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January 2, 2024

The Honorable Lisa M. Gomez
Assistant Secretary of Labor
Employee Benefits Security Administration
U. S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: RIN 1210-AC02, Proposed Definition of Fiduciary Investment Advice;
ZRIN 1210-ZA33, Application No. D-12060, Proposed Amendment to PTE 84-24;
ZRIN 1210-ZA32, Application No. D-12057, Proposed Amendment to PTE 2020-02

Assistant Secretary Gomez:

I am writing on behalf of Finseca to provide comments on the Department's proposed regulation redefining fiduciary investment advice (the "Advice Proposal"); the proposed amendment to Prohibited Transaction Class Exemption 84-24 (the "84-24 Proposal"); and the proposed amendment to Prohibited Transaction Class Exemption 2020-02 (the "2020-02 Proposal"); (collectively, the "Proposal" or "Proposals").[1]

For the reasons summarized here and explained in more detail in our comments below, we strongly urge the Department to withdraw these fundamentally flawed Proposals that will dramatically harm the financial security of the American people.

<u>Our Name is Our Mission: Finseca Stands for Financial Security for All</u>

Finseca is a national trade association comprised of more than 9,000 financial security professionals who serve clients in communities throughout the country. Our members work with consumers to help create comprehensive and holistic financial plans that place protections against certain risks—such as death, injury, and outliving retirement income—as the centerpiece.

Financial security for all

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As a recent independent study by Ernst & Young shows, this approach provides better financial outcomes for consumers than financial plans without products, such as life insurance and annuities, that provide guarantees.[2] Our members are licensed insurance professionals, agency leaders, and brokerage general agents, many of whom are also registered representatives of broker-dealers or representatives of registered investment advisors. Some of our members are licensed as all three. Collectively, they are financial security professionals.

As an organization, our mission is to empower our members to help more American families achieve financial security. One pillar of that mission is to collaborate with policymakers at both the Federal and State levels to craft policies that create the best possible environment for holistic insurance and financial planning. Thus, one of our key goals is to **preserve consumer choice** by ensuring access to the financial security professionals and products that families need to achieve financial security.

The Proposals Would Hurt Retirement Investors Who Most Need Help:

While we recognize that this outcome is the opposite of the Department's intention, recent history shows that the Proposals would harm the very retirement investors the Department seeks to protect by reducing their access to essential insurance and financial products, increasing costs, and by reducing their choice among different types of financial professionals.

There is general agreement that the transition from defined benefit to defined contribution retirement plans has shifted material risks, such as longevity risk and sequence of return risk, from employers to plan participants and retirement savers. As a result, working Americans benefit from increased access to guaranteed retirement income solutions. Bipartisan Congressional leaders worked together in the original SECURE Act of 2019 and on the SECURE 2.0 Act of 2022 to increase access to annuities by retirement savers, not just in ERISA-covered Title I plans, but also as individual retail products in IRAs.[3] We are not aware of a more significant area of policy agreement by the Trump and Biden-Harris Administrations.

We believe the Proposals would have the opposite effect of impeding access to guaranteed retirement solutions. The increased cost, complexity and risk the Proposals would place on financial professionals would cause the market for financial professionals to increasingly shift toward serving only higher-net worth individuals, denying access and consumer choice to those who need help the most.

We note that we are not alone in this concern.

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Eight U.S. Senators recently asked the Department to extend the comment period for the Proposals, writing "Given the broad impacts of this potential rulemaking, we are concerned that you are rushing this process and the people that will be hurt are the ones you are trying to help the most." This was only one of several letters from a growing bipartisan expression of concern from Congress.[4]

These increased costs and risks are not theoretical. They are based on practical experiences in the real world. The Department's 2016 fiduciary regulation and associated exemptions (collectively, the "2016 Rule")[5] caused reduced access to financial assistance for as many as 10 million accounts holding $900 billion in assets.[6]

The Fifth Circuit Court of Appeals specifically documented the harm caused by the 2016 Rule (which at that time had only been partially implemented) in its decision vacating the 2016 Rule, writing "The Fiduciary Rule has already spawned significant market consequences, including the withdrawal of several major companies…from some segments of the brokerage and retirement investor market. [Other] companies…have limited the investment products that can be sold to retirement investors."[7]

Unfortunately, rather than acknowledging the harmful effects the Department's 2016 Rule had on retirement savers—especially those with smaller balances who are most in need of access and choice—the Department dismisses them. As a result, these Proposals repeat—and, in fact, compound—the adverse impact of the ill-advised 2016 Rule.

The Department says that this time things will be different because the current Proposals are different. As the Assistant Secretary asserted during the administrative hearing on December 12th:

> MS. GOMEZ: "…this proposal is not just a repeat of the 2016 advice package that was ultimately struck down by the Fifth Circuit. It departs from that package in numerous ways…This Proposed Rule is much narrower than the 2016 rule, which broadly addressed virtually all investment recommendations regardless of whether there was a relationship of trust and confidence with the advice provider. Unlike the 2016 rule, the proposal does not impose enforceable contract or warranty requirements on advice providers. The sole remedies to investors for any violations of the proposed regulation's requirements would be those expressly set forth in ERISA and the Internal Revenue Code."[8]

The problem with the Assistant Secretary's assertion that the current Proposals are different is that two of the key differences she cited—the elimination of the enforceable contract and of the new causes of action—were provisions in the 2016 Rule that had never gone into effect before the Fifth Circuit vacated the 2016 Rule, yet the court still found that the 2016 Rule had "already spawned significant market consequences."[9] Further, as we discuss in detail below, the scope of the new fiduciary test, which covers nearly all recommendations by financial professionals despite the new "trust and confidence" language she alludes to, is actually broader in scope than the 2016 Rule.

