's needs and that insurance products only be recommended if they advance those needs. NAFA and its membership worked in close cooperation with the NAIC as it worked to develop the model regulation through a deliberative process that reflected input from a wide variety of regulatory, industry and consumer stakeholders.

NAFA believes the NAIC best interest standard strikes a proper balance between an enhanced standard of care for annuity professionals that requires responsible and informed sales conduct and a workable regulatory framework that allows consumer access to essential retirement advice and products. The continued availability to such access is essential to ensure a safe and predictable retirement for the millions of Americans who need and value annuities as part of their retirement plan.

Some specific problems with the Proposal include:

- The false assumption on the part of the Department that it holds the authority to comprehensively regulate standards of conduct applicable to broker-dealers, registered investment advisers, and insurance agents;
- Jettisoning the "primary basis" prong of the five-part test for determining fiduciary status as set forth in the Department's longstanding 1975 regulation;
- The Department's failure to reconcile the Fifth Circuit's Chamber decision by simply making all rollover transactions fiduciary in nature without regard to what type of services or product offerings an independent agent is providing a client;

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<sup>1</sup> An additional half-dozen states are currently poised to adopt the NAIC model best interest standard. In fact, only two jurisdictions – New Jersey and the District of Columbia – have yet to undertake formal rulemaking. Importantly, all of the states that have or will soon adopt the best interest standard conform in all significant particulars to the model rule, providing broad consensus and uniform applicability across the majority of U.S. jurisdictions and ensuring robust and consistent consumer protections for the vast majority of Americans who purchase an annuity.



- Radically amending PTE 84-24, overturning the settled expectations of the life insurance and annuity provider community – formed over a period of more than 40 years;
- The Department's preference for PTE 2020-02, which is largely designed around a broker-dealer distribution model, which ignores the fact that different segments of the industry are subject to differing bodies of law and regulatory oversight; and
- Placing unnecessary, administratively burdensome and risk-inducing requirements upon insurance carriers and independent producers, which could ultimately put many small businesses and entrepreneurs out of business, leaving a sea of retirement-nearing and retirement-ready individuals left without professional financial help.

NAFA and its membership are dedicated to making risk-reducing fixed and fixed index annuity products widely available to Americans of all walks of life as they plan for and prepare for retirement. Retirement investors seek out and rely upon these products as a safe haven against the investment volatility and longevity risks they would otherwise be left to confront alone. The fixed and fixed index annuity community adheres to high standards of conduct under applicable state law when engaged in the sale of fixed annuities to make sure that a recommended product is a fit for and effectively serves the best interest of the retirement investor. The Proposal would disrupt the operation of the fixed and fixed index annuity marketplace by throwing up an array of new regulatory impediments that are poorly suited to the structures of the fixed product provider community, and that would tilt the playing field against independent producers — ultimately harming consumers.

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



directly contradicts the Fifth Circuit's *Chamber of Commerce* decision and inappropriately seeks to confer fiduciary status on financial services professionals and providers who interact with retirement investors in blanket fashion. The Department's preamble explanation that it "generally intends discreet aspects of this regulatory package to be severable" ignores the comprehensive nature of the proposal, which is clearly not amenable to severance.

*NAFA reiterates that the Department's 2023 fiduciary advice Proposal, including proposed amendments to PTE 84-24 and PTE 2020-02, reflects fundamental misunderstandings of fact and law that would, if allowed to proceed, wreak havoc on consumer access to retirement products that are today readily available through well-regulated insurance distribution channels. NAFA believes that the Department's proposed rulemaking package is fatally flawed, not amendable to severance, and should be withdrawn in its entirety.*

We appreciate the opportunity to comment on this critical matter. Please feel free to contact the undersigned at [cjd@nafa.com](mailto:cjd@nafa.com) or [pam@nafa.com](mailto:pam@nafa.com) if you should have any questions or if we could provide additional information.

Sincerely,

Charles J. DiVencenzo, Jr.  
President & Chief Executive Officer  
National Association of Fixed Annuities

Pam Heinrich  
General Counsel & Director of Government Affairs  
National Association of Fixed Annuities



February 28, 2024

The Honorable Virginia Foxx (R-NC)  
Chairwoman  
Committee on Education & the Workforce  
U.S. House of Representatives  
Washington, D.C. 20515

The Honorable Robert C. Scott (D-VA)  
Ranking Member  
Committee on Education & the Workforce  
U.S. House of Representatives  
Washington, D.C. 20515

The Honorable Bob Good (R-VA)  
Chairman  
Subcommittee on Health, Employment, Labor,  
& Pensions  
Committee on Education & the Workforce  
U.S. House of Representatives  
Washington, D.C. 20515

The Honorable Mark DeSaulnier (D-CA)  
Ranking Member  
Subcommittee on Health, Employment, Labor,  
& Pensions  
Committee on Education & the Workforce  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Chairwoman Foxx, Ranking Member Scott, Chairman Good, and Ranking Member  
DeSaulnier:

On behalf of the National Association of Insurance and Financial Advisors ("NAIFA"), I welcome the opportunity to provide the following comments for the Subcommittee on Health, Employment, Labor, & Pensions hearing entitled "Protecting American Savers and Retirees from DOL's Regulatory Overreach." I respectfully request that this letter be made a part of the official hearing record.

I am the Founder and Chief Executive Officer of Midwest Legacy Group in Lisle, Illinois. I currently serve as NAIFA's Secretary and previously served as the President of NAIFA's Chicagoland chapter. I was raised by a middle-income African American woman in a single-income household. I began my career as a financial professional almost 25 years ago after playing professional basketball in the National Basketball Association for the Chicago Bulls and San Antonio Spurs as well as in France. My team of financial professionals and I help individuals and families meet their financial needs and achieve their ideal retirements. We help provide peace of mind through financial products that generate a lifelong stream of income and security for businesses as well as low- and middle-income families. We work to put our clients' well-being first, not our bottom line.

NAIFA thanks the Subcommittee for holding this hearing on the series of proposed regulations issued by the Department of Labor (the "Department" or "DOL") detailing the

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**NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS**

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proposed changes to the definition of the term “fiduciary” under section 3(21) of the Employee Retirement Security Act of 1974 (“ERISA”)<sup>1</sup>, as well as amendments to two current class exemptions, Prohibited Transaction Exemption (“PTE”) 84-24 and PTE 2020-02 (collectively, the “Proposed Rule”).<sup>2</sup> This is a matter of great importance to NAIFA and to your NAIFA constituents. In short, the Proposed Rule is unnecessary at this time and would disproportionately impact low- and middle-income savers who rely on professional financial services to plan for retirement. The Proposed Rule would have the most adverse effects on Black and Hispanic Americans and further widen the existing wealth gap by 20 percent. For these reasons further described below in the text of our comment letter submitted to the Department on January 2, 2024, NAIFA has urged the DOL to withdraw the Proposed Rule.

