Allianz

Allianz Life Insurance Company of North America

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January 2, 2024

The Honorable Lisa M. Gomez
Assistant Secretary of Labor
Employee Benefits Security Administration
U. S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Comments Regarding the Fiduciary Investment Advice Proposal, RIN 1210-AC02; Proposed Amendments to PTE 2020-02, ZRIN 1210-ZA32; and Proposed Amendments to PTE 84-24, ZRIN 1210-ZA33

Dear Assistant Secretary Gomez:

I am writing to you on behalf of Allianz Life Insurance Company of North America and its wholly owned subsidiaries (together, "Allianz Life").[1] The purpose of this letter is to comment on:

- The proposed regulation redefining fiduciary investment advice (the "Proposed Rule");
- The proposed amendment to Prohibited Transaction Exemption ("PTE") 2020-02 ("Proposed 2020-02"); and
- The proposed amendment to PTE 84-24 ("Proposed 84-24") (collectively, the "Proposals").

We appreciate the opportunity to provide you with comments on the Proposals.

Sincerely,

Gretchen Cepek,

Senior Vice President and General Counsel

[1] Allianz Life is a subsidiary of Allianz SE ("Allianz Group"), a global financial services provider based in Germany.

Comments of
Allianz Life Insurance Company of North America and Subsidiaries

On the Fiduciary Investment Advice Proposal, RIN 1210-AC02; the Proposed Amendments to PTE 2020-02, ZRIN 1210-ZA32; and the Proposed Amendments to PTE 84-24, ZRIN 1210-ZA33

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I. BACKGROUND ON ALLIANZ LIFE

Founded in 1896 and based in Minneapolis, Minnesota, Allianz Life is a leading provider of retirement and protection solutions, including fixed index, variable and registered index-linked annuities in both the qualified and nonqualified markets, and life insurance for individuals sold through a network of approximately 86,000 independent financial professionals, including independent insurance agents, registered representatives, and investment advisor representatives.

We hold more than 1.6 million contracts, with over one million customers, and manage more than $172 billion in assets. In 2022, Allianz Life provided annuity distributions of $7.1 billion to its policyholders. Allianz Life is part of the Allianz Group, a global financial services provider based in Germany serving over 122 million retail and corporate clients in more than 70 countries.

We are committed to continue to work in the best interest of our policy and contract holders, literally insuring their financial security.

II. OVERVIEW OF ALLIANZ LIFE'S COMMENTS ON THE PROPOSALS

Allianz Life shares the Department's goal of ensuring that purchasers of annuities receive recommendations in their best interest but we disagree with the Department that the Proposals achieve this goal. In fact, we believe that the Proposed Rule's excessively broad scope and the Proposed PTE Amendments' excessively proscriptive requirements would undermine and conflict with the state and federal best interest regulations already in place. This would result in unnecessary and significant disruptions in the insurance marketplace that will increase costs and reduce access to annuities and other financial security products for the retirement investors who most need them.

The Department argues that the Proposals are needed to respond to the changes in the retirement marketplace, such as the shift from defined benefit plans to defined contribution plans. The current 1975 Rule, the Department asserts, is "under inclusive"[2] because it applies fiduciary status only where there is a mutual intent to rely on individualized advice provided on a regular basis.[3] Instead, the Department argues, the ERISA fiduciary standard must be expanded to apply beyond its traditional scope of advice to ERISA plans, to encompass even a single recommendation, to a single individual, of a single product, purchased with the proceeds of a distribution from an IRA, despite any other federal or state regulation already applicable to the recommendation.

We believe the Department's premise is flawed—the change in the retirement landscape is the very reason the Proposals are the wrong solution, as the rules they seek to expand were developed for a fundamentally different purpose. The Department seeks to apply common

[2] 88 Fed. Reg. 75,890 at 75,899 (November 3, 2023).

[3] 29 CFR §2510.3-21(c)(1)(ii)(B), "Renders any advice…on a regular basis to the plan pursuant to a mutual agreement, arrangement or understanding, written or otherwise, between such person and the plan or a fiduciary with respect to the plan, that such services will serve as a primary basis for investment decisions with respect to plan assets, and that such person will render individualized investment advice to the plan…" ("1975 Rule").

law trust principles, specifically tailored by Congress for trustees with asset management responsibility to employee benefit plans, to individual, non-plan accounts, even including non-discretionary sales recommendations.

This is not what Congress intended. As the U.S. Court of Appeals for the 5th Circuit wrote in vacating the Department's 2016 fiduciary rule and associated class exemptions (collectively, the "2016 Rule"),[4] "[h]ad Congress intended to abrogate both the cornerstone of fiduciary status—the relationship of trust and confidence—and the widely shared understanding that financial salespeople are not fiduciaries absent that special relationship, one would reasonably expect Congress to say so."[5]

Rather than addressing the changes in the retirement marketplace with new standards designed for the new reality, as both the National Association of Insurance Commissioner's ("NAIC") Model Rule #275 (the "NAIC Best Interest Rule")[6] and the Securities and Exchange Commission's ("SEC") Regulation Best Interest ("SEC Regulation Best Interest")[7] do, the Department seeks to apply even more broadly a fiduciary standard never designed to apply to sales activities. The Department's creativity, in again attempting to achieve what the 5th Circuit clearly ruled Congress did not intend, does not change the fundamental problem facing the Department—regulations must be consistent with and flow from the statute. The Department's goal embodied in these Proposals requires a statutory, not a regulatory, solution.

