October 7, 2021

Acting Assistant Secretary Ali Khawar
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave, N.W.
Suite S-2524
Washington, D.C. 20210

Dear Secretary Khawar:

Finseca very much appreciated the opportunity to meet virtually with you and your team on June 24th to discuss ERISA issues related to the distribution of insurance and annuity products by state-regulated independent producers. We represent a large portion of the independent producers who recommend annuities and life insurance in connection with qualified plans and IRAs, and we thank you for taking the time to hear our questions and concerns regarding potentially amending or revoking PTE 84-24 in connection with the new fiduciary rule proposal. We wish to work with the Department as you develop the new rule and review existing class exemptions, and we hope our perspective can help inform the Department's consideration of the material differences between the ERISA, securities and insurance marketplaces that necessitate certain differences in class exemption conditions.

Executive Summary:

- Participants Need Greater Access to Guaranteed Income: Plans and participants need access to annuity and life insurance products that provide greater stability and security in the defined contribution retirement plan system. This is especially important for traditionally underserved communities for whom these products are essential to building and transferring intergenerational wealth. We believe the Department agrees that ensuring access to these annuity and insurance products in plans and in connection with rollovers is important.

- Revised Fiduciary Interpretation Newly Applies ERISA to Many Independent Insurance Producers: The February reinterpretation of the five-part test significantly expanded ERISA's application to insurance producers recommending

annuity and life insurance products. Most insurance producers were not ERISA fiduciaries under the prior interpretation, resulting in new prohibited transaction and exemption issues.

- Conflict between State Law Consumer Protections and ERISA Prohibited Transactions: State law created independent producers as a consumer protection, allowing consumers to get personalized assistance from an insurance professional not limited to a single carrier or product type—independent producers can find the arrangement that is in the best interest of the individual. These independent producers typically are compensated on a commission or transactional basis that, as a consequence of independence, is not uniform between carriers. Unfortunately, the very independence of these producers (a state-level consumer protection) causes an ERISA prohibited transaction.
- Exemptions Must Offer Different Regulatory Conditions to Create a "Level Playing Field"—One Size Cannot Fit All: The Department may desire to achieve a "level playing field" between class exemptions, but it cannot do so by applying the same exemption structure to all different types of financial professionals. PTE 2020-02 is based on securities regulation, and its conditions require a degree of control over the financial professional and involvement in the recommendation by the financial institution that cannot apply to independent insurance producers. The only way to create a level playing field is to maintain PTE 84-24 as well as PTE 2020-02—there must be different conditions for insurance, even if they seek to achieve the same goal.
- Modernizing PTE 84-24: To that end, as you have requested, we have considered what parts of PTE 2020-02 could and could not be incorporated into PTE 84-24, and what other changes might be desirable:
    1. Joint Fiduciary Declaration: We do not believe the written, joint declaration of fiduciary status can be added. Due to producer independence, the insurance carrier has neither functional involvement in the development of the recommendation, nor the authority to control the producer's actions or compensation.
    2. Compensation: We believe the broad definition of covered compensation from PTE 2020-02 should be incorporated. While there has been much discussion about what "commission" means in the current PTE 84-24, the issue should be whether compensation is disclosed and reasonable. PTE 2020-02 wisely adopts this approach, eliminating technical confusion regarding the scope of definitions.
    3. Product Scope: We believe PTE 84-24 should remain available for all types of insurance and annuity contracts. The problems with PTE 2020-02 do not change because of the type of product—the problems result from the mismatch between securities and insurance regulation, and the requirements of PTE 2020-02.
    4. Best Interest: We support the best interest standard of care, but we urge the Department to prioritize harmonizing the exemption requirements with other applicable best interest standards, such as the NAIC Model Rule and the SEC Regulation Best Interest. Neither of these standards existed in 2016, yet one of

them now will apply to nearly all transactions for which PTE 84-24 is needed.

The best interests of consumers—including ERISA plans and participants—are served by having a choice in different types of financial professionals, financial products, and compensation models.

