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Office of Regulations and Interpretations
Office of Exemption Determinations
Employee Benefits Security Administration
Room N–5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210
Attention: Lisa M. Gomez, Assistant Secretary

Subjects: Retirement Security Rule: Definition of an Investment Advice Fiduciary (RIN 1210-AC02); Proposed Amendment to Prohibited Transaction Exemption PTE 84-24 (Application No. D-12060); Proposed Amendment to Prohibited Transaction Exemption PTE 2020-02 (Application No. D-12057)

On behalf of the American Council of Life Insurers (ACLI), we offer these comments on the Department of Labor's (Department's) proposed amendments to the Definition of "Fiduciary" at 29 CFR Part 2510.3-21(c), and proposed amendments to each of Prohibited Transaction Exemptions 84-24 and 2020-02 (collectively, the "Proposal").

ACLI and its members remain perplexed as to why the Department continues to commit governmental resources toward a re-definition of the term "investment advice fiduciary." This "new" Proposal incorporates many of the same inappropriately expansive concepts as were included in the Department's 2016 fiduciary rulemaking package (2016 rule) that was vacated by the Fifth Circuit as inconsistent with the statutory text of ERISA. As detailed below, this Proposal has several significant fatal flaws, is similarly inconsistent with the statutory text and, therefore, must be withdrawn:

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- It places an unacceptable and impermissible barrier between low- and moderate-income savers and financial professionals, denying them access to savings opportunities and retirement income solutions they want and need. It would harm the very retirement savers it purports to want to help.
- It is contrary to current law in several respects:
    - It is contrary to Congressional intent and violates the statutory limits Congress has placed on the Department.
    - It improperly attempts to restructure the statute through the exemption process, imposing Title I fiduciary duties on Title II fiduciaries.
    - It has the improper purpose and effect of authorizing individual retirement arrangement (IRA) investors to bring private actions not authorized by Congress.
    - It violates the McCarran–Ferguson Act.
- Its Regulatory Impact Analysis fails to provide a credible basis for additional rulemaking.
- Its abbreviated comment period and the Department's unprecedented failure to hold a hearing after the end of the comment period fails to provide stakeholders with a meaningful opportunity to participate in the rulemaking process, thereby violating the Administrative Procedure Act.

Finally, the Department proposes this new rulemaking package irrespective of the changes in conduct standards applicable to financial professionals selling retirement products that have been implemented since its last failed rulemaking attempt. Moreover, given the Fifth Circuit's clear decision as to the appropriate scope of ERISA's statutory definition, there is no legitimate basis for the Department to engage in further rulemaking initiatives under section 3(21)(A)(ii) of ERISA to expand the definition of an investment advice fiduciary beyond its historical ambit.

We ask the Department to withdraw the Proposal and focus instead on partnering to implement retirement policies that help – not hurt – Americans who are seeking to save for a secure retirement. Congress shares this goal of helping Americans have access to retirement security, passing two bipartisan retirement bills that were signed into law. This Proposal undermines Congress' work to help Americans plan for their retirement.

I. The Proposal Would Establish a Fiduciary Barrier Denying Access to Annuities

Americans face significant challenges when it comes to saving for a secure retirement. In a 2021 study, the Employee Benefit Research Institute found "nearly half of employees are concerned with their household's financial well-being, citing saving for retirement and having emergency saving as top sources of financial stress."[1] Accordingly, many Americans turn to annuities to provide monthly pension-like income in retirement. Annuities are a product sought and used by middle-income Americans. The median household income among annuity owners in 2022 was $76,000 a year while median household income in the US is $63,000.

Annuities are the only financial vehicle that guarantees income throughout retirement, distinguishing them from mutual funds and other investments. There are a wide variety of annuities available in the marketplace. Some provide immediate income and others provide income later in life. Some

[1] EBRI Insights, October 1, 2020.

annuities offer market exposure and liquidity. Others provide protection against loss of principal. There are costs to providing annuity guarantees and retirement savers pay for the financial certainty of lifetime income when they purchase annuities.

Americans learn about the benefits and features of annuities from financial professionals who are typically compensated through commissions paid by insurers for the sale of the annuity. Life insurers have long sought to structure their compensation arrangements in a way that encourages insurance agents and broker-dealers to devote appropriate time and attention to consumers in the sale of annuities. For that reason, insurers typically pay a sales commission upon the completion of an annuity sale to compensate agents and broker-dealers for the significant effort involved in learning about and marketing and selling annuity products. The vast majority of annuities today are sold on a commission-based compensation structure. This Proposal would upend the marketplace for commission-based sales by broadly expanding the definition of “fiduciary investment advice” under ERISA to include virtually all financial service interactions in the retirements savings setting that could be construed to involve a “recommendation” of almost any investment product, strategy or service. Under this Proposal, Americans would be forced to either forgo retirement guidance or engage a fiduciary investment adviser for any help with retirement finances, from taking the first steps to save for retirement to addressing their income needs in retirement.

Fiduciary Investment Advisers

For decades, the federal securities laws have recognized two distinct types of relationships through which investors of all types - including retirement investors - can obtain investment information to aid them in making investment decisions: (1) a fiduciary advice relationship with an “investment adviser”; and (2) a transactional sales relationship with a “broker-dealer.” Investment advisers play an important role for those who may be in need of ongoing asset management services and are willing to pay ongoing fees for those services. These advisers set minimum account thresholds (e.g., savings of at least $100,000) and charge annual fees that typically start at 1.00% of assets under management (AUM). Although Congress in the Dodd-Frank Act gave the Securities and Exchange Commission (SEC) the authority to subject broker-dealers to a fiduciary standard, the SEC recognized the important distinctions between these two models and instead promulgated Regulation Best Interest ("Reg BI") to preserve fundamental features of the broker-dealer model that allow investors access to valuable information outside of costlier relationship with a fiduciary investment adviser. As was explained by then SEC Chair Jay Clayton upon the SEC’s adoption of Reg BI, “under our approach, Main Street investors will be able to choose the type and level of services they want—from occasional recommendations about particular investments to comprehensive account management—and how they want to pay for those services. I do not believe that a “one size fits all” approach would best serve the diverse interests of our Main Street investors. Further, I believe in this area, a one-size fits all approach could reduce the availability and increase the cost of advice and services, particularly for those with relatively smaller accounts.” [2]

Retirement investors with substantial assets may hire a fiduciary investment adviser solely to provide investment advice, but ordinary retail retirement investors are more likely to obtain the valuable information they need about different investment options the same way they learn about many other important products: through conversations with a salesperson. While the need for longevity protection and income certainty will vary among those that engage fiduciary advisers, it is

[2] SEC Chairman Jay Clayton “Regulation Best Interest and the Investment Adviser Fiduciary Duty: Two Strong Standards that Protect and Provide Choice for Main Street Investors,” Boston MA, July 19, 2018.

important to note that fiduciary wealth advisers that earn their fees through an AUM fee model have a material conflict of interest against the use of annuities, particularly immediate and deferred payout annuities, or for that matter any financial approach that would reduce AUM. The Department's Proposal does not address such conflict and instead disregards the potential lower cost and increased efficiency of commission-based retirement products.

Of note, annuities once bought are held by the purchaser for the long term. This is especially true of immediate and deferred payout annuities and other annuities with fee-based lifetime income guarantees. A buy and hold investment strategy is generally incompatible with the fee-based asset management services offered by fiduciary investment advisers.

History Demonstrates Actual Consumer Harm Associated with a Fiduciary-Only Approach

Before the Department's 2016 regulation was vacated by the Fifth Circuit, the Department's imposition of the regulation's fiduciary-only approach on non-fiduciary transactional sales activity resulted in more than 10 million American workers' accounts, with $900 billion in savings, losing access to professional financial guidance, according to a 2018 Deloitte study. It should surprise no one that financial professionals and the firms for whom they worked moved away from the business of selling products and services following the release of the 2016 regulation that sought to de-incentivize sales and marketing activities. It was never appropriate to impose a fiduciary duty on persons engaged in traditional transactional sales activities.[3] Congress, the SEC and the National Association of Insurance Commissioners (NAIC) have therefore specifically declined to adopt the Department's misguided approach.

Since 2018, a Quantria Strategies study found the 2016 fiduciary regulation would have:

- reduced the projected accumulated retirement savings of 2.7 million individuals, comprised of American workers with incomes below $100,000, by approximately $140 billion over 10 years; and
- imposed the most adverse effects on Blacks and Hispanics, reducing projected accumulated IRA savings by approximately 20% over 10 years and contributing to an approximately 20% increase in the wealth gap attributable to the loss of IRAs savings for these individuals.[4]

II. The Proposal Is Contrary to Current Law

The Proposal Impermissibly Expands ERISA Fiduciary Duties to Sales Recommendations

Under the Proposal, the Department seeks to apply a fiduciary standard when

> the person either directly or indirectly (*e.g.*, through or together with any affiliate) makes investment recommendations to investors on a regular basis as part of their business and the recommendation is provided under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest.

[3] In the Department of Labor's 2010 proposal to amend the definition of fiduciary (75 FR 65263), the Department recognized the dichotomy between advice for a fee and sales and marketing activities by providing a "sellers exception."
[4] Hispanic Leadership Fund, Analysis of the Effects of the 2016 Department of Labor Fiduciary Regulation on Retirement Savings and Estimate of the Effects of Reinstatement, November 8, 2021.

This language is clear and unambiguous: its intent is to impose the fiduciary standard on any person acting in a transactional sales capacity on behalf of a financial institution. The Department's Proposal appears to misinterpret the Department's authority under the law to impose a sweeping assignment of fiduciary status. The Department does not justify applying a broad standard to those individuals or even tie its exceedingly aggressive definition to the statute itself.

The Proposal is premised upon the Department's rejection of the dichotomy under the law between a sales recommendation to a consumer on the one hand, and advice provided for a fee on the other. The Department's Proposal seeks to define the term "investment advice fiduciary" to include anyone who is in the business of making routine sales recommendations by persons engaged in commonplace sales and marketing efforts. The Fifth Circuit disagreed with the Department's conflation of sales activity and fee-based investment advisory activities back in 2018, observing that "when enacting ERISA, Congress was well aware of the distinction … between investment advisers, who were considered fiduciaries, and stockbrokers and insurance agents, who generally assumed no such status in selling products to their clients." Yet, the Department continues to reject this "purported dichotomy" – as it did in the preamble to its 2016 rule. The difference now, in 2023, is that in 2018 a federal court of appeals held that the Department was wrong in its rejection of this "dichotomy" and vacated the Department's flawed rulemaking attempt. In reference to the current regulation issued in 1975, the court noted that "substantial case law has … adopted DOL's original dichotomy between mere sales conduct, which does not usually create a fiduciary relationship under ERISA, and investment advice for a fee, which does."

The court found that the Department's interpretation of ERISA

> conjoins "advice" with a "fee or other compensation, direct or indirect," but it ignores the preposition "for," which indicates that the purpose of the fee is not "sales" but "advice." Therefore, taken at face value, the provision rejects "any advice" in favor of the activity of "render[ing] investment advice for a fee." Stockbrokers and insurance agents are compensated only for completed sales ("directly or indirectly"), not on the basis of their pitch to the client. Investment advisers, on the other hand, are paid fees because they "render advice." The statutory language preserves this important distinction.

The Department is bound by the court's ruling and is not free to engage in rulemaking activity that defies the court's binding interpretation of the scope of the Department's authority.

This broad expansion of sales activity encompassed by the Proposal is not limited to the retail marketplace. The definition captures insurance companies which, as commercial businesses, recommend the purchase of their products and services and seek to best align their recommendations to the specific needs of their customers. Under the Proposal, an insurer responding to a request for proposal and recommending specific insurance products and services to employers such as the offer of a group variable annuity contract to fund a plan, including a pooled employer plan, with a set of investment options or the offer of a group annuity contract to fund pension benefits would be categorized as a fiduciary. In such situations, there is no basis for requiring a life insurance company to assume fiduciary status when carrying out traditional business activities. The plan sponsor fiduciary or an expert independent fiduciary engaged by the plan sponsor for the express purpose of advising the plan sponsor must evaluate any proposal received. In such situations, these plan's fiduciaries are in place and obligated to protect the interests of the plan and its participants. Insurers treated as fiduciaries under the Proposal would not be permitted to earn any revenue at all on the products they sell to ERISA plans or IRAs unless they can meet the terms of a single exemption – PTE 2020-02 – that is ill-suited for use by any commercial business enterprise. There is no basis in law for this expansive interpretation of ERISA and for the Department's intrusion into the direct regulation of the business of insurance.

The Proposal Incorrectly Interprets the Common Law Meaning of a Relationship of Trust and Confidence

In its decision, the Fifth Circuit held that the Congress's choice of the word "fiduciary" within ERISA's text should be construed under the settled principle of statutory interpretation and that, absent other indication, "Congress intends to incorporate the well-settled meaning of the common-law terms it uses." Accordingly, the court found that the common law meaning presumptively applies, and that the common law term "fiduciary" falls within the scope of this presumption. As the court explained, the common law dictates that "fiduciary status turns on the existence of a relationship of trust and confidence between the fiduciary and the client." Indeed, the court noted that the Department conceded the relevance of the common-law presumption and held that the Department's assertion that the presumption was displaced was incorrect.

The preamble and text reflect the Department's choice to ignore or misinterpret the Fifth Circuit's application of common law and the concept of a "relationship of trust and confidence" to the definition of an ERISA investment advice fiduciary. A retirement investor enters into a relationship of trust and confidence with an investment adviser when they agree to pay fees to the adviser for investment advice. It is the nature of this agreement between a retirement investor and an investment adviser that creates an expectation of trust and confidence. Under such an arrangement, a duty of loyalty is owed by the investment adviser to the adviser's client, the retirement investor. It is incorrect to equate the fiduciary relationship that forms when a retirement investor specifically contracts for the advisory services of an investment advisor, with the non-fiduciary sales relationship that arises when an investor seeks the assistance of a broker-dealer or insurance agent to purchase an annuity for retirement planning. Counterparties have duties of good faith and fair dealing even in a sales relationship. However, the fact that a broker-dealer or insurance agent acts in a manner that is trustworthy and provides guidance and recommendations in the investor's best interest does not alter the sales relationship and does not implicate or confer fiduciary status.

The court notes a treatise that describes fiduciaries as "individuals or corporations who appear to accept, expressly or impliedly, an obligation to act in a position of trust or confidence for the benefit of another or who have accepted a status or relationship understood to entail such an obligation, generating the beneficiary's justifiable expectations of loyalty." When a customer engages an insurance agent, the customer does not agree to pay a fee for investment advice as a condition of engaging in discussions with an insurance agent. Nor does the insurance agent expect to be paid as a condition of engaging in discussions with a prospective customer. The agent is acting as the paid sales representative of one or more insurers and expects to be paid a commission only in the event there is a completed sale of an insurance product. Compensation for a completed sale is paid to the agent by the insurer and not by the customer. The customer is free to seek recommendations from a number of insurance agents without being required to pay any of the agents for any recommendations made.