In addition to our own comments below, we have also participated in discussing and drafting comment letters submitted by the American Council of Life Insurers, the Committee of Annuity Insurers, the Insured Retirement Institute, and several other trade groups. We agree with and support the positions taken in those comment letters. <u>Accordingly, we call on the Department to rescind the Proposals and to consider our reasons below:</u>

- <u>*Retirement Savers Need More Access to Annuities; the Proposals, like the 2016 Rule, Would Result in Less Access:*</u>

For more than a decade, on a bipartisan basis, and without regard to which party controlled Congress or the Executive Branch, policymakers have recognized that there is a significant need to make lifetime income options available to retirement plan participants and IRA owners. Both the original SECURE Act and the SECURE 2.0 Act made significant changes to a variety of federal statutes to facilitate the use of annuities by retirement savers, both as options within plans and as retail products in IRAs.[8]

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[4] 81 Fed. Reg. 20,946 – 21,221 (April 8, 2016).

[5] U.S. Chamber of Commerce v. U.S. Department of Labor, 885 F.3d 360 at 376 (5th Cir. 2018) ("Chamber").

[6] Available at www.naic.org/store/free/MDL-275.pdf.

[7] 17 CFR § 240.151-1.

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

The switch from defined benefit retirement plans to defined contribution retirement plans has offered many benefits to the modern and highly mobile workforce, but it has also shifted risks, such as longevity risk or sequence of return risk, from employers to plan participants. Only annuities and other guaranteed insurance products can offer retirement savers security from these risks.

The Proposals run counter to these needs and counter to this clear public policy trend—rather than assisting retirement savers in accessing these needed products, they will make it harder and more expensive for far too many consumers to access these important guarantees.

- *The Economic Analysis Does Not Properly Evaluate the Proposal's Negative Effects on Annuities and Insurance and Dismisses the Negative Effects of the 2016 Rule.*

We believe the Department is inappropriately dismissing or discounting these very real concerns, especially with respect to the insurance and annuity marketplace. The academic studies on which the Department relies in calculating the theoretical benefits of the Proposals largely are based on the investment returns of securities under different fee scenarios. These studies do not reflect the annuity and insurance marketplace in which a fundamentally different product—an insurance guarantee for a premium—is being purchased.

We question whether the Department is conducting a thorough analysis of the very significant effects on insurance producers (most of whom are small businesses), on insurance carriers, and on annuity purchasers. Tellingly, the introduction to the Department's economic analysis concludes with the statement that "[w]hile extending fiduciary duty to more entities will generate costs, the Department believes any new compliance costs will not be unduly burdensome as the proposal broadly aligns with those compliance obligations imposed under the Investment Advisers Act and the SEC's Regulation Best Interest on investment advisers and broker-dealers, respectively, and simply expands them to larger portions of the retirement market."[9] This summary conclusion completely ignores the substantial impact on insurance producers and consumers, the group likely most affected by the Proposals.

In an equally remarkable statement near the end of the economic analysis, the Department asserts that it "…has carefully considered the regulatory landscape in the states and worked to ensure that its proposed regulations would not impose obligations on advisers that are inconsistent with their responsibilities under state law, including the obligations imposed in states that based their laws on the NAIC Model Regulation."[10] As we will explain in more detail below, this statement is simply not true. The fiduciary obligation imposed by the Proposed Rule directly conflicts with the best interest standard applicable to sales professionals. The many new conditions and limits on business models and compensation structures imposed through the Proposed 84-24 and

[9] 88 Fed. Reg. at 75,913.

[10] *Id.* at 75,977.

2020-02 exemptions are directly in conflict with the requirements of state regulation under the NAIC Best Interest Rule.

What's more, even as the Department embraces academic studies that make predictions and extrapolations from data of dubious relevance to annuities and insurance products, the Department dismisses outside studies assessing the real-world response to the 2016 Rule that resulted in loss of consumer access to products and services.

For example, a 2017 Deloitte study of 21 financial institutions that represented 43% of U.S. financial advisors found that 53% had already limited or eliminated access to advice affecting 10 million accounts and $900 billion.[11] Rather than being taken aback by the magnitude of these numbers—the direct result of the 2016 Rule—the Department's economic analysis seems to attempt a positive spin on the data, noting that "…nearly half reported that they maintained advice for all of their brokerage customers…"[12] In another example, a study that found re-imposing the 2016 Rule would reduce retirement savings of individuals with incomes below $100,000 by $140 billion over 10 years[13] was dismissed by the Department as "…not applicable to the current proposal because it assumes reinstatement of the 2016 Rulemaking, which was markedly different than the current proposal."[14] As we will explain in more detail below, the Proposals here are not "markedly different" in their effects, and would, in fact, have an even broader effect than the 2016 Rule. The Department simply ignores statement of fact noted in the 5th Circuit opinion vacating the 2016 Rule that the Rule had "…already spawned significant market consequences, including the withdrawal of several major companies…from some segments of the brokerage and retirement investor market. [Other c]ompanies…have limited the investment products that can be sold to retirement investors."[15]

Insurance professionals already must invest significant amounts of time in understanding the products they recommend, which offer a wide array of choices and coverages. They also must spend a considerable amount of time with each prospective purchaser to gather necessary information and develop a best interest recommendation. The Proposals will only increase the cost, complexity, and legal risks of these sales efforts, even as the Proposals impose arbitrary restrictions on which producers are permitted to receive what compensation. The direct effect of this is that more consumers with small amounts of money would be left behind as costs to service them rise.

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[11] "The DOL Fiduciary Rule: A Study in How Financial Institutions Have Responded and the Resulting Impacts on Retirement Investors," Deloitte, (August 9, 2017).

[12] 88 Fed. Reg. at 75,946.

[13] "Analysis of the Effects of the 2016 Department of Labor Fiduciary Regulation on Retirement Savings and Estimate of the Effects of Reinstatement," Hispanic Leadership Fund and Quantria Strategies, LLC, (November 2021).