Accordingly, we believe the Department should heed the warning of the 2021 study finding that reinstating the 2016 Rule would reduce the accumulated retirement savings of 2.7 million individuals with incomes below $100,000 by approximately $140 billion over 10 years and would contribute to "a roughly 20% increase in the wealth gap when looking at accumulated IRA savings alone" for Black and Hispanic Americans.[10]

Given the reality of consumers' negative experience with the 2016 Rule, the Department should be proceeding cautiously, following the famous admonition to "first, do no harm." Unfortunately, as we explain in more detail below, that is not what the Department has chosen to do. Despite bold action since 2016 by securities and insurance regulators to significantly enhance consumer protections, *dramatically reducing* any perceived benefit from action by the Department; despite having only academic papers making rosy projections of theoretical benefits to counter actual evidence of real world costs; despite having only conjecture about hypothetical risks but no actual evidence of wrongdoing that is not already prohibited by State and Federal laws and the Department's current regulation; despite the Fifth Circuit's clear and unambiguous ruling that the Department does not have the authority to issue so broad a rule: despite all of that, the Department is nonetheless moving forward with undue haste to issue Proposals that would again fundamentally disrupt existing service models and markets that already work well.

The Proposals Seek to Override Thoughtful and Well-Reasoned Rules Developed by Federal and State Regulators with Expertise in the Markets They Regulate:

The Department acknowledges that the regulatory landscape has fundamentally changed since it promulgated the 2016 Rule, but takes from these changes the wrong lesson. The experienced regulators with primary jurisdiction over the conduct of various financial professionals—including the Securities and Exchange Commission ("SEC"), the Financial Industry Regulatory Authority ("FINRA") and nearly all State insurance regulators—have adopted new guidance and more stringent regulations

materially improving consumer protections, including adopting best interest standards and enhanced disclosures.[11]

The Department inexplicably views the adoption of these new protections by primary regulators as a reason to intervene with its own new regulation that would override and even conflict with the responsible actions taken by these experienced regulators, undermining their efforts to protect consumers. This is especially troubling as the Department lacks not only the legal authority to broadly expand the scope of fiduciary advice (as the Fifth Circuit Court of Appeals found in vacating the 2016 Rule), but also the institutional expertise to regulate the products, recommendations, business models and compensation structures of the insurance, banking, and securities marketplaces.

And yet that is exactly what the Proposals again seek to do—rush to impose the Department's inexpert views and "one-size-fits-none" special rules and conditions on top of the new rules and standards developed deliberately and with due care by State and Federal agencies that possess actual expertise in these matters, and that are properly authorized to conduct such oversight.

The Proposals are not "Narrowly Tailored" and are in Direct Conflict with the Fifth Circuit's Ruling Vacating the 2016 Rule:

While the Department asserts that it responded to the Fifth Circuit's ruling with Proposals that are "much more narrowly tailored than the 2016 Final Rule,"[12] the reality is the opposite. The 2016 Rule improperly declared nearly all recommendations by financial professionals relating to ERISA plans and IRAs to be "fiduciary advice," a broad scope that the Fifth Circuit rejected as not reflecting the special relationship of trust that is the hallmark of a fiduciary relationship.

- Transformation of Sales Relationships into Fiduciary Advice

The effect of the Advice Proposal is no less broad, as it equates an individualized recommendation by a financial professional that a retirement investor can reasonably rely on as being made in their "best interest" with fiduciary advice. The Department somehow reaches the remarkable conclusion that a "best interest" recommendation is evidence of a fiduciary relationship of the sort described by the Fifth Circuit, even though the "best interest" standards adopted by primary regulators were adopted precisely because they were NOT fiduciary standards.

The Department seeks to erase the distinction between sales recommendations and fiduciary advice by claiming that any individualized recommendation in a retirement

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investor's best interest meets the special relationship of trust and confidence the Fifth Circuit ruled the statute required. This completely ignores that fact that these elements are a part of every non-fiduciary annuity or securities sales recommendation of the sort the Fifth Circuit ruled was not intended to be fiduciary conduct.

The Department's effort to erase this crucial distinction in the law was fully articulated by Deputy Assistant Secretary Timothy Hauser and Ms. Megan Hansen, Senior Attorney-Advisor in the Office of the Solicitor of Labor in an exchange with witnesses testifying at the public hearing on December 13th. Specifically, regarding the NAIC Best Interest Model Rule, Mr. Hauser and Ms. Hansen asked:

> MS. HANSEN: I'm sorry that I'm having a hard time understanding this. I just want to make sure I understand the point you're making and the terminology is causing me just a bit of difficulty. So, what you are saying is that they do have to act in the best interest of their client. You are saying it is a best interest standard –
> MR. ROBERTS: Yes.
> MS. HANSEN: -- so they have to act in the way that is best for their client, but that, that is not a fiduciary standard.
> MR. ROBERTS: That's correct.
> MS. HANSEN: So they do have to do what is best for their client –
> MR. ROBERTS: That's correct.
> MS. HANSEN: -- but they don't have to act as a fiduciary.
> MR. ROBERTS: That's correct.
> MS. HANSEN: And so what is the – I'm still trying to understand where the – what the action would be that would be both in the best interest – the thing that is best for their client, but is not a fiduciary act. I'm still trying to understand where that line is.
> …
> Mr. HAUSER: …But the question I guess I have and what's confusing to me – and this really, I think is following up on Megan Hansen's line of questions, which is I mean it appears to me as I understand the way this relationship works, the advice – there's advice, it's individualized. It's about a fairly complex set of products that ordinary investors can't really understand without this expert assistance. And the people they're dealing with hold themselves out as acting in the customer's best interest.   And so from all of that, what is the thing that makes this not a relationship of trust and confidence, at least in those circumstances where the advisor is making a recommendation?[13]

The "thing that makes this not a relationship of trust and confidence" is that sales recommendations have always involved both individualized recommendations and a duty to recommend suitable products—these are exactly the sales recommendations the Fifth Circuit ruled that Congress was aware of when it wrote ERISA and did not intend to include as fiduciary advice. Further, the recent development of "best interest" as a refinement of "suitability" does not transform that sales recommendation into a fiduciary "special relationship of trust and confidence."

