NAIFA | Advocacy
NEW JERSEY

August 6, 2025

Via Electronic Mail

Legal and Regulatory Services
Department of Labor and Workforce Development
PO Box 110, 13th Floor
Trenton, New Jersey 08625
Attention: David Fish, Executive Director

Re: Proposed New Rule N.J.A.C. 12:11 (ABC Test; Independent Contractors)

The National Association of Insurance and Financial Advisors (NAIFA) is the oldest and largest association for financial-service professionals in the United States. NAIFA's mission is to empower financial professionals and consumers through world-class advocacy and education, supporting the success of all industry professionals and promoting the financial security of American families and businesses.

NAIFA-NJ represents over 400 insurance producers and financial advisors throughout New Jersey who provide essential financial security services to families and businesses across the state. NAIFA-NJ members include agents who sell life, property, casualty, and health insurance; financial advisors; and employee-benefits specialists, among others. Many of NAIFA-NJ's members operate as independent contractors, giving them the flexibility and resources they need to work in the best interests of their clients.

NAIFA is filing this comment on the notice of proposed rulemaking issued by the Department of Labor and Workforce Development ("Department") concerning the classification of independent contractors. *See ABC Test; Independent Contractors*, 57 N.J.R. 894(a) (May 5, 2025). As described below, any final rule based on the proposal would violate the Administrative Procedure Act ("APA") in numerous ways. The proposal purports to implement judicial precedent interpreting the statutory ABC test. But in fact, the proposal "departs from the existing statute and case law controlling worker classification"—as the Chairs of the Senate Labor, Legislative Oversight, and Commerce Committees recently pointed out.[1] And although the Department's stated goal is to provide clarity, the proposed rule will do the opposite, increasing confusion and the risk of misclassification across the state.

Moreover, the proposal "would have far-reaching consequences, negatively impacting small business owners, employees, and consumers"—as three other state lawmakers recently explained.[2] The proposal would especially harm New Jersey's financial-services and insurance industries. In

[1] Senators Johnson, Zwicker, and Lagana, Comment Letter on PRN 2025-051—ABC Test, Independent Contractors (June 4, 2025) ("Johnson, Zwicker, and Lagana Letter").

[2] Press Release, Gopal, Donlon and Peterpaul Call for Labor Department Pause on New Independent Contractor Rule (July 21, 2025) ("Gopal, Donlon, and Peterpaul Letter").

these industries alone, the proposal would risk misclassifying thousands of independent contractors as employers. Many of these contractors will retire or relocate in response. The businesses with which they contract may decide to work with fewer contractors or provide fewer services to consumers to reduce legal risk. All these problems and more are documented in publicly available studies demonstrating the consequences of reclassifying independent contractors as employees. By contrast, the Department has provided the public with zero evidence to justify the boilerplate assertions that the proposal will have no adverse economic consequences.

Indeed, the Department's claim that the proposal will have no adverse consequences, coupled with its failure to substantiate that claim and to respond to the wealth of evidence to the contrary, puts the Department on the horns of a dilemma: If the Department has supporting evidence, it was obligated to disclose that evidence to the public so they could evaluate and comment on it; this rulemaking cannot lawfully be completed without those further proceedings. On the other hand, if it has no such evidence, the proposal is legally deficient for *that* reason. A change of this magnitude "warrants further study, including a formal economic impact analysis."[3] Either way, for these reasons and others, the proposal is fatally flawed and should be rescinded. If the Department does not withdraw the rule, it should exempt the financial-services and insurance industries from its new version of the ABC test.

[3] *Id.*

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I. Background

A. The Financial-Services And Insurance Industries

Many in the financial-services and insurance industries, including NAIFA members, work as independent contractors.[4] For example, independent insurance agents often sell and service products offered by insurance companies. These independent agents may enter contracts with one or more insurance companies to offer products to their customers, and they have long been treated as independent contractors rather than employees under federal and state law. Financial advisors also operate independently, providing comprehensive financial services such as financial education, planning, implementation, and investment monitoring to individuals, families, small businesses, organizations, and retirement plans. Though both insurance agents and financial advisors may sometimes associate with a particular firm to achieve regulatory compliance, offer a specific company's products to their customers, or gain access to other tools and services provided by the firm, they are not employees. These individuals have built up successful businesses in reliance on their status as independent contractors. They maintain their own offices, set their own hours, hire their own staff, pay employment taxes, obtain workers' compensation insurance, and advertise their individual services in the communities in which they operate. And when they associate with new firms, as often happens over the course of their careers, they can bring their clients and businesses with them.

Both the financial-services and insurance industries are comprehensively regulated at the federal and state level. Each state has its own licensing requirements, product-filing rules, market-conduct exams, solvency standards, and other regulatory standards intended to protect consumers. Insurance companies and financial firms generally must meet risk-based capital standards, abide by investment guidelines, and submit to regular on-site financial and market-conduct examinations. Individual insurance agents and financial advisors are similarly regulated by federal and state agencies or self-regulatory organizations such as the Financial Industry Regulatory Authority (FINRA). For example, any financial advisor who offers financial guidance regarding securities transactions or conducts securities transactions must either register with the Securities and Exchange Commission (SEC) or associate with a broker-dealer. *See* 15 U.S.C. § 78o(a)(1). If the financial advisor chooses to associate with a broker-dealer, the broker-dealer assumes responsibility for the advisor's compliance with applicable laws. 17 C.F.R. § 270.38a-1; FINRA Rule 3110. All these requirements are designed to promote transparency, protect consumers, and strengthen financial markets.