The Proposed Rule is unnecessary at this time as states continue to adopt the National Association of Insurance (“NAIC”) Model Law 275 which requires a best-interest standard for the sale of annuity transactions. Since our comment letter was submitted to the DOL in January, Indiana and New Hampshire are about to adopt the NAIC Model Law 275. In addition, the California legislature has passed the NAIC Model Law 275 and it is awaiting further action from Governor Newsom. With the addition of these states, 45 states will have adopted the NAIC Model Law 275, covering approximately 90 percent of the United States population under a best-interest standard.

We thank the members of Congress, including members of the Subcommittee, who urged withdrawal of the rule in the bipartisan letter led by Representatives French Hill (R-AR) and David Scott (D-GA) to Acting Secretary of Labor Julie Su and Assistant Secretary of Labor Lisa Gomez on January 8, 2024. In addition, 541 NAIFA members who reside in the Subcommittee members’ states filed letters with the DOL in opposition to the Proposed Rule.

#### I. Background and Executive Summary

Founded in 1890 as The National Association of Life Underwriters, NAIFA is the oldest, largest, and most prestigious association representing the interests of financial professionals from every Congressional district in the United States. Our mission – empowering financial professionals and consumers with world-class advocacy and education – is the reason NAIFA has

<sup>1</sup> 29 CFR § 2510.3-21

<sup>2</sup> 88 Fed. Reg. 75,890 (Nov. 3, 2023) (“Retirement Security Rule: Definition of an Investment Advice Fiduciary”), 88 Fed. Reg. 75,979 (Nov. 3, 2023) (“Proposed Amendment to Prohibited Transaction Exemption 2020-02”), 88 Fed. Reg. 76,004 (Nov. 3, 2023) (“Proposed Amendment to Prohibited Transaction Exemption 84-24”). The Department also simultaneously issued technical amendments to PTEs 75-1, 77-4, 80-83, 83-1 and 86-128 that essentially clarify that these PTEs may not be used by investment advice fiduciaries. *See* 88 Fed. Reg. 76,032 (Nov. 3, 2023).



consistently and resoundingly stood up for agents and called upon members to grow their knowledge while following the highest ethical standards in the industry.

NAIFA members are Main Street financial professionals. NAIFA members—comprised primarily of insurance agents, many of whom are also registered broker-dealer representatives—serve primarily middle-market clients, including individuals and small businesses. Nine out of ten NAIFA members report serving middle-income individuals and families and 67 percent work with small businesses. A typical client’s annual household income falls below \$150,000 for 69 percent of NAIFA members. In some cases, our members are the only financial professional across multiple counties.

NAIFA members are also small business owners. Many of our members work in small firms—sometimes firms of one—with little administrative or back-office support. Often, their business practices are dictated by the broker-dealer with whom they work, including the format and provision of client forms and disclosures. They are also subject to transaction-level oversight and review by the broker-dealer.

The retirement products most commonly offered by NAIFA members are annuity products and mutual funds. Some of our members are independent financial professionals working with independent broker-dealers; others are affiliated with (or captives of) product providers and are restricted to some degree in the products they are permitted to sell.

NAIFA members support a “best interest” standard for retirement investment professionals. We believe our members already adhere to and are operating under such a standard. NAIFA members are required to operate under NAIFA’s own Code of Ethics, which requires them to work in the best interests of their clients, in addition to the existing federal and state regulatory frameworks that are described further below.

Nearly all NAIFA members, regardless of whether they are independent or affiliated, and many of their clients, will be significantly impacted by the Department’s Proposed Rule, with low- and middle-income savers hit the hardest.

II. The Proposed Definition of Fiduciary Investment Advice is an Inappropriate Standard

A. The Proposed Definition Would Cover Nearly All Investment Advice

The Proposed Rule would define fiduciary investment advice to include any person who “either directly or indirectly makes investment recommendations *on a regular basis as part of*

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NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS

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*their business...*<sup>3</sup> Under this scenario, essentially every insurance agent, insurance broker, or broker-dealer registered representative providing any advice or recommendation(s) in conjunction with the investment of retirement assets would be considered a fiduciary. Virtually all NAIFA members would be considered fiduciaries under the Proposed Rule's definition. This definition of fiduciary is virtually identical to the Department's previous attempt to redefine the term fiduciary for retirement investment advice (the "2016 Fiduciary Rule")<sup>4</sup> which was rejected by the United States Court of Appeals for the Fifth Circuit in *Chamber of Commerce vs. United States Department of Labor*<sup>5</sup> in part because of the dramatic change from the prior "fiduciary" framework that had been in place for almost half a century. The Proposed Rule, if finalized, will impose significant changes on the business practices of NAIFA members and it also will, as a practical matter, limit the range of clients with whom they will be able to work.

The Proposed Rule's expansive definition will require many NAIFA members to modify their fee and compensation arrangements and move from commissions to flat fee arrangements to avoid the ERISA or Internal Revenue Code's (the "Code") prohibited transaction rules, which, as described further below, will limit access to professional financial services for low- or middle-income clients.

Under the current five-part test for fiduciary investment advice, an isolated, single interaction generally would not be treated as fiduciary investment advice because the advice must be provided **on a regular basis to the plan**.<sup>6</sup> The Proposed Rule would remove this personalized investment advice requirement and, as noted above, apply the "regular basis" requirement to the business of the recommender.

Further, when a financial professional has investment discretion over any of the retirement investor's assets, including personal assets, the Proposed Rule would automatically consider the professional to be a fiduciary of the retirement account.<sup>7</sup> This automatic status has never been part of the Department's construct before the issuance of the Proposed Rule.

#### 1. One-Time Transactions Do Not Create a Fiduciary Relationship

<sup>3</sup> 88 Fed. Reg. at 75,977; Prop. 29 C.F.R. § 2510.3-21(c)(1)(ii) (emphasis added).

<sup>4</sup> 81 Fed. Reg. 20,946 (Apr. 8, 2016) ("Definition of the Term 'Fiduciary'; Conflict of Interest Rule—Retirement Investment Advice").

<sup>5</sup> *Chamber of Commerce of the U.S. v. U.S. Dep't. of Labor*, 885 F.3d 360 (5th Cir. 2018).

<sup>6</sup> 29 CFR § 2510.3-21(c)(1)(ii)(B) (emphasis added).

<sup>7</sup> 88 Fed. Reg. at 75,977; *see also* Prop. 29 C.F.R. § 2510.3-21(c)(1)(i).



As a result of the Proposed Rule's expansive definition that would cover anyone who makes investment recommendations on a regular basis as part of their business, the Proposed Rule would create a fiduciary relationship for many one-time investment scenarios. The Proposed Rule would encompass such one-time recommendations as selling annuity products or providing one-time recommendations on rolling over assets to an individual retirement account ("IRA").