The SEC adopted Regulation Best Interest after considering and expressly rejecting a fiduciary standard of care for broker-dealers.[14] The NAIC and the more than 40 States adopting the Best Interest Model Rule #275 for annuity sales considered and expressly rejected a fiduciary standard of care.

In both cases, these were thoughtful and intentional decisions made by experienced regulators whose primary job is to protect consumers, and these primary regulators separately arrived at the conclusion that conflating sales recommendations with fiduciary advice would adversely affect the consumers they protect. To put it in its simplest terms, it cannot be the case, as the Department asserts, that complying with a non-fiduciary, best interest standard of care creates a fiduciary "trust and confidence" relationship.

Thus, while the Advice Proposal uses different words than the 2016 Rule (such as whether the retirement investor would reasonably believe the recommendation was made in their best interest), the actual scope of the Advice Proposal is just as broad as the 2016 Rule and would apply to the same recommendations. In effect, nearly all recommendations relating to ERISA plans or IRAs would be fiduciary advice, the very outcome the Fifth Circuit rejected. In fact, because the Advice Proposal has no exceptions, the Advice Proposal's scope is even more broad than the 2016 Rule, capturing additional conduct specifically excluded from the 2016 Rule.

The truth is that the Department simply disagrees with the limitations in the ERISA statute in Sec. 3(21). The Department does not believe the law has kept pace with changes in the retirement savings marketplace, and seeks to replace it with a new law. The Department openly discusses its intent to ignore the law and the Fifth Circuit's central holding in the Preamble, writing:

> "More fundamentally, ***the Department rejects the purported dichotomy between a mere 'sales' recommendation*** to a counterparty, on the one hand, ***and advice,*** on the other, in the context of the retail market for investment products. [emphasis added]"[15]

This "purported dichotomy" the Department "rejects" is actually the key holding in the Fifth Circuit's decision to vacate the 2016 Rule. What the Department is rejecting is the court's conclusion that:

> "When enacting ERISA, Congress was well aware of the distinction, explained further below, between investment advisers, who were considered fiduciaries, and stockbrokers and insurance agents, who generally assumed no such status in selling products to their clients.
>
> ***The Fiduciary Rule improperly dispenses with this distinction.*** [emphasis added]"[16]

The Advice Proposal is the opposite of a more "narrowly tailored" rule—it is the same fundamentally flawed rule, premised on the same false perception of the Department's authority, merely expressed in different terms in an attempt to circumvent the clear direction of the judiciary. Or, as the Fifth circuit wrote in its prior decision, "The DOL interpretation, in sum, attempts to rewrite the law that is the sole source of its authority. This it cannot do."[17]

- Extension of Fiduciary Standard of Care to Title II

The Proposals again would establish a fiduciary standard of care applicable to IRAs and other ERISA Title II tax vehicles it does not have the authority to impose. Congress did not create a standard of care for Title II as it did for Title I, and it did not grant authority to the Department to do so. As the Fifth Circuit ruled in vacating the 2016 Rule, "Title II did not authorize DOL to supervise financial service providers to IRAs in parallel with its power over ERISA plans."[18] The fact that the term "fiduciary" is also used in Sec. 4975 of the Tax Code does not confer on DOL the authority to create a standard of care through ERISA Sec. 408(a) that Congress declined to grant it directly. The Fifth Circuit ruled that attempting to do so in the 2016 Rule was improperly requiring "insurance salespeople [to] assume obligations of loyalty and prudence only statutorily required of ERISA plan fiduciaries"[19] under Title I. The Proposal is no different than the 2016 Rule in this regard, and therefore exceeds the Department's authority under the statute.

- Extension of Fiduciary Standard of Care to Distributions

The Proposal again would attempt to apply a fiduciary standard to recommendations regarding the use of distributions from plans and IRAs. The Proposed Rule at Sec. 2510.3-21(f)(10)(i) defines "recommendation" to include the use of assets "after the

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securities or other investment property are rolled over, transferred, or distributed from the plan or IRA."

This is not what the statute permits. ERISA Sec. 3(21)(A)(ii) applies to "investment advice for a fee…with respect to any moneys or other property of such plan…" [emphasis added]. By definition, assets rolled out of or distributed from a plan no longer are part of that plan, and are beyond the scope of the definition.

- No Fiduciary Exclusion for Discussions Among Financial Professionals

The 2016 Rule was fundamentally flawed, but it did contain important exclusions from fiduciary advice for certain sophisticated counterparties. By contrast, the Advice Proposal could apply to discussions between financial professionals, such as insurance issuer wholesalers recommending their company's products to independent insurance professionals, intermediaries assisting independent professional in identifying products and carriers that would serve the needs of specific clients, and general agencies that may be assisting financial security professionals in preparing recommendations.

The "facts and circumstances" approach to this issue in the Advice Proposal will cause unnecessary confusion, and may result in fiduciary status where no exemption is available. The Department reiterates in the Preamble that there are no exclusions, and that even a financial professional's individualized recommendations to other financial professionals who are fiduciaries to their clients can be fiduciary advice, writing, "In general, however, the Department envisions that proposed paragraph (c)(1)(ii) would apply broadly to recommendations to plan and IRA fiduciaries acting on behalf of plans and IRAs."[20]

Two financial professionals discussing business matters amongst themselves, even if one makes an individualized recommendation to the other, are not, and should not be treated like, recommendations to a retirement investor.

- Exposes Financial Professionals to "New-to-Them" Cause of Action

Though not creating a *per se* new cause of action, the Proposals would nonetheless significantly increase the litigation risks facing financial professionals and financial institutions. The effect of the Proposals is to expose sales recommendations that were never before subject to ERISA to ERISA Title I lawsuits. This will significantly impact these professionals, including by requiring them to secure new fiduciary insurance. The Department seems to overlook this very significant impact on small businesses.