[14] 88 Fed. Reg. at 75,946.

[15] *Chamber* at 368.

- *<u>The Department's Improper Administrative Process Denied the Public the Meaningful Opportunity to Comment Protected by the Administrative Procedure Act:</u>*

The Department has demonstrated a surprising disregard for ensuring the public has an opportunity to understand the far-reaching implications of the Proposals and to provide meaningful comments to the Department. While the 60-day comment period may be the minimum required, it was the shortest period the Department has offered in the long history of rulemakings related to this topic, and it fell across an unusual number of federal as well as culturally and religiously significant holidays making it very difficult to organize a timely review and response.

Further, in an unprecedented move, that we believe violates the requirements of the Administrative Procedure Act, the Department insisted on holding two days of public hearings on the Proposals several weeks before the comment period even ended. Put simply, the Department offered no alternative but to show up to discuss a rule before the minimum comment period had even expired. This prevented witnesses from fully considering the Proposals before testifying and prevented the Department from gathering informed analysis through the hearing process.

- *<u>Best Interest Standards Already Apply:</u>*

The Proposals are unnecessary in the first instance because annuity sales are already subject to best interest standards of care applicable to financial professionals who are licensed to recommend them under state and/or federal law. The NAIC Best Interest Rule has already been adopted by more than 40 states, and we anticipate that every state will have adopted the NAIC Best Interest Rule or that state's own best interest standard for annuity sales before the end of 2024. The SEC Regulation Best Interest requires broker dealers to make best interest recommendations, including when recommending annuities that are registered securities. Both of these rules were adopted after the 5th circuit vacated the Department's 2016 fiduciary rule and associated class exemptions. Given the negative comments by insurance regulators provided even before the submission of formal comments, and given that the Proposals are in direct conflict with state insurance regulation, we believe the Department should engage in a meaningful dialogue with the NAIC and individual state insurance commissioners to discuss these issues as it considers whether to withdraw the Proposals.

- *<u>Consumers Benefit from Choices Among Fiduciary and Non-Fiduciary Service Models:</u>*

Both the NAIC and the SEC best interest rules were adopted following an extensive and deliberate process in which the primary regulators of the conduct of insurance professionals and the primary regulator of the conduct of securities professionals determined that consumers benefit from the preservation of a non-fiduciary sales model. Both regulators expressly decided that a best interest standard of care for recommendations associated with sales activity would best protect consumers and that consumers are not well-served by a fiduciary-only model of advice. The fact that more than 50 state and federal regulatory bodies, representing a variety of political affiliations, all of which have as their primary

mission to protect consumers by regulating the conduct of financial professionals, independently reached the conclusion that a fiduciary-only regulation does not serve consumers well, should give the Department pause. The Proposals would do exactly the opposite, imposing a fiduciary standard on sales recommendations never intended by Congress or state lawmakers to be fiduciary conduct.

- *<u>The Proposals are Premised on a Flawed Understanding of Insurance Products and State Insurance Regulation:</u>*

The Proposals appear to be premised on the assumption that the state regulation of annuities provides inadequate consumer protection, and that commission or transaction-based service models common in sales transactions are harmful to consumers and must be more strictly limited than other forms of compensation, as the Department would do in the Proposed 84-24. This premise is flawed and very concerning. We note that the NAIC responded to the release of the Proposals expressing concerns as well, writing, "[w]e fundamentally disagree with the White House's characterization of state consumer protections for annuity products. The White House press statement that [state] oversight…provides 'inadequate protections and misaligned incentives' suggests either ignorance of, or willful disregard for, the hard work of the 40 states and counting that have worked diligently to enhance protections for consumers by adopting the NAIC's [Best Interest Rule]."[16] Further, as the SEC recognizes with respect to dual registrants that can recommend either a fee-based advisory account or a commission-based brokerage account, different investors are better served by one model or the other, leading to potential violations for recommending the model that disadvantages the investor.[17]

- *<u>The Proposed Rule Improperly Applies a Fiduciary Standard to Non-Fiduciary Sales Recommendations:</u>*

As the 5th Circuit noted in vacating the 2016 Rule, the Department misinterpreted the scope of statutory text in ERISA Sec. 3(21). Congress, the court ruled, never intended the fiduciary "special relationship of trust and confidence" to include sales recommendations made by insurance agents, and the 2016 Rule "improperly dispenses with this distinction."[18] The Proposals suffer from the same fatal flaw—they have nearly an equally broad scope as

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[16] "State Insurance Regulators Work to Protect Consumers Who Buy Annuities," National Association of Insurance Commissioners press statement, November 1, 2023, at https://content.naic.org/article/state--isurance-regulators-work-protect-consumers-who-buy-annuities-naic-releases-statement-dol/.

[17] <u>See</u>, e.g., "Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Adviser Care Obligations," Question 20(b) (*"where a retail investor holds both brokerage and advisory accounts, the staff believes a dually registered firm or dually licensed financial professional should consider whether a recommendation of an investment or investment strategy is better suited for the investor's brokerage account or advisory account."*), available at https://www.sec.gov/tm/standards-conduct-broker-dealers-and-investment-advisers#_ftnref78; and "2024 Examination Priorities, Division of Examinations," at 14, (*"The Division will also continue to focus on dual registrants and examinations will encompass…account allocation practices (e.g., allocation of investments where an investor has more than one type of account) and account selection practices (e.g., brokerage versus advisory and wrap fee accounts."*), available at https://www.sec.gov/files/2024-exam-priorities.pdf.