These relationships are between a buyer and a seller and are not among those described by common law as trust-and-confidence relationships. This result is not altered merely because an insurance agent is a professional, who is knowledgeable, skilled and adept at identifying customer needs and recommending insurance and annuity products that meet those needs. Indeed, as the Fifth Circuit explained, "[s]tockbrokers and insurance agents are compensated only for completed sales ('directly or indirectly'), not on the basis of their pitch to the client. Investment advisers, on the other hand, are paid fees because they 'render advice.'" Once again, as the Department attempted to do in its vacated 2016 rulemaking package, the Proposal illustrates the Department's failure to understand and apply this clear legal distinction outlined by the Fifth Circuit and by Congress.

<u>The Proposal's Exemptive Relief Amendments Illustrate the Improper Application of Fiduciary Status to Customary Sales Practices</u>

The proposed revisions to PTE 84-24 and PTE 2020-02 would significantly narrow the compensation that an insurance agent can receive when selling an annuity, with predictably disruptive effects on the marketplace and resulting in denial of access to retirement investors. Under the proposed revisions to PTE 84-24, independent insurance agents may only receive insurance sales commissions. Under the proposed revisions to PTE 2020-02, the Department – contrary to its own original rationale in PTE 2020-02, without either identifying adverse experiences under the original version of the exemption, or otherwise justifying the need for the change – proposes to further narrow compensation in a manner that leaves open the question as to whether anything other than uniform insurance sales commissions or a fixed salary with no performance increases would be acceptable. In attempting to apply a fiduciary duty to sales recommendations, the Department calls into question a variety of forms of compensation that are customary to those working in a sales capacity.

The NAIC Suitability in Annuity Transactions Model Regulation #275 (NAIC Model) was developed by state insurance regulators and adopted by the NAIC in 2020 to apply to persons in the business of selling annuity products. The Department's proposal would deny relief for the receipt of numerous categories of customary sales and marketing compensation to those who would be considered fiduciary sales representatives. "Independent producers" would only be permitted exemptive relief for commissions, effectively prohibiting marketing, office support, retirement, health and welfare benefits, training and educational conference opportunities and other reasonable compensation beyond sales commissions. For all other insurance agents, the proposal calls into question compensation practices that reward sales professionals with superior performance. The Department's Proposal would effectively regulate and restrict the sale and marketing of insurance products, thereby rejecting the dichotomy between those who provide investment advice for a fee and the sale and marketing of insurance products, i.e., the business of insurance.

The PTEs fail to recognize the variety of arrangements used by insurers when selling and marketing insurance products. For example, the dramatically revised PTE 84-24 is restricted to "independent producers," defined as persons licensed to sell insurance contracts of multiple unaffiliated insurers who are not an employee or statutory employee of an insurer. PTE 2020-02 requires an insurer to supervise insurance agents to ensure every sale is in compliance with the PTE. Neither PTE would work when an insurance agent is a statutory rather than common law employee who sells insurance products of multiple insurers if the Department requires one insurer to supervise the sale of another insurer's insurance products. Again, the Department's Proposal is not compatible with the business of insurance. The revised PTE 84-24 is impractical for insurers that distribute annuities through thousands of independent producers. Every insurer doing business with an independent producer would be required to perform the same annual background check on that producer, review each recommendation before an annuity is issued even when it is not yet clear that there will be a sale upon the completion of the review (likely to lead to delays for consumers), and conduct separate retrospective reviews, each year with respect to each and every one of the producers, with such review to include the producer's compliance with the terms of the PTE. Thus, the Department proposes that the business of insurance now includes serving as a surrogate enforcer for a federal agency.

<u>The Proposal Impermissibly Imposes ERISA Title I Fiduciary Duties on Fiduciaries to IRAs</u>

As with the vacated 2016 regulation, again the Department's Proposal seeks to impose ERISA Title I fiduciary duties and obligations, the "Impartial Conduct Standards," on fiduciaries to IRAs as a condition for exemptive relief under the Internal Revenue Code. The Fifth Circuit rejected the Department's authority to impose these conditions, finding

> ERISA Title II created tax-deferred personal IRAs and similar accounts within the Internal Revenue Code. 26 U.S.C. § 4975I(1)(B). Title II did not authorize DOL to supervise financial service providers to IRAs in parallel with its power over ERISA plans. Moreover, fiduciaries to IRAs are not, unlike ERISA plan fiduciaries, subject to statutory duties of loyalty and prudence.

The standards of conduct that Congress developed for Title I plans, duties of loyalty, care, skill and prudence, are simply not applicable to Title II fiduciaries. It is not within the authority of the Department to impose Title I standards of conduct on Title II fiduciaries as a condition to exemptive relief for transactions involving Title II plans.

The Department continues to rely, as a basis for justifying its new rulemaking, on claims of changing market environment conditions and asserts that existing regulations should be revised to "reflect the current realities." According to the Department, this includes the "growth of participant directed accounts and IRAs." This "need" for rulemaking is not new, the Department used this justification for rulemaking in its 2016 rule. In response, the Fifth Circuit held "that times have changed, the financial market has become more complex and IRA accounts have assumed enormous importance are arguments for Congress to make adjustments in the law, or for other appropriate federal or state regulators to act within their authority. A perceived need does not empower DOL to craft de-facto statutory amendments or to act beyond its expressly defined authority."

<u>The Exemptions Violate the Separation of Powers and Impermissibly Raises Private Right of Action Liabilities</u>

In *Chamber of Commerce v. United States Department of Labor,* the Fifth Circuit held that the Best Interest Contract Exemption (BICE) promulgated as part of the Department's 2016 rulemaking package violated the separation of powers as it created a private right of action only Congress can create. The court found that Congress authorized private rights of action for participants and beneficiaries of employer sponsored plans, but it did not so privilege IRA owners under Title II.

Pursuant to the proposed changes to PTEs 2020-02 and 84-24, to obtain exemptive relief under either PTE, persons must acknowledge in writing that they are providing fiduciary investment advice under ERISA, the Code (for IRAs), or both. Fiduciaries to ERISA plans are at risk of legal action in federal courts for alleged violations of their duties. As for IRAs, even though no private right of action is provided for under the Code, the enhanced disclosure requirements and unqualified acknowledgement of fiduciary status provided to investors in advance of their decision to enter into a transaction will likely be alleged to have given rise to enforceable contract rights under state law based on investor reliance theories. Accordingly, these elements of the proposed exemption amendments carry with them the same legal consequence that was problematic under the bilateral written contract required by the BICE – it creates a private right of action with respect to IRAs, even though Congress included no such right under the Code. Through the Proposal, the Department is once again creating vehicles for private lawsuits indirectly, where it cannot do so directly. The Department's technique may be different this time, but the result is the same, an impermissible violation of the separation of powers between Congress and administrative agencies.

The Proposal Improperly Conflates "Best Interest" With ERISA's "Sole Interest" Obligation

The Department uses the term "best interest" frequently including within the PTEs. Under the Department's formulation, advice "is in a Retirement Investor's 'Best Interest' if such advice (A) reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, and (B) does not place the financial or other interests of the Investment Professional, Financial Institution or any Affiliate, Related Entity, or other party ahead of the interests of the Retirement Investor, or subordinate the Retirement Investor's interests to their own."

The term "*best interest*" has no meaning under ERISA. The Department's use of the term "best interest" creates confusion among the public and those regulated by ERISA Title I as to the actual obligations a fiduciary has to an investment advice recipient under Title I. The comparison to the best interest obligations owed by persons engaged in sales transactions under federal securities law and state insurance law adds to this confusion. Standards that apply to sales and marketing professionals are the purview of the prudential regulators of those professionals. Whether or not a person is subject to a "best interest" standard under other law has no bearing on whether they are providing "investment advice *for a fee*" under ERISA.

ERISA demands nothing less than that a fiduciary act in the sole interest of the advice recipient. Such a standard is incompatible with the very nature of sales and marketing activities. Both the SEC in adopting Reg. BI and the NAIC in adopting its best interest model regulation recognized and accounted for this distinction. A sales professional compensated by the firm that engages them to sell products can never act in the sole interest of the advice recipient due to this very fact. The Department's efforts with this Proposal appear to rest on the premise that sales activities can be compatible with ERISA's sole interest standard, but the Department offers no reasoned basis for that premise. The reality is that a sole interest standard would effectively impose a one-size-fits-all fiduciary model on all retirement recommendations relating to Title I or Title II plans.

The Department must make clear to both fiduciaries to Title I plans and their investment advice recipients that it has a clear understanding of the law, including the sole interest obligations under ERISA, and that it will enforce the law as written.

The Proposal Indicates Confusion as to the Purpose of and Authorities for PTEs

The administrative feasibility of the exemption amendments is highly questionable. Congress gave the Department authority to grant conditional and unconditional administrative exemptions from the prohibited transaction provisions, but only if the Department finds that the exemption is (1) administratively feasible for the Department, (2) in the interests of the plan and of its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries of such plan.[7]

The Fifth Circuit directly addressed this issue, finding that the "test is whether an exemption is administratively feasible; in the interests of the plan, its participants and beneficiaries; and protective of participants' and beneficiaries' rights." As was the case with the Department's vacated 2016 rulemaking package, the new proposed definition of investment advice fiduciary imposes ERISA's fiduciary obligations and prohibited transaction restrictions on a vast number of new individuals and entities. Accordingly, as the Fifth Circuit found, it also "subjects most of these newly regulated actors and transactions to a raft of affirmative obligations" though the amended PTEs. As was the case with the 2016 rulemaking package, among the new requirements, brokers and insurance salespeople assume obligations of loyalty and prudence only statutorily required of ERISA plan fiduciaries. The consequences will be the same with this proposal. These newly imposed affirmative obligations and liabilities, which inappropriately impose ERISA's statutory obligations of loyalty and prudence on brokers and insurance salespeople, will result in a limitation in access to financial guidance to retirement savers. We fail to see how the amendments to the two PTEs are therefore in the interest of a plan or its participants and beneficiaries if it will result in limited access to retirement savings guidance and products – especially lifetime income products sold on a commission basis.

The Proposal Violates the McCarran-Ferguson Act

The McCarran-Ferguson Act, passed by Congress and signed into law in 1945, entrusts states with the authority and responsibility for the regulation of the business of insurance. The sales and marketing of insurance products fits squarely within the boundaries of the "business of insurance" for to be in business is to market and sell goods and services. The preemptive authorities under ERISA do not extend to the business of insurance.

The Department has no authority to regulate the conduct of agents compensated solely for the sale of insurance products. Under McCarran-Ferguson Act the "business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business" and "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance…."

For example, the Department's Proposal would impair the ability of insurers to provide allowances for training and education. For those insurers regulated by the New York Insurance law, Section 4228 specifically allows training allowances, varying expense allowances, varying commissions, and business meetings for agents. Business meetings are highly prescribed by the statute and seen as a regular part of the insurance distribution landscape. This is a clear case of a state "regulating the business of insurance."

The provisions of ERISA applicable under this Proposal do not specifically relate to the business of insurance. We question the authority of the Department to invalidate, impair or supersede Section 4228 or any other state law regulating the business of insurance.

The Proposal Seeks to Usurp Authority Reserved to Congress.

The Department contended in the preamble to its 2015 Proposal that since 1975, "the retirement plan landscape has changed significantly." It went on to posit that in the landscape of 2015 "the existing 1975 regulation no longer serves ERISA's purpose to protect the interests of retirement investors, especially given the growth of participant-directed investment arrangements and IRAs, the conflicts of interest associated with investment recommendations, and the pressing need for plan participants, IRA owners, and their beneficiaries to receive sound advice from sophisticated financial advisers when making critical investment decisions in an increasingly complex financial marketplace." This change in the landscape is the argument used by the Department to scuttle the 1975 regulation.

In a similar fashion, the Department now contends that since 1975, "developments in retirement savings vehicles and in the investment advice marketplace have altered the way retirement investors interact with investment advice providers" and that "individual investors have far greater responsibility for decisions about their retirement savings than was true in 1975, when investment professionals directly managed plan investments." The Department goes on to note that individual investors "routinely depend on the quality of the advice they receive from financial professionals who commonly hold themselves out as trusted advice providers," that "these professionals have inherent conflicts of interest" and that "there is an ever-present danger that the investment advice the retirement investor receives will be driven, not by the best interest of the investor, but by the financial interests of the investment professional or firm whom they depend upon for advice that is in their interest."

The Department also seeks to justify its actions with its concerns regarding the efficacy of the SEC's Reg BI and the NAIC Model issued in 2020 that has been adopted in more than 40 states. The merits of this justification are not relevant here. The Department has no authority to impose its judgement and supplant the authority of the SEC and the states with regard to sales activities in which the person receives no special compensation to provide investment advice alone or in combination with a sale.

The Department acknowledges in the preamble to the Proposal that it has no idea how the Department could ever have promulgated the 1975 regulation under ERISA in the first instance, noting that three of the five "components of the five-part test are not found in the statute's text," a statement that could also be made regarding this Proposal. It then argues that the provisions of the 1975 regulation, "in today's marketplace, undermine legitimate investor understandings of a professional relationship centered around the investor's best interest." Finally, the Department argues that "there are currently many situations where the retirement investor reasonably expects that their relationship with the advice provider is one in which the investor can (and should) place trust and confidence in the recommendation, yet which are not covered by the current regulation."

In the Fifth Circuit's ruling vacating the 2016 rulemaking package, the court stated that the 1975 regulation "captured the essence of a fiduciary relationship known to the common law as a special relationship of trust and confidence between the fiduciary and his client," that the regulation echoed the then thirty-five-year old distinction drawn between an "investment adviser," who is a fiduciary regulated under the Investment Advisers Act, and a "broker or dealer" whose advice is "solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor."

As the 1975 rule captures the essence of the law, then the Department's actions here seek to go beyond what can be supported under the law based upon the Department's views regarding circumstances that have changed since Congress enacted the law or insufficiencies in other prudential regulation. The question of whether and how to address these changes in circumstances or prudential regulator insufficiencies are questions for Congress, the lawmakers, to consider. This is clearly the case given that existing law does not support this action by the

Department. It is Congress, not the Department of Labor, who should consider whether to revise the law to impose a fiduciary status on commission-based sales activities. It is Congress that has the authority to determine whether the SEC's Regulation Best Interest and the state best interest efforts adequately protect consumers while preserving commissioned-based services and the extent to which these changes sufficiently address the change in the landscape since 1975. Four fifths of state legislatures and state insurance departments under existing authorities have adopted the NAIC Model following a review of many of the landscape change issues raised by the Department in the Proposal's preamble. The states did so with rules tailored to preserve the role of sales professionals and without the adoption of new fiduciary rules. It is Congress that has the role to examine whether federal laws should change and the costs and benefits of such change for investors and service providers.