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- 60-Day Implementation Period is Arbitrary and Capricious

It is not possible for any entity subject to the Proposals, much less small independent financial professionals, to adapt to changes of this magnitude in 60 days. The Department is acting in an entirely arbitrary and capricious manner when it indicates that it will enforce its policies that would fundamentally displace State insurance regulation of annuities with a new and comprehensive Federal structure only 60 days after publishing a final rule.

The Proposals and Administration Statements in Support Falsely Vilify Commissions and Other Transaction-based Forms of Payment that Best Serve Many Consumers:

It was inappropriate and irresponsible of the President's Council of Economic Advisors to suggest that commissions are "junk fees" that create unique conflicts of interest.[21] The rapid growth in annuity sales in recent years is a result of rising interest rates, market volatility, and consumer demand for risk protection, not the commission-based business model. Retirement savers want to insulate themselves against longevity risk, mortality risk, sequence of return risk, interest rate and loss of principal risks, and to do so they generally need to purchase individual annuities.

Commissions are not "junk fees" and assertions to the contrary simply are not rooted in reality. In fact, such assertions undermine the efforts of the States that review and approve these products and their commission schedules. Every other financial regulator recognizes that commission or transaction-based cost models better serve some retirement savers, while fee-based cost models better serve others. The truth is that consumers need access to both cost models to best serve their individual needs, and the Department should act to protect that consumer choice.

As the Department should know from its longstanding enforcement and policy coordination efforts with the SEC under a series of Memorandums of Understanding,[22] it is a violation of the SEC's Regulation Best Interest and of the fiduciary standards applicable to a registered investment advisor to steer clients to a fee-based model who would be better served by a commission-based model. The SEC devotes considerable resources to enforcing these standards regarding so-called "reverse churning" by "dual registrants" who are licensed to recommend both types of accounts to a client.

In these cases, such as where a retirement investor makes investment changes infrequently, an annually charged fee of 1% to 1.5% against the account's assets causes the retirement investor to pay more in fees during the relationship for services they

don't need as compared to a one-time commission (a commission that, in a typical annuity, does not directly reduce the value of the asset as investment management fees do).

In many cases, especially with regard to retirement investors whose investments and annuities are typically purchased and held for long periods of time, commissions can be a more cost-effective approach, saving the client significant fees over the course of the investment period, thereby preserving a larger net asset.

Ultimately, wise regulation must preserve consumer choice for all of these options.

The 84-24 Proposal Discriminates Against Certain Insurance Professionals Distributing the Same Products, Despite the Fifth Circuit's Finding that Disparate Treatment of Insurance Products in 2016 was Arbitrary and Capricious

Consumers are best protected when they have access to both fee and commission-based business models and choice among various financial professionals. This is why we strongly object to the arbitrary limits the 84-24 Proposal would place on consumer access and choice.

The 84-24 Proposal, in direct opposition to and disregard for State insurance law regarding compensation and its disclosure, would permit only a narrowly defined subset of independent insurance professionals that sell only a narrowly defined subset of annuities and insurance products to receive only a narrowly-defined subset of compensation described as an "Insurance Sales Commission." No other form of compensation, regardless of its reasonableness, utility to the consumer, or transparency of disclosure, is permitted.

These highly unusual and proscriptive limits are in direct contrast to the Proposed (and current) PTE 2020-02, which does not mandate a specific form of compensation so long as it is disclosed and otherwise reasonable. Permissible compensation under PTE 2020-02 is unconnected to the type of financial professional and does not discriminate with regard to the compensation structure. As the Proposed PTE 84-24 and the Proposed 2020-02 are otherwise largely identical in their requirements, there is no valid reason for the Department to arbitrarily prohibit perfectly legal and disclosed compensation when received by independent insurance professionals, but broadly permit such compensation when it is received by other types of financial professionals. These Proposals intentionally result in an unequal playing field by creating two classes of individuals that are serving consumers in the same manner and offering the same products and services.

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Further, repeating the mistakes of the vacated amendments to PTE 84-24 that were part of the 2016 Rule package, the Department again singles out certain products (non-security annuities) and certain financial professionals (independent insurance professionals who are neither employees nor statutory employees of an insurance carrier) for separate and unequal treatment. Similar separate treatment of fixed index annuities was a material factor in the Fifth Circuit's decision to vacate the rule in part because the treatment of these products was arbitrary and capricious.[23]

The Department should not confuse our objection to its arbitrary divisions among insurance and annuity products and among insurance professionals with our endorsement of the Department's view that insurance, securities and banking can all be treated the same way through a one-size-fits-all exemption. The opposite is true. Retaining an insurance and annuity specific exemption is crucial to ensure that consumers have access to insurance products including annuities that round out their financial plans creating holistic financial security.

As Finseca previously explained to the Department,[24] preserving a broad PTE 84-24 is essential because there are fundamental differences in how insurance and annuity products are distributed and regulated that cause them not to fit within the requirements of the current PTE 2020-02 or the 2020-02 Proposal. Acknowledging these differences with a specific exemption or process tailored to reflect the realities of the State-regulated insurance marketplace is not inappropriate, arbitrary or capricious—it is vital to a properly functioning marketplace for financial security for consumers.

The Department's limiting decisions within the context of the 84-24 Proposal are arbitrary and capricious because only some financial professionals, and only some insurance products, are allowed to use the exemption at all, and only for a specific and limited form of compensation. Rather than recognizing essential differences of these State markets, the 84-24 Proposal arbitrarily creates unnecessary dividing lines and limits between insurance products and insurance professionals. It is this unnecessary limitation and segmentation of the insurance marketplace that is arbitrary in the same way the amendments to PTE 84-24 associated with the 2016 Rule were arbitrary.