[18] *Chamber* at 372.

the 2016 Rule in that they would clearly capture sales recommendations that Congress never intended to be fiduciary recommendations. The scope is in some respects even more broad, in that the Proposed Rule does not retain exclusions from the 2016 Rule, such as recommendations made between financial professionals. The Department materially underestimates the disruptive effect the Proposals will have on financial professionals who are not currently operating as fiduciaries, and who must now contend with an entirely new and different federal regulatory regime.

- *The Proposed Rule Asserts a Fiduciary Relationship is Established by Conduct Required by Non-Fiduciary Sales Regulations:*

The Department's Proposed Rule purports to be "…much more narrowly tailored than the 2016 Final Rule,"[19] because it focuses on the conduct of the person making a recommendation. The Department asserts that its new formulation of the fiduciary "test" focuses on whether a special relationship of trust has been established by the interaction between the financial professional and the client. However, the elements of the conduct the Department cites as establishing a fiduciary relationship are simply those of an ordinary sales relationship. An insurance producer does not establish a fiduciary relationship simply because:

> (1) the producer routinely makes recommendations as part of her job (recommending a product is inherent in any sales activity, and recommending products to other clients seems unrelated to the relationship between the producer and a specific client),
>
> (2) the producer individualizes the recommendation to the client (gathering and considering the specific client's individual information in developing a sales recommendation is a requirement of state and federal non-fiduciary regulations governing annuity sales recommendations), and
>
> (3) the client may reasonably rely on the recommendation as being made in the client's best interest (again, a best interest recommendation is a requirement of state and federal non-fiduciary rules governing sales recommendations).

The Department cannot assert that it is consistent with the 5th Circuit's ruling to use compliance with elements of a non-fiduciary sales regulation (such as SEC Regulation Best Interest or the NAIC Best Interest Rule) as establishing exactly the sort of fiduciary relationship those sales regulations expressly declined to create.

- *The Proposed Rule Improperly Applies a Fiduciary Standard to ERISA Title II Plans it Has No Authority to Impose:*

The Department again attempts in the Proposals, as it unsuccessfully did in the 2016 Rule, to establish a fiduciary standard of care for Title II IRAs that it has no authority to impose directly. The fact that the prohibited transaction rules in Sec. 4975 of the Code apply to IRAs do not

[19] 88 Fed. Reg. at 75,901.

confer on the Department the authority to regulate the conduct of financial professionals making recommendations to IRAs when Congress itself declined to establish a Title II-specific standard of care or cause of action for such persons. Congress intended the primary regulator of the financial professional to govern its conduct with respect to Title II plans, just as it would a consumer transaction not involving an IRA.

- *The Proposed Rule Would Subject Insurance Producers and Carriers to New Litigation Risks and Causes of Action:*

While the Department is technically correct that the Proposals, unlike the 2016 Rule, do not expressly create a "new" cause of action, the Department does not take into account that the Proposals would nonetheless significantly increase the litigation risks facing insurance producers and carriers selling annuities. The effect of the Proposals is to make sales recommendations under state law that were never before subject to ERISA into fiduciary recommendations under ERISA. Thus, where those recommendations involve a Title I plan—such as in connection with a rollover recommendation—the existing cause of action in Title I is now applicable to the insurance producer and the co-fiduciary insurance carrier as a new liability risk that did not previously exist. Further, because these parties have now acknowledged fiduciary status in writing, it is likely that this written acknowledgment will be used in other contexts, such as to support state law causes of action under different bodies of law. The Department also has not considered the fiduciary insurance issues presented by the Proposals. Insurance producers likely do not have any professional liability coverage that will cover fiduciary conduct. Many thousands of individuals and small business entities would have to seek new professional insurance that will address their status as fiduciaries.

- *The Proposals are Fatally Vague with Respect to the Fiduciary Status of Insurance Intermediaries and Provide No Clear Exemptive Relief:*

Insurance intermediaries such as Independent Marketing Organizations ("IMOs") or Field Marketing Organizations ("FMOs") play a significant role in the distribution, training, and sales support of producers and insurance carriers. Some of these roles may expose these intermediaries to fiduciary status under the Proposed Rule, such as when assisting a producer in evaluating products and carriers in connection with a specific retirement investor. If these actions are considered fiduciary, the Department has not provided any clearly applicable exemption, given the strict requirements of Proposed 84-24 and Proposed 2020-02. The Proposals, premised as they are on a securities model in which broker-dealers and RIAs control the actions of their representatives, do not appear to take into account the many roles intermediaries play in the state insurance marketplace, in which many producers are independent of insurance carriers and not controlled by them. This key difference in state insurance law that offers consumers a choice between captive agents and independent producers has no ready analogue in securities law. Intermediaries assist independent producers in training, compliance, marketing, product selection and many other roles that insurance carriers generally cannot fulfill because of the producer's independence, and the Proposals do not take this key difference into proper account.

- *The Proposed Rule Improperly Applies to Recommendations Regarding Assets Not Held in Plans:*

The Proposed Rule defines "recommendation" in Sec. 2510.3-21(f)(10)(i) so broadly as to include a recommendation regarding the use of assets "…after the securities or other investment property are rolled over, transferred, or distributed from the plan or IRA." However, ERISA Sec. 3(21)(A)(ii) applies to "…investment advice for a fee…with respect to any moneys or other property of such plan…" [emphasis added]. As the Department's authority under ERISA is limited to assets of the plan, the Department can have no jurisdiction regarding recommendations related to the proceeds of a distribution from a plan.