<u>The Proposal Implicates the Major Questions Doctrine</u>

In *West Virginia v. EPA*[5], Chief Justice Roberts wrote in the majority opinion that

> in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to "clear congressional authorization" for the power it claims.

In determining whether under that case a "major questions doctrine was applicable, the court focused on whether the federal agency was "claiming a transformative expansion in [its] regulatory authority based on an unheralded power".

It is clear that this rulemaking package implicates this judicial doctrine. As it did in 2016, the Department here is attempting to expand the definition of "investment advice fiduciary" beyond the scope of what Congress intended when ERISA was promulgated. The Department has not received any clear authorization – or indeed, any authorization – from Congress to radically assign fiduciary status to virtually all financial institution marketing and sales related recommendations. The Department is, as the court held in *West Virginia v. EPA*, claiming a transformative expansion in its regulatory authority, not only by ignoring the Fifth Circuit ruling and Congressional intent, but by also usurping the authority of the Department of the Treasury over IRA prohibited transaction enforcement.

III. The Proposal Will Cause Severe Market Disruption for Consumers

Should the Department not withdraw this Proposal in its entirety and instead move to promulgate the new definition of investment advice fiduciary as a final rule and adopt the proposed amendments to the PTEs, we anticipate major market disruption for consumers seeking annuities to address their retirement security needs. While there are similarities in some of the elements currently required under other regulatory regimes, this rulemaking is of another kind altogether.

As the Department made clear in the preamble, this rulemaking brings with it personal liability. If made final, those who are not considered fiduciaries under current law, but who will be treated as such under a final rule, will have many decisions to make. These persons have not arranged their businesses with an expectation of fiduciary liability under federal or state law. They have neither

[5] 142 S. Ct. 2587 (2022).

conformed their business practices to PTE 2020-02, the amendments thereto, or the proposed amendments to PTE 84-24. They must thoroughly review the final rule and amended exemptions. They will need time to examine their various businesses, distribution approaches, etc., determine possible approaches to respond to the rule and PTEs, and gain management approval on a course of action. Depending upon the course of action, they will need time to develop conforming disclosures, time to develop processes and procedures to ensure compliance with the rule, time to train employees and agents, etc. on the new processes and procedure. The Department proposes 60 days to accomplish these tasks. Yet, firms that currently conform to PTE 2020-02 had two years to do this work.

<u>The Proposal Will Upend the Independent Distribution Marketplace to the Detriment of Consumers</u>

Many life insurers rely solely on independent agents to connect consumers seeking guaranteed lifetime income in retirement with their annuity products. Independent agents utilize the services of insurance intermediaries to facilitate their engagement with multiple insurers. Insurance intermediaries play an important role in the independent distribution of annuities, providing marketing support, technological assistance, back office and compliance support, and practice building services to agents. Due to the proposed changes to both the definition of fiduciary investment advice and PTE 84-24, independent agents treated as fiduciary investment advisers under the Proposal must examine the arrangements they have in place with these insurance intermediaries to determine whether these arrangements must be changed in any way to conform with the exemption and ERISA. It is reasonable to assume that while this examination is underway, the ability of consumers to access guidance and information on annuities from independent agents will be negatively affected.

Although insurance companies are not formally co-fiduciary financial institutions under PTE 84-24, they are required to engage in almost all of the same supervision activities as co-fiduciary financial institutions under PTE 2020-02 – despite the fact that insurance companies selling in the independent distribution market do not have the ability to control an independent agent's sales conduct in the same way that a broker-dealer can with respect to their registered representatives. PTE 84-24 effectively demands that insurers take actions to control every action taken by independent producers, i.e., producers that are independent of the insurer, an approach that is simply not possible. The Department argues that, in working with independent producers, insurance companies are not fiduciaries and only need to supervise the sale of their own products, but in fact the Department seeks to compel insurers to serve in the role of supervisors of the conduct of independent fiduciaries. The Department provides no legal basis for a non-fiduciary entity supervising a fiduciary entity. Under the Proposal's draconian eligibility provision, a failure to comply with PTE 84-24 could effectively put an insurer that only works with independent agents out of the business of providing annuities to ERISA plans and IRAs.

<u>The Proposal's Newly Expanded Criminal "Ineligibility" Provisions Will Have a Detrimental Impact on Consumer Access to Financial Savings Products</u>

The Proposal greatly expands PTE 2020-02's eligibility provisions to all "affiliates" of a Financial Institution and expands the specific crimes that would result in ineligibility beyond those arising out of a person's provision of investment advice to retirement investors. The absurd result of this unjustified expansion is that any relative of an employee (consistent with the PTE's definition of "affiliate") convicted of one of the "enumerated" crimes in the US, or any relative of an employee convicted of *any* crime "however denominated by the laws of the relevant foreign or state government," could result in the financial institution's ineligibility to utilize the exemption for a decade. It is not possible for an insurer or anyone to take steps to prevent relatives of an employee from committing any acts, criminal or otherwise. Yet, the proposal seeks to prohibit insurers from selling annuities to ERISA plans and IRAs due to the actions of these non-employees.

It is reasonable to anticipate market disruption following the release of this proposal as final. It is reasonable to anticipate that those impacted by the rule and these exemptions will pull back on current market activities while they chart a course of action for the future. Such pull back, which also took place in 2016 in response to the 2016 rule, will impact those Americans seeking support and guidance on their retirements. In 2024, we will see the largest number of Americans reaching the age of 65 in our country's history. And simultaneously with this development, the Department plans to put the market for retirement products, including annuities, into disarray.

IV. The Proposal's Regulatory Impact Analysis is Flawed and Fails to Provide Justification for Regulatory Action

In 2024, the number of new retirees is expected to surge by 12,000 per day and by 2033, the U.S. retirement-age population is expected to reach 75 million compared to about 56 million today.[6,7] The Department's Proposal will inherently change the market for both financial advice and annuities, negatively impacting the retirement security of lower and middle-income Americans at a time when the retirement age population is surging and retirement security is a growing national concern.

The Proposal's Regulatory Impact Analysis is Flawed and Incomplete

The Department's regulatory impact analysis (RIA) is incomplete and flawed. Though the Department acknowledges that the market for advice and annuities will change, neither those changes, nor their associated costs are examined. The RIA also does not adequately specify or quantify the benefits of the proposed regulation or who precisely gains and losses. This oversight is surprising given that this is the Department's third attempt at a new definition of investment advice fiduciary or fiduciary rule, and that (as indicated) industry and households had already started adjusting to the previous rule prior to its being vacated, with negative retirement security consequences.

The RIA is primarily focused on compliance costs associated with implementing and adhering to the Proposal (e.g., the initial and recurring time and cost of a compliance lawyer to make sure all documents correspond to the regulation, the cost of changing forms, the cost of annual reviews, etc.), while assuming that "retirement investors" will universally benefit. No evaluation is offered of how the 2016 rule or Reg BI impacted different demographic and income groups, or retiree and retirement savers. Instead, studies that attempt to do so are casually discredited and disregarded.

In fact, direct evidence from investment advisers, 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 access to a financial professional, households are likely

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[6] Fichtner, Jason J., The Peak 65 Generation: Creating a New Retirement Security Framework, Alliance for Lifetime Income, 2023.

[7] United Nations, Population Division, Department of Economic and Social Affairs, World Population Prospects, 2022. Constant fertility assumed.

to save less, will likely be exposed to greater risk, and will be more inclined toward rash, cookie-cutter, and other sub-optimal financial decisions. Importantly, defaulting consumers into robo-advisors is not the answer. Research shows that those who work with a non-human (robo-advisor) or hybrid advisor do not fare as well as those who work with a human advisor.[8,9]

The Department contends that gains to investors "*may manifest as pure social welfare "benefits," as some resources that were previously inefficiently used to acquire financial products and services are now available for more valuable uses*". Whereas *"[o]ther improvements may take the form of "transfers" of social welfare to retirement investors from other entities in society*." Even though *"[t]hese transfers represent a beneficial gain to retirement investors and are a primary objective of the proposed rule and PTE*," there is insufficient data to "*allow the Department to quantify the gains to investors or the components social welfare "benefits" and "transfers*." The Department has not clearly articulated what these social benefits are, who precisely they will transfer from and to. If this is a primary objective of the proposal, it should be better articulated and quantified. A regulation that will disrupt the advice and annuity markets, and that will impact lower and middle-income savers/investors needs to be based on more than unspecified 'social welfare benefits and transfers.'

The Proposal ignores the broad objective of Congress to *improve retirement security for as many people as possible*. The Department's RIA does not estimate, assess, or address the extent to which the rule will disrupt supply and demand for financial advice and annuities, and how that disruption will impact price and availability of the services and goods in question. Additionally, the Department should determine how household retirement savings will change, who will lose access to a human advisor, how much the cost of advice will change, what annuity features will be lost due to the rule, and what will aggregate retirement security look like in 10, 20, 30 years. The Department should adequately answer these and similar questions and construct a more compelling case for market failure before releasing its proposal. These omissions are significant and suggest that the rule should be withdrawn.

We anticipate that the rule would ultimately result in lower and middle-income households experiencing a decline in their *long-term* financial security relative to what it would have been otherwise. If enacted, the negative impact of the rule will build over time and will not be fully felt for a number of years. The Department's RIA does not take any of this into consideration and generally maintains a short-term perspective.

<u>The Proposal Process Did Not Include a Request for Information</u>

The Department's RIA seeks answers to over 180 questions, many of which require extensive analysis and research for which there is insufficient time and, the answers to which will purportedly impact the Department's final rule. We are troubled by the number and nature of these questions, especially in light of the EBSA Assistant Secretary Lisa Gomez's statement in a letter rejecting the financial services trades' request for more time to review the proposal.[10] In the letter, Assistant Secretary Gomez states that "EBSA believes that its current proposal reflects significant input it has received from public engagement with this project since 2010…." And that "since the beginning of this Administration, EBSA has engaged informally with numerous stakeholders

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[8]Harrison, J.P; Samaddar, S., "Who is Better at Investment Decisions, *Man or Machine*?", *the Journal of Wealth Management*, Winter 2020, pp. 1-16.
[9]Snider, Susannah, "Why Wealthy Advisors May Be Leaving Robo-Advisors for Human Advisors", Yahoo Finance, October 13, 2020.
[10] Letter to Lisa Blier dated November 14, 2023

representing multiple viewpoints on issues related to the proposed rulemaking package." Since this effort first appeared on the Department's agenda, it has had nearly three years to seek to address these questions through the issuance of a formal request for information. Having reviewed these questions, we find that it would require many months of research to properly address several of them. Yet, the Department gave the public just 39 business days to review the Proposal, find the questions and respond.

The life insurance industry could provide information to further inform the Department, but compiling and aggregating responses to the wide variety of questions posed is not possible in the time frame provided. In our experience, a relatively short and simple industry-wide survey requiring a single individual from a company to respond typically takes up to six weeks from fielding of a survey to final analysis, and generally results in about a 50 percent response rate (by total industry assets, less by number of companies, depending on the nature of the survey). Given the 60-day comment period (which encompasses several major holidays, secular and religious), the numerous, varied, detailed questions posed, and the coordination necessary to generate responses from several people in different departments within a company, the Department's requests are onerous and unreasonable. The numerous requests for information should have been addressed in an official request for information and well-understood *prior to release* of the Proposal, particularly given the short and ill-timed comment period. The number and varied nature of questions posed by the Department strongly suggest that the Proposal was released prematurely and the Department's approach of regulating first and asking questions later is plainly contrary to basic principles of reasoned decision-making governing agency action.

<u>The Proposal Fails to Properly Address the Value and Utility of Annuities</u>

The Proposal rests on a profound misunderstanding and disregard of the immense benefit of annuities to many retirement savers. When a worker is *younger* and has many years before retirement, financial experts universally agree that they should focus on: (1) consistently saving a percentage of their income for retirement; (2) at minimum, ensuring an employer match for their defined contribution plan, if available; and (3) avoiding withdrawals. Because they won't retire for decades, younger savers have the capacity to bear greater risk and, given their long-term time-horizon, should place greater emphasis on: (4) maximizing investment returns.

Financial professionals also agree that as retirement savers approach retirement age, they should *lower their risk exposure* and shift their focus from *accumulation* to *decumulation*. There is a 'risk-return tradeoff', whereby lowering risk exposure typically results in a decline in investment returns (the Department's primary metric of market failure). When risk exposure is lowered, savings are more secure and are less likely to be impacted by market volatility, increasing the likelihood that savings will last throughout retirement, a phase of life when earned income flow permanently stops. Though investment returns are still important for those in or approaching retirement, managing longevity, volatility, and inflation risk take center stage and is critical for maintaining living standards and ensuring that accumulated savings last throughout retirement. *An annuity is designed to manage such risk, thereby guaranteeing a consistent income flow throughout a retiree's lifetime*. In other words, annuities do more than simply offer an investment return.

It's not uncommon for somebody to spend 30 or more years in retirement, without an earned income. During that time period, the economy and financial markets will likely experience a series of shocks which, by definition, can't be predicted and which can be both financially and psychologically devastating. For example, during the 30-year period from 1992 to 2022, the U.S. experienced three recessions (including the Great Recession), and inflation ranging from -0.4 to 8.0

percent (2009 and 2022). During the same time-period, 30-year mortgage rates ranged from 2.67 to 9.25 percent (December 2020 and November 1994), labor force participation among seniors (age 65+) ranged from 10.7 to 20.8 percent (April 1993 and February 2020), and the S&P500 experienced four bear markets lasting a total of 59 months with market declines as substantial as 56.0 percent.[11]

Importantly, seniors are more likely to face age-related cognitive impairment than other age groups, increasing the likelihood of poor financial decisions in a time of market stress. *Annuities are explicitly designed to protect seniors from financial and economic shocks, and from having to navigate financial markets during stressful times*. Consequently, the Proposal does not include an adequate analysis with a proper long-term focus, nor does it include a careful examination of the benefits and costs of *all* annuity features. Instead, the Proposal and RIA improperly limit their analysis of annuities to only the returns on the investment component of some types of annuities, and short-term sales and sales practices. Additionally, the Department's RIA does not include a series of simulations and long-term stress tests of different types of portfolios, including those that are annuity-focused versus those that are not.

The Proposal and RIA are short-sighted. Nowhere in the proposal or cited studies are the long-term benefits and returns of annuities properly examined. Because annuities usually require a longer-term commitment to enjoy their full benefit, and because the nature of their benefits add to complexity, a higher commission is typically offered to compensate the financial professional for the time and effort required to educate the customer and ensure that a product meets the customer's needs and objectives, and that it addresses longevity and other risks, if needed. Typically, annuity expense ratios and commissions are positively related to the nature and type of benefits offered by a particular annuity. All else equal, the more generous and varied the benefits, the higher the expense ratios and commissions. *Additional benefits are not an indication of an inferior product.* Rather, benefits help manage financial market participation and household liquidity, while ensuring a lifetime income. By necessity, this comes at a cost – yet neither the Department nor the studies they rely on directly and explicitly investigate why some annuities have higher expenses and commissions or the value of a particular annuity's guarantees and other financial security benefits. By assuming these costs are not legitimate costs associated with a more comprehensive product, the Department implicitly assumes that an annuity's guarantees and benefits are of no value. This is clearly wrong.