The Proposed Rule specifies that an IRA rollover would be considered investment advice that would create a fiduciary relationship, even if the financial professional is providing a one-time recommendation and is not providing (much less being paid to provide) ongoing advice post-rollover or post-distribution, or if the services provided post-rollover or post-distribution do not involve an account otherwise subject to ERISA or the Code.<sup>8</sup> In the preamble to the Proposed Rule, the Department states that rollover and distribution recommendations typically involve investment advice to the ERISA plan and plan participant so that ERISA's fiduciary duties and not just the Code's prohibited transaction provisions apply to the advice.<sup>9</sup> The Department further indicates that a recommendation not to take a distribution or rollover requires the same evaluation and recommendation and would be covered as fiduciary investment advice.<sup>10</sup>

In vacating the 2016 Fiduciary Rule, the Fifth Circuit in *Chamber of Commerce* was clear that one-time recommendations do not create a fiduciary relationship. Rather, the Fifth Circuit held that fiduciary status "turns on the existence of a relationship of trust and confidence between the fiduciary and client."<sup>11</sup> The Fifth Circuit highlighted that the 2016 Fiduciary Rule, inconsistent with the ERISA's definition of fiduciary, "expressly include[d] one-time IRA rollover or annuity transactions where it is ordinarily inconceivable that financial salespeople or insurance agents will have an intimate relationship of trust and confidence with prospective purchasers."<sup>12</sup>

## 2. A Fiduciary Relationship of Trust and Confidence Requires Control and Authority

Citing the Supreme Court, the Fifth Circuit stated that ERISA's statutory fiduciary definition applies to a relationship of "trust and confidence" that requires "control and authority."<sup>13</sup> Under these principles, a fiduciary relationship is not present in all financial

<sup>8</sup> See 88 Fed. Reg. at 75,906-07.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Chamber of Commerce* at 370.

<sup>12</sup> *Id.* at 380.

<sup>13</sup> *Id.* at 377 (citing *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993)).





relationships, but only those formed to provide advice in the heightened degree of “trust and confidence.” The Fifth Circuit held that the 2016 Fiduciary Rule’s “interpretation of an investment advice fiduciary lacks any requirement of a special relationship.”<sup>14</sup>

The “control and authority” requirement for a fiduciary relationship is found in two of ERISA’s three statutory fiduciary definition prongs.<sup>15</sup> The Fifth Circuit stated the “control and authority” requirement applies uniformly across all three prongs and the Department was misreading the statute because its interpretation of a fiduciary “lack[ed] any requirement of a special relationship.”<sup>16</sup>

Similar to the 2016 Fiduciary Rule, the Proposed Rule’s interpretation of investment advice fiduciary again lacks any requirement of a special relationship of “trust and confidence” and any requirement of “control and authority.” The Proposed Rule’s application of a fiduciary relationship considers the business of the recommender and attaches the fiduciary moniker to one-time transactions. The Proposed Rule is inconsistent with the Fifth Circuit’s view of a fiduciary relationship with a specific investor that is based on ERISA’s statutory requirements of “control and authority.” Similar to the 2016 Fiduciary Rule, the Proposed Rule would deem persons to be fiduciaries without these hallmarks of a fiduciary relationship. The Proposed Rule goes too far and encompasses circumstances where there is no reasonable expectation of “control and authority” and is completely inconsistent with the Fifth Circuit’s decision to vacate the 2016 Fiduciary Rule.

#### B. The Proposed Rule Would Create Additional Liability for Financial Professionals

Not only would the Proposed Rule expand the definition of a fiduciary but it would also expand potential litigation exposure for such fiduciaries, including private rights of action and excise tax penalties. As the Proposed Rule states, financial professionals making a covered investment advice interaction would be subject “to the Department’s robust enforcement program as well as to a private right of action.”<sup>17</sup> Potential penalties include private rights of action under federal law for allegations related to employer plans and private rights of action under state common law for IRAs.

Such fiduciary status, if applied under the Proposed Rule, would subject financial

<sup>14</sup> *Id.* at 377.

<sup>15</sup> See 29 U.S.C. § 1002(21)(A)(i), (iii).

<sup>16</sup> *Chamber of Commerce* at 377.

<sup>17</sup> 88 Fed. Reg. at 75,942.



professionals to ERISA Section 502(a). Along with federal enforcement actions brought by the Department, financial professionals would be subject to private rights of action, including potential class action litigation.

These private rights of action are inconsistent with the Fifth Circuit's opinion in *Chamber of Commerce*. The Department included in the 2016 Fiduciary Rule a best interest contract exemption (the "BIC Exemption").<sup>18</sup> In vacating the 2016 Fiduciary Rule, the Fifth Circuit explained that the BIC Exemption would impermissibly create a private right of action for owners of IRAs.<sup>19</sup> The court noted that IRAs are not subject to ERISA, but instead are subject to section 4975 of the Code, which does not provide a private right of action for IRA owners.<sup>20</sup>

Similar to the BIC Exemption, the Proposed Rule would potentially subject financial professionals to claims under state law from IRA owners. Under the proposed amendments to PTE 2020-02, both the "Financial Institution" (i.e. the Insurer or Broker-Dealer) and the investment advisor are required to acknowledge in the requisite disclosure that they are acting as "fiduciaries".<sup>21</sup> Under the proposed amendments to PTE 84-24, only investment advisors are required to make this fiduciary acknowledgement.<sup>22</sup> A breach of fiduciary duty is generally a state-law claim and the required written acknowledgment of fiduciary status could make a financial professional subject to such claims. The Proposed Rule's requirement that the investment advisor acknowledge fiduciary status will have an effect very similar to the BIC Exemption in creating state law rights to sue that are inconsistent with the Fifth Circuit's opinion in *Chamber of Commerce*. Courts have held that an agency cannot create a cause of action that Congress did not.<sup>23</sup> When vacating the 2016 Fiduciary Rule, the Fifth Circuit stated:

In ERISA, Congress authorized private rights of action for participants and beneficiaries of employer sponsored plans, 29 U.S.C. § 1132(a), but it did not so privilege IRA owners under Title II. DOL may not create vehicles for private lawsuits indirectly through BICE contract provisions where it could not do so directly.<sup>24</sup>

Similar to the 2016 Fiduciary Rule, the Department is again attempting to create a private right of

<sup>18</sup> 81 Fed. Reg. 21,002 (Apr. 8, 2016) ("Best Interest Contract Exemption").

<sup>19</sup> *Chamber of Commerce* at 384-85.

<sup>20</sup> *Id.*

<sup>21</sup> 88 Fed. Reg. at 76,000 (PTE 2020-02, Prop. Sec. II(b)(1)).

<sup>22</sup> 88 Fed. Reg. at 76,027-28, (PTE 84-24, Prop. Sec. VII(b)(1)).

<sup>23</sup> See *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001).

<sup>24</sup> *Chamber of Commerce* at 384.



action outside of the remedial scheme enacted by Congress by modifying PTE 84-24.

In addition to the increased threat of litigation, financial professionals will also face substantial risk of excise tax penalties. Professionals that do not satisfy the PTE requirements could be subject, under section 4975 of the Code, to excise taxes of 15 percent per year of the amount involved in the transaction – typically the value of the impacted product or accounts – from the date of the “prohibited transaction.”

A high level of litigation risk and penalty exposure will increase the cost of doing business for financial professionals and financial institutions, and in many cases, this amplified risk will cause services to disappear for low- and middle-income clients.