B. New Jersey's ABC Test And The Proposed Rule

New Jersey uses the "ABC test" to determine whether a person is considered an employee or an independent contractor. *Hargrove v. Sleepy's, LLC*, 106 A.3d 449, 453 (N.J. 2015). Under that test, "[s]ervices performed by an individual for remuneration shall be deemed to be employment . . . unless":

[4] This comment predominately focuses on independent insurance agents and financial advisors licensed by the State of New Jersey and the insurance carriers, investment advisory firms, and broker-dealers they contract with.

> (A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact;
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> (B) Such service is either outside the usual course of the business for which such service is performed, or . . . such service is performed outside of all the places of business of the enterprise for which such service is performed; and
>
> (C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.

N.J.S.A. § 43:21-19(i)(6). Because the test is conjunctive, all three elements must be satisfied for independent-contractor status.

In 2019, the Legislature considered a proposal to amend Prong C so that it would require that "[t]he individual is customarily engaged in an independently established business *or enterprise of the same nature as that involved in the work performed*." S. 863, 219th Leg., Reg. Sess. (N.J. 2019) (emphasis added). The bill would have narrowed the statutory definition of an independent contractor, under which Prong C is satisfied if an individual is engaged in an independently established business of a *different* nature than the work performed. But the bill failed to pass, and the Legislature has not sought to amend the ABC test since.

In May 2025, the Department of Labor and Workforce Development announced the present rulemaking, which similarly concerns the statutory ABC test. *See ABC Test; Independent Contractors*, 57 N.J.R. 894(a) (May 5, 2025). Notably, the Department's proposal is significantly broader than the bill the Legislature declined to adopt in 2019—and it was developed without the benefits and democratic accountability of the legislative process.

The Department held a public hearing on the proposal on June 23, 2025. The great majority of commenters who testified opposed the proposal. They represented a wide range of interests, including the trucking, shipping, financial-services, insurance, and retail industries; freelance writers; franchisees; and gig economy workers. Many commenters explained that the proposal would make it very difficult—if not impossible—to operate as an independent contractor in New Jersey. They explained that independent contractors have chosen that status and want to keep it because they consider themselves entrepreneurs, prioritizing independence, flexibility, and hard work. They also testified that the proposal would create confusion, hinder business-model innovation, and harm New Jersey consumers and the broader economy by increasing costs and reducing the availability of goods and services.

In addition, the Chairs of the Senate Labor, Legislative Oversight, and Commerce Committees submitted a comment letter expressing their "concern[s]" that the proposal "departs from the existing statute and case law controlling worker classification." Johnson, Zwicker, and Lagana Letter. They also warned that the proposal may have a "substantial negative impact . . . on thousands of independent business owners who are properly classified." *Id.*

II. The Proposed Rule Contradicts New Jersey Precedent Interpreting The ABC Test.

The proposed rule purports to "rel[y] heavily" on the case law interpreting the ABC test and to make those precedents "known to employers who are making those consequential classification

decisions." Proposal at 2–3. At the public hearing, the Hearing Officer similarly described the rule as "based on the opinions of the New Jersey Supreme Court and the Appellate Division of the New Jersey Superior Court." Hearing at 3:35–4:10.

That characterization of the proposal is incorrect. On all three prongs, the proposal departs from the statute and defies controlling precedent. Johnson, Zwicker, and Lagana Letter. The Department lacks authority to adopt a rule premised on these legal errors. *See, e.g.*, *In re New Jersey Individual Health Coverage Program's Readoption of N.J.A.C. 11:20-1*, 847 A.2d 552, 557 (N.J. 2004) (a regulation is not "valid" if it is "inconsistent with its enabling statute"); *Matter of Adoption of Amends. to N.J.A.C. 6:28-2.10, 3.6 & 4.3*, 702 A.2d 838, 844 (N.J. Super Ct. App. Div. 1997) (similar); *Bowser v. Bd. of Trs., Police & Firemen's Ret. Sys*., 188 A.3d 375, 379 (N.J. Super. Ct. App. Div. 2018) (rejecting agency action that "misinterpreted" controlling New Jersey Supreme Court decision and holding that "[a]n agency is required to follow judicial precedent interpreting the statute it implements"); *In re N.J.A.C. 17:2-6.5*, 257 A.3d 683, 691 (N.J. Super. Ct. App. Div. 2021) (rule was "arbitrary and irrational" because it "omits" the interpretation of the statute that is "evident in the case law and other sources").

A. Prong A: "Control" Does Not Include Steps To Ensure A Contractor's Compliance With The Law.

The ABC test's first prong requires that the individual "has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact." N.J.S.A. § 43:21-19(i)(6)(A). According to the proposal, the Department will consider "control[] or direction that the putative employer has exercised or has reserved the right to exercise in order to be in compliance with a law or rule." Proposal at 4. The Department even states that the fact that a firm seeks to contractually assure "compliance with a law or rule" will be given "the same weight as would be given to any other control or direction that the putative employer has exercised or has reserved the right to exercise." *Id.*

