

December 29, 2023

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655, U.S.
Department of Labor,
200 Constitution Ave. NW, Washington, DC 20210
Attention: Definition of Fiduciary—RIN 1210–AC02.

Via Regulations.gov

To Whom It May Concern:

The Ohio Department of Insurance (ODI) submits the following comments on the proposed Retirement Security Rule: Definition of an Investment Advice Fiduciary (Proposed Rule), as proposed by the Employee Benefits Security Administration (EBSA), and Department of Labor (DOL), and published in the Federal Register on November 3, 2023.

ODI's mission is to provide consumer protection through education and fair but vigilant regulation while promoting a stable and competitive environment for insurers. Consistent with its mission, ODI supported the work of the National Association of Insurance Commissioners (NAIC) in developing an updated annuity suitability model regulation. When the United States Court of Appeals for the Fifth Circuit vacated the DOL's 2016 fiduciary rule, state regulators worked to ensure that annuity product recommendations made by insurance agents are in the best interest of consumers. ODI took action to make certain these carefully drafted consumer protections applied to Ohioans by adopting the NAIC annuity suitability model regulation in 2021. Along with Ohio, a growing number of more than 40 state insurance regulators have adopted the annuity suitability model regulation in their jurisdiction.

The Proposed Rule would undermine the work of state insurance regulators to protect consumers by: (i) infringing on state authority to regulate the business of insurance in direct violation of federal law; (ii) creating consumer confusion through the DOL's attempt to assert itself as an oversight body for insurance agents; and (iii) limiting access to financial advice regarding insurance products to those that are willing and able to pay advisory fees charged by financial planners.

Since the passage of the McCarran-Ferguson Act in 1945, Congress has recognized states as the primary regulators of the business of insurance, including licensing and oversight of insurance agents. The Employee Retirement Income Security Act of 1974 (ERISA), the law under which the DOL purports to derive the authority to promulgate the Proposed Rule, contains an express

provision preserving state regulation of insurance, commonly referred to as the savings clause. While the Proposed Rule includes an acknowledgement of state authority by affirmatively stating “[n]othing in this section shall be construed to affect or modify the provisions of section 514 of Title I of the Act, including the savings clause in section 514(b)(2)(A) for State laws that regulate insurance, banking, or securities,” the effect of the rule reaches a contrary result. The Proposed Rule would impermissibly supersede the best interest standard Ohio has adopted and applied to all insurance agent recommendations of annuities. The Proposed Rule attempts to frame itself as being within the constraints of ERISA’s purview by focusing on retirement investors rather than the party whose conduct is regulated by the rule—state-licensed insurance agents. The DOL’s reasoning—that a single recommendation by an insurance agent to certain consumers is a sufficient basis for DOL regulation by virtue of the consumer’s status as a “retirement investor”—raises significant questions about how far the DOL’s authority may be stretched.

ODI is the chief insurance regulator for Ohioans. Every day, Ohio consumers turn to ODI for assistance with insurance products, including annuities. Likewise, when consumers have concerns about the conduct of Ohio licensed insurance agents, they know whom to contact—ODI. Under the Proposed Rule, the federal government asserts that the DOL or EBSA will “likely” provide some greater level of oversight. However, the expansion of a complicated regulatory scheme to insurance agents, some of which are already subject to dual state and federal regulation by the U.S. Securities Exchange Commission, will result in consumer confusion. The unintended consequence of the Proposed Rule will be to remove the certainty that Ohio’s annuity suitability regulation currently provides. No longer will Ohio consumers be able to trust that recommendations of products by Ohio licensed insurance agents will be regulated by ODI. Rather, the very same annuity product, with the very same features and risk, will require complicated legal analysis to determine which standard of care applies and which regulatory agency is responsible for oversight and enforcement. What’s more, even if the DOL is successful in co-regulating certain insurance agents in certain situations, the DOL lacks the authority to take direct action on an insurance agent’s license. Rather, the Proposed Rule would create a private cause of action against insurance agents, opening the door for expensive litigation instead of appropriate regulatory oversight.

While the structure of the Proposed Rule raises significant concerns related to state regulation of insurance, the greatest potential consumer harm arises from the substance of the rule itself. Today, countless Ohioans receive product advice from licensed insurance agents at no cost to the consumer. Insurance companies compensate insurance agents through commissions. Notably, the model annuity suitability regulation was deliberately drafted to preserve a market in which consumers could access insurance products without regard to their ability to pay for professional advice. The Proposed Rule, in contrast, will drive consumers to financial advisors that charge a fee for their services in lieu of receiving commission compensation. While this approach may be appropriate for sophisticated investors with significant assets, many Ohioans will have no choice but to forgo this advice because they simply cannot afford to pay a fee-based advisor.

Thank you for the opportunity to comment on the Proposed Rule. ODI is available to discuss these or other issues as the DOL continues its work in considering the comments submitted on this Proposed Rule. For all the reasons discussed above, the Department strongly encourages the DOL to reconsider its broad proposal to redefine investment advice fiduciaries.

Sincerely,

A handwritten signature in blue ink that reads "Judith L. French". The signature is written in a cursive style with a horizontal line at the end.

Judith L. French
Director