### III. The Proposed Rule Will Harm Low- and Middle-Income Savers

The Proposed Rule is counterproductive to the on-going retirement savings crisis. Similar to the 2016 Fiduciary Rule, the Proposed Rule will make it harder, not easier, to provide low- and middle-income savers with the services and products that will help them save for retirement.

Study after study has found that Americans are not saving enough for retirement. A recent study from the non-profit Transamerica Center for Retirement Studies found that fewer than one in four Americans strongly agree they are currently building or have built a large enough retirement nest egg.<sup>25</sup> Just 12 percent of individuals with a household income (“HHI”) of less than \$50,000 strongly agree they are currently building or have built a large enough retirement nest egg, compared with 20 percent of those with an HHI of \$50,000 to \$99,999, 34 percent with an HHI of \$100,000 to \$199,999, and 47 percent with an HHI of \$200,000 or more.<sup>26</sup> The National Conference of State Legislatures reported that if current trends continue, inadequate retirement savings could cost the states and federal government a combined \$1.3 trillion in additional expenditures by 2040.<sup>27</sup>

It is more important than ever that all Americans are encouraged to save and have access to information and guidance from financial professionals about appropriate retirement savings

<sup>25</sup> Transamerica Center for Retirement Studies, “A Compendium of Demographic Influences on Retirement Security” (Dec. 2023) at 26 available at <https://www.transamericainstitute.org/docs/default-source/research/compendium-demographic-influences-retirement-security-research-report-december-2023.pdf>.

<sup>26</sup> *Id.* at 57.

<sup>27</sup> See National Conference of State Legislatures, “State and Federal Impacts of Insufficient Retirement Savings” (Jul. 17, 2023) available at <https://www.ncsl.org/labor-and-employment/state-and-federal-impacts-of-insufficient-retirement-savings>



products tailored to their unique situation. Employers need reliable information on the design and investment options of their retirement plans, and employees need to be educated on the importance of saving early for retirement, determining their risk tolerance, and evaluating the investment options available through their workplace retirement plan. Individuals also need professional services when rolling over assets from one retirement plan to another or an IRA, and when taking distributions during retirement, and those without access to an employer retirement plan need education and guidance about other retirement savings vehicles.

Before it was vacated, the 2016 Fiduciary Rule generated negative consequences for consumers and, as described below, NAIFA anticipates those same consequences will occur if the Proposed Rule is not withdrawn.

A. The 2016 Fiduciary Rule Hurt Small Account Holders

Before it was invalidated, NAIFA members saw firsthand the adverse impact of the 2016 Fiduciary Rule. The Department's approach eliminated consumer support from financial professionals who receive one-time commissions and left only fiduciaries available for those with substantial savings willing to pay ongoing service fees. The Department made the brokerage model so expensive and risky that many of our members could no longer serve small accounts. Low- and middle-income clients generally could not afford to hire someone subject to the fiduciary standards of the 2016 Fiduciary Rule and, as a result of the rule, were shut out of the market for financial professionals.

In moving forward with the Proposed Rule, the Department is ignoring the extensive body of research and real-world experience that shows how the 2016 Fiduciary Rule significantly harmed low- and middle-income workers when it was in effect and before being vacated by the Fifth Circuit in 2018. A Deloitte study of the 2016 Fiduciary Rule found that more than 10 million smaller retirement account owners lost the ability to work with their preferred financial professionals. The study found that, upon the 2016 Fiduciary Rule's initial application, 53 percent of study participants reported limiting or eliminating access to brokerage advice for smaller retirement accounts, impacting an estimated 10.2 million accounts and \$900 billion in retirement savings.<sup>28</sup> The Deloitte study further found that the 2016 Fiduciary Rule accelerated the shift of retirement assets to a fee-based model.<sup>29</sup> The Hispanic Leadership Fund's more recent analysis found that if the Department adopts a new rule that is similar to the 2016 Fiduciary Rule, the

<sup>28</sup> Deloitte, "The DOL Fiduciary Rule: A study on how financial institutions have responded and the resulting impacts on retirement investors" (Aug. 9, 2017) at 11 available at <https://www.sifma.org/wp-content/uploads/2017/08/Deloitte-White-Paper-on-the-DOL-Fiduciary-Rule-August-2017.pdf>.

<sup>29</sup> *Id.* at 12.



retirement savings of 2.7 million individuals with incomes below \$100,000 would plummet by \$140 billion over ten years.<sup>30</sup> This study further found that a similar rule would only increase the racial wealth gap by 20 percent, with Blacks and Latinos among the hardest hit.<sup>31</sup>

B. The Proposed Rule Will Restrict Consumers' Access to Professional Financial Services and Increase Costs

The value of professional financial services should not be overlooked or underestimated. NAIFA members help people plan and save for retirement by helping employers set up retirement plans and by providing guidance to individual investors outside of the workplace. Such investors are better off than those who did not receive professional assistance.

The Proposed Rule would impact the clients our members serve and the types of products our members offer. When faced with several new fiduciary obligations under the Proposed Rule, some firms and professionals will no longer offer certain products or services to small plans or individuals with small accounts. The Proposed Rule would impose substantial cost and administrative burdens, new business models and fee structures, and additional litigation exposure that will squeeze low- and middle-income consumers out of the market.

Reduced access to professional services, increased costs, and fewer products is not a desirable outcome and should not be the Department's goal.

1. The Proposed Rule Will Restrict Access to Financial Services for Low- and Middle-Income Clients

After the Department announced the Proposed Rule, NAIFA surveyed its members who are financial professionals to gauge its impact. With more than 1,000 respondents, the survey found the Proposed Rule would harm Main Street financial professionals and clients due to expected changes in minimum asset thresholds if the Proposed Rule is finalized. These changes will leave many Americans without access to financial guidance and products.

NAIFA's survey found that 70 percent of respondents do not currently have a minimum asset requirement for service. If the Proposed Rule is finalized, only 28 percent of respondents

<sup>30</sup> Hispanic Leadership Fund, "Analysis of the Effects of the 2016 Department of Labor Fiduciary Regulation on Retirement Savings and Estimate of the Effects of Reinstatement" (Nov. 8, 2021) at 1 *available at* [https://hispanicleadershipfund.org/wp-content/uploads/2021/11/FINAL\\_HLF-Quantria\\_FiduciaryRule\\_08Nov21.pdf](https://hispanicleadershipfund.org/wp-content/uploads/2021/11/FINAL_HLF-Quantria_FiduciaryRule_08Nov21.pdf).

<sup>31</sup> *Id.*



will not require a minimum asset threshold for service. Further, the survey found only 13 percent of respondents require a minimum asset threshold of \$50,000. If the Proposed Rule is finalized, 47 percent of respondents would impose a minimum threshold exceeding \$50,000.

## 2. The Proposed Rule Will Increase Costs on Small Businesses

Financial professionals cite that the Proposed Rule will not only limit access to financial products and services to consumers, but it will harm small business owners by increasing costs and limiting career options. If the Proposed Rule is finalized, NAIFA's survey found the following:

- 92 percent of respondents will incur increased costs from the additional disclosures;
- 91 percent of respondents will incur increased record-keeping costs; and
- 90 percent of respondents will incur increased costs for hiring and training new employees.