This interpretation is inconsistent with New Jersey precedent and the weight of authority from other jurisdictions that have considered the issue. Applying New Jersey law, the U.S. District Court for the District of New Jersey rejected the argument that an insurance agent was an employee because "he was subject to rules promulgated by Defendants[] in response to regulatory guidance and state and federal law." *Walfish v. Nw. Mut. Life Ins. Co.*, 2019 WL 1987013, at *7 (D.N.J. May 6, 2019). The court was "unwilling to find that, by promulgating certain rules to ensure regulatory compliance, [the Defendant] exercised control and direction sufficient to fail the Part A of the ABC test." *Id.* Were it otherwise, "any business operating in a regulated industry would necessarily no longer be able hire workers under an independent contractor relationship unless it was willing to risk regulatory non-compliance." *Id.*

In *Trauma Nurses, Inc. v. Board of Review, New Jersey Department of Labor*, similarly, an employment broker for nurses mandated that the nurses comply with a wide range of third-party requirements. 576 A.2d 285, 286–87 (N.J. Super. Ct. App. Div. 1990). Each nurse had to maintain "malpractice insurance, health and disability insurance coverage, a valid CPR certification and a nursing license"; complete a skills checklist "as required by the Joint Commission for Accreditation of Hospitals"; and follow "whatever policies and practices are mandated by the hospital or institution in which he or she is placed." *Id.* at 287. The Appellate Division still held that Prong

A was satisfied because the putative employer lacked the requisite control for the nurses to be considered employees. *Id.* at 288.

The Appellate Division of the Superior Court's recent decision in *Bergin v. New Jersey Department of Labor & Workforce Development* similarly contradicts the Department's position. 2024 WL 157928 (N.J. Super. Ct. App. Div. Jan. 16, 2024), *cert. denied*, 315 A.3d 1221 (N.J. 2024). There, a securities broker-dealer worked with an intermediary, who in turn hired a group of brokers as the intermediary's "employees or agents." *Id.* at *1. The court held that the broker-dealer did not employ the brokers. *Id.* at *8. Although the court did not decide the precise nature of the relationship between the broker-dealer and the intermediary, it explained that their contract treated the intermediary as an independent contractor. *Id.* at *8. The broker-dealer had "no right to control or direct" either the intermediary or the intermediary's brokers "other than according to the terms of the [contractual] agreement and to the extent required by law to oversee compliance with rules of relevant authorities, such as the Securities Exchange Commission and National Association of Securities Dealers." *Id.* at *1, *8–9. The broker-dealer could not "be considered the brokers' employer" where "the extent of [its] oversight was to provide that necessary to ensure the brokers' compliance with securities laws." *Id.* at *9; *see also Gil v. Clara Maass Med. Ctr.*, 162 A.3d 1093, 1100 (N.J. Super. Ct. App. Div. 2017) (hospital "had no control" over a doctor, even though the parties' contractual arrangement "called for [the doctor's] compliance with Clara Maass's bylaws and regulations").

Other jurisdictions agree that control that is exercised merely to ensure compliance with the law cannot create an employment relationship, especially "in the context of insurance agents or other highly regulated industries." *Walfish*, 2019 WL 1987013, at *6. "A company does not exercise the requisite control necessary to create an employer-employee relationship merely because it restricts the manner or means of their work in order to comply with statutory and regulatory requirements." *Santangelo v. New York Life Ins. Co.*, 2014 WL 3896323, at *9 (D. Mass. Aug. 7, 2014), *aff'd*, 785 F.3d 65 (1st Cir. 2015); *see also, e.g.*, *Sinclair Builders, Inc. v. Unemployment Ins. Comm'n*, 73 A.3d 1061, 1070 (Me. 2013) (mandatory compliance with "safety measures" required by Occupational Safety and Health Administration regulations "is not relevant to the finding of an employment relationship"); *Hart v. Rick's Cabaret Int'l, Inc.*, 967 F. Supp. 2d 901, 916 (S.D.N.Y. 2013) (similar); *Matson v. 7455, Inc.*, 2000 WL 1132110, at *4 (D. Or. Jan. 14, 2000) (similar); *Tiger Home Inspection, Inc. v. Dir. of Dep't of Unemployment Assistance*, 193 N.E.3d 462, 468 (Mass. App. Ct. 2022) (similar).[5]

[5] Some of these jurisdictions apply tests other than the ABC test for the ultimate determination of who qualifies as an independent contractor. *See, e.g.*, *Hart*, 967 F. Supp. 2d at 911–12 (applying "economic realities" test under the Fair Labor Standards Act); *Matson*, 2000 WL 1132110, at *4 (same); *Santangelo*, 2014 WL 3896323, at *7 (considering "traditional agency law principles" as required under Massachusetts law before the state's adoption of the ABC test). But, like the ABC test, each of these tests considers whether the putative employer "controls" the putative employee. The New Jersey Supreme Court has held that for purposes of the ABC test the "doctrine of control is derived from the common law," *Carpet Remnant Warehouse, Inc. v. New Jersey Department of Labor*, 593 A.2d 1177, 1189 (N.J. 1991), so cases concerning "control" in other contexts are still informative of control's meaning under New Jersey law.

This conclusion makes sense. Legally compelled requirements display control by a *regulator*, not a putative employer—which is itself just as regulated as the contractor. *See Loc. 777, Democratic Union Org. Comm. v. NLRB*, 603 F.2d 862, 875 (D.C. Cir. 1978) ("Government regulations constitute supervision not by the employer but by the state."). And contractual requirements intended to ensure legal compliance (or other third-party requirements, such as a requirement to follow an industry's best practices) are commonplace in business-to-business contracts too, further demonstrating that they do not denote an employment relationship.