Differences in Insurance Regulation Must Be Taken into Account to Ensure Participant Access to Retirement Income:

We strongly believe that PTE 84-24 remains necessary to address the very real differences in securities and insurance regulation, and we urge that it be retained. Despite the Department's well-intentioned guidance in FAQ 18, the conditions of PTE 2020-02 are based on securities law, and do not fit the reality of the independent insurance producer distribution model. The independent model offers very real benefits to consumers, including ERISA plans and participants. One of these benefits is greater opportunity to choose among insurance and annuity products and providers while working with a financial professional who specializes and focuses on these products from the client's perspective. We believe one of the Department's policy goals is to preserve access to insurance and annuity products that provide financial security and guaranteed income—indeed, these products are essential to providing stability and retirement income that many participants in defined contribution plans need. These products are vital to workers' ability to retire with dignity, and independent insurance producers are experienced financial professionals who are well-positioned to assist consumers in selecting annuities and life insurance policies that are in the consumers' best interest. It is inconsistent with the Department's goal to ensure access to such products if its application of PTE 2020-02 reduces access and choice for ERISA plans, participants and IRA owners by eliminating or significantly curtailing the ability of independent producers to make such recommendations.

- Ensuring All Consumers Have Access to Financial and Retirement Income Services

We fully support the Biden-Harris Administration's emphasis on the importance of making financial products and services accessible to all Americans, particular minority communities that traditionally have been underserved and faced discrimination. Insurance and annuity products not only provide financial security, but are key building blocks for creating intergenerational wealth. Finseca is very active in trying to close the racial wealth gap, and our members are deeply committed to reaching out to underserved communities. Our products and services often are important first steps in greater financial engagement with these communities. In a recent survey of African Americans by LIMRA, nearly half reported financial concerns related to not having enough life insurance, more than a third cited wealth transfer and supplemental retirement income as reasons they need life insurance, and more than one in five attributed their lack of coverage to lack of knowledge about what products would serve their needs. Financial professionals that focus on annuity and insurance products, including independent producers, are best-positioned to serve these needs.

Given the role insurance and annuity products can play in providing financial security for underserved communities, we are very concerned that the Department must take into account how these underserved communities will gain access to professional assistance in financial planning, including life insurance and annuity needs. As the Department considers which class exemptions it intends to make available in the future, and as it considers the conditions of class exemptions that will be applicable to insurance and annuity transactions, the Department must recognize the important role independent, commission-based producers play in providing access to underserved communities. PTE 84-24 is necessary for these recommendations, because, as we explain in detail below, PTE 2020-02 will make it harder for insurance professionals to serve these communities. The problem is the fundamental difference between insurance and securities regulation—by intentional design of state law, insurance companies do not control independent agents, and PTE 2020-02 fundamentally relies on control of the financial professional by the financial institution. Without PTE 84-24, independent insurance agents will not be able to serve the needs of these communities because the only available exemption, PTE 2020-02, won't work in practice.

- Level Playing Field vs. Material Differences

From the discussion in our meeting, we understand the Department is concerned that class exemptions granted decades apart can have very different conditions, and that the Department desires to create a "level playing field" by making exemption conditions more uniform. We appreciate that the Department has valid reasons for seeking such commonality, such as to provide more uniform consumer protection benefits, and to ensure equitable compliance conditions among different types of investment professionals and financial institutions.

However, some of the differences between existing exemptions reflect the reality that there are also material differences between types of transactions, often due to the specific state and/or federal requirements imposed by the regulatory agency focused on a particular type of financial institution or professional. These state and federal regulators have adopted specific requirements designed to protect consumers in relation to the particular financial institution or investment professional's primary purpose, and these requirements can differ significantly across types of transactions.

Unfortunately, unless these material differences are taken into account through specific exemptions, the commonality the Department seeks to achieve can itself create an "un-level playing field" in which the available exemptions are not accessible in practice for all financial institutions or professionals. Put another way, the same set of exemption conditions cannot reasonably addresses the diversity of financial institutions, financial professionals and regulatory regimes applicable to entities that may also become ERISA fiduciaries under the expanded new interpretation of the 1975 regulation's five-part test (or likely under the new regulatory definition the Department intends to propose in December 2021). For example, PTE 2020-02 does not contemplate a regulatory environment in which the financial institution does not control the financial professional, yet that is exactly what state law provides for independent distribution—the independent insurance agent is purposefully not controlled by any insurance company, and thus the conditions of PTE 2020-02 can't be applied as currently written.

