January 2, 2024

Via Federal eRulemaking Portal at www.regulations.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N–5655
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC 20210

Office of Exemption Determinations
Application No. D-12057
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC 20210

Office of Exemption Determinations
Application No. D-12060
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC 20210

RE: Comments of NAIFA to RIN 1210–AC02: Retirement Security Rule: Definition of an Investment Advice Fiduciary and ZRINs 1210-ZA32, 1210-ZA33, 1210-ZA34

To Whom it May Concern:

On behalf of the National Association of Insurance and Financial Advisors ("NAIFA"), I write to provide comments in response to a series of proposed regulations issued by the Department of Labor (the "Department" or "DOL") detailing the proposed changes to the definition of the term "fiduciary" under section 3(21) of the Employee Retirement Security Act of 1974 ("ERISA")[1], as well as amendments to two current class exemptions, Prohibited Transaction

[1] 29 CFR § 2510.3-21

Exemption ("PTE") 84-24 and PTE 2020-02 (collectively, the "Proposed Rule").[2] We appreciate the opportunity to comment on the Proposed Rule and discuss the potential impact on both our members and their clients. 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. For these reasons further described below, NAIFA urges the Department to withdraw 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 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 advisor 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.

[2] 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).

NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS
1000 Wilson Boulevard, Suite 1890, Arlington, Virginia 22209 | 703-770-8100 | www.naifa.org

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 their business***…".[3] 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")[4] which was rejected by the United States Court of Appeals for the Fifth Circuit in *Chamber of Commerce vs. United States Department of Labor*[5] 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***.[6] The Proposed Rule would remove this personalized

[3] 88 Fed. Reg. at 75,977; Prop. 29 C.F.R. § 2510.3-21(c)(1)(ii) (emphasis added).
[4] 81 Fed. Reg. 20,946 (Apr. 8, 2016) ("Definition of the Term ''Fiduciary''; Conflict of Interest Rule—Retirement Investment Advice").
[5] *Chamber of Commerce of the U.S. v. U.S. Dep't. of Labor*, 885 F.3d 360 (5th Cir. 2018).
[6] 29 CFR § 2510.3-21(c)(1)(ii)(B) (emphasis added).

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.[7] This automatic status has never been part of the Department's construct before the issuance of the Proposed Rule.

1. <u>One-Time Transactions Do Not Create a Fiduciary Relationship</u>

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.[8] 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.[9] 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.[10]

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."[11] 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."[12]

---

[7] 88 Fed. Reg. at 75,977; *see also* Prop. 29 C.F.R. § 2510.3-21(c)(1)(i).
[8] *See* 88 Fed. Reg. at 75,906-07.
[9] *Id.*
[10] *Id.*
[11] *Chamber of Commerce* at 370.
[12] *Id.* at 380.

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."[13] Under these principles, a fiduciary relationship is not present in all financial 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."[14]

The "control and authority" requirement for a fiduciary relationship is found in two of ERISA's three statutory fiduciary definition prongs.[15] 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."[16]

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."[17] 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.

[13] *Id*. at 377 (citing *Mertens v. Hewitt Assocs*., 508 U.S. 248, 262 (1993)).
[14] *Id.* at 377.
[15] *See* 29 U.S.C. § 1002(21)(A)(i), (iii).
[16] *Chamber of Commerce* at 377.
[17] 88 Fed. Reg. at 75,942.

Such fiduciary status, if applied under the Proposed Rule, would subject financial 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").[18] 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.[19] 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.[20]

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".[21] Under the proposed amendments to PTE 84-24, only investment advisors are required to make this fiduciary acknowledgement.[22] 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.[23] 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.[24]

Similar to the 2016 Fiduciary Rule, the Department is again attempting to create a private right of 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

[18] 81 Fed. Reg. 21,002 (Apr. 8, 2016) ("Best Interest Contract Exemption").
[19] *Chamber of Commerce* at 384-85.
[20] *Id*.
[21] 88 Fed. Reg. at 76,000 (PTE 2020-02, Prop Sec. II(b)(1)).
[22] 88 Fed. Reg. at 76,027-28, (PTE 84-24, Prop. Sec. VII(b)(1)).
[23] *See Alexander v. Sandoval*, 532 U.S. 275, 286 (2001).
[24] *Chamber of Commerce* at 384.

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.[25] Just 12% 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% of those with an HHI of $50,000 to $99,999, 34% with an HHI of $100,000 to $199,999, and 47% with an HHI of $200,000 or more.[26] 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.[27]

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 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.

[25] *See* 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.
[26] *Id*. at 57.
[27] *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

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.[28] The Deloitte study further found that the 2016 Fiduciary Rule accelerated the shift of retirement assets to a fee-based model.[29] 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 retirement savings of 2.7 million individuals with incomes below $100,000 would plummet by $140 billion over ten years.[30] 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.[31]

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.

[28] 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.
[29] *Id*. at 12.
[30] 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.
[31] *Id*.

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 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.

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.[32]

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

[32] *See* Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, Div. T, 136 Stat. 5275 (2022).

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.[33] 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 contract, including renewal fees and trailing fee."[34] 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.[35] 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."[36]

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.[37] The McCarran-Ferguson Act specifically preserved the states'

---

[33] 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)).
[34] *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)).
[35] *Id*. at 76,031 (PTE 84-24, Prop. Sec. X(g)).
[36] *Id*. at 76,028 (PTE 84-24, Prop. Sec. VII(c)(2)).
[37] 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).

NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS
1000 Wilson Boulevard, Suite 1890, Arlington, Virginia 22209 | 703-770-8100 | www.naifa.org

authority to regulate and tax insurance.[38]

Under the Proposed Rule's 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.[39] 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."[40] Further, the insurance company must document the basis for its initial determination and must review such determination annually.[41]

These requirements are the purview of state insurance regulators. The National 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.[42] 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.[43] 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. <u>The Proposed Rule Excludes Independent Marketing Organizations from PTE 2020-02</u>

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.[44] 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.

---

[38] *See* 15 U.S.C. § 1012.
[39] 88 Fed. Reg. at 76,028, (PTE 84-24, Prop. Sec. VII(c)(3)).
[40] *Id*.
[41] *Id*.
[42] NAIC Model Law 275-1 ("Suitability in Annuity Transactions Model Regulation"), Section 6(E) (NAIC 2020).
[43] *Id*. at Section 6(E)(1), (3)(a)-(b).
[44] 88 Fed. Reg. at 76,003 (PTE 2020-02, Prop. Reg. V(e)) (Definition of "Financial Institution").

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.[45]

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.[46] In addition, the NAIC model regulation that requires insurance producers to satisfy a best-interest standard aligns well with Reg BI.[47] 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.[48]

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

---

[45] 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").
[46] 17 C.F.R. § 240.15l–1.
[47] NAIC Model Law 275-1 ("Suitability in Annuity Transactions Model Regulation"), Section 6(A) (NAIC 2020).
[48] 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").

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 Congress in recent years through the SECURE Act and the SECURE 2.0 Act is key to that goal.[49] 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."[50]

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.[51] NAIFA believes the Department did not provide a meaningful opportunity for stakeholders to engage in the rulemaking process.

***

Thank you for your consideration of our submitted comments.

Sincerely,

Bryon Holz
2023 President
National Association of Insurance and Financial Advisors

---

[49] *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).
[50] 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.
[51] Letter from DOL Assistant Secretary for Employee Benefits Security Lisa M. Gomez (Nov. 14. 2023).