The Department's new rule would also have widespread negative consequences. For one, the fact that ensuring "compliance with the law" might establish "control" in New Jersey but not in other jurisdictions would cause confusion for companies operating across state lines. Treating legal compliance as "control" would also create perverse incentives. The Department's new rule would incentivize companies to "simply delegate a task to another party and not double-check to verify that the task was done properly." *Morales-Garcia v. Higuera Farms, Inc.*, 2021 WL 6774327, at *17 (C.D. Cal. Oct. 15, 2021), *aff'd*, 70 F.4th 532 (9th Cir. 2023). Worse, any resulting noncompliance could "endanger the health or safety" of workers and the public. *Sinclair Builders*, 73 A.3d at 1070.

The Department's new test would be especially problematic for highly regulated businesses such as financial services and insurance. As explained above, these industries are regulated and supervised by state and federal agencies and by self-regulatory organizations such as FINRA. *Supra* at 4. For example, professionals who conduct transactions involving securities are *legally required* to associate with a broker-dealer. *See, e.g.*, FINRA Rule 3270 (requiring agents or registered representatives to disclose outside business activities to FINRA member firm, who must evaluate the proposed activity); FINRA Rule 1210 ("Each person engaged in the investment banking or securities business of a member shall be registered with FINRA as a representative."). The goal of these supervisory arrangements is to ensure compliance with applicable laws for the protection of consumers and financial markets overall. Forcing businesses to choose between legal compliance and retaining an independent-contractor relationship would jeopardize that goal.

Accordingly, the law has always recognized that financial-services and insurance professionals can be independent contractors notwithstanding regulatory oversight. The Internal Revenue Code provides that "[i]n determining for purposes of the Internal Revenue Code of 1986 whether a registered representative of a securities broker-dealer is an employee . . . *no weight shall be given* to instructions from the service recipient which are imposed only in compliance with investor protection standards imposed by the Federal Government, any State government, or a governing body." Taxpayers Relief Act of 1997, Pub. L. No. 105-34, § 921(a), 111 Stat. 788, 879 (codified at 26 U.S.C. § 3121 note) (emphasis added). Courts across the country have likewise held that these professionals remain independent contractors even when they are contractually obligated to follow the law. *See, e.g.*, *Walfish*, 2019 WL 1987013, at *7 (insurance agent); *Chamberlain v. Securian Fin. Group, Inc.*, 180 F. Supp. 3d 381, 393 (W.D.N.C. 2016) (same); *Santangelo*, 2014 WL 3896323, at *9 (same); *Taylor v. Waddell & Reed Inc.*, 2013 WL 435907, at *6 & n.27 (S.D. Cal. Feb. 1, 2013) (financial advisors). The proposal would turn this consensus on its head, and would encourage firms to loosen their insistence on compliance in industries where compliance delivers great benefits to individual customers and consumers.

B. Prong B: An Employer's "Place Of Business" Does Not Include Customers' Homes.

The proposal's interpretation of the second prong of the ABC test is similarly flawed. The second prong requires that the "[s]ervices performed by [the] individual" be "either outside the usual course of the business for which such service is performed, or . . . performed outside of all the places of business of the enterprise for which such service is performed." N.J.S.A. § 43:21-19(i)(6)(B). But under the proposal, the phrase "places of business" would have no real meaning and would extend even to a *customer's* house or place of business if "the services performed by the individual at such location are an essential component of, rather than ancillary to, the putative employer's business." *Id.* at 5, 11–12.

This interpretation is inconsistent with the statutory text. Prong B is worded disjunctively: An individual may be an independent contractor if he or she works *either*: (1) "outside the usual course of the business for which such service is performed," *or* (2) "outside of all the places of business of the enterprise for which such service is performed." N.J.S.A. § 43:21-19(i)(6)(B). The second track—which focuses on "places of business"—turns on the physical location of the putative employer. The proposal would reimagine the phrase to include "locations . . . where the services performed *by the individual* are an essential component of, rather than ancillary to, the putative employer's business." Proposal at 11 (emphasis added). But the nature of the individual's services is relevant only to the first option in Prong B, which asks whether an individual's services are "outside the usual course of the [putative employer's] business."

The Department's proposed narrowing of Prong B is also inconsistent with precedent from the New Jersey Supreme Court. In *Carpet Remnant Warehouse, Inc. v. New Jersey Department of Labor*, the Court addressed whether a carpet warehouse was the employer of carpet installers who provided services in customers' homes. 593 A.2d 1177, 1179 (N.J. 1991). The warehouse sold carpets to customers, set an installation date, and scheduled workers to visit the customers' homes or places of business on that date to install the carpet. In proceedings at the agency level, the Department had concluded that Prong B was not satisfied because "the retailer's places of business may broadly be said to extend to *every geographical point of installation*" (including customers' homes). *Id.* at 1190 (emphasis added; quotations and alterations omitted).

The Supreme Court squarely rejected that interpretation. Among other problems, such a capacious view of the phrase "places of business" would make it "practically impossible" "for a person to satisfy the B standard's second alternative." Accordingly, the Court adopted a narrower, common-sense definition of the phrase: "places of business . . . refers only to those locations where the enterprise has a physical plant or conducts an integral part of its business." *Id.* A customer's residence is "clearly outside" this definition. *Id.* (quotations omitted); *see also Walfish*, 2019 WL 1987013, at *8 (Prong B satisfied where insurance agent worked "from his own home, and from the homes or offices of his clients"). Here, the Department's proposed test would *include* customers' homes as a putative employer's "place of business," even though *Carpet Remnant Warehouse* rejected the exact same argument. 593 A.2d at 1190.