Annuity and Insurance Products are Not the Same as Investment Products—They Serve Different Purposes, Have Different Structures and Benefits, and Should be Regulated Differently:

Many of the harms resulting from the Proposals are the product of attempting to impose a one-size-fits-all set of rules and exemptions that were designed for securities investment recommendations onto the fundamentally different insurance and annuity marketplace.

Insurance products and annuities are not investments, they are forms of insurer risk mitigation products in which the issuer assumes significant risks that simply are not borne by the managers of typical investment products. State insurance laws actually prohibit insurance and annuity products from being advertised as investments.[25] Life insurance and annuities provide risk guarantees in which the carrier assumes identified risks so that consumers are protected.

The distribution and cost structure of these products, therefore, is very different than the cost structure of typical investments, such as mutual funds or collective trusts. The issuer of the life insurance or annuity product is assuming some or all the asset management risk, market risk, inflation risk, mortality risk, longevity risk, sequence of returns risk, interest rate risk, etc. This transfer of risk is at the core of Ernst & Young's conclusion that holistic financial plans which include these products lead to better outcomes for consumers.[26]

Life insurance and annuities offer insurance benefits as options within contracts that often are the primary reasons to select these products —these can include various annuity payment options, death benefits, guaranteed minimum withdrawal benefits, guaranteed minimum income benefits, guaranteed lifetime withdrawal benefits, guaranteed minimum accumulation benefits, guaranteed liquidity benefits and guaranteed increasing payout benefits. As a result, these contracts are funded with premiums.

It is important to note that the amount of premium paid by the purchaser does not vary based on the commissions paid to an insurance professional selling the contract. The purchaser pays the same premium and receives the same funds guaranteed by the issuer without regard to the commission received by the insurance professional. This is very different than fee-based investment advice in which the retirement investor assumes most, if not all these risks, and typically has the annual fees deducted from the account assets, directly reducing its value.

To ensure issuers can meet their contractual guarantees, insurance issuers are heavily regulated by the States, monitoring solvency, financial reserves, assets and liabilities.

Similarly, annuity products have certain features that make such guarantees feasible, such as potential surrender charges or market-value adjustments.

The role of an insurance professional is also different than the role of a typical investment advisor. The vast majority of (and fastest growing part) of the financial security profession are not controlled by any particular issuer. They offer and recommend to clients a variety of annuities from multiple insurance issuers affording clients a greater pool of options to meet their specific goals and objectives. By design, these independent insurance professionals are not controlled by a specific issuer—their independence is a feature of State law that does not have a clear securities law analogue. In addition, those issuers or carriers compete with one another on a multitude of factors, including but not limited to, price, service, credit rating, history, and product features.

The Eligibility Provisions in PTE 84-24 and PTE 2020-02 Would Impose 10-Year Bans on Financial Professionals and Carriers For Unrelated Acts of Affiliates without Valid Due Process:

The eligibility provisions added to Proposed PTE 84-24 and 2020-02 are arbitrary and capricious. They would ban financial professionals and carriers from participation in a $26 trillion[27] marketplace for 10 years for acts committed by distant affiliates that are unrelated to investment advice. Further, the Department may itself impose such a ban for entities it believes are not sufficiently compliant, with very limited redress that does not seem designed to ensure due process. The criteria causing ineligibility under the current version of PTE 2020-02 are appropriately limited to those crimes referenced in ERISA Sec. 411 that "aris[e] out of such person's provision of investment advice to Retirement Investors"[28] and that are committed by the Investment Professional, the Financial Institution or another Financial Institution in the same Control Group.[29]

Further, the inclusion of nearly identical criteria in both PTE 84-24 and PTE 2020-02 likely results in no alternative investment advice exemptions available to an ineligible person, and while the Department suggests that an ineligible person could apply for an individual exemption, the Department separately issued a pending proposed regulation stating that the Department "ordinarily will not consider" exemption applications from similar persons.[30]

The Department does not provide an explanation of why such an expansion is necessary, and did not indicate that the current language in PTE 2020-02 has proved inadequate for enforcement of the exemption.

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Instead, it merely asserts that the current eligibility standards in PTE 2020-02 are "too narrow" and that the changes described below "will help foster a culture of compliance throughout the organization in recognition of the importance of investment advice to Retirement Investors."[31]

The 2020-02 Proposal Does Not Address the Annuity Product Differences Preventing Its Use Even as it Becomes Mandatory for Many Insurance Companies and Professionals

In stark contrast to the Department's grudging (though too limited) recognition in the 84-24 Proposal that there are differences in the insurance marketplace that must be reflected in a dedicated insurance exemption, PTE 2020-02 was built on a securities law "chassis" that does not fit the fixed insurance and annuity model. Current PTE 2020-02 and the 2020-02 Proposal require that a financial professional be affiliated with and controlled by a particular financial institution.

This financial institution then controls the professional's actions through compliance with policies and procedures, governing which insurance or investment products the professional can recommend, and how the professional must develop and document the reasons for a specific recommendation.

Not by coincidence, this is how a broker-dealer and a registered investment advisor interact with their representatives. However, this is not how insurance issuers are permitted to interact with their independent insurance professionals (regardless of the statutory employee designation the Department falsely equates with status as a captive agent). This is true regardless of whether the independent Insurance professional meets the Department's narrow definition in Proposed 84-24 or not, and as a result, many independent insurance professionals will be forced to use Proposed 2020-02. Broker-dealers and registered investment advisors can serve as a co-fiduciary under PTE 2020-02 for their representative's recommendation because they control their representatives' actions. Insurance issuers do not, and should not, control independent insurance professionals (statutory employees or not) and therefore cannot serve as co-fiduciaries for all of the recommendations made by independent insurance professionals.

Thus, we are very concerned the 2020-02 Proposal, which is the only exemption that most independent financial security professionals would be eligible to use, will not work for these professionals and issuers as proposed.