A series of basic text searches demonstrate that the Department has entirely ignored the function and role of annuities for retirement security and, by extension, did not properly assess how the rule will impact the annuity market for consumers. For example, the term "annuity" or "annuities" is used 331 times in the Proposal, the term 'investment' is used 1,192 times, and the term "return" or "returns" is mentioned 55 times. *Neither "longevity" nor "volatility" are mentioned, the term "inflation" is used twice and in neither case referring to annuity protection, and the term "guarantee" or "guarantees" is mentioned 3 times in the text*. Protection against longevity and inflation risk, and guarantees are key annuity features. They set annuities apart from other financial products.

The Department has failed to even properly acknowledge the primary purpose of an annuity or the utility of annuity-specific features and is instead focusing only on the investment component of some annuities. When the Proposal does address annuities, it does *not* offer an honest, complete

[11] Federal Reserve Bank of St. Louis. Retrieved on December 7, 2022; and, Duggan, Wayne "A History of U.S. Bear Markets, 1957 to 2022", Forbes, August 21, 2023.

description, but rather offers incomplete descriptions, emphasizing what they see as a limitation but neglecting to mention the benefit. For example, the Department states that "while the rate of return of the indexed annuity is linked to performance of the index, indexed annuity returns are subject to contractual limitations which effectively cap returns." This is true, but the Proposal neglects to mention that *there is also a floor which limits losses and ensures that there is some return during market down-turns* (*i.e.,* during volatile periods). The Proposal implies that the cap is a deficiency but neglects to mention that the corresponding floor is also a valuable feature and is part of the entire package. This type of subtle bias (i.e., bias by omission) permeates the Proposal. Elsewhere, the Department concludes that the rule will protect consumers "from *losses* that can result from conflicts of interest [*emphasis added*]," yet ignore the fact that the rule will limit access to products that *protect consumers against losses* due to market downturns, volatility, and inflation, as well as longevity risk. Based on these omissions alone, the Department must withdraw this Proposal.

When assessing any proposed regulation that may have an impact on U.S. retirement security via the annuity market, it is imperative that the role, function, and importance of annuities for retirement security be clearly understood and acknowledged. 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 financial professional and harms the retirement investor/saver.

The Proposal Neglects the Fact That Annuity Owners Value Guarantees

A recent MetLife study found that nine in ten retirees and pre-retirees feel that a guaranteed monthly income in retirement is either 'very important' or 'absolutely essential'.[12] Guarantees are a primary reason many annuity owners purchased an annuity. Explaining these features takes time and effort on the part of the financial professional, for which he/she must be compensated. If that incentive is removed, products which retirees and retirement savers value will not be available.

A 2013 Gallup Organization and Mathew Greenwald and Associates survey of individual annuity contract holders should dispel any doubt about the value of annuities.[13] The survey asked owners of variable annuities with guaranteed living benefits (GLBs) how much they valued their guaranteed lifetime withdrawal benefit, which is typically associated with greater expenses and higher commissions.[14] The survey found that "almost nine in ten individual annuity owners (87%) consider a guaranteed lifetime withdrawal benefit to be valuable, with 48% describing it as very valuable (p. 20). Additionally, among variable annuity owners whose annuity had a guaranteed lifetime withdrawal benefit, "77% [said] that the benefit was an important factor in their decision to purchase an annuity, and 43% [said] it was a very important factor" (p. 21).

The Proposal Fails to Adequately Address Consumer Choice and Consumer Differences

Accumulation and decumulation needs and preferences vary widely by individual and household. For example, some individuals entering retirement may have multiple medical conditions or a family

[12] MetLife, "2022 Paycheck or Pot of Gold Study: The Great Retirement Decision", 2022.
[13] The Committee of Annuity Insurers, "2013 Survey of Owners of Individual Annuity Contracts", the Gallup Organization; Mathew Greenwald and Associates, 2013. Similar surveys were conducted in 1993-1999, 2001, 2005, and 2009.
[14] In 2014, about 60% of variable annuities sold had guaranteed living benefits. In 2020, about 32.9% of variable annuities sold had guaranteed living benefits.

history of premature death, while others can legitimately anticipate a longer life. Some retirees may have dependents, adult children with special needs, spouses, or would like to leave a bequest, while others have none of these considerations. Some have a high tolerance for risk, others less so. Essentially, needs are as varied as are people and a financial professional can help a saver/investor understand various options and develop an optimal, personalized retirement strategy.

The Proposal neglects consumer differences and the importance of consumer choice when planning for retirement. Throughout the document, the Department offers no indication of what retirement savers/investors preferences might be, or how preferences may differ between savers/investors. Instead, "uniformity of regulation," and by extension uniformity of advice, seems to be the Department's desired objective. In fact, "uniformity of regulation" is listed as an *unquantified* and unproven benefit of the regulation. By not addressing consumer preferences and choice, the Proposal implicitly assumes that either consumer preferences and circumstances are homogenous, they therefore do not need a wide variety of choices, or that consumer choice does not matter. The first assumption is incorrect, and the alternative assumption is wrong.

We agree with the Department that small savers *(i.e.*, "individuals, or households with low account balances or of modest means") "cannot afford to lose any of their retirement savings", but take a longer-term, retirement-focused view, that small savers cannot afford to lose any of their *retirement security*. That means savings need to last throughout retirement, whether 4 months or 40 years. It also means planning for decumulation, rather than fixating on returns. Making savings last throughout retirement should be the primary focus of all retirement savers in or nearing retirement, with investment returns being just one variable to consider. Because people cannot usually predict how long they will live (longevity risk), the state of their health (morbidity risk), or the state of the economy and financial markets (inflation, investment, and volatility risks), they rationally turn to annuities.

Rather than focusing on how consumers depend on annuities and what consumers receive for fees paid, the Department chose to fixate on compensation for financial professionals, concluding that:

> "conflicts sometimes lead advisers to recommend products with lower expected net returns than available alternatives. Consumers' losses from [such] advisory conflicts tend to exceed what can be justified as fair compensation for good advice as these consumers could often benefit more from competitively priced impartial advice".

Because preferences, objectives, and risk tolerance differ, it is entirely reasonable that some individuals prefer an annuity that does not generate the highest return, but that offers other appealing features. The Department cannot assume that such an annuity is inferior without any basis in fact. Before concluding that lower returns are an indication of conflicts of interest and an inferior product, it is necessary to clearly examine the purpose and objective of the product in question and the features offered, which neither the Proposal nor RIA do.

While critical of expenses, the Department makes no attempt to investigate the cost of insurance. The solvency rules applicable to life insurance companies compel insurers to hold reserves equal to liabilities and to hold additional capital. 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.[15] In 2022, life insurers held a total of $4.0 trillion in annuity reserves.[16]

In a similar vein, when formulating the Proposal, the Department admits to relying on stale data regarding the number of life insurance companies in the annuity business. The Proposal states that "[i]n the Department's 2016 RIA, it estimated that 398 insurance companies wrote annuities. The Department continues to use this estimate *although the number may have changed in intervening years* [*emphasis added*]." In other words, the Department didn't bother to fully examine how the annuity market has changed since 2016, or how annuity producers were impacted.

<u>The Proposal Fails to Address the Impact of a Fiduciary-Only Rule on Middle, Lower-Income and Underserved Households</u>

The Department has unreasonably and improperly discounted three studies that examine how the rule will impact small savers and underserved groups.[17] Based on data available at the time the studies were released, all three conclude that the 2016 rule substantially impacted the market for financial recommendations, particularly among underserved and middle market households, and suggests that further action will perpetuate the trend.

Deloitte's 2017 study is based on a survey of 132,000 U.S. financial advisers (43 percent of total), serving 35 million retail accounts and holding $4.6 trillion in assets. Deloitte found that 53 percent of survey participants *limited or eliminated access to brokerage services*, which has led to a shift to fee-based services, and *95 percent eliminated or limited asset classes offered*, and made changes to product offerings. This study is supported by further evidence reported more recently in the media.[18]

In 2017 the U.S. Chamber of Commerce compiled a list of findings reported in various comment letters and studies in response to the previous Proposal. The more notable findings include: the possibility of 7 million IRA holders losing access to investment information and guidance; 300 to 400 thousand *fewer* IRA accounts opened each year; a 200 percent service fee increase; 92 percent of firms believe that their plans could limit or restrict products for retirement investors; over ten years, investors could lose $109 billion; and, 11 million households could face fewer choices as a result of the rule.

Finally, a 2021 Hispanic Leadership Fund study concluded that "low and middle-income individuals will lose access to valuable investment assistance that the Department disregarded in its 2016 analysis", and that "the effects on minority populations will be most adverse". Specifically, the study concludes that, had the 2016 rule remained in place, 2.7 million workers with income less than $100,000, would have been adversely impacted. The study further concluded that personalized financial guidance is particularly important for minority populations, and that loss of such guidance could increase the wealth gap by 20 percent over 10 years, reducing savings balances of Black and Hispanic households.

[15] American Council of Life Insurers, <u>Annuity Product Line Report</u>, 2022. Estimates are based on company surveys.
[16] American Council of Life Insurers, <u>Life Insurers Fact Book</u>, 2023.
[17] Hispanic Leadership Fund, <u>Analysis of the Effects of the 2016 Department of Labor Fiduciary Regulation on Retirement Savings and Estimate of the Effects of Reinstatement</u>, November 8, 2021; U.S. Chamber of Commerce, <u>The Data is In: The Fiduciary Rule Will Harm Small Retirement Savers</u>, Spring 2017; Deloitte, <u>The DOL Fiduciary Rule: A Study in How Financial Institutions Have Responded and the Resulting Impacts on Retirement Investors</u>, August 9, 2017.
[18] For example: Dow Jones, "Barclays Considers Dropping Investment Bank Clients to Cut Costs", November 28, 2023; Morris, Steven, "Barclays Explores Plan to Drop Thousands of Investment Bank Clients", Financial Times, November 28, 2023.

Since the release of those studies, new data has become available which suggest that *households are becoming increasingly less likely to seek the guidance of a financial professional* when making investment and saving decisions, instead relying on themselves, internet research, and their friends.[19] Using household-level data from the Federal Reserve, Survey of Consumer Finances, figure 1 (*see Exhibit for all figures referenced*) compares reliance on financial professionals among households with total income between the 25th and 75th percentiles (i.e. middle-income households) to those in the 90th or higher percentiles, triennially from 2007 to 2022. The gap between the two cohorts was narrowest in 2010. At that time, roughly coinciding with the Department's 2010 proposed rule, 67.2 percent of higher income households would use a financial professional, compared to 57.9 percent of the middle-income cohort. By 2022, 76.8 percent of higher-earning households would consult a financial professional, compared to only 52.0 percent of middle-income households. Over the 12-year period from 2010 to 2022, the spread has steadily widened from 9.3 to 24.8 percentage points. Concerningly, the intention to engage a human appears to be on a substantial downward trend among middle-income households since 2016.

Similarly, figure 2 reports on the use of financial professionals for investment and savings decisions by race of household head. In 2010, 59.4 percent of white households would use a financial professional for guidance, compared to 50.0 percent of Black households (9.4 percentage-point spread) and 52.0 percent of Hispanic households (7.4 percentage-point spread). By 2022, 58.1 percent of white households would use a financial professional, compared to 38.2 percent of Black households (18.2 percentage-point spread) and 39.9 percent of Hispanic households (19.9 percentage-point spread). Importantly, the percentage of Black households who would use a financial professional has been on a steep downward trend since 2016, from 54.5 to 39.9 percent. Clearly, the racial advice gap has increased significantly and will continue to do so if the rule is enacted.

In a similar vein, figures 3 and 4 report on whether households list a financial professional as their *first source* for financial information regarding saving and investment. As in the earlier diagrams, there is a growing disparity between higher and middle-income households, and between races. Notably, since 2016 all household-types have been less likely to use a financial professional as a first source of information. This is particularly concerning given that this period included COVID-related economic turmoil, a spike in unemployment, an increase in retirements, fear of recession, and inflation.

<u>The Proposal Fails to Address the Impact on Americans' Retirement Savings</u>

The Proposal and RIA contend that retirement savers benefited from the 2016 rule and will continue to benefit from the 2023 version. But other than speculating about returns and the timing of trades, the Department does not specify exactly *who* benefited, *how* they benefited, or *how much* they benefited. Concerningly, the Department doesn't know how the rule would impact the most important building-block of retirement security–- savings. Despite several years of post-2016 rule and Regulation Best Interest (Reg BI) related evidence, uncertainty remains:

[19] ACLI analysis of U.S. Federal Reserve Survey of Consumer Finances, *various years*. The specific survey question asks: "What sources of information do you (and your [husband/wife/partner]) use to make decisions about savings and investments?" Respondents are asked to enter all that apply, in order of use. Receiving advice from a broker, banker, insurance agent, financial planner, lawyer, and/or accountant are provided as response options. All of those sources are treated as financial professionals in the diagrams and analysis presented, though *they are not necessarily fiduciaries*, merely human financial professionals.

> "[t]o understand the potential magnitude of savings for retirement investors from the proposed rule, the Department believes the experience following the 2016 rulemaking and SEC's Regulation Best Interest provides context. As discussed in the baseline discussion, the regulatory and market environments have shifted since the 2016 Rule, and accordingly, *the Department acknowledges that there is significant uncertainty about the magnitude of savings that would result for retirement investors as a result of the proposed rulemaking*. The Department requests comment on this point [*emphasis added*]."

Similarly, the Proposal cites an October 5, 2023, Department-commissioned study which claims to show that from July 2020 through June 2023, after Reg BI took effect, there was a "dramatic improvement in the timing of trades", particularly load compared to no-load funds, *though the Department admits that the factors underlying the improvement in transaction timing are uncertain, as do the study authors:* "[h]owever, factors other than Reg BI may account for the observed reduction in the excess performance gap of load over no-load funds. For example, the COVID-19 pandemic, which started in early 2020, caused major disruptions to the economy[20] It should be noted that the S&P500 fell to a COVID-related trough in late March 2020 then reached a peak in June 2022. The S&P500 was on a strong upward trend during that period, which may have positively impacted the timing of trades. Additionally, Panis and Padmanabhan (2023) focus only on mutual funds and do not consider the possibility that households holding front-load vs. back-load vs. no-load funds may differ in some way, and that this difference is driving the timing of trades.