The proposal cites the facts of *East Bay Drywall v. Department of Labor and Workforce Development*, 278 A.3d 783 (N.J. 2022) as support for its narrowing of Prong B and implicit rejection of *Carpet Remnant Warehouse*. *See* Proposal at 11–12. But *East Bay Drywall* addressed only Prong

C's application to the drywall workers at issue in that case and specifically declined to "analyze prongs A and B." 278 A.3d at 794. In a footnote, the Supreme Court suggested that the Department "promulgate regulations clarifying where an enterprise 'conducts an integral part of its business' and what constitutes the 'usual course of the business,'" "particularly in light of the prevalence of remote work today." *Id.* at 794 n.3. But the Court did not overrule *Carpet Remnant Warehouse* or otherwise authorize the Department to disregard the Court's prior holding that a customer's home is "clearly outside" the definition of a putative employer's "place of business." 593 A.2d at 1190. A request to "clarify" is not a request to repudiate the Court's prior holdings.

As with Prong A, other jurisdictions have rejected the Department's restrictive interpretation of Prong B. For example, the Connecticut Supreme Court held that "it makes no sense for an individual's home to be considered a place of business when the enterprise has no office in the home and the sanctity of the home and the privacy interests of its residents have long been recognized." *Standard Oil of Connecticut, Inc. v. Adm'r, Unemployment Comp. Act*, 134 A.3d 581, 608 (Conn. 2016). A contrary interpretation could have turned "every Connecticut household into a place of business for any company that performs services at a customer's home, thus profoundly limiting an employer's ability to subcontract work." *Id.* Similarly, the Massachusetts Supreme Court rejected the argument that customers' homes could fairly be considered a putative employer's "'places of business.'" *Athol Daily News v. Bd. of Rev. of Div. of Emp. & Training*, 786 N.E.2d 365, 372 (Mass. 2003); *see also Metro Renovation, Inc. v. State Dep't of Lab.*, 543 N.W.2d 715, 722 (Neb. 1996) (construction jobsites were not "places of business" because this "reasoning precludes any construction company from ever meeting the requirements of [the ABC test]"); *Hasco Mfg. Co. v. Maine Emp. Sec. Comm'n*, 185 A.2d 442, 445 (Me. 1962) (rejecting argument that "[p]lace of business extends to where sales are made," including "the customer's home"); *Sinclair Builders*, 73 A.3d at 1072 (similar for construction jobsites).

The Department's interpretation of Prong B will harm the financial-services and insurance industries and their customers. Professionals in both industries offer products and services that protect customers' financial security and help them grow their wealth in ways tailored to their individual needs. And some professionals choose to serve their clients by offering services in their clients' own homes. *See, e.g.*, *Walfish*, 2019 WL 1987013, at *8. This is more convenient for customers, keeps costs down for the professionals, and encourages a relationship of mutual trust and cooperation. Insurance agents and financial advisors across the state have decided that this arrangement best serves their clients, and the Department provides no reasonable explanation why these professionals should be required to risk sacrificing their independent-contractor status to continue providing services in a manner that has proven convenient for customers seeking financial assistance and security.

C. Prong C: The Proposal Misstates The Relevance Of Unemployment Benefits And Other Considerations Relevant To Prong C Under New Jersey Precedent.

The proposal's interpretation of Prong C—which requires the individual to be "customarily engaged in an independently established trade, occupation, profession or business," N.J.S.A. § 43:21-19(i)(6)(C)—similarly departs from the statute and New Jersey precedent.

For starters, the proposal states that whether a person would qualify for unemployment benefits is "not relevant" to Prong C. Proposal at 7. The New Jersey Supreme Court has held the opposite.

Although an independent contractor may be unable to satisfy Prongs *A and B* of the ABC test even if she will not collect unemployment benefits if the putative employer goes out of business, "the C standard provides the closest connection between the obligation to pay taxes and the eligibility for benefits." *Carpet Remnant Warehouse*, 593 A.2d at 1189. Even for Prongs A and B, "in cases in which satisfaction of the C standard convincingly demonstrates a person's ineligibility for unemployment benefits, it would be inappropriate for the [Department] to apply the A or B tests restrictively or mechanically if their applicability is otherwise uncertain." *Id.* Thus, the question whether a person would qualify for unemployment benefits is plainly *relevant* to Prong C and can even be outcome determinative for the overall ABC test where Prongs A and B are unclear.

The proposal also misstates the law in providing that a series of factors—including multiple employment, working full-time or part-time in industries unrelated to the service performed for the putative employer, licensure in an occupation or profession, proof of business registration, and liability insurance—are insufficient to satisfy Prong C. Proposal at 5–6. Even if these considerations are insufficient standing alone, New Jersey courts have long held that factors like these are at least *relevant* to Prong C and suggest independent-contractor status. *See, e.g.*, *Trauma Nurses*, 576 A.2d at 292 (licensure requirements and multiple employment); *Feinsot v. Bd. of Rev.*, 2007 WL 561326, at *4 (N.J. Super. Ct. App. Div. Feb. 26, 2007) (same); *Wachenfeld v. Bd. of Rev., Dep't of Lab.*, 2015 WL 1057908, at *3 (N.J. Super. Ct. App. Div. Mar. 12, 2015) (liability insurance and business registration).