- Simultaneous But Fundamentally Differing Regulatory Requirements

ERISA occupies a unique position in financial conduct regulation because its fiduciary standard almost always overlaps with different standards enforced by other regulators. Because of ERISA's functional fiduciary definition, a wide variety of financial institutions and financial professionals may also become ERISA fiduciaries if they give investment advice to qualified plans and participants. As the Department expands the definition of fiduciary investment advice to capture recommendations that were not previously viewed as fiduciary recommendations (as it did by rescinding AO 2005-23A and providing new rollover guidance in the Preamble to PTE 2020-02), this issue becomes more acute, especially with respect to independent insurance producers. More transactions are now subject to ERISA along with state and federal regulations applying different fiduciary and non-fiduciary standards to the same transaction.

For example, an independent producer who recommends a rollover involving a variable annuity may now simultaneously be subject to:

(1) state insurance best interest regulation (because the annuity is an insurance contract under state law);

(2) Federal securities rules (either the SEC's Regulation Best Interest for Broker-Dealers or the SEC's RIA guidance), because the variable annuity is also a security under federal law; and

(3) ERISA's fiduciary standard of care and the need to comply with the conditions of a relevant prohibited transaction exemption.

While all of the different regulators are operating with the same goal of protecting consumers and providing financial security and stability—goals we fully support—the ways they achieve these goals are very different as they are tailored to the specific issues presented by each type of financial services provider. This creates significant regulatory challenges the Department must take into account. In the best case, the Department and other regulators fit new requirements into the existing structure in a way that facilitates simultaneous compliance. In the worst case, the rules can conflict in ways that restrict the availability of, or that significantly increase the cost of, products and services needed by ERISA plans and participants. It also enhances the chance that consumers will be confused by the conflicting regimes designed to protect them. Our concern is that with respect to the independent distribution of annuity and insurance products, PTE 2020-02 will create such conflicts, while PTE 84-24 does not.

- Independent Distribution—State Consumer Protection as a Potential ERISA Conflict

Independent distribution of insurance and annuity products is a good example of why a separate exemption can be necessary to create a level playing field, and why removing that separate exemption can create an un-level playing field.

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State insurance laws created the independent insurance producer as a consumer protection. Instead of dealing with an agent that can only represent one carrier, consumers can use an independent producer to review multiple carriers and multiple insurance or annuity products, finding one that is in the best interest of that consumer. These independent producers owe their primary duty to the consumer they are assisting, and they must comply with conduct standards to protect consumers when making these recommendations. In addition, more than 16 states have already adopted the new NAIC Best Interest Model Rule for annuities, and the vast majority of states will likely do so in the next year or so. The Model Rule establishes a best interest standard of care that has much in common with the Department's best interest standard used in PTE 2020-02. For example, producers cannot put their interests ahead of the consumer, they must provide certain disclosures, and certain types of conflicted compensation are prohibited. Where the NAIC Model Rule and PTE 2020-02 differ is not in protecting consumers, but in the details of how these similar consumer protections are applied to insurance and annuity transactions. The NAIC Model Rule was developed with insurance in mind—PTE 2020-02 was modeled on securities regulation. These differences are material.

Unfortunately, the very independence that constitutes an important state law consumer protection is the root cause of an ERISA violation. ERISA generally prohibits commissions, transaction-based compensation and any variable compensation in relation to fiduciary investment advice. Because commissions vary from carrier to carrier, and because the commission is the primary form of insurance and annuity compensation, independent producers fully compliant with state law are considered to be illegally self-dealing under ERISA from the outset. Worse, as the Department knows well, the prohibited transaction is unrelated to the substance of the recommendation—a recommendation that everyone agrees is prudent and in the best interest of its recipient nonetheless is prohibited simply because the insurance professional receives a commission.

