March 6, 2023

Delivered via email

The Honorable Felton Booker	The Honorable Steven Seitz
Deputy Assistant Secretary	Director
Financial Institutions	Federal Insurance Office
U.S. Department of the Treasury	U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW	1500 Pennsylvania Avenue, NW
Washington, DC 20220	Washington, DC 20220

Dear Deputy Assistant Secretary Booker and Director Seitz:

The undersigned organizations would like to thank you for contacting us for input on the Department of Labor's (DOL) forthcoming rulemaking project to propose a new definition of a fiduciary and to propose amendments to existing prohibited transaction exemptions (PTEs). Your interest in our feedback on the implications of such proposals on Americans' access to lifetime income products and other savings opportunities is much appreciated.

As we discussed, in our view, there is no demonstrated need for any further rulemaking from DOL regarding the definition of fiduciary or regarding modifications of existing PTEs. Our members and the vast majority of financial professionals who sell insurance products are dedicated to acting in the best interest of their customers, as they are required to do by the SEC's Regulation Best Interest and the NAIC model best interest standard, which has been adopted in more than 30 states and will be adopted in more states soon. These are rigorous standards that directly and effectively address the DOL's underlying concerns regarding conflicts of interest, which it previously sought to address through the now-vacated 2016 fiduciary rule. For example, Regulation Best Interest requires broker-dealers to identify and mitigate any conflicts of interest that could create incentives not to act in their customers' best interest. Regulation Best Interest and the NAIC model rule accomplish DOL's ultimate consumer protection goals without imposing onerous costs and compliance obligations that ultimately harm main street investors. There is no reason for DOL to take any further action while these other regulatory regimes are effective and working.

The core of this issue is that the salespeople who sell insurance products are very appropriately required to act in the best interest of their customers, but they are not fiduciaries. Based on the language in the preamble to PTE 2020-02 and in FAQs issued in April of 2021, DOL seems to want to revive its prior position that turns such salespeople into fiduciaries despite the clear invalidation of that position, as arbitrary and capricious rulemaking, by the U.S. Court of Appeals for the Fifth Circuit in 2018.[1] Under that decision, a fiduciary relationship is a "special relationship of trust and confidence," and no such relationship exists in the case of a salesperson. In our view, this is the correct interpretation of the law. Any proposal that would effectively re-

[1] Chamber of Com. of U.S. v. U.S. Dep't of Lab., 885 F.3d 360 (5th Cir. 2018).

instate DOL's invalidated position – as DOL has clearly foreshadowed it intends to pursue in the preamble to PTE 2020-02 and the FAQs – would run counter to the Fifth Circuit's ruling on the law and produce widespread harm, as proven by very clear data discussed below.

Before turning to that data, we want to call your attention to a key development that occurred since we spoke. On February 13, 2023, the U.S. District Court for the Middle District of Florida issued an opinion invalidating DOL's new interpretation of the "regular basis" prong of the five-part test used to determine when a provider of investment advice has triggered fiduciary status, as reflected in the preamble to PTE 2020-02 and the April 2021 FAQs.[2] DOL's new definition was characterized as arbitrary and capricious by the court. The court noted that DOL's new interpretation, which would have significantly expanded DOL's jurisdiction to cover rollover and post-rollover advice, is not supported by the plain text and long-term interpretation of the five-part test. In addition, the court found DOL's new interpretation to be inconsistent with Congress' clear intent in structuring a bifurcated framework under which ERISA governs advice about plan assets while the Internal Revenue Code governs advice about IRA assets.

And this was not the first court to reject DOL's new definition. The court in this case cited another federal court decision that found that DOL's new definition of a fiduciary was incorrect.[3] We believe this decision, much like that of the Fifth Circuit, reflects the correct interpretation of the law.

So, in short, DOL issued a new rule in 2016. It was invalidated. DOL tried to revive the 2016 rule indirectly in 2020 and 2021. The only two courts to have reviewed the revived version have rejected it, with a third case to be decided very soon.[4] And all signs point to DOL's continued attempt to push these invalidated positions in forthcoming rulemaking.

Issuing invalid rules repeatedly harms everyone. It creates enormous confusion and costs for retirement savers by imposing new rules and then undoing them at great cost to those providing advice to savers. And frankly, it undermines respect for the regulatory process, which is unfortunate for all of us in and out of government who believe so strongly in the regulatory process.

It is time for DOL to wait until the judicial process has run its course. Then it will be time for DOL to comply with the court decisions.

And if the above is not enough reason for DOL to stop moving forward to revive the 2016 rule, there is also the devastating damage done by the 2016 rule. Before the finalization of the 2016 rule, DOL argued that a fiduciary standard would not cause low and middle-income individuals to lose access to investment assistance. The facts unfortunately proved DOL to be wrong:

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[2] American Securities Association v. United States Department of Labor, Case No. 8:22-cv-330-VMC-CPT (M.D.FL. Feb. 13, 2023)

[3] Carfora v. Teachers Insurance Annuity Association of America, WL 4538213 (S.D.N.Y. Sept. 27, 2022).