For low- and middle-income clients who continue to receive professional retirement guidance, the service is likely to become more expensive because the Proposed Rule will force clients into more expensive compensation arrangements and because the high costs of compliance will be passed on to consumers. The Proposed Rule effectively leaves financial professionals with three choices:

- (1) do not give the investment advice, as defined under the Proposed Rule, and avoid becoming a fiduciary;
- (2) become a fiduciary and turn all your compensation arrangements into advisory fee-for-service arrangements; or
- (3) become a fiduciary, retain current compensation arrangements, and comply with a PTE (with additional compliance obligations and high costs)

The first option leaves clients with no meaningful guidance whatsoever. The second and third options will harm consumers by increasing their costs. Under the third option, in which financial professionals who keep commission-based arrangements and rely on a PTE, low- and middle-income and small business clients will still face additional costs. The high cost of compliance with a PTE will be ultimately borne by someone. The regulated entity required to comply with the PTE will look for ways to pass on those costs and consumers will bear some of that additional cost burden.

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### 3. The Proposed Rule Will Restrict the Sale of Guaranteed-Income Products

If finalized, the Proposed Rule will also result in fewer annuity products being sold, which is especially harmful to low- and middle-income consumers. This also is contrary to the Congressional intent of the SECURE 2.0 Act of 2022 which included several changes intended to remove barriers and encourage the use of annuities in retirement plans.<sup>32</sup>

Beyond Social Security and a defined benefit pension, an annuity is the only other way to ensure guaranteed income in retirement. Annuities are a Main Street financial product and are critical for ensuring middle-income families have a lifetime stream of income to provide security in retirement.

As noted above, one-time transactions, including the sale of annuities, would be covered under the Proposed Rule's definition of fiduciary investment advice and financial professionals would be forced to rely on a PTE to sell their client an annuity. NAIFA's survey found that the Proposed Rule would cause more than 66 percent of respondents to stop or reduce the sale of fixed annuities, largely due to the additional administrative burdens and costs our members will have to incur from relying on the PTEs. These products should continue to be available, and to be available in a broad enough range, including fixed, indexed, and variable annuities, to preserve investor choice and provide sufficient options for individual investors' particular needs and retirement savings goals.

### IV. The Proposed Rule Treats Compensation for Independent Agents Differently

The Department's proposed amendments to PTE 84-24 would limit the relief provided under the exemption only to "Independent Producers", which are defined in the Proposed Rule to cover independent agents and brokers who sell fixed annuities or other non-securities insurance investment products for two or more insurance companies.<sup>33</sup> Insurance companies and their agents would be excluded from PTE 84-24 and would likely need to seek relief under PTE 2020-02 related to any fiduciary recommendations.

The proposed amendments to PTE 84-24 would limit the forms of compensation for Independent Producers only to "Insurance Sales Commissions", which would be defined as a "sales commission paid by the Insurance Company or an Affiliate to the Independent Producer for the service of recommending and/or effecting the purchase or sale of an insurance or annuity

<sup>32</sup> See Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, Div. T, 136 Stat. 5275 (2022).

<sup>33</sup> 88 Fed. Reg. at 76,027 (PTE 84-24, Prop. Sec. VI(a)); see also 88 Fed. Reg. at 76,031 (PTE 84-24, Prop. Sec. X(d)).



contract, including renewal fees and trailing fee.”<sup>34</sup> Compensation that includes “revenue sharing payments, administrative fees or marketing payments, payments from parties other than the Insurance Company or its Affiliates, or any other similar fees” would be excluded from relief under PTE 84-24.<sup>35</sup> Further, the proposed amendments would require Insurers to identify and eliminate volume-based incentive sales, including “quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other similar actions or incentives.”<sup>36</sup>

The Department would impose this compensation disparity between independent and captive agents without justification. The Proposed Rule’s limitations on compensation are not necessary in either PTE.

V. PTE 84-24 is Inconsistent with the Principles of State-Based Insurance Regulation

In 1945, Congress passed the McCarran-Ferguson Act which affirmed that states are the primary regulators of insurance.<sup>37</sup> The McCarran-Ferguson Act specifically preserved the states’ authority to regulate and tax insurance.<sup>38</sup>

Under the proposed amendments to PTE 84-24, the Department would impose on insurance companies broader review and audit obligations for Independent Producers. Insurance companies would be required to develop a “prudent process” for determining whether an Independent Producer is fit to sell the insurer’s products.<sup>39</sup> As part of this prudent process, the insurance company must review “customer complaints, disciplinary history, and regulatory actions concerning the Independent Producer”, as well as “the Independent Producer’s training, education, and conduct.”<sup>40</sup> Further, the insurance company must document the basis for its initial determination and must review such determination annually.<sup>41</sup>

These requirements are the purview of state insurance regulators. The National

<sup>34</sup> *Id.* at 76,025-26 (PTE 84-24, Prop. Sec. III(g)); *see also* 88 Fed. Reg. 76,031 (PTE 84-24, Prop. Sec. X(g)).

<sup>35</sup> *Id.* at 76,031 (PTE 84-24, Prop. Sec. X(g)).

<sup>36</sup> *Id.* at 76,028 (PTE 84-24, Prop. Sec. VII(c)(2)).

<sup>37</sup> An Act to Express the Intent of Congress with Reference to the Regulation of the Business of Insurance, ch. 20, 59 Stat. 33 (1945) (“McCarran-Ferguson Act”) (codified as amended at 15 U.S.C. §§ 1011-1015).

<sup>38</sup> *See* 15 U.S.C. § 1012.

<sup>39</sup> 88 Fed. Reg. at 76,028, (PTE 84-24, Prop. Sec. VII(c)(3)).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*





Association of Insurance Commissioners (“NAIC”) Model Statute regarding the sale of annuity transactions, as amended to require a best-interest standard, provides a safe harbor for insurers to satisfy the best-interest requirements.<sup>42</sup> For the safe harbor to apply, the insurer is required to monitor the conduct of the financial professional and develop a supervisory system with enforcement by the state insurance commissioner.<sup>43</sup> Forty-one states have now enacted the NAIC Model Statute, but the proposed amendments to PTE 84-24 would override these state statutes and substitute state regulators with a federal requirement for insurance companies to oversee Independent Producers.

VI. The Proposed Rule Excludes Independent Marketing Organizations from PTE 2020-02

Independent marketing organizations (“IMOs”) are entities designed to work with independent insurance agents and insurers to deliver non-securities-based insurance products, such as life insurance and fixed annuities, to customers. IMOs develop relationships with small agencies and work with independent agents to provide them access to insurance products from various carriers.

The Proposed Rule declined to name IMOs as a “Financial Institution” under the proposed amendments to PTE 2020-02.<sup>44</sup> This restrictive definition of “Financial Institution” would limit IMOs dealing in annuities and, by extension, the independent insurance agents with whom they work from utilizing PTE 2020-02.

