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Docket: EBSA-2023-0014
Definition of an Investment Advice Fiduciary

Comment On: EBSA-2023-0014-0001
Retirement Security Rule: Definition of an Investment Advice Fiduciary

Document: 1210-AC02 comment 00273 Conroy 12292023

Submitter Information

Name: Chris Conroy

General Comment

I am opposed to the proposed DOL 2023 version of the "fiduciary rule". As an annuity owner myself and an attorney who has worked in the insurance industry for 27 years, I am convinced that this rule is unnecessary and will have a severe negative impact on consumers' access to responsible financial professionals, a more diverse selection of financial products, and ultimately resulting in a more expensive retirement plan for Americans.

This new 2023 version of the fiduciary rule is functionally the same rule as the 2016 fiduciary rule which struck down by the Court of Appeals and vacated. The main legal arguments successfully made by the plaintiffs in the Chamber v. DOL have not changed because the functional legal bases and industry dynamics have not changed. What has changed since 2016 is that both the securities industry and insurance industry have adopted a more robust Best Interest standard of care and processes which has improved transparency with consumer disclosures, created a more comprehensive consumer explanation process, reduced complaints, and led to better product solutions available. While the DOL's preamble rhetoric suggests otherwise, as an insurance industry expert for 27 years, I disagree that the current insurance regulatory regime is inadequate or otherwise needs to be further regulated by a federal agency. I agree with comments made by the National Assoc. of Insurance Commissioners where they have objected to this new DOL fiduciary rule and that the

DOL has failed to properly acknowledge the efforts in drafting and impact of the NAIC Model #275 Best Interests regulation has had and will have on the marketplace. The DOL should respect the important role that the functional state insurance regulators have in setting the laws, regulations and overseeing the sales practices, products, financial solvency, and robust marketplace standards that today work very well to protect consumers.

One primary concern with the 2023 fiduciary rule is the irreversible negative impact that the rule will have on the entire annuity industry given the unjustified expansion of who is covered as a "fiduciary", the unworkable proposed compliance plans of PTE 2020-02 and PTE 84-24, as revised, and the major disruption that will ensue with confusing and vague subjective rules which do not fit within the unique insurance industry. Independent insurance agents seem to be the most negatively impacted with no compliance pathway that currently exists and is unlikely to be available once the proposed PTE 84-24 revisions would take effect. As an insurance professional in this industry, I am not aware of any insurance carrier that has suggested they would build out the overly expensive and impractical new PTE 84-24 compliance apparatus and take on the added liability that will attach by building it. And without perhaps ANY insurance carries willing to do so, this leaves hundreds of thousands of insurance agents unable to sell annuities resulting in a dramatic loss of access to principal-protected fixed annuities and the loss of careers and jobs for these agents and their staff. With 2/3rd of the fixed annuity market being qualified money, these independent agents are likely to simply retire or leave the fixed annuity industry entirely. Shockingly, we saw a similar impact in the 2016-2018 period in reduced sales as a result of just the impending 2016 fiduciary rule. According to Accupoint, a reliable 3rd party financial and agent aggregation service, there are 1,294,880 agents who are authorized to sell fixed annuities in the USA who have an active appointment to sell annuities who are NOT affiliated with a broker-dealer. This means that over one million independent agents are affected by this rule and would need to build their own DOL compliance plan, disclosures, and unique regulatory analysis and consumer plan. This is far larger than the 4,000 agent estimate that the DOL guessed on in the preamble, and it is important to note that each agent has their own unique range of services, products, potential conflicts to disclose/ manage, expertise/ credentials, analysis tools & process, and varying individual professional interactions that necessarily cannot be created or operated on a "cookie cutter" approach. Each agent would need to consult with an ERISA expert attorney to advise how this complicated and vague rule might be applied to their individual business and clientele which would cost far more than the woeful low estimates of the DOL preamble.

I further object to the proposed rule's attempted reinterpretation of who is covered as a "fiduciary" through the DOL's unfounded reimagining of the 5-part test. I support the

filed comments made by the National Assoc. of Fixed Annuities to this rule where they point out the DOL's flawed attempt to redefine the "trust and confidence" prong- ERISA and the 5th Circuit decision should be followed.
I support comments attached of NAIC & NAFA.