D. The Proposed Rule Undermines The Department's Stated Goal Of Clarity.

The Department repeatedly states that its goal in issuing the proposal is to "provide clarity to both employers and employees regarding the issue of independent contractor status." Proposal at 8; *see also id.* at 2 (under the new rule, "employers will be better informed, and, consequently, more likely to make appropriate decisions regarding the classification of workers").

In fact, the proposal would have the opposite effect. As explained above, for each prong of the ABC test the proposal departs from and misconstrues settled New Jersey precedent while purporting to codify those same cases. That will make it more, not less, difficult for independent contractors and the companies they work with to understand how to avoid creating an employment relationship under New Jersey law.

Moreover, the proposal repeatedly adopts non-exhaustive, multi-factor tests that in practice will be impossible to apply with any certainty to individual contracts. For example, the proposal lists factors "that shall be considered when evaluating whether an individual" satisfies Prong A. Proposal at 10. But it then provides that these factors "shall not be used as a checklist," and that a putative employer cannot count on independent-contractor status even when "a majority of the factors listed [in the proposal] have been met." *Id.* The Department also asserts unlimited discretion to "consider[]" "additional factors." *Id.* The Department's approach to Prongs B and C is similarly muddled. Proposal at 12–13 (listing "factors . . . that shall be considered," but adding that "[t]he factors listed . . . above are not exhaustive and additional factors may be considered").

All of this creates confusion, not clarity. If the proposal is adopted, New Jersey businesses and individuals who provide services to them will be unable to divine how the Department will choose to apply its freewheeling analysis to their particular circumstances. This flaw alone renders the

proposal "arbitrary, capricious or unreasonable" in violation of the APA. *In re Carter*, 924 A.2d 525, 530 (N.J. 2007); *In re FCC 11-161*, 753 F.3d 1015, 1143 (10th Cir. 2014) (a regulation that "will undermine the [agency's] own objective" is arbitrary and capricious).

III. The Proposal Will Harm Businesses, Customers, And The Broader Economy.

The proposal will "have far-reaching consequences, negatively impacting small business owners, employees, and consumers." Gopal, Donlon, and Peterpaul Letter. Yet in a single short paragraph, the Department baldly asserts that "[t]he proposed new rules would have a positive economic impact" resulting from the purported "clarity" provided by the proposal and from minimizing "expenses related to . . . violations of the law and rules." Proposal at 8; *see also id.* (same for social impact). Then, in a single sentence, the Department asserts without explanation that "[t]he proposed new rules would have no impact on either the generation or loss of jobs." *Id.*

The record conclusively demonstrates the opposite. In the financial-services and insurance industries alone, the proposal would harm individuals currently classified as independent contractors, deprive New Jersey residents of valuable services, and cost New Jersey thousands of jobs. These adverse effects are representative of the negative impact the proposal would have across industries more broadly.

A. Independent Contractors Enjoy Autonomy, Flexibility, And Higher Compensation.

The proposal claims that "those who become properly classified as employees (and their families) would be impacted positively from an economic[] as well as social perspective." Proposal at 8. Many affected individuals in the financial-services and insurance industries would disagree.

Financial advisors and insurance agents who are currently classified as independent contractors overwhelmingly want to maintain their status. According to a national survey, "13.5 percent of all financial advisors, securities agents and insurance agents in the financial and insurance industry are independent contractors," which is "nearly double the 6.9 percent of workers in the overall U.S. workforce" who operate as independent contractors.[6] The financial services and insurance industries offer ample opportunities for formal employment relationships. But nearly all independent contractors in the industry—95 percent, according to one study—would choose to remain independent contractors if offered the choice.[7] Among other reasons, these professionals prefer to operate as independent contractors because it allows them to follow a flexible schedule and be their own boss.[8] Many contractors need that flexibility because they are also juggling unpredictable personal obligations, such as childcare or care for a sick parent. *See* New Jersey Oxford

[6] *The Role of Independent Contractors in the Finance and Insurance Sectors*, NERA Economic Consulting 11–12 (Nov. 2022), https://bit.ly/3IxJGW3 ("NERA Study").

[7] *NAIFA Experts Testify on the Importance of Independent Contractor Status at NCOIL*, NAIFA (July 18, 2021), http://bit.ly/4mq6Dtf.

[8] *How the Proposed Independent Contractor Rule Would Reshape New Jersey's Financial Advisory Industry: A Report for the Financial Services Institute*, Oxford Economics 9 (Aug. 2025), http://bit.ly/3GYjofx ("New Jersey Oxford Economics Study"); *see also* NERA Study at 17.

Economics Study at 11.

In addition, independent contractors report increased compensation. New Jersey Oxford Economics Study at 9. When financial advisors serve as employees, they must generally hand over 50–60% of their gross revenue to the employers. Independent contractors, by contrast, can keep 90% or more of their gross revenue because they have the freedom to hire personnel, pay for services, and set a fee structure on their own terms.[9] And when independent contractors are paid based on output—for example, on a commission basis—the incentives of the contractors and the companies with which they contract are aligned, thus increasing economic efficiency overall. NERA study at 9–10.