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Specifically, in Frequently Asked Question 18 related to the current PTE 2020-02, the Department clarified that the scope of policies and procedures, including supervision of an independent insurance professional, does not require policies and procedures regarding "unrelated and unaffiliated insurance companies."[32] However, this guidance has not been incorporated into the Proposed 2020-02 even though some other sub-regulatory clarifications from the FAQ guidance were.[33] The 2020-02 Proposal has no provision addressing the limited scope of an insurance carrier's co-fiduciary responsibility as compared to another kind of financial institution.

The Proposals Leave the Fiduciary Status and Potential Exemptive Relief for Insurance Intermediaries Vague and Undefined:

We are also very concerned that the Proposals appear to expose insurance intermediaries, such as independent marketing organizations ("IMOs"), brokerage general agencies ("BGAs") and others providing administrative support and/or wholesaling activities, to potential fiduciary status for some of their shared or common activities even when these intermediaries do not have a direct relationship with the consumer.

This omission is another example of the Department's limited understanding of the insurance marketplace, and why the Department should not be substituting its judgement for that of primary regulators with subject matter expertise.

The Proposals also do not provide an alternative exemption that would be clearly applicable to insurance professionals or employees utilizing IMOs, BGAs or other insurance intermediaries if their conduct should become fiduciary under the Proposals. IMOs and other insurance intermediaries currently assist a broad range of financial professionals, providing access for their clients to a broad array of various insurers' products and solutions, which in turn promotes consumer choice in meeting their goals and objectives.

Rather than creating a potential fiduciary recommendation by the intermediary, assisting an insurance professional in understanding and selecting from the intermediary's robust product shelf actually mitigates potential conflicts. The Advice Proposal has no relief, exclusion or alternative exemption for recommendations made between two financial professionals where one party is an independent third-party intermediary. Insurance intermediaries are not financial institutions under the 2020-02 Proposal, and are not acting as independent insurance professionals receiving an "insurance sales commission" under the 84-24 Proposal.

Given the important role insurance intermediaries play in training, product education, creating and managing networks of financial professionals, and bringing product access and choice to consumers, the lack of clear guidance on fiduciary status for such common activities—resulting in a prohibited transaction for which there may be no applicable exemption—creates unnecessary risks, costs and confusion throughout the insurance marketplace. The only material mention of IMOs and other intermediaries is in footnote 10 in Proposed PTE 84-24, where the Department states that "[t]he Insurance Sales Commission may be paid directly to an intermediary such as an intermediary [sic] marketing organization (IMO) or field market organization (FMO), which then compensates the individual Independent Producer who has provided investment advice."[34] While this clarification has some utility, it does not address similar groups that may well be viewed as intermediaries for the flow of commissions, such as general agencies.

The Department's Development of the Proposal was Informed by an Inadequate Economic Analysis and Alternatives Considered

With respect to the economic analysis, we have serious concerns about its thoroughness and validity, and do not believe it complies with the requirements of the applicable Federal laws and Executive Orders governing the process.

At the outset, it is worth noting that the Department requests comment and data on over 180 specific issues in the Proposal—this degree of uncertainty makes it clear that the Proposal should have been a Request for Information. The Department clearly lacks the necessary understanding of the issues to develop a thoughtful rule, or to properly analyze less restrictive alternatives to the rule, as is required by the Executive Orders governing the regulatory process. In short, this is indicative of an economic analysis that was written to justify a predetermined policy outcome, not to assist in developing an efficient regulation informed by the facts and likely effects of policy.

Though the analysis considers some compliance costs associated with implementing and adhering to the Proposal, it materially underestimates these, especially with respect to the burden on small businesses, including independent insurance professionals, insurance general agencies, and intermediaries. At the same time, the analysis assumes that "retirement investors" will universally benefit in a variety of not-clearly defined ways. Most remarkably, the analysis makes no real effort to evaluate how the 2016 Rule actually affected retirement savers. This is the single most important aspect of the entire analysis, and the one area in which actual data, rather than academic conjecture, is available.

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Selective Consideration of Academic Projections Rather Than Actual Evidence:

Direct evidence from investment advisors, publicly available research, and testimony of interested parties show that low and middle-income households, including the underserved, will bear the most substantial cost of the rule in the form of foregone advice, access to fewer solutions, and greater financial vulnerability. Without an advisor, households are likely to save less, will likely be exposed to greater risk, and will be more inclined toward sub-optimal financial decisions.

To the extent the Department engages with the evidence of the 2016 Rule, it is to accept academic studies of dubious applicability, while dismissing as invalid actual surveys of how financial institutions responded to the Rule.

For example, the Department favorably cites to a study that "found that the Department's 2016 Final Rule reduced flows into funds with excess loads or loads that were higher than would otherwise be expected based on the fund's characteristics."[35]

It reached a conclusion about these effects of the 2016 Rule by "examining the period from 1993 to 2017 in order to look at the impact of the Department's Final Rule, taking into consideration preexisting marketplace trends, anticipatory effects, the April 2015 Proposal, and the April 2016 Final Rule. The study calculates the excess load as 'the difference between loads predicted by a regression and actual load, given a number of other control variables.'"[36] Whatever this study may show about trends in fees in mutual funds over a 24 year period, it seems highly unlikely to establish clear causal links between such fee changes and the 2016 Rule, or between these mutual fund fee trends and annuity purchases that reduce risks as a primary objective.

By contrast, the Department dismissed a 2017 Deloitte survey of 21 major financial institutions which found that 29% percent had limited and 24% had eliminated their provision of guidance or recommendations to small dollar clients in response to the 2016 Rule. Actual interviews with actual entities serving actual clients directly complying with the actual rule were dismissed through a footnote pointing out that "Deloitte … was not asked to and did not independently verify, validate or audit the information presented by the study participants" on which its findings were based.[37]

This was one of three studies the Department dismissed that examined how the 2016 Rule impacted small savers and underserved groups.[38]

Based on data available at the time the studies were released, all three conclude that the 2016 Rule substantially impacted the market for financial guidance and recommendations, particularly among underserved and middle market households, and suggests that further action will perpetuate the trend.