Attachments

government-affairs-rin-1210-ac02-def-fiduciary

2023_1214_Notice-to-Members_NAFA_DOL-Testimony

proposed-retirement-security-rule-hearing-day2 pp 21-31

NAIC NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS

December 21, 2023

Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC 20210

Re: RIN 1210-AC02—Definition of Fiduciary

On behalf of the National Association of Insurance Commissioners (NAIC)[1], we appreciate the opportunity to provide comments on the Department of Labor's (DOL) proposed "Retirement Security Rule: Definition of an Investment Advice Fiduciary" and proposed amendments to the prohibited transaction exemptions (PTEs) (collectively, the "Proposed Rule").

While the NAIC typically refrains from commenting on the rule proposals of fellow regulators unless they are directly preemptive of our authorities, in this instance, we are compelled to respond given the potentially significant impact the Proposed Rule would have on insurance consumers and access to lifetime income products in retirement. We also feel compelled to respond to commentary, used by the Administration to justify the proposal, that disparages the ongoing work of state insurance departments to adopt and enforce comprehensive and consistent standards of care for annuity products.

We are disappointed that the DOL did not engage or coordinate substantively with NAIC members—the chief insurance regulators from the 50 states, the District of Columbia, and the U.S. territories—before promulgating the current Proposed Rule. While the DOL has interacted with NAIC staff and members, those discussions were

[1] As part of our state-based system of insurance regulation in the United States, the National Association of Insurance Commissioners (NAIC) provides expertise, data, and analysis for insurance commissioners to effectively regulate the industry and protect consumers. The U.S. standard-setting organization is governed by the chief insurance regulators from the 50 states, the District of Columbia and five U.S. territories. Through the NAIC, state insurance regulators establish standards and best practices, conduct peer reviews, and coordinate regulatory oversight. NAIC staff supports these efforts and represents the collective views of state regulators domestically and internationally. For more information, visit www.naic.org.

focused almost exclusively on aspects of the NAIC model and provided no opportunity for discussion of DOL's own work or thinking. We acknowledge the administrative limitations on DOL's ability to share or discuss the text of proposed rules, but substantive policy questions can and should be discussed with fellow regulators, even if in the abstract, to avoid duplication or conflict. DOL should demonstrate interest in coordination and harmonizing our respective rules given their overlapping impact on the same population of companies, industry participants, and customers. Only after the Proposed Rule text was released did DOL engage directly with insurance commissioners, albeit with a limited 30-day exposure period underway to digest and assess the proposal.

We are also greatly disappointed in, and fundamentally disagree with, the Administration's characterization of state consumer protections around annuity sales as "inadequate" and providing "misaligned incentives."[2] The rationale and justification for DOL's work should stand on its own as complementary to robust state efforts and should not mischaracterize differences in regulatory philosophy as an absence of regulatory competence or efficacy in this space.

In the seven years since the DOL last put forward a similar fiduciary proposal, the regulatory landscape for annuities has changed dramatically due, in large part, to the diligent work of state regulators and their legislative counterparts. While the DOL has shared jurisdiction with the states with respect to insurance products sold through Employee Retirement Income Security Act of 1974 (ERISA) plans, such as annuities, states' regulatory responsibilities extend to the entire market for such products, including disclosure requirements, professional standards of conduct for agents, and supervisory controls. In short, state insurance regulations cover *all* annuity products, not just those purchased within ERISA plans.

State Consumer Protections are Comprehensive and Consistent

Following extensive deliberations and input from state regulators, consumer representatives, and the insurance industry, the NAIC made significant revisions to its *Suitability in Annuity Transactions Model Regulation* (#275), adopting a best interest standard. The standard requires producers and insurers, when making annuity recommendations, to act in the best interest of the consumer, without placing their

[2] https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/31/fact-sheet-president-biden-to-announce-new-actions-to-protect-retirement-security-by-cracking-down-on-junk-fees-in-retirement-investment-advice/

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financial interest ahead of the consumer's interest. These amendments were designed to be consistent with the U.S. Securities and Exchange Commission's (SEC) Regulation Best Interest to ensure a high degree of harmonization among regulatory platforms.

To meet the new standard, states require that insurance agents and carriers act with "reasonable diligence, care, and skill" in recommending an annuity. The recommended annuity must also appropriately address the specific consumer's "financial situation, insurance needs and financial objectives." Model revisions also included enhancements to supervision to assist with compliance, and development of additional guidance to respond to common state implementation questions to promote consistency not just in text but in practice. To date, 41 states have implemented—and five states are actively pursuing adoption of—the NAIC's best interest enhancements.

Currently, the NAIC is working with states to coordinate a two-phase implementation review of the top 25 annuity writers in the United States. The purpose of these implementation examinations is to ensure that companies are appropriately incorporating and executing the enhanced standards in their policies and procedures.