Independent contractors also have access to attractive benefits. For example, the Internal Revenue Code affords a special status to full-time, independent contractors who sell life insurance and annuities, allowing them to participate in retirement plans, report income, deduct business expenses, and have the company with which they contract pay FICA taxes on their behalf. I.R.C. § 3121(d)(3)(B).

B. Consumers Also Benefit From Independent-Contractor Arrangements.

The proposal would also harm consumers. Independent contractors' ability to work with multiple companies allows them to offer a diverse range of products and services to their clients. *See* NERA Study at 21 (independent insurance agents "sell[] insurance products on behalf of one or more companies"). Independent insurance agents, for example, can sift through the offerings of multiple insurance companies to select the products that best meet their clients' needs, both in terms of coverage and affordability. *See Britten v. Liberty Mut. Ins. Co.*, 914 A.2d 305, 309 (N.J. Super. Ct. App. Div. 2007) (noting the Legislature's policy goal of "offer[ing] consumers the freedom of choice" in making insurance decisions). Independent agents who are forced to become employees of an insurance company will lose this flexibility to the detriment of their customers. As one survey reports, over 60% of New Jersey financial advisors expect that the proposal will cause their customers to experience reduced services and investment options. New Jersey Oxford Economics Study at 14.

Restricting the use of independent contractors would also require firms to restructure their business models, resulting in financial services that are less accessible and more expensive. NERA Study at 24. Among other reasons, an independent-contractor model lowers the costs of complying with regulatory requirements (e.g., by allowing contractors to associate themselves with a broker-dealer or insurance carrier). Customers reap the benefits of cost-cutting measures like these. *Id.* at 18–19. By contrast, reclassifying independent contractors as employees will likely lead to increased costs for customers in the form of higher account minimums, higher fees, and reduced investment options. Oxford Economics Study at 20; New Jersey Oxford Economics Study at 14–15.

Low- and moderate-income customers would suffer the most, as independent contractors are particularly effective in serving these populations. NERA Study at 20, 24; *see also* New Jersey

[9] *See The DOL's Independent Contractor Classification Rule Would Decrease Access To Advice And Increase Costs For Investors*, Oxford Economics 6 (Jan. 17, 2023), http://bit.ly/44jJuCz ("Oxford Economics Study").

Oxford Economics Study at 15 (64% of surveyed financial advisors report they would take on fewer new customers under the proposal). And these harms build on each other. Without access to financial services provided by independent contractors, customers will experience reduced savings and wealth accumulation, as well as potential obstacles or difficulties in reaching their financial goals. *Id.* at 16. The proposal again fails to consider any of these economic or social consequences.

C. The Proposal Will Cost New Jersey Thousands Of Jobs And Potentially Billions Of Dollars In Economic Output For The Financial-Services And Insurance Industries Alone.

The proposal will also harm New Jersey's economy. The financial-services and insurance industries are a critical part of the state economy. A conservative estimate of the total annual economic output of independent contractors in these industries in New Jersey is $1.5 billion—nearly 20% of the total output.[10] Between 2015 and 2022, small businesses led by independent contractors created approximately 1,802 new establishments and 8,240 new jobs in New Jersey, "all or most of which would not have existed if independent contracting were prohibited or made unavailable as a practical matter due to overly restrictive regulatory requirements." *Id.*

Restricting access to independent contracting will also lead to job losses. One study estimated that New Jersey's adoption of the ABC test led to a decrease in both self-employment (by 10.1%) and traditional employment (by 3.8%).[11] The effects were disproportionately experienced by women, whose traditional employment declined by 7.4%, whereas men's traditional employment demonstrated no significant change. This general downward trend is not unique to New Jersey—it is experienced by other states that adopted similar tests too.[12] The proposal's even more restrictive application of the ABC test will only make matters worse, disrupting business relationships across New Jersey. Gopal, Donlon, and Peterpaul Letter. Some companies will opt to end their relationship with New Jersey contractors altogether—either by doing business with fewer contractors, shutting down, or moving to another state where working with independent contractors is easier—rather than reclassify contractors as employees. *See* Palagashvili New Jersey Study. This is true for small businesses facing "new administrative burdens." Gopal, Donlon, and Peterpaul Letter. And it is especially likely for multistate companies who will not want to change their business models simply to suit the idiosyncratic independent-contractor test of a single state.

For their part, many independent contractors will choose to retire or relocate to another state rather

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[10] *Appendix: The Economic Impact of Independent Contractors in the Financial and Insurance Services Industry in New Jersey*, NERA Economic Consulting 1 (July 2025), http://bit.ly/45c41YE ("NERA New Jersey Appendix").

[11] Liya Palagashvili & Revana Sharfuddin, *The Labor Market Effects of Codifying the New Jersey ABC Test*, George Mason University: Mercatus Center (Aug. 4, 2025) ("Palagashvili New Jersey Study").

[12] *See* Liya Palagashvili et al., *Assessing the Impact of Worker Reclassification: Employment Outcomes Post–California AB5*, Working Paper, George Mason University: Mercatus Center (Jan. 2024); Liya Palagashvili and Revana Sharfuddin, *New Study: From Gig to Gone? ABC Tests and the Case of the Missing Workers*, Labor Market Matters (Jan. 10, 2025), http://bit.ly/4ktSxFQ.

than become employees due to a more restrictive version of the ABC test. And again, they will be even more likely to shift operations away from the state if they currently operate in multiple states rather than exclusively in New Jersey. Between the financial-services and insurance industries, independent-contractor-led firms currently employ approximately 6,300 people in New Jersey—which amounts to 25 percent of the total workforce in these two industries. NERA New Jersey Appendix at 1. One study estimates that the proposal would cause 65% of financial advisors in New Jersey to relocate and another 4% to retire. New Jersey Oxford Economics Study at 5, 10. Combined, that means over two-thirds of New Jersey financial advisors could retire or relocate if the proposal is adopted. The same study estimates that this would translate to 4,700 financial advisors, who currently support 3,500 jobs and contribute $470 million to New Jersey's GDP. *Id.* at 16–17. Going forward, independent contractors would also be less likely to move to New Jersey, and New Jersey residents would be less likely to start new businesses. *Id.* at 17.