- *Proposed 84-24 Imposes Vaguely Defined New Producer Appointment and Retroactive Review Requirements, Duplicating Role of State Regulators:*

Proposed 84-24 imposes many new supervisory requirements on insurance carriers as a condition of using the exemption. Among these, carriers must adopt a prudent process for reviewing each independent producer that will sell their products to identify those producers who (1) "have failed or are likely to fail to adhere to the Impartial Conduct Standards," or (2) "who lack the necessary education, training, or skill." Proposed 84-24 Sec. VII(c)(2) states that the process must consider specific issues, and that the carrier must document the initial review and conclusion, as well as conduct and document annual retrospective reviews thereafter for every independent producer selling their products.

In imposing these requirements, the Department appears to ignore the fact that state regulators already mandate licensing and training requirements, and conduct disciplinary efforts against producers who violate the rules. In addition, carriers already must follow an appointment process that ensures the fitness of producers selling their products. The Department does not explain why it believes these state-mandated requirements are not sufficient to prevent or detect producers who do not follow the rules and instead choose to create its own alternative regime that differs from the state processes.

In addition to the general waste and burden of this annual retroactive review, we object to the vague standards. We are not clear how our policies and procedures are supposed to detect someone who is "likely to fail" to follow the rules in the future. Further, while it is clear how to assess whether a producer has met the training requirements, we are not sure how to assess whether they have the "necessary education…or skill" as these subjective terms are not defined. How is education distinct from training? What are the necessary skills, and how does a prudent process assess them? The burden is clear, but the means by which to comply are not.

- *Proposed 84-24 Arbitrarily Treats Similarly Situated Independent Producers Differently:*

Proposed 84-24 limits use of the exemption based on a new definition of "independent producer" that arbitrarily treats some independent producers differently than other independent producers, despite the fact that their ability to recommend the products of multiple carriers is the same. Though independent producer is a term with a clear meaning in insurance regulation, referring to an insurance professional who represents multiple carriers and recommends the product that is in

the best interest of the client, regardless of the carrier, the Department introduced a new definition of independent producer that arbitrarily treats some independent producers differently than other independent producers. There is no rational basis for this distinction—both producers meeting the Department's new definition and those not meeting it operate in the same way, and serve their clients in the same way.

- *Proposed 84-24 Arbitrarily Limits Forms of Compensation for Similarly Situated Insurance Producers:*

Proposed 84-24 does not permit an insurance producer to receive any compensation other than an up-front, renewal or trail commission. By contrast, current PTE 2020-02 permits an insurance producer to receive reasonable compensation without regard to form. Thus, the exemption arbitrarily singles out only some independent producers—those recommending a non-security insurance product, who are neither an employee nor a statutory employee of any carrier—for treatment different than that of other independent producers or carrier-affiliated insurance producers. This arbitrary and very specific definition distorts the market and will stifle innovation in business models and fees. This will restrict competition that would ordinarily take place in an evolving marketplace. The Department provides no explanation for this arbitrary distinction other than that its interpretation is "consistent" with the history of the existing exemption's coverage of commissions. Further, the Proposed 84-24 arbitrarily restricts a carrier's use of educational conferences. Targeted conferences help train producers in a more tailored fashion, growing their knowledge where it is most needed and most impactful. While the Department is correct that "training is a necessary component of providing Best Interest advice," it does not follow that, in the Department's words, "educational opportunities should be offered equally to all."[20] Different financial professionals may benefit from different, targeted training based on a wide range of factors, including their sales history and existing familiarity with the products. Yet, the Proposed exemption requires carriers to employ a one-size-fits-all approach to educational conferences by prohibiting them from targeting certain producers based on sales volume. The Department offers no reasonable explanation for this very proscriptive requirement.

- The Eligibility Provisions in Proposed 84-24 and Proposed 2020-02 Arbitrarily Permit the Department to Impose 10-year Bans without Sufficient Due Process:

The importance of an exemption cannot be overstated. If the Department had the authority it asserts in the Proposals, compliance with an exemption would be necessary to be able to serve a roughly $26 trillion marketplace. However, the new eligibility criteria applicable to insurance producers, insurers and their foreign and domestic affiliates could result in a ten-year denial of access to this marketplace due to the unrelated actions of any affiliate (even foreign ones), or the Department's determination that a producer or insurance carrier has not followed the exemption rules well enough. The remedy is an ill-defined limited ability to contest the Department's de facto 10-year ban. While this provision should not be part of any final grant of exemption, if the

[20] 88 Fed. Reg. at 76,011.

Department does move forward, it should apply prospectively to avoid significant unintended consequences.

The 60-Day Effective Date for the Proposals Is Simply Unworkable

The Department proposes that the new fiduciary definition and the associated class exemption amendments would go into effect only 60 days after publication in the Federal Register. This is unreasonable—and quite simply, impossible—given the magnitude of the changes proposed. This is especially true for insurance producers and carriers, whose traditional state-regulated sales activities would be improperly converted into fiduciary advice, and subject to a new, extensive, detailed, and burdensome federal regulatory regime. Past Department rulemaking projects have provided far longer implementation periods including two years for firms adhering to PTE 2020-02.

In summary, we are concerned that the Proposals are based on an incomplete understanding of how insurance products, including annuities, are designed, regulated, and distributed. The Department's flawed assumptions about conflicts related to commissions and about the inadequacy of state regulation of the conduct of insurance professionals have resulted in Proposals that would ultimately harm the very persons they are intended to help. This negative effect would be especially pronounced for retirement investors with only small amounts of retirement savings, as advisory account minimums and minimum premium requirements would need to rise to cover the costs of conflicting regulations and new liability risks facing financial professionals.