This inherent bias against transaction or commission-based compensation is unfortunate, as the reality is that transaction or commission-based compensation often can be the most cost-efficient payment mechanism for the consumer. The best interests of consumers—including ERISA plans and participants—are served by having a choice in different types of financial professionals, financial products, and compensation models. As the Department has ably demonstrated in its publications on retirement plan fees, even a relatively small cost difference in ongoing advice fees can result in significant expense for the participant. Further, ongoing advice fees may not be appropriate where, as in many insurance or an annuity products, there is little need for ongoing advice following the initial recommendation. Consumers deserve the right to select the approach that is best for them, and not be denied products and advice simply because the complex ERISA prohibited transaction rules disfavor commission or transaction-based compensation.

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We appreciate that to permit commissions and transaction-based compensation, the Department has used its administrative authority in the past to issue exemptions like PTE 84-24. We appreciate that in the past the Department stated that it did not wish to ban commissions. We hope that is still the Department's view as it considers amendment or revocation of existing exemptions. However, because an exemption is required to receive such compensation at all, the conditions of the exemption that permit the receipt of commissions and transaction-based compensation must fit the realities of insurance regulation. Unfortunately, PTE 2020-02 does not accommodate the structural differences in insurance regulation.

Issues Presented by PTE 2020-02 vs. PTE 84-24

The Department's historic approach has been to provide specific class exemptions for each type of financial service provider. Thus, PTE 84-24 has been the primary class exemption for ERISA fiduciary recommendations of insurance and annuity solutions. However, in adopting the new PTE 2020-02, the Department signaled its desire to begin moving to a broad-based approach, providing a general exemption for non-discretionary fiduciary investment advice.

However, PTE 2020-02 is modeled on securities law, specifically on the SEC's Regulation Best Interest, and as a result, it does not create a level playing field for insurance professionals that do not hold a securities license. Securities professionals are not independent of their financial institutions, and thus the conditions of PTE 2020-02 require the financial institution to exercise control over their representatives and affiliates. This type of control by an insurance carrier is fundamentally inapposite to independent insurance producers.

Here are a few examples:

- Product Limitations—An insurance carrier cannot dictate to the independent producer what products offered by competitors he or she may recommend. This independence is fundamental to consumer protection in these state markets. By contrast, a broker-dealer representative is prohibited from "selling away," or recommending products that have not been approved by the broker-dealer. This allows a broker-dealer to control the range of recommendations a representative may provide to the consumer in a way that an insurance carrier cannot.

- Compensation—An insurance carrier cannot impose rules on how the producer is compensated by other carriers. In fact, doing so would be anti-competitive. By contrast, an RIA or broker dealer establishes compensation rules that its representatives must comply with. As a result, the RIA or Broker-Dealer has the control necessary to mitigate conflicts of interest that an insurance carrier does not.

- Developing a Recommendation—An insurance carrier cannot tell the independent producer how to compare different products in developing a recommendation—it can only require the producer to demonstrate the suitability of the recommendation of its own product. It cannot impose policies and procedures on the independent producers governing their comparative analysis. By contrast, an RIA or broker-dealer can establish detailed policies and procedures requiring the representatives to develop and document their recommendations in very specific ways.

- Supervision—The broker-dealer or RIA must supervise associated persons to ensure their general compliance with securities laws and (for broker-dealers) with FINRA rules as well. This broad requirement is not just related to a specific transaction, but applies to the conduct of the associated person in general. The carrier supervision requirement under most state insurance laws reflects the transactional nature of the independent producer relationship, and generally does not apply to conduct beyond the specific sale of the recommended product. It is not broad supervision, but limited, and sale specific, supervision.

For all of these reasons, the structure of PTE 2020-02 does not fit the realities of the independent producer distribution model, because the consumer protection the states created is rooted in a fundamentally different advice model, one based on the independence of the producer from the financial institution. By contrast, PTE 2020-02 is based on the control of the financial professional by the financial institution. PTE 84-24 avoids these control issues by requiring the producer to make certain key disclosures and to meet the exemption conditions—it recognizes the independent role of the producer.

Potential Changes to PTE 84-24:

In our meeting, staff asked for our views on which elements of PTE 2020-02 could be incorporated into PTE 84-24 without causing concerns regarding the efficacy of the exemption. To that end, we offer the following thoughts for your consideration.