[4] Federation of Americans for Consumer Choice v. United States Department of Labor, Case No. 3:22-CV-00243-K-BN, filed February 9, 2022.

- In 2017, there was a study[5] of institutions representing 43 percent 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 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 savings.***
- In 2021, a study[6] that showed that reinstatement of the 2016 rule would:
  - ***reduce the projected accumulated retirement savings of 2.7 million individuals with incomes below $100,000 by approximately $140 billion over 10 years, and***
  - ***have the most adverse effects on Blacks and Hispanics – reducing their projected accumulated IRA savings by approximately 20 percent over 10 years – contributing to an approximately 20 percent increase in the wealth gap attributable to IRAs for these individuals***.

By turning salespeople into fiduciaries, the 2016 fiduciary rule made the brokerage model so expensive and risky that many financial institutions could no longer serve small accounts. That led to a movement away from the brokerage model toward the advisory model, where persons with large amounts of savings can pay a year-round fee for year-round advice. In short, the wealthy continued to be served, and low and middle-income individuals lost, as shown by the facts.

And very importantly for the Federal Insurance Office (FIO), DOL's 2016 fiduciary rule most acutely affected individuals' access to insurance products that provide much-needed guaranteed income for life. Insurance products are generally sold through the brokerage model, and less often sold through the advisory model. Thus, by turning salespeople into fiduciaries, DOL greatly harmed access to guaranteed income for life.[7] And this also hurt the thousands of

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[5] Deloitte conducted the study.

[6] This study was sponsored by the Hispanic Leadership Fund and conducted by Quantria Strategies.

[7] See, e.g. LIMRA Secure Retirement Institute Study (2017), as described in NAIFA's August 4, 2017 comment letter ("LIMRA estimates that access to guaranteed income products will decline 29% under the [DOL Fiduciary] Rule/PTEs." (The reference to "PTEs" is to the exemptions from the application of the Fiduciary Rule, which substantially all qualified annuities had to use.)); Independent Insurance Agents & Brokers of America, Inc. (IIABA) Member Survey (July 2017), as described in IIABA's August 3, 2017 comment letter ("38%, or 315 respondents, answered that they personally and/or the insurance agency they work for had stopped selling or giving advice related to products impacted by the fiduciary rule, or planned to do so on or before January 1, 2018 when the [fiduciary] rule takes full effect.") ("[M]ore than one third of independent insurance agents who responded to the survey will exit the market on or before January 1, 2018; and for those that remain some will offer more limited services to clients."); LIMRA Secure Retirement Institute's *First Quarter 2017 U.S. Retail Annuity Sales Survey*, as described in May 18, 2017 LIMRA press release (Indexed annuity sales are forecast to decline 5-10% in 2017 and "another 15-20 percent in 2018 when the BICE goes into effect," referring to the "Best Interest Contract Exemption" under the DOL fiduciary rule); LIMRA Secure Retirement Institute's *Second Quarter 2017 U.S. Retail Annuity Sales Survey*, as described in an August 23, 2017 LIMRA press release (total annuity sales for the first half of 2017 decreased 10% over the first half of 2016, *the lowest first half sales since 2001)* (*Variable annuity sales are forecast to drop 10-15% in 2017, returning to levels not seen since 1998).*

In 2017, shortly after the 2016 rule was finalized, NAIFA surveyed its members to understand the potential effects of the rule. For instance, approximately 89 percent of respondents predicted that consumers would have to pay more for services. Similarly, when asked what percentage of their clients with tax-favored retirement savings plans would

insurance agents who have spent their lives trying to make their customers' lives more financially secure. We know that FIO has a great interest in helping individuals benefit from the protections available through insurance products.

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, according to a survey by Greenwald Research in 2022. The survey found that moderate-income retirement savers strongly oppose government regulations that would discourage or prohibit financial professionals from being compensated by commission, and that they feel compensation by commission is sometimes preferable to ongoing fees. Commissions are in some cases more appropriate for consumers, particularly when consumers are purchasing guaranteed lifetime income.

For the above reasons, we would hope that you would share our great concerns over any resurrection of any part of a 2016 fiduciary rule that did so much damage and deprived so many people of lifetime income protections.

Thank you once again for contacting us. We are more than happy to answer any questions you may have or meet again to discuss this further.

American Council of Life Insurers
Committee of Annuity Insurers
Insured Retirement Institute
National Association of Insurance and Financial Advisors

experience increased costs due to the rule, approximately 78 percent said that more than half would. Ninety-one percent of survey respondents said they had already experienced or expected to experience a restriction in the products they could offer to clients.