VII. Modifying the Existing Regulatory Structure is Unnecessary at This Time

Under the current regulatory structure, NAIFA members are already operating under a best-interest standard. NAIFA strongly believes that modifying the existing regulatory structure to adopt the Proposed Rule is unnecessary at this time. In the years since the Department’s 2016 Fiduciary rule was finalized and subsequently vacated, regulators at the federal and state levels have adopted and implemented significant and workable new regulations that directly address conflicts of interest and that are already working to achieve the objective that the Department represents it is seeking to address with the Proposed Rule.<sup>45</sup>

<sup>42</sup> NAIC Model Law 275-1 (“Suitability in Annuity Transactions Model Regulation”), Section 6(E) (NAIC 2020).

<sup>43</sup> *Id.* at Section 6(E)(1), (3)(a)-(b).

<sup>44</sup> 88 Fed. Reg. at 76,003 (PTE 2020-02, Prop. Reg. V(c)) (Definition of “Financial Institution”).

<sup>45</sup> 88 Fed. Reg. at 75,890-91 (“[T]he proposal is intended to protect the interests of retirement investors by requiring investment advice providers to adhere to stringent conduct standards and mitigate their conflicts of interest”).



On June 5, 2019, the U.S Securities and Exchange Commission (“SEC”) adopted Regulation Best Interest (“Reg BI”), which provides strong protections to consumers who engage broker-dealers on a commission basis by requiring all broker-dealers and their registered representatives to always act in their clients’ best interest without putting their own interests first.<sup>46</sup> In addition, the NAIC model regulation that requires insurance producers to satisfy a best-interest standard aligns well with Reg BI.<sup>47</sup> Reg BI went into effect on June 30, 2020, and the SEC, the Financial Industry Regulatory Authority, and state securities regulators, as the Department notes in the Preamble to the Proposed Rule, have been actively and aggressively enforcing it.<sup>48</sup>

Neither the Department nor any other federal or state regulatory agency has presented evidence suggesting that this comprehensive framework is not effectively working to protect retirement savers. Even if there was such evidence, it would be incumbent upon those regulators and not the Department to address such deficiencies. In the absence of any evidence of deficiencies in the existing rules, there is simply no justification for any effort to require further regulations that will create unnecessary instability for retirement plans, retirees, and savers.

With the Proposed Rule, the Department is ushering in a new fiduciary regime on top of the existing federal and state regulations in the retirement space. It will take significant time and resources for financial professionals and investors to fully digest and operate under the Department’s proposed structure while introducing a substantial amount of uncertainty in the marketplace. Unlike in 2015, NAIFA members will have to adjust to the interplay between the Proposed Rule, Reg. BI, and the NAIC state statutes, while the Proposed Rule faces potential litigation and potentially the same fate in the federal courts as the 2016 Fiduciary Rule. All of these developments will be costly and confusing, with the heaviest burden falling on Main Street financial professionals and their clients.

Instead of pursuing this rulemaking effort, NAIFA urges the Department to focus its resources and efforts on providing clear and appropriate opportunities for the Department to help America’s workers and retirees build their retirement nest eggs and enjoy a financially secure retirement. Implementing the critically important retirement security provisions enacted by

<sup>46</sup> 17 C.F.R. § 240.15I-1.

<sup>47</sup> NAIC Model Law 275-1 (“Suitability in Annuity Transactions Model Regulation”), Section 6(A) (NAIC 2020).

<sup>48</sup> 88 Fed. Reg. at 75,919 (“The SEC announced in January 2023 that it intends to incorporate compliance with Regulation Best Interest into retail-focused examinations of broker-dealers 209 and both the SEC and FINRA have begun enforcement actions related to Regulation Best Interest. In June 2022, the SEC charged a firm and five brokers for violating Regulation Best Interest and selling high-risk bonds to retirees and other retail investors. Meanwhile, FINRA levied its first Regulation Best Interest-related fine in October 2022 and suspended two New York-based brokers in February 2023”).



Congress in recent years through the SECURE Act and the SECURE 2.0 Act is key to that goal.<sup>49</sup> The Proposed Rule threatens low- and middle-income workers' ability to utilize the SECURE Act and SECURE 2.0 Act's provisions due to being forced out of the market for professional financial services. The DOL's Inspector General has even urged the Employee Benefits Security Administration "to focus its limited available resources on investigations that are most likely to result in the prevention, detection, and correction of [ERISA] violations."<sup>50</sup>

With the negative impact on low- and middle-income workers and families, NAIFA is also concerned with the Department's rushed process to finalize the Proposed Rule. The Department's 60-day comment period occurred over two federal holidays and the Department held a public hearing on the Proposed Rule before the close of the comment period. When NAIFA and other stakeholders requested an extension of the comment period, the Department stated that it "believes that its current proposal reflects significant input it has received from public engagement with this project since 2010" and rejected the request.<sup>51</sup> NAIFA believes the Department did not provide a meaningful opportunity for stakeholders to engage in the rulemaking process.

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We thank you for your continued work and stand ready to work with you on these vital issues that impact financial professionals and – most importantly – their clients across the country.

Sincerely,

Christopher Gandy  
Secretary  
National Association of Insurance and Financial Advisors

<sup>49</sup> See Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, Div. O, 133 Stat. 3137 (2019); *see also* Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, Div. T, 136 Stat. 5275 (2022).

<sup>50</sup> Office of Inspector General for the U.S. Department of Labor, "Semiannual Report to Congress (Apr. 1, 2023 – Sep. 30, 2023)" at 24 available at <https://www.oig.dol.gov/public/semiannuals/90.pdf>.

<sup>51</sup> Letter to Securities Industry & Financial Markets Association from U.S. Department of Labor Assistant Secretary for Employee Benefits Security Lisa M. Gomez (Nov. 14, 2023).

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Representative Wagner Statement for the Record  
Subcommittee on Health, Employment, Labor, and Pensions hearing “Protecting  
America’s Savers and Retirees from DOL’s Regulatory Overreach”  
Thursday, February 15, 2024

I want to thank Chairman Good and Chairwoman Foxx for convening this hearing. This proposal marks the Department of Labor’s fourth attempt to issue a “fiduciary” proposal. Each version of this decade-long effort has drawn significant investor as well as bipartisan Congressional concern. Most notably, Congress passed a joint resolution I was proud to lead that would have stopped the Obama Administration’s 2016 DOL Fiduciary Rule. I am encouraged to hear that Mr. Allen will be leading a Congressional Review Act resolution to overturn this harmful proposal and look forward to supporting these efforts.

Just last month, the Financial Services Committee’s Subcommittee on Capital Markets, which I chair, held a hearing to examine this harmful proposal coming out of Biden’s Department of Labor. During the hearing, we discussed the redundancy of the proposed rule in light of existing regulations like the SEC’s Regulation Best Interest (“Reg BI”) and the National Association of Insurance Commissioners’ best interest model, highlighting their effectiveness in safeguarding retirement savers. Members also addressed the disproportionate impact this rule will have on lower and middle-income savers and the potential to once again create two classes of investors; those who can afford investment advice, and those who cannot.