III. SPECIFIC CONCERNS REGARDING THE PROPOSED RULE DEFINING FIDUCIARY INVESTMENT ADVICE

As discussed above, the Proposed Rule is fundamentally flawed in that it would apply a fiduciary standard to sales recommendations never intended by Congress to be fiduciary. The Proposed Rule is therefore inconsistent with the 5th Circuit's decision vacating the 2016 Rule, despite the Department's efforts to distinguish the Proposed Rule from the 2016 Rule by focusing on the specific actions of the financial professionals. However, as those identified actions merely comprise ordinary sales activity, the Proposed Rule fails on the same grounds.

A. Listing Sales Activities as Conduct Establishing a Fiduciary Relationship Fails to Abide by the 5th Circuit's Ruling

While the Department has made an effort to distinguish the Proposed Rule from the 2016 Rule in how it describes the new fiduciary "test," the distinction is without any material difference. Recommendations from sales professionals would be fiduciary advice just as often under the Proposed Rule as under the 2016 Rule.

Despite these efforts to distinguish the Proposed Rule, the Department is nonetheless quite open about its intent to capture sales activity despite the statute and the 5th Circuit decision. As stated in the Preamble, "More fundamentally, the Department rejects the purported dichotomy between

a mere ‘sales’ recommendation to a counterparty, on the one hand, and advice, on the other, in the context of the retail market for investment products.”[21]

The challenge for the Department is that the “purported dichotomy” it “rejects” is one of the central issues in the 5th Circuit’s decision to vacate the 2016 Rule. While the Department seeks to take conduct that is sales activity—making individualized recommendations in the client’s best interest—and assert that it constitutes a fiduciary’s special relationship of trust, this assertion also fails because the conduct cited by the Department is, in fact, required under the NAIC Best Interest Rule and the SEC Regulation Best Interest. As these standards were adopted expressly instead of a fiduciary standard of care,[22] compliance with their requirements can hardly be used to demonstrate that a fiduciary relationship exists.

B. The Proposed Rule Again Misinterprets the Statute

ERISA Sec. 3(21)(A)(ii) defines an advisory fiduciary as a person who “renders investment advice for a fee or other compensation direct or indirect... with respect to any moneys or other property of such plan.” The 1975 Rule clarified, in a manner the 5th Circuit found consistent with the statute, that such advice must be rendered “on a regular basis pursuant to an agreement...that such advice will form the primary basis for investment decision making.” In other words, an advisory fiduciary is distinguishable from an insurance producer by the fact that the fiduciary provides advice on a “regular basis” and this advice is the basis for the investment decision, unlike the sales agent, who affects individual sales transactions, rather than providing overarching investment advice for multiple assets, and the fiduciary’s advice is the basis for the investment decision.

The Proposed Rule, however, again eliminates this distinction and thus misinterprets the meaning of rendering advice just as did the 2016 Rule. The Department’s assertion that the 1975 Rule is under inclusive and that a less detailed rule than the 1975 Rule with its 5-Part test could be consistent with the 5th Circuit’s ruling—a position articulated by DOL officials during the recent administrative hearing[23]—does not support the conclusion that the Proposed Rule is such a finely-tuned test. In fact, so far as we can tell, literally any sales recommendation that complies with SEC Regulation Best Interest or the NAIC Best Interest Rule would be a fiduciary recommendation under the Proposed Rule.

[21] 88 Fed. Reg. at 75,907.

[22] 84 Fed. Reg. 33,318 at 33,322 (July 12, 2019). “We have declined to subject broker- dealers to a wholesale and complete application of the existing fiduciary standard…we believe (and our experience indicates), that this [fiduciary] approach would significantly reduce retail investor access to differing types of investment services and products, reduce retail investor choice in how to pay for those products and services, and increase costs for retail investors of obtaining investment recommendations.”

[23] *See*, Transcript of “Public Comment Hearing, Retirement Security Rule: Definition of an Investment Advice Fiduciary,” pgs. 264-270, December 12, 2023 regarding comments of EBSA Deputy Assistant Secretary Tim Hauser to Mr. Jason Berkowitz, Investment Retirement Institute.

C. The Proposed Rule is Even More Expansive than the 2016 Rule Because it Does Not Contain Specific Exclusions, Such as Recommendations Between Financial Professionals, or Certain Salaried Employees, Such as Call Center Workers

Unlike prior versions of the fiduciary regulation, the Proposed Rule has no exclusions for sophisticated counterparties to a recommendation. This is especially troubling with regard to wholesaling activities in which insurance carriers recommend their products to insurance producers and securities professionals, and with regard to the assistance insurance intermediaries provide to insurance producers.

Under the Proposed Rule, it potentially could be considered fiduciary advice to make a recommendation to another financial professional who is, in turn, a fiduciary to a plan or IRA. As there is no exclusion for discussions between financial professionals, any conversation that otherwise meets the very broad criteria in the Proposed Rule would require an exemption.

While the Department notes that a generalized recommendation by a wholesaler touting a new product likely does not meet all the criteria, that could change in an instant if the producer turns the discussion to a particular client, and asks how the new product would fit that specific client's needs. Similarly, insurance intermediaries often assist insurance producers in reviewing which carriers and products might be appropriate for a particular client based on the client's individual characteristics.

Neither of these examples are the kind of "retail" recommendation to a retirement investor about which the Department appears to be primarily concerned, but both could be captured by the broad Proposed Rule. If these do become fiduciary recommendations, it is quite possible that neither Proposed 84-24 nor Proposed 2020-02 could be relied upon, as neither the wholesaler nor the insurance intermediary may be able to fit into the narrow confines of the exemptions.

Further, many insurance companies and their affiliated principal distributors operate on a wholesale basis, do not make specific product recommendations to consumers, and do not receive transaction-based compensation. These companies, however, do maintain internal customer service and phone center personnel, who may assist prospective and current contract owners with product information and respond to administrative questions including questions pertaining to executing rollovers and distributions. These personnel do not receive transaction-based compensation.