Retirement savings balances have also changed since the Department started pursuing a change to the definition of "investment advice fiduciary" in 2010. Figures 5 and 6 report the percentage of households with *any* retirement savings, by high vs. middle income group (figure 5), and by race (figure 6). Unsurprisingly, higher income households are more likely to have retirement savings than middle income households (in 2022, 86.0 vs. 49.8 percent), as are white households relative to Black or Hispanic households (in 2022, 56.8 vs. 28.4 vs. 28.8 percent). Among each of these income and racial groups, the percentage of households with any retirement savings has not substantially changed since at least 2007. However, median retirement savings balances have increased substantially among higher-income (figure 7) and white (figure 8) households, but more modestly among middle-income, Black and Hispanic households. Figures 7 reports median retirement savings among retirement savers with total income in the 90th percentile or above, and those with total income between the 25th and 75th percentile. Whereas median retirement savings among the latter group increased modestly since 2013 (an average of 5.0 percent per year) and was $42,000 in 2022, median retirement savings among the higher-income group increased substantially (an average of 10.4 percent annually) and was $464,000 by 2022.

Similarly, figure 8 shows the increasing gap in retirement savings between white and Black, and white and Hispanic households. Since 2010, median retirement savings balances of white households nearly doubled from $50,000 to $97,000 in 2022 (an average 7.8 percent annual growth). Meanwhile, median balances of Hispanic households only increased from $20,000 in 2010 to $27,000 in 2022 (2.9 percent average annual growth), and Black households from $20,000 to $28,000 (3.3 percent average annual growth).

[20] Panis, Constantijn; Padmanabhan, Karthik, "*Buy Low, Sell High: The Ability of Investors to Time Purchases and Sales of Mutual Funds"*, Intensity, LLC, October 5, 2023, 2023. Note that at the time the Proposal was released, this study was not publicly available.

The Proposal Fails to Address the Impact on Life Insurance

In several instances, the Proposal states that: *"The term 'investment property' does not include health insurance policies, disability insurance policies, term life insurance policies, or other property to the extent the policies or property do not contain an investment component."* Consequently, selling life insurance products with an "an investment component" would trigger fiduciary status. This would include sales to a welfare benefit plan or recommendations to plan participants. Importantly, outside of specifying that term life insurance products won't fall under the rule, the Proposal only refers to life insurance when making a point about regulatory regimes (a study about the Indian life insurance industry is cited).[21] 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.[22] Further, in 2022 life insurers sold 5.8 million whole life policies with a face value of $551.2 billion.[23] 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. Life insurance ownership has been steadily declining since the early 1970s. Today, only 52 percent of American adults report that they have coverage.[24] If the Department adopts this Proposal, it will only result in greater financial vulnerability for American families.

The Proposal Cites Studies That are Narrowly or Mis-Focused and Out of Date

Most of the studies referred to in the RIA are either narrowly focused or mis-focused for the Department's intended purposes, or are recycled from the 2016 effort. For example, justification for the rule relies heavily on Egan *et al*, (2022).[25] However, this study focuses on fees and shorter-term investment returns, and ignores the benefit of lifetime retirement income and risk management. Maximizing shorter-term returns to the exclusion of long-term security is not the objective of a long-term retirement product and should not be used to determine whether an annuity is 'inferior.' Throughout the study, the authors assume that annuities with higher expenses and commissions are inferior to those with lower expenses and commissions, and annuities with lower returns are inferior to those with higher returns. The study doesn't sufficiently examine the *nature and variety* of annuity benefits and does not fully account for (or report on) benefits in their quantitative analysis. Nor does it directly and explicitly investigate why some annuities have higher expenses and commissions. By default, Egan *et al*. treat annuities as though they were mutual funds.

According to Egan *et al*., the 2016 rule resulted in a 52% decline in variable annuity sales, which they interpret as improving "investor welfare", but fails to address the impact on overall retirement savers and retiree welfare. Similarly, *total* individual annuity sales were 13.9% lower in 2017 than 2014 (-$37 billion). During the same time period, the number of people aged 55 and over

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[21] Santosh Anagol, Shawn Cole & Shayak Sarkar, *Understanding the Advice of Commissions-Motivated Agents: Evidence from the Indian Life Insurance Market*, 99(1) The Review of Economics and Statistics 1-15, (2015).
[22] American Council of Life Insurers, Life Insurance Product Line Report, 2022
[23] American Council of Life Insurers, Life Insurers Fact Book, 2023.
[24] LIMRA, 2023 Life Insurance Fact Sheet, 2023
[25] Egan, Mark; Ge, Shan; Tang, Johnny, "Conflicting Interests and the Effect of Fiduciary Duty – Evidence from Variable Annuities", *Review of Financial Studies*, vol. 35, no. 12, pp. 5334-5386.

increased by 6.4 million (7.4%). Were it not for the 2016 rule, *many of those individuals would have purchased an annuity, but instead were left unprotected.* A recent MetLife study found that one in three retirees who take a lump sum from their defined contribution plan depleted their lump sum, on average, in five years.[26] Clearly, the long-term welfare of retirees and retirement savers has diminished.

Though Egan *et al*. concluded that 'investor' welfare improved as a result of the 2016 rule, their analysis is very narrow and *does not indicate* that overall retiree/retirement saver welfare improved. The welfare of retirees and retirement savers who may have benefited from the purchase of a variable annuity is entirely neglected in the study.

Egan *et al*. claim that variable annuities changed in response to the 2016 rule but fail to address specifically *how* they changed and whether these changes impacted retirees and near retirees (as opposed to 'investors'). Because preferences, objectives, and risk tolerance differ, it is entirely feasible that some individuals would prefer an annuity that does not generate the highest return, but that offers other appealing features, beyond the number of sub-accounts. Egan *et al*. assume that such an annuity is inferior without any basis in fact.

The Proposal May Lead to Investment Homogeneity and Systemic Risk

The Department asserts that the Proposal will result in higher returns because of greater uniformity in regulation, a reduction in losses resulting from conflicts of interest, improved confidence in advice and more efficient capital allocation. In effect, the Department envisions a future where retirement savers hold simpler, easier to understand, higher yielding, more homogenous investments. But too many savers with retirement assets in similar, plain vanilla, cookie-cutter investments could create a systemically risky environment. Currently, households hold about $13.0 trillion in IRA and $10.0 trillion in defined contribution plan assets.[27] If too many of those assets are held in overly homogenous portfolios, our entire retirement system could become more vulnerable by exposure to systemic risk. We urge the Department to reconsider the longer-term, aggregate impact of the Proposal.

The Proposal Incorrectly Assumes Financial Professionals Will Embrace Fiduciary Status

The Department assumes, with no evidence, insurance agents will react to the Proposal by reorienting their business to accept the obligations of an ERISA fiduciary, attendant liabilities, and the demands of the prohibited transaction exemptions. Essentially, the Proposal demands that insurance agents accept more liability risk and earn less compensation under a commissioned-based sales regime. Based on the market changes following the 2016 rule, it is rational to assume that, should this rule become law, there will be far fewer insurance agents and likely far fewer financial professionals available to work with retirement plan investors. Absent a restructuring away from sales-based commissions to a fee-based advice model on the part of each and every financial professional, a reduction overall in the number of financial professionals is likely. It is reasonable to assume that such a reduction would cause an increase in the market value of the remaining fiduciary adviser's time. As this Proposal takes effect, over time, investors will likely pay more for advice, whether through higher advisory fees,

[26] MetLife, "2022 Paycheck or Pot of Gold Study: The Great Retirement Decision", 2022.
[27] U.S. Federal Reserve, Flow of Funds, 2023, 2nd quarter.

higher minimum wealth thresholds set by advisers, or both. For most Americans, financial help will be unattainable.

The Proposal Fails to Properly Compare Commissions to Advisory Fees

The Proposal is founded on a premise that commissioned products influence financial professionals to provide conflicted guidance and recommendations to the detriment of retirement plan participants. As such, the Proposal elevates fee-based advice and automated robo-advice systems as preferable alternatives because they are cheaper and aligned with the interests of retirement plan participants. These premises are incorrect in many cases. Recommendations under the Proposal may generate the least expensive product that may actually disserve and impair the participant's best interests. While fee-based or automated retirement recommendations are appropriate for some individuals, they are not necessarily appropriate for all.

Financial product recommendations and associated compensation arrangements for the sale of those products are most objectively evaluated according to the unique facts and needs of each financial customer and the individual compensation arrangement. Financial advisers who obtain their compensation through annual fees based on assets under management ("wrap fees") are not likely to recommend certain commission-based products, like annuities, because that purchase is not generally included within the assets under management on which the annual, recurrent fees are assessed by this type of fee-based financial adviser. Recurrent annual fees may be ill-suited to individuals with moderate assets needing little annual advice. Annuity disbursements also result in a declining asset value and declining fees, making investment advisers less likely to recommend them even when they would be in a client's best interest. There is no discussion of this conflict in the Proposal.

FINRA issued guidance about fee-based arrangements, recognizing that while fee-based programs are beneficial for some customers, "they are not appropriate in all circumstances."[28] FINRA instructs that

> Firms must consider the overall needs and objectives of the customer when determining the benefits of a fee-based account for that customer, including the anticipated level of trading activity in the account and non-price factors such as the importance that a customer places on aligning his or her interests with the broker. Additionally, firms must take into account the nature of the services provided, the benefits of other available fee structures, and the customer's fee structure preferences.[29]

As FINRA aptly observes, under some customer circumstances, compensation through commission arrangements may be more appropriate than fee-based arrangements. Quite correctly, FINRA explained that the appropriateness of fee-only financial arrangements should be evaluated on the unique circumstances of each customer and their financial needs. The same is

[28] *See* Notice to Members 03-68, *Fee-Based Compensation-NASD Reminds Members That Fee-Based Compensation Programs Must Be Appropriate*, http://www.finra.org/sites/default/files/NoticeDocument/p003079.pdf .

[29] *See Fee-Based Questions and Answers*, http://www.finra.org/industry/fee-based-account-questions-answers . FINRA stated that

> Certain potential problems have been identified through our examination program. For example, it is not always clear that customers receive adequate disclosure about the distinctions and features of fee-based versus commission-based accounts, including the differences in fee structures and that fees will probably be higher in a fee-based account if the level of activity is modest. Training and education at some firms are minimal, particularly in giving brokers guidance on how to evaluate whether a customer is appropriate for a fee-based account.

true with evaluations of commissioned sales of certain financial products like annuities.[30] There are many customers for whom annuities provide a valuable and appropriate means to achieving retirement security and guaranteed lifetime income. The fact that the salesperson was compensated by commissions does not diminish the important role annuities play in financial and retirement security. Commission-based compensation can be the most economical and appropriate form of compensation that will enable consumers owning moderate amounts of retirement assets to obtain information and guidance about these and other products and may be significantly less expensive than non-commissioned forms of compensation, such as asset management fees.

For all of these reasons, the Proposal's recurrent conviction that recommendations by financial professionals who receive commission-based compensation are always conflicted fails to fulfill the statutory, executive, and judicial mandates that the cost-benefit analysis should be balanced and consider several solutions to proposed rulemaking.

V. The Proposal's Administrative Procedure Act and Constitutional Defects

For the reasons provided above, the Department should abandon the Proposal in its entirety. If, however, the Department proceeds to promulgate a final rule and adopt the amendments to the exemptions, the rulemaking package would be subject to numerous legal claims that that would compel judicial vacatur of the rulemaking package under the Administrative Procedure Act (APA).[31]

<u>If Finalized, The Proposal Would Be Contrary to Law Under the APA Because It Would Vastly Exceed the Department's Statutory Authority Under ERISA</u>

As a threshold matter, and for many of the reasons already explained, the Department lacks the statutory authority to finalize the Proposal. It is axiomatic both that an agency has only the authority that Congress delegates to it[32] and that an agency acts contrary to law when it exceeds its statutory authority.[33] As explained in Section II above, in enacting ERISA in 1974, Congress incorporated the well-established common-law meaning of "fiduciary"—a concept that turns on the existence of a special relationship of trust and confidence between a fiduciary and a client.[34] When the Department attempted in 2016 to vastly expand the definition of investment advice fiduciary beyond that common-law anchor, the Fifth Circuit rightly vacated the rule, concluding that the Department lacked the authority to promulgate it under ERISA.[35]

The Proposal here is similarly defective in all of the ways that matter. Like the 2016 rule, the Proposal would abandon the Department's decades-old five-part test for determining fiduciary status—a test that the Fifth Circuit emphasized "flow[s] directly" from the common-law definition of

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[30] Elisse B. Walter, who served as acting SEC chair, SEC Commissioner, and FINRA Senior Executive Vice President, noted:

> In a nutshell, while fee-based accounts can be a good thing, they are not always the right thing, or the best thing. We need you to look at each customer and determine what kind of fee works best for him or her. The Tully Report itself recognized that investors with low trading activity would probably be better off with a commission-based program that charges only when trades are made. *See* Elisse Walter, *Current NASD Regulatory Issues on Sales and Marketing* (Sept. 28, 2004) http://www.finra.org/newsroom/speeches/092804-remarks-27th-annual-sia-sales-and-marketing-conference.

[31] *See* 5 U.S.C. § 706.

[32] *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 357 (1986).

[33] 5 U.S.C. § 706(2)(C).

[34] *Chamber of Commerce v. U.S. Dep't of Labor*, 885 F.3d 360, 369-371 (Fifth Cir. 2018).

[35] *Id.* at 369.

"fiduciary" codified by statute, including its requirement "of an intimate relationship between adviser and client beyond ordinary buyer-seller interactions."[36] Indeed, by once again eliminating the five-part test's requirements that advice be given on a "regular basis," "pursuant to a mutual agreement," and "as a primary basis for investment decisions,"[37] the Proposal would (just like the 2016 rule) impermissibly "encompass[] virtually all financial and insurance professionals who do business with ERISA plans and IRA holders."[38] ERISA simply does not permit such a sweeping expansion of fiduciary obligations.