For those independent contractors who choose to continue providing services in New Jersey, many will be forced to incur significant costs to avoid classification as employees. For example, some independent contractors—one study estimates 17%—may decide they would rather create their own registered investment-advisor firms rather than associate with an existing firm. New Jersey Oxford Economics Study at 5, 10. Starting a new firm would come with substantial start-up costs, including legal and compliance fees, marketing and branding, staffing, technology, and trading-platform costs. One survey indicated that these costs could reach $150,000 to $200,000 per firm. Oxford Economics Study at 15–16. Like the other economic consequences of the proposal, the Department has failed entirely to account for these burdens.

D. The Proposal Lacks Any Evidence To The Contrary.

The economic consequences discussed above and described in the cited studies are just a sampling of the harmful consequences of the proposed rule, and only for a single subset of independent contractors in New Jersey (namely, those who work in the financial-services and insurance industries). Despite the public availability of much of this evidence, the proposal fails to cite *any* evidence to support its drive-by conclusions that the economic impact of the proposal will be positive and that the proposal will have "no impact on either the generation or loss of jobs." Proposal at 8.

To the extent the Department has evidence to support the boilerplate economic- and jobs-impact statements in the proposed rule, it has failed to disclose that evidence to the public. As NAIFA explained in its prior letter to the Department, the APA requires an agency to make available the "studies or reports" that it "relied on . . . in adopting [a] rule" so that the public "may contest their accuracy or worth." *Safeway Trails, Inc. v. Bd. of Pub. Util. Comm'rs*, 201 A.2d 717, 725 (N.J. 1964).[13] This transparency helps ensure that "both public and private interests are fully protected and the agency has the opportunity to weigh both the advantages and disadvantages of the proposed rules before exercising its legislative judgment." *Id.* at 725.

The Department was also obligated to provide this information in the public hearing that the Department held on June 23. New Jersey law provides that "[a]t the beginning of each hearing . . . the agency, if it has made a proposal, shall present a summary of the factual information on which its proposal is based." N.J.S.A. § 52:14B-4(g). Here, the Department failed to do so. *See* Hearing

[13] NAIFA-NJ Comment Letter on Proposed New Rule (June 6, 2025).

at 0:40–5:00.

If the Department has evidence that supports the proposal, it was obligated to make that evidence available to the public; it would be unlawful to adopt a final rule without doing so, and without then allowing the public an opportunity to evaluate and comment on that evidence. And if the Department undertook *no* meaningful analysis of the economic or jobs impact prior to proposing its new version of the ABC test, the record now makes clear that the proposal was premised on a wildly inaccurate and arbitrary understanding of its economic consequences. Or, at the very least, the record demonstrates the proposal requires "further study, including a formal economic impact analysis." Gopal, Donlon, and Peterpaul Letter. Either way, the Department cannot lawfully adopt a final rule on the current record or without an additional notice-and-comment period.

IV. At Minimum, The Department Should Exclude The Financial-Services And Insurance Industries From Its New Version Of The ABC Test.

For the reasons explained above, the proposal is misguided and should simply be withdrawn. At minimum, however, the Department should re-propose the rule with an exclusion to eliminate the threats posed by reclassifying contractors in those industries as employees. *Supra* at 12–15. For example, the Department could exclude licensed financial-services and insurance professionals from the rule's scope altogether. *See, e.g.*, Cal. Labor Code § 2750.3(b)(1) (California test exempting "[a] person or organization who is licensed by the Department of Insurance" from the ABC test); *id.* § 2750.3(b)(4) (exempting "[a] securities broker-dealer or investment adviser or their agents and representatives that are registered with the Securities and Exchange Commission or the Financial Industry Regulatory Authority or licensed by the State of California").[14]

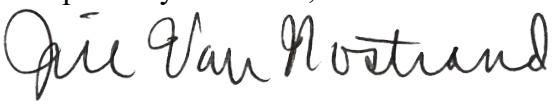
V. Conclusion

For these reasons, the Department should rescind the proposal.

[14] New Jersey law currently provides a statutory exemption from the definition of "employment" for "[s]ervice performed by agents of mutual fund brokers or dealers in the sale of mutual funds or other securities, by agents of insurance companies, . . . or by agents of investment companies . . . wholly on a commission basis." N.J. Stat. Ann. § 43:21-19(i)(7)(J). But regulated parties have recently expressed uncertainty over the scope of this statutory exemption, and particularly given the breadth of the proposal, it does not sufficiently protect financial advisors and insurance agents from the proposal's consequences. *See Walfish v. Nw. Mut. Life Ins. Co.*, 245 A.3d 534 (N.J. 2021) (accepting certified question regarding the scope of the exemption, before the case was settled and voluntarily dismissed).

August 6, 2025

Respectfully submitted,



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