The Proposed Rule should clarify that these customer service and phone center employees are not fiduciaries as they are compensated by salary, do not receive "variable compensation" within the meaning of the Proposed Rule, and are not being compensated for providing recommendations.

While we urge the Department to rescind the Proposals as a whole, we believe targeted exclusions from what is considered fiduciary advice that address situations like these are essential if the Department chooses to promulgate a final rule.

D. The Proposed Rule's Extension of Fiduciary Standards to Recommendations Related to Title II Plans and to Reinvestment of Distributions Exceeds the Department's Authority

The Department asserts that the definition of fiduciary investment advice applies to Title II plans in the same manner as to Title I plans because both are subject to the prohibited transaction rules in Sec. 4975 of the Tax Code. While they are both subject to that Code section, ERISA does not provide the same authority to the Department to regulate Title II plans. Specifically, while Title I establishes a standard of care specifically applicable to ERISA plan fiduciaries and empowers the Department to stand in the shoes of plan fiduciaries and participants to sue to enforce their rights, there is no corresponding standard of care, cause of action, or grant of enforcement authority to the Department in Title II. As the 5th Circuit ruled in vacating the 2016 Rule, "Title II did not authorize DOL to supervise financial service providers to IRAs in parallel with its power over ERISA plans."[24]

The court rejected the Department's assertion that redefining fiduciary for the purposes of applying the prohibited transaction rules under Code Sec. 4975 allowed it to impose conditions on the conduct of advisors and salespeople to IRAs that it could not impose directly. This, the court wrote, was improperly requiring "…insurance salespeople [to] assume obligations of loyalty and prudence only statutorily required of ERISA plan fiduciaries"[25] under Title I.

The Proposed Rule operates in exactly the same manner as the vacated 2016 Rule and therefore exceeds the Department's authority to regulate. The conduct of an insurance producer selling an annuity in connection with an IRA transaction is subject to state law, and Title II does not authorize the Department to assert a simultaneous fiduciary standard.

IV. SPECIFIC CONCERNS REGARDING THE PROPOSED 84-24

The Department indicates that it decided to retain PTE 84-24 due to specific concerns about the unique nature of the state insurance marketplace and the relationship between producers and carriers that prevents PTE 2020-02 from working for many insurance producers or insurance carriers. However, the resulting Proposed 84-24 is so narrowly and arbitrarily constrained that it would fail to provide meaningful relief, an outcome that ultimately harms retirement investors.

A. A Universal Insurance Exemption is Necessary—the Department should Retain PTE 84-24 in Its Current Form

The reality is that the state-regulated insurance marketplace is fundamentally different than the securities marketplace. The role of the independent producer does not have an analogue in securities law, and insurance intermediaries fulfill a wide array of functions the Department does not understand, as it does not regulate insurance markets.

It is not "regulatory arbitrage" to have a separate exemption designed for the insurance marketplace—it is wise and efficient regulation based on material differences. The Department

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[24] *Chambers* at 364.

[25] *Id.* at 382.

should not attempt to create false distinctions between different types of insurance producers and products, further distorting the marketplace in ways the Department cannot predict.

We believe that no change is necessary to the current version of PTE 84-24, but if the Department insists on making amendments, it should apply a common standard for all insurance professionals, and not draw false distinctions among producers, products and compensation.

B. Eligibility Provisions in Proposed 84-24 and 2020-02 are Unnecessarily Broad, Permitting the Department to Impose a 10-Year Marketplace Ban with Limited Due Process

The Department proposes to insert new eligibility criteria applicable to insurance producers, insurance carriers and their foreign and domestic affiliates in Sec. VIII of the Proposed 84-24, and to dramatically expand the eligibility criteria currently applicable to financial professionals, financial institutions and their foreign and domestic affiliates in Sec. III of the Proposed 2020-02.

We are concerned that the over breadth of the new eligibility criteria will have significant unintended consequences, such as denying retirement investors access to insurance producers and annuities for reasons completely unrelated to the quality of the assistance they are receiving. Further, the two exemption Proposals provide limited due process rights for those declared ineligible, such as limiting discussions with the Department to a single meeting.

Finally, as a practical matter, the inclusion of nearly identical criteria in both Proposed 84-24 and Proposed 2020-02 means that there likely are no alternative investment advice exemptions available to an ineligible person. While the Department suggests that an ineligible person could apply for an individual retroactive exemption under procedures described at 29 CFR 2570.35(d), the Proposals fail to consider that the Department has issued a pending proposed regulation amending these procedures. The proposed amendments to these procedures state that the Department "ordinarily will not consider" exemption applications from such persons.[26]

At a minimum, if the Department does grant final class exemptions for Proposed 84-24 and Proposed 2020-02 containing new eligibility criteria, the Department must clarify that the eligibility criteria apply prospectively from the date the class exemptions are granted. To do otherwise could have disastrous and unanticipated consequences on the services and service providers immediately available to retirement investors.

For example, we do not believe anyone can currently estimate how many foreign "affiliates" of covered entities may have been convicted in the past 10 years for a foreign offense "substantially equivalent" to the newly broadened list of offenses. Prospective application avoids this regulatory uncertainty. We are encouraged by recent public comments from Principal Deputy

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

Assistant Secretary Khawar suggesting that the Department intends prospective application, and we urge that prospective application be expressly stated in any final grant of exemption.[27]

C. Proposed 84-24 Arbitrarily Limits Forms of Compensation for Similarly Situated Insurance Producers:

Both current and Proposed 2020-02 permit a financial professional, including an insurance producer, to receive any form of reasonable compensation. The exemption does not attempt to select winners and losers among business models in this regard in PTE 2020-02.