- Written Fiduciary Status for Carrier and Producer

The primary issue raising concern is the written statement of fiduciary status regarding the financial institution (the carrier) and the financial professional (the producer). In our view, requiring a written statement of fiduciary status does not fit the independent distribution model.

Functional Fiduciary Status—The independence of the producer means that the carrier does not play a functional role in the fiduciary process of developing the recommendation. The carrier is not and cannot be involved in the comparative process that results in the producer submitting an application for approval to Carrier A rather than to Carrier B, or for deciding to recommend a rollover at all. There can be no functional fiduciary status where there is no material role in the development of the recommendation.

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The producer may have functional fiduciary status under the new interpretation of the 1975 regulation's five-part test as he or she does engage in the process of developing the recommendation for the specific participant. However, we do not see the application of that test in practice to be as simple as the Department presents it to be. The ongoing relationship analysis under the "regular basis" prong of the test is surrounded by ambiguous issues. For example, if the anticipated ongoing relationship involves discussions about exercising optional features of the contract, are these discussions actually about "investment advice?" The fact that trailing commissions are received appears to suggest to the Department that an ongoing relationship may be present when the chosen commission structure can be unrelated to any ongoing services or recommendations. The "mutual understanding" prong reinforces the ambiguity of the relationship given the Department's view that the writings of the parties may be considered but are not dispositive of the intent of the producer or the participant.

We also note that as the Department is planning to rewrite the fiduciary rule, the interpretive guidance may no longer be relevant in the near future, and it is difficult to give feedback on how PTE 84-24 should be structured when it is unclear what functional conduct might lead to fiduciary status in the future.

Fiduciary Control—Because the carrier does not have responsibility to direct the independent producer's actions, the carrier does not have the requisite control to have fiduciary status. The carrier cannot require the fiduciary to carry out the fiduciary process of developing a recommendation in a particular way, or require the producer to receive only certain amounts of compensation. The supervision in the relationship relates only to the narrow question of whether the recommendation of the company's own product can be suitable for the participant—this is not at all the same question as whether recommending the product is prudent fiduciary advice. For example, recommending a rollover may be imprudent even though the recommended annuity is suitable and would be appropriate for the participant. Similarly, recommending a rollover may be prudent, but recommending the carrier's specific product may be imprudent when compared to other carriers' products that were available.

The Department implies that insurance intermediaries, such as brokerage general agencies (BGAs), independent marketing organizations (IMOs), or field marketing organizations (FMOs), could impose some commonality of rules or control over independent producers, essentially filling a role akin to that of a broker-dealer. However, such intermediaries are regulated by state insurance laws, which do not afford them the level of authority over insurance agents that broker-dealers have over their registered representatives. The roles of intermediaries is voluntary on the part of producers and carriers, and even if an intermediary were to attempt to assert greater control over producers through contract arrangements, there is no requirement that any producer work through that intermediary.

FAQ 18 Questions—While the FAQ 18 guidance suggests that PTE 2020-02 may be relied upon if a carrier takes into account only its own products, the guidance omits several key issues in its analysis.

First, the terms of the exemption are only relevant where an entity is a fiduciary. As discussed above, the FAQ does not explain why a carrier would be a fiduciary to begin with, as it does not play a material role in making the recommendation or in controlling the fiduciary process leading to the recommendation.

Second, PTE 2020-02, like any exemption, only addresses whether a potential prohibited transaction qualifies for an exemption, not whether the fiduciary complied with its fiduciary duty under ERISA. PTE 2020-02 does not relieve a fiduciary of any of its fiduciary obligations under the fiduciary standard of care. If one accepts that the carrier is a fiduciary, then the carrier must have an obligation to ensure that the use of its product in a rollover recommendation is prudent, not just suitable under insurance law and regulation—how can it meet this obligation without reviewing whether the underlying rollover is prudent, and whether its product was prudent as compared to other reasonably available products? PTE 2020-02 may exempt the carrier from the excise tax, but it will not prevent fiduciary liability for failing to consider the prudence of the transaction. It's not clear how a carrier could assure itself the transaction is prudent without considering factors beyond its own products or asserting a level of control over the producer inconsistent with their independent contractor relationship.