Retirement Savings Gap

Amid these ongoing state regulatory efforts to enhance consumer protections, the elderly population in the U.S. has continued to grow at an unprecedented rate, while the working-age population has contracted, placing an increased strain on public assistance programs like Social Security and exacerbating the retirement savings gap. Further, defined-benefit pension plans have been largely replaced by defined-contribution plans in the workplace, which offer less certainty to retirement savers. And nearly half of all workers do not have access to an employer-sponsored retirement plan. Given these challenges, DOL should be encouraging, not potentially limiting, access to well-regulated retirement guidance and products such as annuities that could help to bridge the retirement savings gap. There are few retirement security products that protect consumers from their own longevity risk and provide lifetime income, except annuities. Regulators, state or federal, should not substitute our own judgement for those we intend to protect by potentially denying them access to such products when they are appropriate to the retiree.

Indeed, bipartisan Congressional efforts, such as the SECURE Act in 2019 and a follow-up effort in 2022, and multiple Administrations of both parties have consistently recognized the importance of lifetime income products in closing the retirement security protection gap. At the same time, Congress has consistently reaffirmed the states' role as the primary regulators in this area. We view these federal efforts as complementary to our own, and we have met the responsibility to regulate with collaborative action and resolve. We fear DOL's latest attempt at a fiduciary rule could undermine this important work.

Thank you for the opportunity to comment.

Chlora Lindley-Myers
NAIC President
Director
Missouri Department of Commerce
and Insurance

Andrew N. Mais *(He/Him/His)*
NAIC President-Elect
Commissioner
Connecticut Insurance Department

Jon Godfread
NAIC Vice President
Commissioner
North Dakota Insurance Department

Scott White
NAIC Secretary-Treasurer
Commissioner
Virginia Insurance Department

MEMBER ALERT

NAFA excoriates DOL's newest fiduciary proposal in public testimony

In day two of the Department of Labor's (DOL's) public hearing on its current fiduciary rule package, NAFA showed up prepared to do battle. NAFA President and CEO Chuck DiVencenzo was accompanied by Pam Heinrich, NAFA Director of Government Affairs and General Counsel, and Tom Roberts of Groom Law Group as they outlined several key flaws of this onerous regulatory package, highlighting the potential damage it could do to everyday retirement savers working with licensed insurance professionals to help secure their future.

"… The Department has singled out fixed index annuities for special criticism that is exceedingly misinformed, reflecting a fundamental misunderstanding of what these products accomplish for consumers. The announcement of the proposed rule included an outrageous characterization of the many diligent members of our industry who make available products that American workers demand to enhance their financial security, particularly in their golden years," DiVencenzo opened.

DiVencenzo went on to highlight that the expanded scope of the proposal cannot be reconciled with the Fifth Circuit Court's *Chamber of Commerce* decision and that it should be withdrawn in its entirety. He also homed in on the preamble's "junk analysis," suggesting its contents are "based on selective pieces of outdated academic research and back-of-the-envelope calculations intended to justify a pre-determined conclusion" before opening up further analysis from Heinrich.

Heinrich used her testimony to remind the DOL of the extensive work the National Association of Insurance Commissioners and its working group put into gathering input from stakeholders to craft its best insurance model regulation that is now adopted or in the process of being adopted by 47 states.

"… The NAIC got it right. Its best interest model establishes high standards for the responsible sale of annuity products by trained insurance professionals, subject to oversight by state insurance departments," Heinrich explained.

NAFA, the National Association for Fixed Annuities, is the premier trade association exclusively dedicated to fixed annuities. Our mission is to promote the awareness and understanding of fixed annuities. We educate annuity salespeople, regulators, legislators, journalists, and industry personnel about the value of fixed annuities and their benefits to consumers. NAFA's membership represents every aspect of the fixed annuity marketplace covering fixed annuities sold by independent agents, advisors and brokers. NAFA was founded in 1998. For more information, visit www.nafa.com.

The testimony delivered sparked numerous questions from regulators from the Employee Benefits Security Administration, which NAFA navigated by underscoring the clear distinctions between fiduciary advice and singular insurance transactions.

Read the InsuranceNewsNet Recap »

Read the InvestmentNews Recap »

NAFA is now focused on working to submit its comment letter prior to the Jan. 2, 2024, deadline.

If you haven't already, please participate in our grassroots efforts to help defeat this rule. It takes just two minutes to **send a letter** to your elected officials using our seamless online platform. It's essential our collective voice is heard to keep the future of independent distribution, fixed annuities and Main Street consumers protected!

December 21, 2023

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