We have heard bipartisan concerns from across industry and the retirement community that this proposal will raise costs, limit choices, and restrict access to investment for hardworking Americans. I am disappointed that Congress is once again forced to take action to prevent this utterly wrongheaded proposal from harming the financial wellbeing of our constituents. I would urge all of my colleagues to oppose this proposal and join me in supporting Mr. Allen’s resolution.

Congress of the United States  
House of Representatives  
Washington, DC 20515-1013

January 8, 2024

The Honorable Julie A. Su  
Acting Secretary  
U.S. Department of Labor  
200 Constitution Avenue, N.W.  
Washington, DC 20210

The Honorable Lisa Gomez  
Assistant Secretary, Employee Benefits Security  
Administration  
U.S. Department of Labor  
200 Constitution Avenue, N.W.  
Washington, DC 20210

Dear Acting Secretary Su and Assistant Secretary Gomez:

We write to express our concerns about the Department of Labor's (DOL) proposed "Retirement Security" (RIN: 1210-AC02)<sup>1</sup> rule announced by President Biden at the White House on October 31, 2023, and published in the Federal Register on November 3, 2023. The proposal, which was previously referred to as the "Conflicts of Interest in Investment Advice" rule as described in DOL's Spring 2023 regulatory agenda,<sup>2</sup> includes significant, unnecessary, and counterproductive changes to the existing regulatory framework governing the conduct of financial professionals who provide personalized investment advice to retirement savers under the *Employee Retirement Income Security Act of 1974* (ERISA)<sup>3</sup> and the *Internal Revenue Code of 1986*<sup>4</sup> (the Tax Code). DOL's past efforts to expand these rules, which federal courts have repeatedly rejected, dealt a devastating blow to millions of American workers and retirees by impairing their ability to obtain much-needed affordable financial professional help to prepare for and achieve a secure and dignified retirement. We urge DOL to cease its efforts to adopt this proposal in order to prevent needlessly inflicting harm on millions of retirement savers across the country.

#### **Harm to Lower- and Middle-Income Workers**

In moving forward with this proposal, DOL has unreasonably dismissed the extensive research and real-world experience decisively demonstrating the 2016 DOL fiduciary rule significantly harmed lower- and middle-income workers before being vacated in federal court. The proposed fiduciary definition goes further than the 2016 fiduciary rule that was invalidated by a federal appeals court ruling. It would repeal the ERISA five-part test used to determine fiduciary status and replace it with a three-part test, one prong of which would impose fiduciary status on any financial professional who recommends financial products. The proposal also includes many changes to existing prohibited transaction exemptions (PTEs). Changes proposed to PTE 2020-02 and PTE 84-24 could, if adopted, significantly impair their utility for serving retirement savers.

As in 2016, the proposal, if adopted, could cause a large number of financial professionals, who currently serve a broad range of customers, to switch to providing service as investment advisers, rather than as insurance agents or registered representatives of a broker-dealer. This is the case because the proposals in 2016 and 2023 impose much more severe risks and burdens on broker-dealers and insurance representatives than on investment advisers. Investment advisers charge ongoing advisory fees and impose account minimums that low- and moderate-income workers and retirees cannot afford,

<sup>1</sup> U.S. Department of Labor, Employee Benefits Security Administration: [Proposed Retirement Security Rule: Definition of an Investment Advice Fiduciary; Proposed Amendment to Prohibited Transaction Exemption 2020-02; Proposed Amendment to Prohibited Transaction Exemption 84-24; and Proposed Amendment to Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, and 86-128](#), November 3, 2023.

<sup>2</sup> U.S. Department of Labor, [Spring 2023 Unified Agenda of Regulatory and Deregulatory Actions](#), June 13, 2023.

<sup>3</sup> [ERISA § 3\(21\)](#), 29 U.S.C. § 1002(21).

<sup>4</sup> Internal Revenue Code – [Title 26, Code of Federal Regulations](#).

causing them to lose access to any financial professional.

A study of the 2016 fiduciary rule found that more than 10 million smaller retirement account owners lost the ability to work with financial professionals.<sup>5</sup> A more recent analysis found that if DOL adopts a new rule that is similar to the 2016 rule, the retirement savings of 2.7 million individuals with incomes below \$100,000 would plummet by \$140 billion over ten years. The analysis also found that people of color, particularly Black and Latino retirement account owners would be among the hardest hit, increasing the racial wealth gap by 20 percent.<sup>6</sup>

DOL's continued pursuit of this misguided policy objective will end up hurting the very same people it is tasked to protect. If adopted, the Retirement Security Rule proposal would deprive America's workers and retirees of much needed professional guidance to navigate the complex world of investing in order to achieve their retirement goals.<sup>7</sup>

#### Conflicts of Interest Are Being Addressed

In the years since the 2016 fiduciary rule was vacated, regulators at the federal and state levels have adopted and implemented significant and workable regulations that directly address the conflicts of interest that DOL asserts it is seeking to address with this new proposed rule to level the playing field. The U.S. Securities and Exchange Commission (SEC) adopted Regulation Best Interest (Reg BI),<sup>8</sup> which requires all broker-dealers and their registered representatives to always act in their client's best interest without putting their interests first. Reg BI went into effect on June 30, 2020, and the SEC, the Financial Industry Regulatory Authority, and state securities regulators have been actively and aggressively enforcing it. In addition, forty states<sup>9</sup> have now enacted an updated National Association of Insurance Commissioners (NAIC) model regulation<sup>10</sup> that requires insurance producers to satisfy a best interest standard that aligns well with Reg BI. Further, DOL adopted its own new rule in 2020 that provided cohesion with the newly emerging federal and state regulatory regime.<sup>11</sup>

<sup>5</sup> ["The DOL Fiduciary Rule: A Study on How Financial Institutions Have Responded and the Resulting Impacts on Retirement Investors,"](#) Deloitte, August 9, 2017. This study represents results from institutions representing 43% of U.S. financial advisers and 27 percent of the retirement savings assets in the market. The study found that, as of the DOL rule's first applicability date, 53% of study participants reported limiting or eliminating access to brokerage advice for smaller retirement accounts, impacting an estimated 10.2 million accounts and \$900 billion in savings.

<sup>6</sup> ["The Data is In: The Fiduciary Rule Will Harm Small Retirement Savers,"](#) U.S. Chamber of Commerce, Spring 2017. This report is a compilation of survey statistics and other data that was submitted to the U.S. Department of Labor during the comment period in response to the February 3, 2017, Presidential Executive Order on the Fiduciary Rule. The compilation showed if the rule is implemented, it could limit or restrict investment products for some 11 million households and affect up to 7 million individual retirement account (IRA) owners who could lose access to investment advice altogether. It also showed that the provision of advice to individuals with small accounts would be curtailed or cut off due to the risk and increased costs of the rule.