By contrast, Proposed 84-24 severely limits the compensation permitted to an insurance producer. Any other compensation is prohibited, other than an up-front, renewal or trail commission. As the Department has further restricted which insurance producers are eligible for Proposed 84-24, the Department is directly and arbitrarily deciding what compensation is permissible for certain producers but not for others. Almost all of the other conditions—such as disclosure and conflict mitigation requirements—are essentially the same under the two exemptions, and the Department provides no explanation for this arbitrary distinction other than that its interpretation is "consistent" with the history of PTE 84-24. There is no rational basis to support this arbitrary and capricious limitation on compensation for some insurance producers but not others.

V. Specific Concerns Regarding the Proposed 2020-02

Despite the fact that PTE 2020-02 is a new exemption, the Department is proposing material amendments that increase cost and complexity. We do not believe any amendments are necessary, but if the Department does proceed to amend the exemption, it should codify certain guidance related to use of the exemption by insurance professionals.

A. PTE 2020-02 Is Not Ripe For Costly Amendment—It was Only Recently Fully Implemented and Its Impact Has Yet to Be Accurately Measured

As its name indicates, PTE 2020-02 was published barely three years ago on December 18, 2020, and did not become initially effective until two years ago.[28] Further, material parts of PTE 2020-

[27] "…there was a lawyer who was looking at this and said, as I read this [the eligibility provisions in PTE 84-24 and PTE 2020-02], what's going to happen is, all of the entities that you've provided special relief for pursuant to your QPAM reg are now going to be ineligible to rely on 2020-02 because they had a conviction and that's kind of it. They're out. They're now barred.

That isn't the way we read the language, that isn't our- certainly not our intent. It's also not the way we think the language is structured. What we intended to write and what we think we wrote was a much more prospective approach, that once the exemption is finalized, you should try and make sure you get your convictions in before we finalize the exemption because afterwards, it's going to have an impact. But there's not that kind of retrospective applicability to that conviction issue." Transcript of Comments made at the Practicing Law Institute, New York City, November 14, 2023 by Principal Deputy Assistant Secretary Ali Khawar.

[28] 85 Fed. Reg. 82,798 at 82,845 (Dec. 18, 2020), referencing the DOL Field Assistance Bulletin No. 2018-02.

02 were not fully implemented until June 30, 2022.[29] As a result, the regulated community and the Department have had less than 19 months of full implementation and enforcement of PTE 2020-02.

Put simply, proposing material new conditions to the exemption, such as the eligibility provisions discussed above and the additional disclosure and reporting requirements proposed, comes at a cost to retirement investors to implement when their necessity and effect is unknown.

More time should pass before the Department proposes changes to PTE 2020-02. The industry will have more time to implement current PTE 2020-02 and adjust business practices accordingly, rather than putting in efforts to implement regulatory changes in the Proposal. It will give the Department more time to receive and review self-correction notifications summarizing the most common failures and what changes, if any, are truly needed. The Department has failed to provide data of any significant concern with current PTE 2020-02, and this part of the Proposals should be withdrawn.

B. The Amendments in Proposed 2020-02 Should Specifically Address Issues Unique to Its Application to Insurance, Such as Codifying FAQ 18 Guidance.

In the event that the Department does not withdraw the revisions in Proposed 2020-02, the revisions to Proposed 2020-02 should recognize the unique aspects of its application to the insurance industry. While guidance documents and Preamble statements can be useful, issues of central importance and compliance, such as the limitation of the carrier's review to its own products described in FAQ 18, should be codified in the text of the exemption.

In Frequently Asked Question 18 related to the current PTE 2020-02, the Department clarified that the scope of policies and procedures, including supervision of an independent producer, does not require policies and procedures regarding "unrelated and unaffiliated insurance companies."[30] Given the antitrust concerns, the Department's FAQ was welcome clarification for the insurance industry. Although the Department explicitly incorporated other sub-regulatory clarifications in the Proposed 2020-02, the Department failed to incorporate FAQ 18 into the Proposal.[31] Any final revised Proposed 2020-02 should incorporate all sub-regulatory guidance the Department has issued regarding current PTE 2020-02 that recognizes the unique aspects of the insurance industry.

C. Compensation Restrictions, While Less Limited than Those of Proposed 84-24, are Still Too Limited

The Proposed 2020-02 further restricts permissible compensation, and in doing so, fails to recognize how the insurance industry pays producers. The Department imposes a list of compensation types that it states are per se prohibited, writing "Financial Institutions may not

[29] DOL Field Assistance Bulletin No. 2021-02 (Oct. 25, 2021).

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

[31] 88 Fed. Reg. 75,987 at n. 17 (incorporating FAQs 16 and 17).

use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other similar actions or incentives that are intended, or that a reasonable person would conclude are likely, to result in recommendations that are not in Retirement Investors' Best Interest." Proposed 2020-02 Section II (c)(2). The Department's list of practices is overbroad, and we urge that no additional compensation restrictions be adopted.

VI. CONCLUSION

Allianz Life appreciates the opportunity to comment on the Proposals. As outlined in this letter, we do not believe that ERISA and the relevant case law authorize the promulgation of the Proposals in their current form. Specifically, ERISA does not support the treatment of insurance sales agents as "fiduciaries."

We urge the Department to slow the process to engage in meaningful exchanges with the state insurance regulators, as the Proposals would result in serious unintended consequences in the insurance marketplace. The Department would benefit from the experience of dedicated insurance regulators who have recently grappled with the same issues, but who have reached very different conclusions.

We again respectfully ask the Department to rescind the Proposals, and we would be happy to answer any questions the Department may have.

Sincerely,

Gretchen Cepek

Senior Vice President and General Counsel

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