Third, the FAQ does not examine how the relief in PTE 2020-02 is available to the producer as well as to the carrier where the focus is only on applying PTE 2020-02's requirements (including the best interest standard of care) to a particular carrier's own products, and not to other products the producer may have considered. Is it the Department's intention, as the guidance and exemption text appear to read, to provide the same relief to both fiduciaries based solely on review of the use of that carrier's product? If both are fiduciaries, then both need relief from the prohibited transaction, or else PTE 2020-02 does not actually address the transaction.

Finally, FAQ 18 suggests that insurance intermediaries may be the means by which carriers could indirectly assert control over producers. Non-variable insurance and annuity sales are typically processed through insurance intermediaries that are *not* broker-dealers or other entities registered under securities laws. As discussed above, BGAs, IMOs, or FMOs are state regulated insurance entities, which means they do not have the relationship of control akin to that of a broker-dealer under securities law. Further, if one or more carriers attempted to use intermediaries to establish uniform compensation or similar requirements, this would likely constitute anticompetitive behavior prohibited by law.

- Adopt PTE 2020-02's Definition of Compensation

We believe the broad definition of compensation in PTE 2020-02 should be considered for inclusion in any amendment to PTE 84-24. We understand the Department may have concerns that the scope of relief in PTE 84-24 is construed too broadly given the lack of a definition of "commission" in the current exemption. However, as the Department implicitly recognizes in PTE 2020-02, the form of the compensation is not the source of the Department's concern as long as it is reasonable in total, and appropriately disclosed. The issue that is most important is whether the recommendation was made using a prudent and thorough fiduciary process and

whether it is in the best interest of the participant. We therefore think that limiting PTE 84-24 to only certain commission compensation is not providing any additional protection to participants and should be expanded as in PTE 2020-02.

- Scope of Eligible Insurance and Annuity Contracts

We strongly urge the Department to retain the broad scope of PTE 84-24 with respect to all insurance and annuity contracts. The 2016 amendments to PTE 84-24 excluded variable and fixed indexed annuities from eligibility for the exemption. Such a limitation on PTE 84-24 would create an unlevel playing field by favoring securities-licensed providers that can operate under PTE 2020-02 while disfavoring independent insurance producers operating under state insurance law. As discussed above, PTE 84-24 is needed to provide strong consumer protections while also accommodating the realities of the insurance marketplace in order to ensure a level playing field.

- Best Interest Standard of Care

Finseca strongly supports the concept of the best interest standard of care—our members act in the best interest of their clients, and we have supported the SEC and the NAIC in developing their standards. However, these two standards are written to harmonize with one another—the SEC standard does not apply to life insurance or annuity recommendations that are not securities, and the NAIC Model Rule on Annuities permits use of the SEC standard where an annuity is a security. As a result, there is no material conflict between the two slightly different regulatory standards because they do not overlap.

As discussed above, the Department operates in a different regulatory environment—its rules almost always apply simultaneously with another regulator. Thus, if the exemption requires an ERISA-specific version of the best interest standard, two best interest standards would apply. We ask that the Department consider the impact of potential compliance costs and conflicts resulting from two different standards that achieve the same goals, but differ in the technical details.

We believe the Department should prioritize its efforts to ensure any changes to PTE 84-24 regarding a best interest standard harmonize with the NAIC and SEC best interest standards, or accept compliance with these as satisfying the exemption's best interest standard. An annuity recommendation will be subject to a state-law best interest standard of care in the vast majority of states in the near future based on the NAIC Model Rule. In addition, all variable sales by broker-dealers are covered under the SEC's Regulation Best Interest. This is a major change from 2016, when the Department last amended PTE 84-24 to adopt a best interest standard—most of these recommendations are now already subject to a best interest standard.

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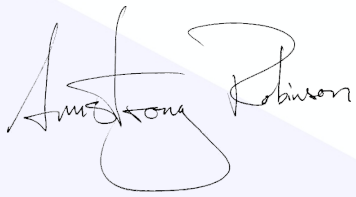
Conclusion:

Thank you again for your time, and we hope to continue to engage the Department in an ongoing dialogue. It is important for participants, especially underserved communities, that the Department construct exemptions that preserve access and choice to retirement income products, and we believe PTE 84-24 should be retained to better serve those participant needs.

Sincerely,



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