<sup>7</sup> ["Analysis of the Effects of the 2016 Department of Labor Fiduciary Regulation on Retirement Savings and Estimate of the Effects of Reinstatement,"](#) prepared by Quantria Strategies, LLC for the Hispanic Leadership Fund, November 8, 2021. This analysis found that if the vacated 2016 DOL Fiduciary Rule is reinstated, it would reduce the accumulated retirement savings of 2.7 million individuals with incomes below \$100,000 by approximately \$140 billion over 10 years. The analysis also found that reinstatement of the rule would result in a roughly 20% increase in the wealth gap for Black and Hispanic Americans when looking at accumulated IRA savings alone.

<sup>8</sup> ["The Importance of Access to Financial Guidance to Moderate Income Retirement Savers,"](#) Matthew Greenwald, PhD, Greenwald Research, May 18, 2022. This survey examined views on access to financial professionals for those ages 55 to 70, with life savings in the lower half of financial wealth when compared to all Americans of their age. The survey found that a majority of moderate-income savers who are in or near retirement are concerned that a fiduciary-only regulation would keep them from the professional financial guidance they want and need, especially during difficult economic times (85% believe they have at least a somewhat great need for financial guidance from a professional, 81% feel the guidance they receive helps them feel reassured during difficult economic times). Of those without a financial professional, almost all believe it would be important to work with one to feel reassured through difficult economic times (97%) and during times of high inflation (97%).

<sup>9</sup> U.S. Securities and Exchange Commission, [Regulation Best Interest: The Broker-Dealer Standard of Conduct](#), adopted June 5, 2019.

<sup>10</sup> [Map of 40 states that adopted NAIC Suitability in Annuity Transaction Model Regulation](#), Insured Retirement Institute, October 2023.

<sup>11</sup> National Association of Insurance Commissioners, [Suitability in Annuity Transaction Model Regulation](#), adopted February 2020.

<sup>12</sup> U.S. Department of Labor, Employee Benefits Security Administration, [Prohibited Transaction Exemption 2020-02, Improving Investment Advice for Workers & Retirees](#), adopted February 16, 2021

Neither DOL nor any other federal or state regulatory agency has presented evidence suggesting that this newly implemented comprehensive framework is not working effectively to protect retirement savers or demonstrates there is a need to make changes such as those provided for in the proposed rule. Without any evidence of deficiencies in the existing rules, it is difficult to justify the need for the proposed rule and the unnecessary instability it would cause for retirement plans, retirees, and savers.

#### **Ignoring Federal Court Rulings**

For more than a decade, DOL has sought to increase its role and broaden the requirements of the fiduciary standards imposed under ERISA and the Tax Code beyond the authorizing statute. Federal courts have rejected these efforts numerous times in recent years.<sup>12</sup> While DOL claims the proposed rule is in alignment with the 2018 Fifth Circuit Court ruling that invalidated the 2016 fiduciary rule, it disregards the court's finding that Congress intentionally structured ERISA to recognize the distinction between investment advice and sales. Instead, the proposal, if adopted, would extend fiduciary duty to all who make recommendations while failing to recognize that when ERISA was enacted, there was a fundamental difference in obligations between (i) investment advisers who are paid fees for advice, and who have long been considered fiduciaries, and (ii) stockbrokers and insurance agents, who generally assumed no such status in selling products to their clients.

Furthermore, the proposed rule defines several key terms and concepts, including "recommendation," "retirement investor," and "fees," in a manner that similarly ignores the distinction between investment advice and sales commissions as established in the 2018 Fifth Circuit Court of Appeals ruling. Finally, the proposed rule would apply ERISA fiduciary status to rollover recommendations – a decision that is inconsistent with the intent and text of ERISA as interpreted in federal courts.<sup>13</sup> We firmly request DOL respect the limits set forth by Congress and abide by the decisions upheld in our federal courts.

#### **Focus on Implementing New Retirement Security Laws**

The proposed DOL rule purports to protect workers and retirees from fees tied to commissions that are inherent in the annuity distribution chain for certain retirement products, such as annuity sales. However, rather than protecting workers and retirees, the proposal could effectively prohibit annuity sales through the existing distribution channels. As a result, this could likely to retirement product distribution chains and reduce access to annuities and other retirement products.

Instead of pursuing this problematic and counterproductive rulemaking effort, DOL should focus its resources and efforts on implementing the critically important retirement security provisions enacted by Congress in recent years through the *SECURE Act*<sup>14</sup> and *SECURE 2.0 Act*.<sup>15</sup> These bipartisan legislative measures provide clear and appropriate opportunities for DOL to help America's workers and retirees have opportunities to build their retirement nest eggs and enjoy a financially secure retirement.

For the reasons above, we urge DOL to withdraw and cease efforts to adopt the "Retirement Security" (RIN: 1210-AC02) rule proposal and accompanying amendments to the PTEs announced by President Biden at the White House on October 31 and published in the Federal Register on November 3, 2023.

We look forward to your attention on this matter and your response to our request.

<sup>12</sup> See, e.g., *Chamber of Com. v. U.S. Dep't of Lab.*, 885 F.3d 360 (5th Cir. 2018); *Carfora v. Teachers Ins. Annuity Ass'n of America*, 631 F. Supp. 3d 125 (S.D.N.Y. 2022); *Am. Sec. Ass'n v. U.S. Dep't of Lab.*, 2023 WL 1967573 (M.D. Fla. 2023); *Fed'n. of Ams. for Consumer Choice v. U.S. Dep't of Lab.*, Case No. 3:22-cv-00243-K-BT (N.D. Tex. June 30, 2023) (Rutherford, Mag. J).

<sup>13</sup> *Id.*

<sup>14</sup> [Consolidated Appropriations Act, 2020, Pub. L. No. 116-34, Div. O \(2020\)](#).

<sup>15</sup> [Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, Div. T \(2022\)](#).



Sincerely,



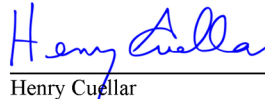
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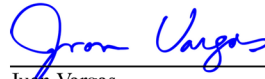
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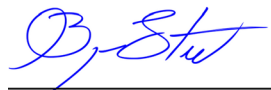
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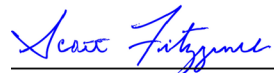



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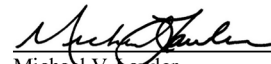
  
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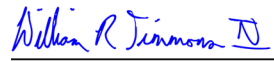
  
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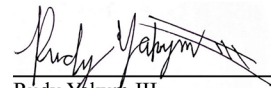
  
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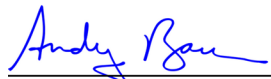
  
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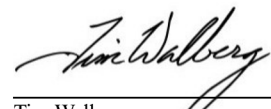
  
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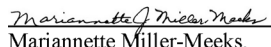
  
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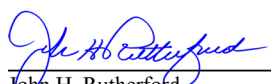
  
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*Dan Meuser*

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*Glenn Thompson*


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Glenn "GT" Thompson  
Member of Congress


*Kevin Hern*

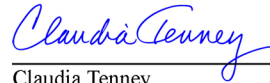
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