Resisting this conclusion, the Department has asserted that the Proposal is "responsive to the Fifth Circuit's emphasis on relationships of trust and confidence,"[39] but the Department has made no meaningful effort to develop a record demonstrating that all, or even many, of the relationships covered by the rule are ones that, as a matter of fact, bear the critical indicia of common-law fiduciary relationships. To the contrary, the Department effectively acknowledges that is presently not the case, in arguing that the rule is needed to *create* expectations of trust and confidence that, according to the Department, are missing.[40] The rulemaking record thus makes clear that the Department is seeking to create fiduciary relationships by regulatory fiat, not to regulate already existing relationships under federal law.[41] Critically, moreover, the Department provides no empirical support for the critical proposition that the transactions covered by the rule arise out of mutually understood relationships of trust and confidence.[42]

The breadth of the Department's proposed definition of fiduciary makes clear how far the Department has strayed beyond its statutory authority. For example, the Proposal extends fiduciary obligations to transactions between sellers and independent fiduciaries and other sophisticated parties—which is deeply inconsistent with ERISA's common-law conception of fiduciary. In this respect, the Proposal sweeps more broadly than the 2016 rule by omitting the "seller's carve-out" for transactions with financial professionals who are themselves fiduciaries[43]—such as a pension risk transfer transaction, in which the pension fund already has a named fiduciary charged with and responsible for managing the fund. To subject insurance agents selling financial products to sophisticated pension fund managers to a redundant fiduciary obligation bears no relation whatsoever to the common-law conception of fiduciary embodied in ERISA. Indeed, under the Department's new definition, responding to an RFP for a pension risk transfer

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[36] *Id.* at 374.
[37] *See* 29 C.F.R. § 2510.3-21(c)(1).
[38] *Chamber of Commerce*, 885 F.3d at 366.
[39] 88 Fed. Reg. at 75,901.
[40] *See, e.g.*, 88 Fed. Reg. at 75,942 ("By holding all retirement investment advice providers to standards that rightly instill trust, this proposal would facilitate efficient, trust-based relationships between retirement investors and investment advice providers.")
[41] The Department has asserted that the Proposal, if finalized, would be narrower than the 2016 rule because fiduciary status would attach only if financial professionals were "in the business of providing investment recommendations." *Id.* at 75,902. But that serves no practical narrowing function, as evidenced by the fact that the Department's best example of someone this limitation would exclude is a "car salesman who recommends a retiree cash in their 401(k) for a new convertible." *Id.* at 75,961. Neither the Fifth Circuit nor anyone else was concerned that the 2016 rule would have swept in car salesmen. The relevant point is that the Proposal, like the 2016 rule, would subject virtually all sales and marketing speech by insurance agents and others involving retirement products to fiduciary status.
[42] *See, e.g.*, *id.* at 75,901 (asserting, without evidentiary support, that rule applies only in "circumstances in which the retirement investor can reasonably place their trust and confidence in the advice provider.").
[43] *See* 88 Fed. Reg. 75,907 n.118.

transaction would appear to make an insurance agent a fiduciary, even in circumstances where the plan did not want fiduciary advice.

As another example of the rule's untenable breath, the rule provides that one-time "advice provided in connection with a rollover decision, even if not accompanied by a specific recommendation on how to invest assets, should be treated as fiduciary investment advice."[44] That, too, is entirely divorced from ERISA's common-law conception of fiduciary. As the Fifth Circuit explained when vacating the 2016 rule, in "one-time IRA rollover or annuity transactions," "it is ordinarily inconceivable that financial salespeople or insurance agents will have an intimate relationship of trust and confidence with prospective purchasers."[45] The Department's adoption of a nearly *per se* rule that rollover recommendations and guidance are necessarily fiduciary advice is flatly inconsistent with the common law, the five-part test as it has existed for decades, as well as the Fifth Circuit's decision.

As another example of the rule's vast sweep, the rule would apparently expand the scope of Title I's enforcement mechanisms to reach *any* recommendations about a transaction that would involve funds being transferred out of a Title I plan into another retirement account. As the Department trumpets, "recommendations on distributions" from Title I plans, "including rollovers or transfers into another plan or IRA," would "fall within the scope of investment advice in this proposed regulation, and would be covered by Title I of ERISA, including the enforcement provisions."[46] That expansion improperly override Congress's carefully drawn distinction between Title I and Title II remedies, as the Fifth Circuit emphasized in vacating the 2016 rule.[47]

Finally, even were there doubt about the scope of the Department's fiduciary authority—and particularly in light of the Fifth Circuit's decision, there should be none—there are other clear indications that the Department has strayed well-beyond its delegated authority. For one thing, the Proposal arrogates to the Department authority that Congress delegated to the SEC or reserved to the states. As the Fifth Circuit explained, the 2010 Dodd Frank Act (1) delegated to the SEC the power to promulgate standards of conduct for broker-dealers and investment advisers who render personalized investment advice about securities to retail customers;[48] and (2) expressly reserved for the states the authority to regulate fixed income annuities.[49] And, as noted in Section II above, by seizing these powers for itself and by expanding the definition of "investment advice fiduciary" beyond the limits Congress intended in enacting ERISA, the Department is claiming a "transformative expansion in [its] regulatory authority"—thus implicating the major questions doctrine.[50] The major questions doctrine puts an exclamation point on why Department's proposed sweeping expansion of fiduciary authority over major segments of the U.S. financial services and insurance industries is indefensible.

[44] *Id.* at 75,906.
[45] *Chamber of Commerce*, 885 F.3d at 380.
[46] 88 Red. Reg. at 75,906.
[47] *See Chamber of Commerce*, 885 F.3d at 382 ("ERISA employer-sponsored plan fiduciaries may be sued under Title I," but ERISA does not similarly "expose brokers and insurance salespeople.").
[48] *Chamber of Commerce*, 885 F.3d at 385; Dodd-Frank Act § 913(g)(1), 124 Stat. 1827-1828 (2010).
[49] *Chamber of Commerce*, 885 F.3d at 385; Dodd-Frank Act § 989J, 124 Stat. 1376, 1949-1950 (2010).
[50] *West Virginia v. EPA*, 142 S. Ct. 2587, 2610 (2022).

The Proposal Would Unlawfully Create Private Enforcement, Contrary to Congress's Design Of ERISA

The Proposal would also exceed the Department's authority under ERISA by creating a new private enforcement regime that is not authorized by the statute. As described above, PTEs 2020-02 and 84-24 would obligate insurance agents and broker-dealers to state in writing that they are fiduciaries. That written acknowledgement has the purpose and effect of exposing those actors to private state-law claims and liability, under breach-of-fiduciary or breach-of-contract theories. But ERISA does not give the Department the authority to create new enforceable state-law rights, particularly with respect to IRA plans for which Congress created an administrative, not judicial, enforcement mechanism.[51] What is more, the written acknowledgment of fiduciary status serves no plausible purpose other than to create a mechanism for private enforcement. The Department previously sought to do this directly through the now-vacated Best Interest Contract Exemption. And the Department's new effort to create private enforcement would be unlawful for the same reasons.

The Proposal Would Violate the McCarran-Ferguson Act

In addition to ERISA, the Proposal would violate the McCarran-Ferguson Act. That statute commands that no federal law can be "construed to invalidate, impair, or supersede" any state law enacted for the purpose of regulating the business of insurance unless the federal statute "specifically relates to the business of insurance."[52] Under McCarran-Ferguson, as the Supreme Court has made clear, federal law cannot be applied when it "directly conflicts with state regulation," where "application of the federal law would … frustrate [a] declared state policy," or where the federal law would "interfere with a State's administrative regime."[53]

Here, a final rule would be subject to McCarran-Ferguson's prohibition because it would directly and palpably conflict with the insurance laws of at least 41 States. As the Department acknowledged in the Proposal, in the vast majority of States, insurance agents selling annuity products are governed by state suitability standards that incorporate the National Association of Insurance Commissioners' (NAIC) Suitability in Annuity Transactions Model Regulation.[54] This NAIC Model Regulation, in the Department's own words, "expressly disclaim[s] that its standard creates fiduciary obligations."[55] The Department's Proposal, however, would have the explicit goal of imposing fiduciary status on insurance agents selling these same products, and would require those insurance agents (among other things) to state in writing that they are fiduciaries before they may receive compensation for their work.[56] This conflict with state laws triggers McCarran-Ferguson reverse preemption because "the sale of an insurance policy" or insurance product (like an annuity) "is undoubtedly the 'business of insurance' for McCarran Act purposes."[57] The Supreme Court recognized as much in *SEC v. National Securities, Inc.*, observing that "[t]he selling

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[51] *See Chamber of Commerce,* 885 F.3d at 384.
[52] 15 U.S.C. § 1012(b).
[53] *Humana Inc. v. Forsyth*, 525 U.S. 299, 307 (1999).
[54] 88 Fed. Reg. at 75,925-75,926.
[55] *Id.*; *see* NAIC Model Regulation #275 §§ 1(B), 6(A)(1)(d).
[56] 88 Fed. Reg. at 75,950.
[57] *Cody v. Community Loan Corp. of Richmond Cnty.*, 606 F.2d 499, 503 (Fifth Cir. 1979).

and advertising of policies" falls "within the scope" of the McCarran-Ferguson Act as clearly as "the fixing of rates."[58]

If this direct conflict with state-law standards were not enough, the Proposal would also interfere with state administrative regimes regulating the business of insurance in myriad other ways. As explained above, many states closely regulate the conduct of life insurance companies and their sales agents, including by setting limits on the commissions that agents can receive.[59] The final rule supersedes those state laws by establishing a new framework governing the receipt of commissions by insurance sales agents, and frustrates the ability of States to implement their chosen policies in this traditional area of state regulation.

The Proposal Would Violate the First Amendment

The Department's Proposal would also violate the First Amendment. If finalized, the rule would be a content-based regulation of speech and thus "presumptively unconstitutional."[60] It would directly regulate truthful sales speech by insurance agents and broker-dealers by prohibiting their recommendations about retirement products unless the rule's onerous fiduciary requirements are satisfied. The "overriding justification for the regulation," moreover, would be the Department's purported "concern for the effect of the subject matter" of the speech "'on its listeners'" (i.e., retirement investors); "[t]his is the essence of content-based regulation," subject to strict scrutiny.[61] Furthermore, the rulemaking record demonstrates clearly that a key Department goal in the rulemaking is to target recommendations by insurance agents and broker-dealers regarding specific topics—namely, annuities,[62] a clear content-based and viewpoint-based justification for the rule.

For those reasons, the Department would bear the burden of demonstrating that the rule advances a "compelling government interest" and is "narrowly tailored to achieve that interest."[63] The Department cannot possibly satisfy that test. Indeed, "[i]t is rare that a regulation restricting speech because of its content will ever be permissible."[64] That is doubly so when it comes to viewpoint discrimination. Here, at the very least, the Proposal would not be narrowly tailored because many "less restrictive alternative[s]"[65] are readily apparent—including, tailored disclosure regimes as well as the robust enhanced suitability standards that the vast majority of states have already determined adequately protect retirement investors.

The proposed rulemaking package would also unlawfully compel speech. As structured, a condition of PTE 2020-02 would require insurance agents and broker-dealers to provide a written acknowledgment conveying the government's message that they are fiduciaries. Generally, compelled-speech mandates of this sort are subject to strict scrutiny.[66] And although in *Zauderer*

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[58] 393 U.S. 453, 460 (1969).
[59] *See* N.Y. Ins. Code § 4228.
[60] *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).
[61] *United States v. Playboy Entertainment Grp., Inc.*, 529 U.S. 803, 811 (2000).
[62] *See, e.g.,* 88 Fed. Reg. 75,891 (The Rule "will be especially beneficial with respect to … recommendations to roll over assets from a workplace retirement plan to an IRA…investment recommendations with respect to many commonly purchased retirement annuities, such as fixed index annuities."); *id.* at 75,902 (singling out as a fiduciary "an insurance agent's recommendation to invest a retiree's retirement savings in an annuity as fiduciary advice."); *id.* at 75,939-75,941 (section titled "Protections Concerning Annuity Investment Advice").
[63] *Reed*, 576 U.S. at 171.
[64] *Playboy*, 529 U.S. at 818.
[65] *See id.* at 813.
[66] *See National Institute of Family and Life Advocates (NIFLA) v. Becerra*, 138 S. Ct. 2361, 2371 (2018).

v. Office of Disciplinary Counsel of the Supreme Court of Ohio[67] and other decisions, the Supreme Court has sometimes applied more deferential review to certain mandated commercial disclosures, it has done so with respect only to compelling the disclosure of "factual, noncontroversial information about the terms under which ... services will be available."[68] Here, the compelled message ("I am a fiduciary") would be vigorously disputed by regulated parties—who believe they are not and cannot be made fiduciaries—and would actually change, not merely neutrally disclose, the terms of service. Through the mandated representation, the Proposal would transform salespeople into fiduciaries. The deferential *Zauderer* standard therefore does not apply. But even under *Zauderer*, the Department would need to establish that the disclosure requirement was "neither unjustified nor unduly burdensome."[69] The Department cannot satisfy even that standard, given that any justification for the mandated disclosure is "purely hypothetical" and unsupported by real-world evidence.[70]

Lastly, even if the Proposal were deemed a content-neutral regulation of commercial speech, it still would not pass constitutional muster. In that case, intermediate scrutiny would apply, and the Department would be required to demonstrate that the rule "directly advances" "a substantial government interest and is not more extensive than is necessary to serve that interest."[71] The rule would fail both aspects of that test. First, the rule would not directly advance a substantial government interest because it would improperly assume that truthful sales speech harms consumers and that reducing consumer access to information is preferable. That premise is irreconcilable with the Constitution: The Supreme Court has made clear that even when commercial speech "communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all."[72] That is true even when the speaker has financial interests; "a great deal of vital expression" "results from an economic motive."[73] Second, the rule would not be narrowly tailored because it would be vastly overbroad and it would ignore other obvious alternatives (such as a more tailored disclosure requirements). To take just one example of a more narrowly tailored alternative, the Department could easily adopt an exemption (like it did in 2016) for transactions with independent fiduciaries. Extending duplicative fiduciary protections to those transactions does not advance the Department's claimed interest in protecting retirement investors.[74]

<u>If Promulgated in Its Current Form, Based on This Record, The Proposed Rule Would Be Arbitrary and Capricious</u>

The APA requires courts to "hold unlawful and set aside agency action" that is "arbitrary" and "capricious."[75] An agency rule is arbitrary and capricious when the agency has "entirely failed to consider an important aspect of the problem," or "offered an explanation for its decision that runs

[67] 471 U.S. 626, 651 (1985),
[68] *NIFLA*, 138 S. Ct. at 2372 (quoting *Zauderer*, 471 U.S. at 651 (1985)).
[69] *Id.* at 2377.
[70] *Id.*
[71] *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980).
[72] *Id.* at 562.
[73] *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 567 (2011).
[74] In addition to the problems posed under the First Amendment, promulgation of a final rule may also be invalid under the Appointments Clause if Acting Secretary Su is not confirmed by the Senate prior to the rule's issuance. U.S. Const. art. II, § 2, cl. 2.
[75] 5 U.S.C. § 706(2)(A).

counter to the evidence."[76] Challenges under this standard often turn on the reasoning the agency provides in support of the final rulemaking and the support developed in the record, but here, it is already evident that the Department's rule would be arbitrary and capricious. Crucially, given that the Department relies in significant part of the administrative record for the vacated 2016 rule, ACLI expressly incorporates its prior comments and submissions (as well as its litigation filings in challenging the 2016 rule) as part of the record for this rulemaking.