Comparing Apples and Oranges—Annuities Are Different than Investments and Used for Different Purposes by Retirement Savers

The economic analysis in general treats and analyzes annuities as if they are short-term investments, rather than long-term, risk-shifting guarantees. For example, there is no consideration of the long-term outcomes of different types of portfolios, including those that are annuity-focused versus those that are not.

A series of basic text searches demonstrate that the Department has ignored the function and role of annuities in retirement security. The terms "longevity" and "volatility" are not mentioned--"inflation" is used only twice (not in the context of a risk that annuities can address), and the text mentions "guarantee" or "guarantees" only 3 times. Protection against volatility, longevity, and inflation risk through guarantees are key annuity features that set them apart from investments.

To the extent the Proposal does address annuities, it does so to emphasize restrictions and costs, which are necessary to provide the guarantee, but it does not address the value of the guarantee itself. For example, the Department notes that indexed annuities typically cap returns, but does not seem to consider that they also provide floors, a risk prevention feature that has real value to retirement savers who are not in a position to absorb losses in volatile markets. Most of the academic studies cited in support of the Proposal do not adequately take the function of annuities into account, if at all, and are instead narrowly focused on the investment component of *some* annuities, neglecting the trade-off between returns and risk mitigation. In effect, most of the cited studies treat annuities like expensive mutual funds where the added expense only benefits the advisor and harms the retirement investor.

While critical of expenses, the Department makes no attempt to investigate the underlying reasons for the cost of insurance guarantees. The solvency rules applicable to life insurance companies compel insurers to hold reserves equal to liabilities and to hold additional capital. There is no clear analogue to this in a typical securities investment. At year-end 2021, life insurers held $1.6 trillion in variable annuity reserves for contracts with guaranteed minimum death benefits and $1.0 trillion for contracts with guaranteed living benefits.[39] In 2022, life insurers held a total of $4.0 trillion in annuity reserves.[40]

The value that guarantees offer to retirement savers comes at a cost, and failing to compare these structural cost differences between annuities and investments (or to assess the value of the guarantee to retirement savers) makes the cost comparisons inapposite and unreasonable.

The Analysis Ignores the Effect on Life Insurance

Because "investment property" appears to include life insurance with an investible component, the analysis needs to take into account the broader effect of the Proposal on insurance markets not typically considered as part of retirement investing by the Department. The Proposal makes no attempt to identify any issues with the market for these products, the value of the protection these products provide to American families in their time of need, nor the impact of the Proposal on the future availability of these products to workers through welfare benefit plans or through the use of ERISA plan or IRA funds to purchase life insurance. This is a substantial oversight given the size of the non-term life insurance market. In 2021, there were 95.4 million permanent life insurance policies in-force with a total face-value of $7.1 trillion.[41] Further, in 2022 life insurers sold 5.8 million whole life policies with a face value of $551.2 billion.[42] If the Proposal is enacted, the market for life insurance will be negatively impacted, exposing the financial wellbeing of millions of families to greater mortality risk.

<u>The Regulatory Process Employed by the Department Denied the Public a Meaningful Opportunity to Comment on the Rule:</u>

We are very concerned that the Department rushed to implement the Proposals without adequately considering their impact on retirement investors' access to and choice of financial professionals and retirement and investment options, and without considering viable, effective alternatives. It certainly did so with little respect for the public notice and comment process, acting in a manner that denied the public a meaningful opportunity to comment under the Administrative Procedure Act and the Executive Orders governing the regulatory process.

Specifically, the Department took the unprecedented step of holding two days of public hearings on this significant regulatory package <u>before the end of the minimum required comment period</u> on the Proposals. This suggests an arbitrary and capricious process that does not value input from the regulated community. The Department intentionally—despite timely, good faith protest from the regulated community asking for a new hearing date—insisted on holding the hearing before comments could be completed, preventing the thoughtful exchange of information between witnesses who had read one another's comments on important points.

What is clear is that the Department is not interested in receiving meaningful comments from the public if it is willing to ignore even the basic minimums of the regulatory process in its quest to finalize the Proposals before the end of the current term of the Administration.

Conclusion:

For all of these reasons, we urge the Department to withdraw this fundamentally flawed Proposal. Not only does the Department lack the authority to implement these changes, but doing so would harm retirement savers and deny them access to the financial security they desperately need.

I would be happy to discuss these matters with you at your convenience.

Sincerely,

Marc Cadin
Chief Executive Officer

[1] 88 Fed. Reg. 75,890-76,032 (November 3, 2023).

[2] “Benefits of Integrating Insurance Products into a Retirement Plan,” Ernst &Young, LLP, October 2022, available at https://www.ey.com/en_us/insurance/how-life-insurers-can-provide-differentiated-retirement-benefits.

[3] See, Setting Every Community Up for Retirement Enhancement Act of 2019, Pub. Law 116-94 (Secure 1.0) and Secure 2.0 Act of 2022, Pub. Law 117-3 (Secure 2.0).

[4] Letter to Acting Secretary Julie Su from United States Senators Tester, Peters, Manchin, Coons, Cardin, Hassan, Sinema, and Hickenlooper, dated December 20, 2023. United States Senators Marshall, Barrasso, Braun, Collins, Cornyn, Ernst, Grassley, Hagerty, Hyde-Smith, Rounds, and Thun sent a letter expressing their concerns with the proposals. A separate letter requesting more time for comment was sent by United States Senator Wyden.

[5] 81 Fed. Reg. 20,946 – 21,221 (April 8, 2016).