All of the legal defects described above are important aspects of the problems that the Department will be required to consider and "articulate a satisfactory explanation" about,[77] especially now that those concerns have been raised in comments before the agency. In addition, a final rule will almost certainly be arbitrary and capricious for the following reasons:

Failure to reasonably account for existing regulatory protections. Reasoned decision-making obligates an agency to take account of existing regulatory protections. The Department will not be able to demonstrate that the rule is warranted in light of the existing protections that already address the same concerns regarding purportedly conflicted investment advice.[78] These protections include the SEC's Regulation Best Interest and the NAIC's Model Suitability Standards adopted by 41 States and counting. The Department acknowledges that "[t]hese regulatory changes cover many … of the assets held by retirement plans,"[79] but it asserts that the Department's proposed approach is necessary because "gaps" in the regulatory landscape persist. In reality, the *only* examples that the Department has cited of retirement transactions that are not covered by either Regulation Best Interest or the NAIC model regulation involve transactions with institutional retirement plans that are already safeguarded by an ERISA fiduciary. And although the Department claims that consumers remain vulnerable because annuities not covered by Regulation Best Interest are subject to "state regulations that potentially hold [sellers] to a lower standard,"[80] the Department has not explained (and cannot explain) why those state regulations fail to sufficiently protect retirees. In key part, moreover, the Proposal rests on express and implied criticism of the work of both the SEC and multiple state insurance agencies. But the Department does little to build a meaningful record to establish that those recently enhanced regulatory regimes are failing—indeed, given how recent some of the key reforms are and the careful consideration given them by the regulators who adopted them, the Department could not justifiably make such a premature determination. For that reason, too, the Department's precipitous decision to rush ahead with a one-size-fits-all fiduciary approach at the federal level is unjustified and is arbitrary and capricious.

Pursuing a substantial regulatory overhaul without meaningful evidence of a problem to address. Relatedly, the rule would be arbitrary and capricious as a paradigm "solution in search of a problem."[81] A "regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist."[82] Critically, the Department cites no current, reliable evidence of a problem in the marketplace that would warrant the burdensome, sweeping regulations that the Department proposes. In attempting to establish that a problem exists, the Proposal relies on studies that are methodologically flawed and that do not support the

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[76] *Motor Vehicle Mfrs. Assn' of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).
[77] *Id.* at 43.
[78] *See* 88 Fed. Reg. at 75,914.
[79] *Id.* at 75,898.
[80] *Id*. at 75,920.
[81] *New York v. U.S. Dep't of Health & Human Servs*., 414 F. Supp. 3d 475, 546 (S.D.N.Y. 2019).
[82] *City of Chicago v. Fed. Power Comm'n*, 458 F.2d 731, 742 (D.C. Cir. 1971).

conclusions that the Department seeks to draw. For example, the Proposal frequently invokes the Egan, Ge, and Tang study.[83] But that study rests on an inaccurate assumption that annuities are inferior investment products if they come with higher expense ratios or commissions, without taking into account the value of the annuity's guarantees and benefits. The study also contains serious analytical gaps, including its failure to explain a dramatic spike in complaints against life insurance companies from 2015-2018, when the 2016 rule was first promulgated and put into effect. Nor can the Egan, Ge, and Tang study serve as evidence that extending fiduciary status to insurance agents selling annuities actually benefits retirement savers—the study focuses narrowly on investment performance and investor complaints, without addressing retirement savers who would have purchased an annuity but for the 2016 rule's effect on the availability and nature of professional financial recommendations for annuities.

In addition, and remarkably, the Department leans heavily on analyses considered and conducted when the Department promulgated the 2016 rule more than seven years ago.[84] That evidence was deeply flawed then, as ACLI and other commenters made clear, and it remains even more flawed now. For example, those studies predate what the Department has recognized were significant changes in the market for annuities following the promulgation and vacatur of the 2016 rule,[85] the promulgation of Reg BI, and the enhancement of state suitability standard, as well as important developments in the larger economy, such as the consequences of the COVID-19 pandemic. And the Department's purportedly new analysis is replete with references to similarly outdated materials. For example, the Department attempts to justify its claim that it must protect institutional investors who already have dedicated fiduciaries by pointing to data that are nearly two decades old.[86] It is arbitrary and capricious to rely, as the Department does here, on studies that are outdated, that address different products than annuities (such as mutual funds),[87] and that are analytically flawed or incomplete.

Failure to consider reasonable alternatives. The APA obligates agencies to consider reasonable alternatives. While the Department has purported to assess some alternatives, the Department has offered no reasoned explanation for why more narrowly tailored approaches would not adequately address any existing problems in the marketplace. For example, if, as the Department worries, some retail investors are confused about the precise role of a financial professional or the standard governing that professional, a simple, clear disclosure requirement would address that perceived problem. The Department rejects that approach, based on purported evidence that "disclosures alone can have, at best, a minor impact on conflicts, and can sometimes exacerbate the conflicted behavior."[88] But setting aside that the Department's open hostility to disclosures is at war with the securities laws (which have long relied on disclosure) as well as the First Amendment (which presumes that listeners understand truthful disclosures in the context of commercial speech), the Department offers no reason to believe that informed retail investors cannot decide for themselves what type of relationship would best meet their needs.

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[83] *See* 88 Fed. Reg. at 75,941, 75,943, 75,944, 75,946.
[84] *See, e.g.*, *id.* at 75,922.
[85] *See id.* at 75,941.
[86] *See id.* at 75,919.
[87] *E.g.*, *id.* at 75,894 ("[I]n the absence of the 2016 Final Rule, the underperformance associated with conflicts of interest in the mutual funds segment alone could have cost IRA investors between $95 billion and $189 billion over the following 10 years and between $202 billion and $404 billion over the following 20 years").
[88] *Id.* at 75,962.

Significant costs to retirement investors, including lack of access to truthful information about retirement products. Reasoned decision-making requires an agency to identify the disadvantages of a proposed rule and to explain why those disadvantages are nonetheless justified. The Proposal fails this standard as well, because the rule would cause retirement investors to lose access to the array of professional financial guidance currently available to them. As explained above, this result is detailed in studies published by Deloitte and by Quantria Strategies in partnership with the Hispanic Leadership Fund. Thus far, the Department has dismissed these concerns based on unsupported assertions that they are "inconsistent with more rigorous academic research" and that they are not predictive of the consequences of the current proposal, which (the Department claims) is "markedly different" than the 2016 rule.[89] But the Department's unspecific methodological quibbles are not sufficient to justify its discounting of these studies showing concrete, real-world harm to retirement investors. And the Department's attempts to distinguish the 2016 rule from the current one are unavailing given that the Department continues to try to justify its redefinition of "investment advice fiduciary" by relying heavily on the regulatory analysis it used to support the 2016 rule, as well as on studies—such as Egan, Ge, and Tang (2022)[90]—that purport to show the positive effects of the 2016 rule. Indeed, in deciding not to adopt blanket fiduciary status, the SEC made detailed findings explaining why fiduciary status would harm consumers and lead to less access to information about retirement products. The Department arbitrarily and capriciously disregards those findings of an expert sister federal agency.

Critically, the Proposal also appears improperly targeted at and designed to steer the marketplace away from annuities generally, or at least the types of annuities that the Department disfavors (such as variable annuities). But at the outset, Congress never authorized the Department to pick winners and losers under ERISA in the market for financial products. For example, the Department apparently intends that blanket fiduciary status will change the "compositional shift" of products in the retirement marketplace, including driving "sales … away from variable annuities."[91] But this regulatory effort to steer the market away from certain annuities not only exceeds the Department's authority but also ignores that consumer access to a range of annuity options has immense value to consumers. Any effort, for example, to impair access to variable annuities overlooks the immense value those annuities can have for some retirement investors, particularly those concerned with inflation risk. The Department's failure to account for this foreseeable (if not intended) cost of the rule is also arbitrary and capricious.

Deeply flawed cost-benefit analysis. Above, we demonstrate in detail why the Department's assessment of the costs and benefits of the rule is fundamentally flawed. This, too, will compel vacatur of a final rule. For example, the Department's analysis of the compliance and other costs associated with the Proposal is based on wholly unreasonable and inaccurate assumptions and focuses narrowly on the costs of compliance paperwork but ignores that the fiduciary standards themselves will impose additional costs and requirements. The Department notes in passing that "entities who did not previously identify as a fiduciary may also incur some transition costs," but it makes no attempt to estimate those costs itself.[92] Nor has the Department event attempted to assess other critical costs, "such as legal costs, fiduciary insurance costs, human capital costs, or other costs of this nature."[93] And the Department makes no effort to account for the liability costs

[89] *See id.* at 75,945-75,946.
[90] Mark Egan, Shan Ge, & Johnny Tang, *Conflicting Interests and the Effect of Fiduciary Duty—Evidence from Variable Annuities*, 35(12) The Review of Financial Studies 5334–5486 (December 2022).
[91] *Id.* at 75940.
[92] 88 Fed. Reg. at 75,949.
[93] *Id.*

that will flow from exposing insurance agents and others to state-law liability. The Department's failure to account for these obvious costs is arbitrary and capricious.[94]

Procedural defects in the rulemaking. The Proposal will also be subject to challenge for procedural violations of the APA. For example, "an agency commits serious procedural error when it fails to reveal portions of the technical basis for a Proposal in time to allow for meaningful commentary."[95] Here. the Department admits time and again that it does *not* have relevant data on key parts of the rulemaking. Given those admissions, the Department should have proceeded first with an RFI, not an NPRM, as we explain above. Indeed, the Department's decision to rush ahead with an NPRM without actual data is clear evidence that the Department has engaged in outcome-oriented decision-making that defies the APA's overriding obligation of reasoned decision-making. But this situation also introduces a significant and prejudicial procedural problem: ACLI and other stakeholders will be deprived of the opportunity to comment on, or critique technical data and analyses that are provided by other commenters in response to the Department's sweeping requests for information. In these circumstances—where an agency has openly admitted that it needs additional data to regulate—it would violate the APA's requirements for the Department rely on submitted data that other commenters have not had any meaningful opportunity to respond to.[96]

VI. The Definitional Change and Proposed PTE Amendments Are Not Severable

In the preamble, the Department states that it "generally intends discreet aspects of this regulatory package to be severable. While that may be the Department's intent, as with the 2016 rulemaking and the new and amended exemptions included as part of that rulemaking package, the change in the definition of "investment advice fiduciary" and amendments to the exemptions are not severable. As was the case with the 2016 rulemaking package, here the Department once again has had to modify the exemptions "to blunt the over inclusiveness of its new definition." But for this new expansive definition of "investment advice fiduciary" amendments to the exemptions would not be necessary. Further, as the BICE did in 2016, the amendments to PTE 2020-02 and PTE 84-24 "subject newly regulated actors and transactions to a raft of affirmative obligations." As such, any court reviewing this rulemaking package will likely conclude, as the Fifth Circuit did in 2018, that "this comprehensive regulatory package is plainly not amenable to severance."

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94 "A regulation is arbitrary and capricious if the agency failed to consider an important aspect of the problem. That includes, of course, considering the costs and benefits associated with the regulation." *Chamber of Commerce v. U.S. Securities and Exchange Comm'n.*, 85 F.4th 760, 777 (Fifth Cir. 2023).
95 *Connecticut Light & Power Co. v. Nuclear Reg. Comm'n*, 673 F.2d 525, 530 (D.C. Cir. 1982); *see also* 5 U.S.C. § 553.
96 In addition, the Department has relied on several studies that are either prohibitively expensive to obtain or unavailable to the public. For example, it cites to seven reports from Cerulli Associates, each of which costs upwards of $19,000. If the Department fails to make those studies and all other evidence available to the public with opportunity to comment, it will be subject to additional legal challenges.

On behalf of the ACLI member companies, considering what we have detailed above regarding the Proposal's significant fatal flaws, we ask that the Department completely withdraw the proposed Definition of an Investment Advice Fiduciary, the proposed Amendment to Prohibited Transaction Exemption PTE 84-24, and the proposed Amendment to Prohibited Transaction Exemption PTE 2020-02. We welcome the opportunity to discuss these comments.

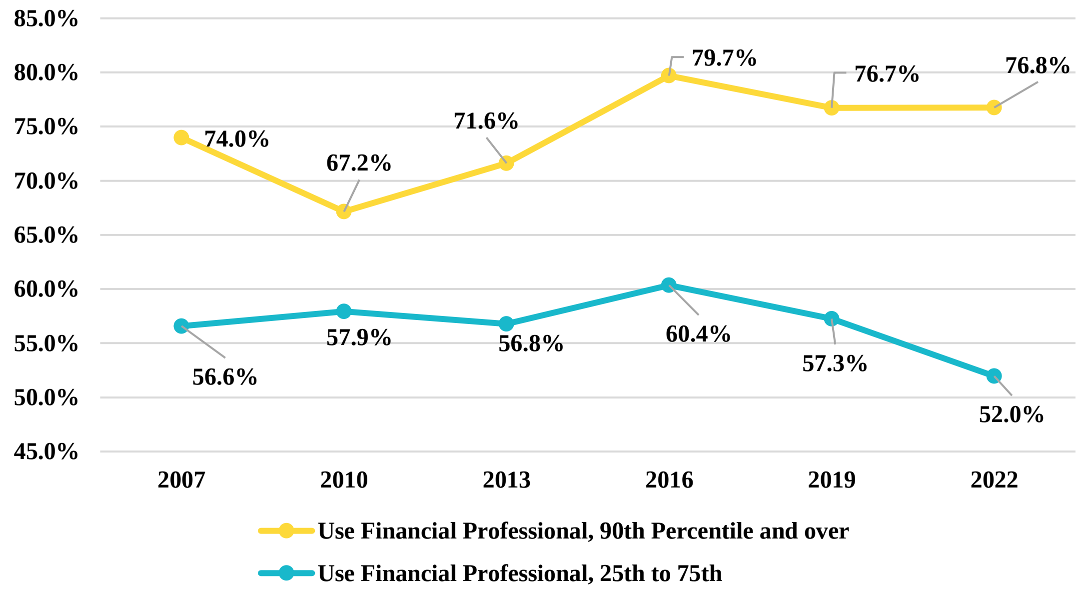
Respectfully,

James Szostek

Howard Bard

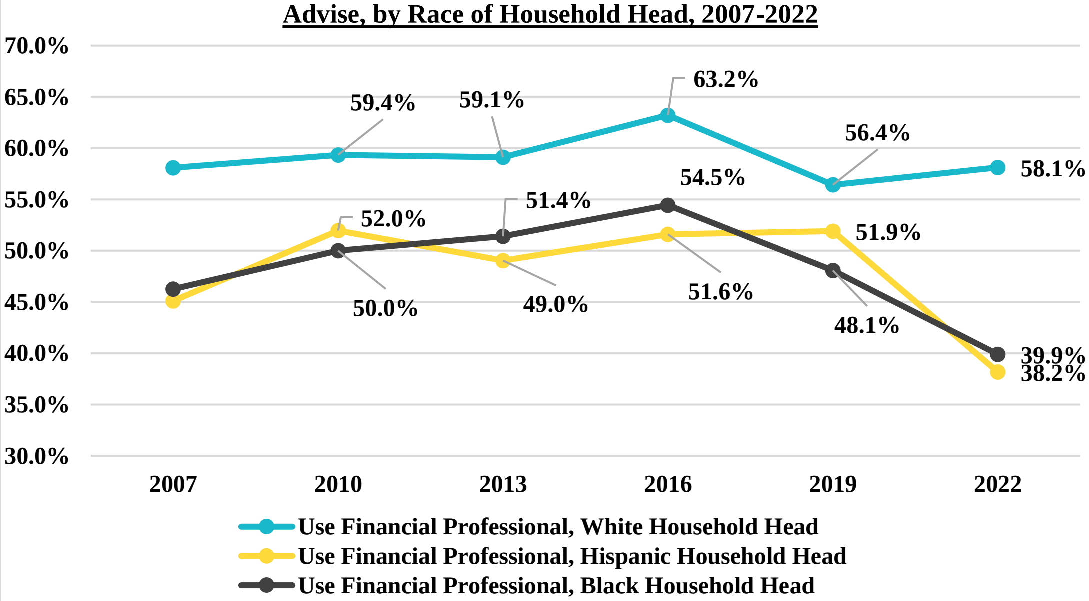
EXHIBITS

Figure 1: Would Use Financial Professional for Investment and Savings Advice; 90th and above vs. 25th to 75th Total Income Percentiles, 2007-2022



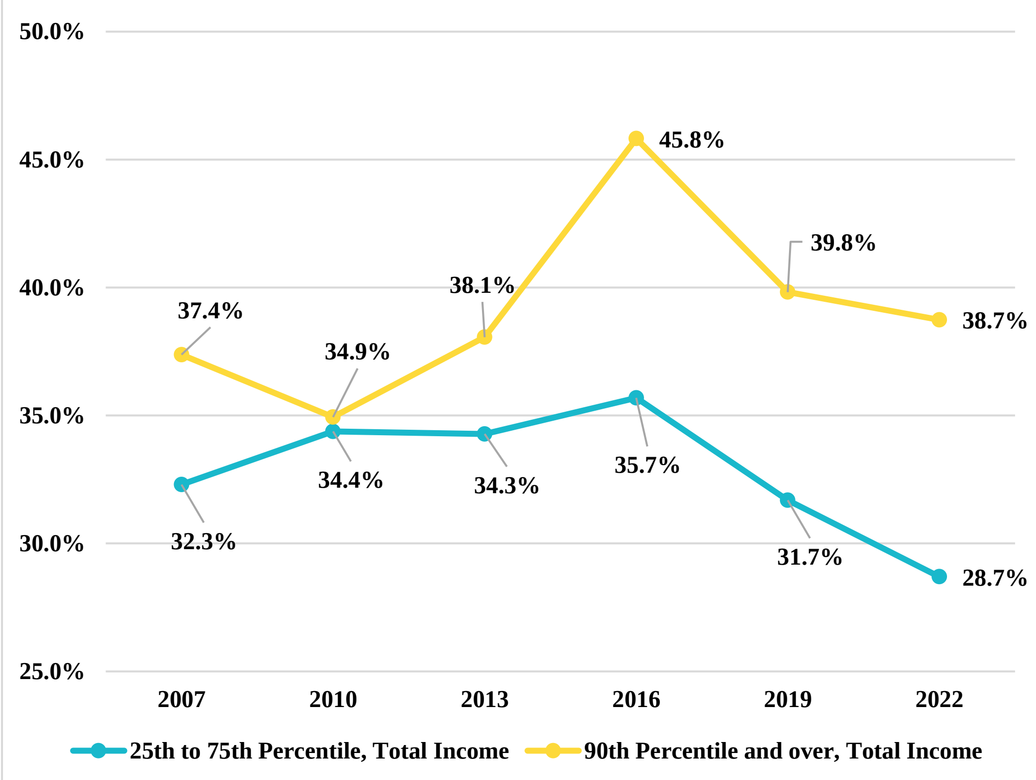
Source: ACLI analysis of the U.S. Federal Reserve Survey of Consumer Finances, *various years*.

Figure 2: Would Use Financial Professional for Investment and Savings Advise, by Race of Household Head, 2007-2022



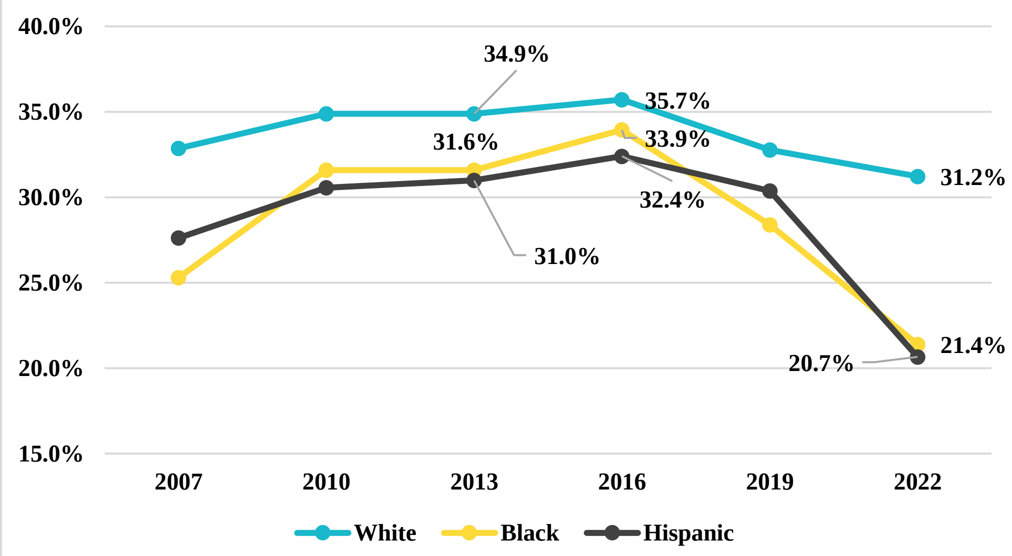
Source: ACLI analysis of the U.S. Federal Reserve Survey of Consumer Finances, *various years*.

Figure 3: Financial Professional Listed as *First Source* of Investment and Savings Information, 90th and Above vs. 25th to 75th Total Income Percentiles, 2007-2022



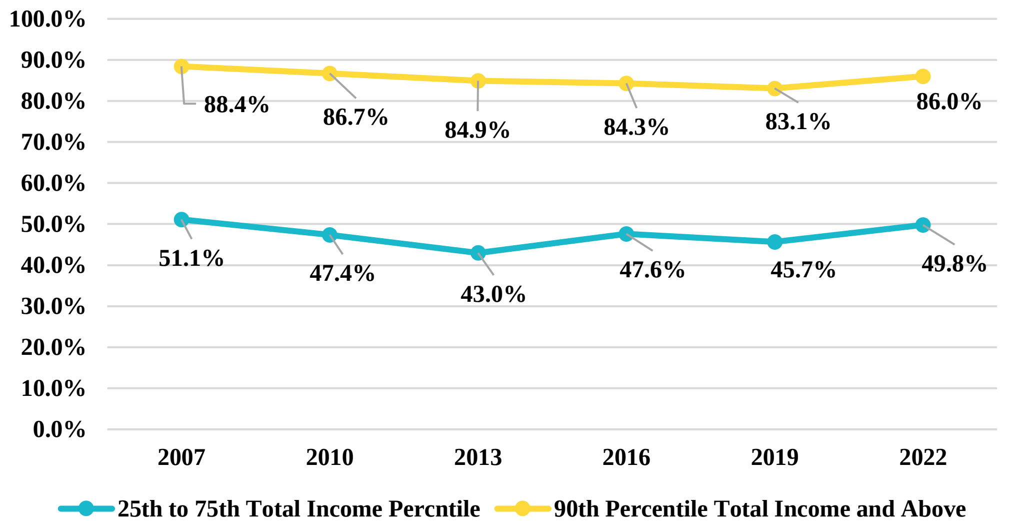
Source: ACLI analysis of the U.S. Federal Reserve Survey of Consumer Finances, *various years*.

Figure 4: Financial Professional Listed as *First Source* of Investment and Savings Information, By Race (2007-2022)



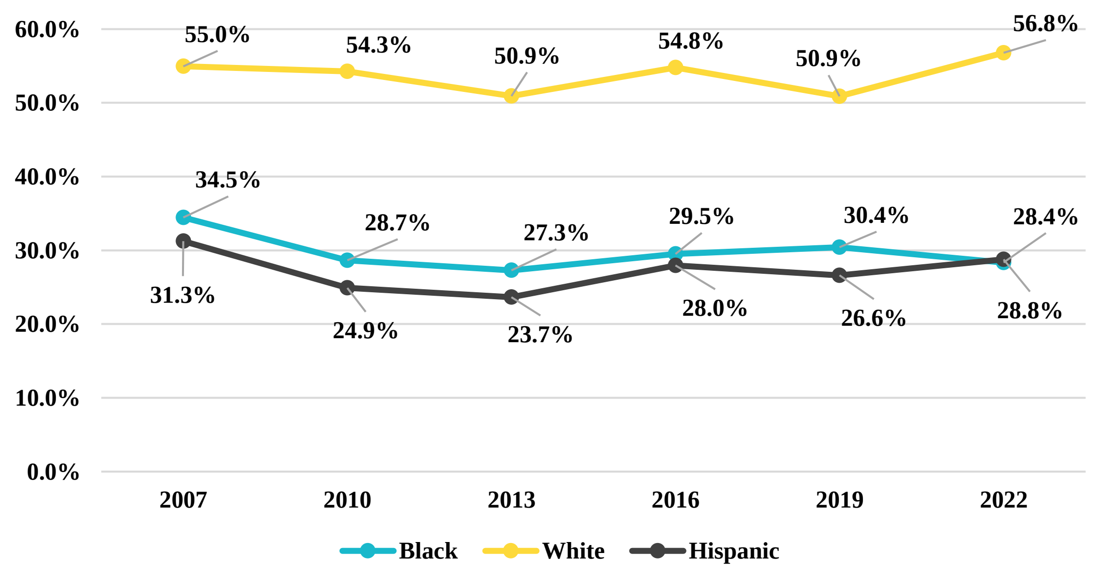
Source: ACLI analysis of the U.S. Federal Reserve Survey of Consumer Finances, *various years*.

Figure 5: **Percent of Households with Any Retirement Savings, 90th vs. 25th to 75th Total Income Percentiles, 2007-2022**



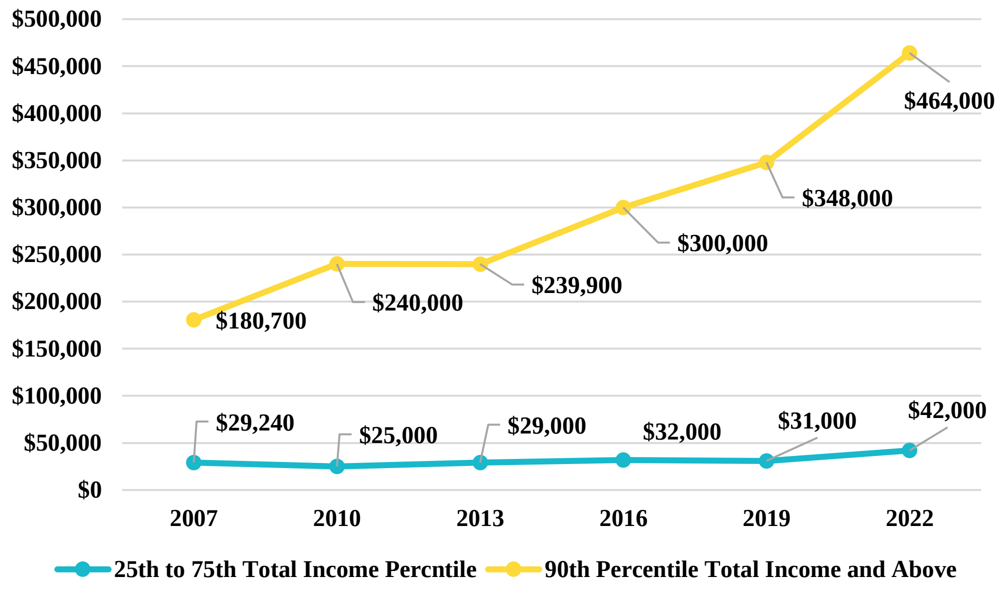
Source: ACLI analysis of the U.S. Federal Reserve Survey of Consumer Finances, *various years*.

Figure 6: **Percent of Households with Any Retirement Savings, by Race (2007 to 2022)**



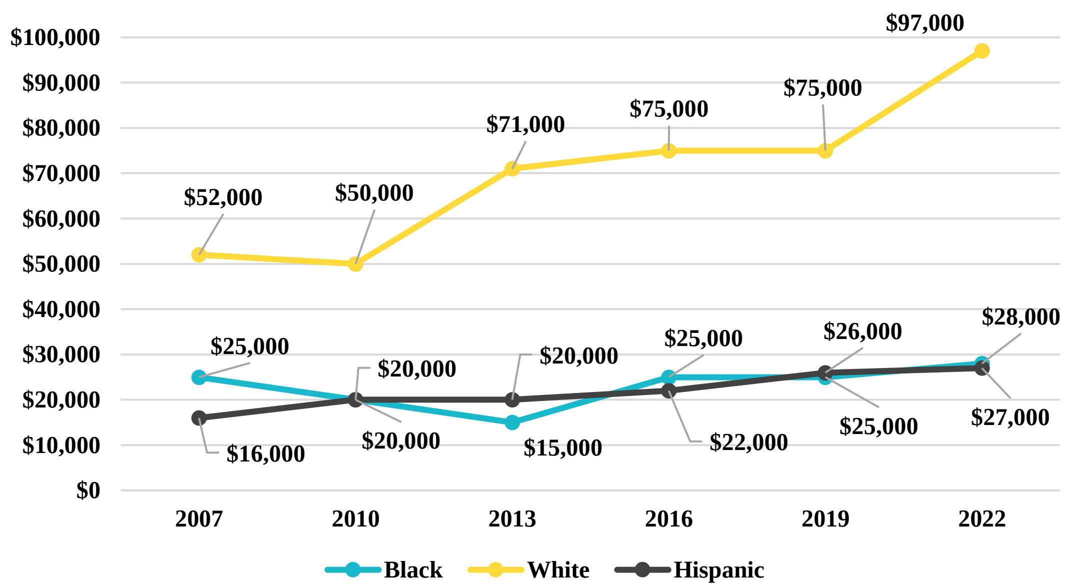
Source: ACLI analysis of the U.S. Federal Reserve Survey of Consumer Finances, *various years*.

Figure 7: Median Retirement Savings (Retirement Savers Only), 90th vs. 25th to 75th Total Income Percentiles, 2007-2022



Source: ACLI analysis of the U.S. Federal Reserve Survey of Consumer Finances, *various years*.

Figure 8: Median Retirement Saving (Retirement Savers Only), by Race (2007 to 2022)



Source: ACLI analysis of the U.S. Federal Reserve Survey of Consumer Finances, *various years*.