[6] “Analysis of the Effects of the 2016 Department of Labor Fiduciary Regulation on Retirement Savings and Estimate of the Effects of Reinstatement,” report for the Hispanic Leadership Fund prepared by Quantria Strategies, at iii, November 8, 2021.

[7] *U.S. Chamber of Commerce v. U.S. Department of Labor*, 885 F.3d 360 at 368 (5th Cir. 2018).

[8] Transcript of “Public Comment Hearing, Retirement Security Rule: Definition of an Investment Advice Fiduciary,” pgs. 9-10, December 12, 2023.

[9] Implementation of these and other major provisions of the 2016 Rule were delayed until July 1, 2019, while the Fifth Circuit opinion is dated March 15, 2018. See, “18-Month Extension of Transition Period and Delay of Applicability Dates; Best Interest Contract Exemption (PTE 2016–01); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (PTE 2016–02); Prohibited Transaction Exemption 84–24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters (PTE 84–24),” 82 Fed. Reg. 56,545 (November 29, 2017).

[10] Hispanic Leadership Fund Report at iii.

[11] See, e.g.; “Form CRS Relationship Summary; Amendments to Form ADV,” 84 Fed. Reg. 33,492 (July 12, 2019); “Regulation Best Interest: The Broker-Dealer Standard of Conduct,” 84 Fed. Reg. 33,318 (July 12, 2019); “Commission Interpretation Regarding Standard of Conduct for Investment Advisers,” 84 Fed. Reg. 33,669 (July 12, 2019); and NAIC Model Rule #275 available at https://content.naic.org/cipr-topics/annuity-suitability-best-interest-standard.

[12] 88 Fed. Reg. at 75,901.

[13] Transcript of “Public Comment Hearing, Retirement Security Rule: Definition of an Investment Advice Fiduciary,” pgs. 37-38 and 44, December 13, 2023. Mr. Thomas Roberts was testifying on behalf of the National Association for Fixed Annuities.

[14] 84 Fed. Reg. at 33,322 (July 12, 2019). “We have declined to subject broker- dealers to a wholesale and complete application of the existing fiduciary standard…we believe (and our experience indicates), that this [fiduciary] approach would significantly reduce retail investor access to differing types of investment services and products, reduce retail investor choice in how to pay for those products and services, and increase costs for retail investors of obtaining investment recommendations.”

[15] 88 Fed. Reg. at 75,907.

[16] *Chamber* at 372.

[17] Id. at 373.

[18] Id. at 364.

[19] Id. at 382.

[20] 88 Fed. Reg. at 75,907.

[21] "CEA Blog: The Retirement Security Rule — Strengthening Protections for Americans Saving for Retirement" posted October 31, 2023, at https://www.whitehouse.gov/cea/written-materials/blog/

[22] See, e.g., "MEMORANDUM OF UNDERSTANDING CONCERNING COOPERATION BETWEEN THE U.S. SECURITIES AND EXCHANGE COMMISSION AND THE U.S. DEPARTMENT OF LABOR" available at https://www.sec.gov/news/press/2008/sec-dol-mou-072913.pdf.

[23] See., e.g., *Chamber* at 366, "In a novel assertion of DOL's power, the Fiduciary Rule directly disadvantages the market for fixed indexed annuities in comparison with competing annuity products."

[24] See, e.g., Finseca letter to Acting Assistant Secretary Khawar dated October 7, 2021 and AALU Comment Letter Regarding RFI RIN 1210-AB82 dated August 7, 2017 (AALU was a predecessor organization of Finseca).

[25] See., NAIC Model Rule #570, "Advertisements of Life Insurance and Annuities Model Regulation available at https://content.naic.org/sites/default/files/inline-files/MDL-570.pdf.

[26] "Benefits of Integrating Insurance Products into a Retirement Plan," Ernst &Young, LLP, October 2022, available at https://www.ey.com/en_us/insurance/how-life-insurers-can-provide-differentiated-retirement-benefits.

[27] "By the first quarter of 2022…IRAs held $13.2 trillion in assets, private defined contribution plans held $9.2 trillion, and private defined benefit plans held $3.7 trillion in assets." 88 Fed. Reg. at 75,915.

[28] PTE 2020-02 Sec. III(a)(1).

[29] PTE 2020-02 Sec. III(b)(2) and (3).

[30] See, Proposed exemption procedures Sec. 2570.33 providing that the Department "ordinarily will not consider…an application involving a party in interest who is the subject of such an investigation or who is a defendant in an action…[by]…any other regulatory entity to enforce…any other Federal or state laws." 87 Fed. Reg. 14,722 (March 15, 2022). The final rule has been approved for publication in the Federal Register but has not been released as of this writing.

[31] 88 Fed. Reg. at 75,989.

[32] DOL PTE 2020-02 Frequently Asked Questions (April 2021).

[33] 88 Fed. Reg. 75,987 at n. 17 (incorporating FAQs 16 and 17).

[34] 88 Fed. Reg. at 76,007.

[35] 88 Fed. Reg. at 75,937.

[36] Id.

[37] Id.

[38] "Analysis of the Effects of the 2016 Department of Labor Fiduciary Regulation on Retirement Savings and Estimate of the Effects of Reinstatement," Hispanic Leadership Fund, November 8, 2021; "The Data is In: The Fiduciary Rule Will Harm Small Retirement Savers," U.S. Chamber of Commerce, Spring 2017; "The DOL Fiduciary Rule: A Study in How Financial Institutions Have Responded and the Resulting Impacts on Retirement Investors," Deloitte, August 9, 2017.

[39] American Council of Life Insurers, Annuity Product Line Report, 2022. Estimates are based on company surveys.

[40] American Council of Life Insurers, Life Insurers Fact Book, 2023.

[41] American Council of Life Insurers, Life Insurance Product Line Report, 2022

[42] American Council of Life Insurers, Life Insurers Fact Book, 2023.