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Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

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

To Whom It May Concern:

Thank you for the opportunity to comment on the proposed regulation and amendments referenced above (collectively, the "Proposal") issued by the U.S. Department of Labor ("DOL") on October 31, 2023.

The Proposal represents the culmination of 14 years of efforts by the DOL to extend fiduciary status to all advice involving ERISA plans and IRA rollovers. But instead of harmonizing the regulatory framework by mirroring recent efforts of the Securities and Exchange Commission ("SEC") and State regulators through the National Association of Insurance Commissioners ("NAIC"), the DOL has imposed a new set of onerous requirements, which will overturn expectations, increase costs, and limit consumer choice.

Due to significant flaws in the design of the Proposal, Pacific Life Insurance Company ("Pacific Life") respectfully requests that the DOL withdraw the Proposal in its entirety.[1] As written, the Proposal will have the effect of limiting investor access to annuities – the only products available in the marketplace that guarantee lifetime income. This letter will identify specific examples of the Proposal's flaws, and how the Proposal's negative impacts necessitate its withdrawal.

1 In the preamble, the DOL states that it "generally intends discrete aspects of this regulatory package to be severable." While that may be the DOL's intent, as with the 2016 Regulation 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. Any effort to sever will result in unintended impacts and harms.

To be clear, we are not suggesting that edits to individual components of the Proposal will resolve our objections, as we do not believe the Proposal can or should be "fixed." Instead, our comments are intended to illustrate the myriad reasons why we are firmly convinced that the DOL should discontinue this regulatory project.

Pacific Life Supports Industry Trade Group Comment Letters

Pacific Life supports the comments and conclusions set forth by the American Council of Life Insurers, the Insured Retirement Institute, and the Committee of Annuity Insurers in their respective comment letters, including with respect to the following issues:

- *DOL Lacks Authority to Adopt Proposal:* The DOL's abbreviated comment period and unprecedented timing of its public hearing have deprived stakeholders of a meaningful opportunity to participate in the rulemaking process, in violation of the Administrative Procedures Act. Moreover, the Proposal disregards the central holdings of the Court's decision in *Chamber of Commerce v. United States Department of Labor,* 884 F.3d 360 (5th Cir. 2018) ("Fifth Circuit"), in which the United States Court of Appeal for the Fifth Circuit vacated the expansive fiduciary regulations adopted by the DOL in 2016 (the "2016 Final Rule").
- *DOL Dismisses the Value and Utility of Annuities:* The DOL has dismissed the value of the protections and guarantees that annuities can provide, with little to no consideration of how annuities protect against the risks of outliving one's assets, cash flow uncertainty, inflation, or market swings (to name a few of the risks that annuities can help address).
- *Seller's Exemption:* In contravention of longstanding market practices, and without regard for its impact on the wide selection of financial products and provider models currently available to retirement investors, the Proposal conflates sales activity and fiduciary advice and limits consumer choice. The Proposal should not impose fiduciary duties or eliminate provider models in situations where a seller's financial incentives are disclosed and reasonable. Requiring annuity issuers in the institutional marketplace – where ERISA plan sponsors and other ERISA plan fiduciaries typically engage in requests for proposals ("RFPs") and sophisticated negotiations with multiple annuity providers at the same time, to obtain optimal terms and pricing – to assume fiduciary duties is particularly misplaced.
- *Eligibility Provisions:* The Proposal bars insurers and others from the retirement marketplace for 10 years upon the happening of certain events (including a wide range of actions by an insurer, its employees, or affiliates). Such material and unconventional penalties should be narrowly focused on clearly defined, willful misconduct occurring in the U.S. retirement market, and should include substantive and procedural due process protections typically found in U.S. jurisprudence.
- *Grandfathering Provision*: Any additional rulemaking should only apply to transactions occurring after the effective date. It would be inappropriate to impose additional duties or requirements upon already-established relationships, especially as that could overturn expectations about the nature or extent of those relationships. Further, amending existing relationships through regulation could impose significant costs that were not considered at the onset of those relationships.

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The DOL Has Failed to Account for the Changing Regulatory Environment and Ignored Bipartisan Congressional Policy

The DOL has proposed sweeping changes to the retirement landscape due to its mistaken belief that retirement investors continue to suffer severe harm from conflicted investment advice. However, over the last several years, there have been significant changes to the regulatory environment. The DOL has not fully considered these changes. By imposing a set of requirements for market participants that are different from and (in many respects) inconsistent with others that have been recently introduced, the Proposal would increase the cost and difficulty of providing investment services, which will reduce access to investment advice and products, and run counter to the goals of legislation recently adopted by Congress.

Since the DOL's introduction of the 2016 Final Rule, both the SEC and NAIC have promulgated "best interest" standard of conduct regulations – the SEC's Regulation Best Interest ("Reg BI") and the NAIC's Suitability in Annuity Transactions Model Regulation ("NAIC Model"). As of November 27, 2023, 40 states have adopted the NAIC Model, with adoption pending in another six states.

While the DOL claims to propose a "best interest" standard of conduct similar to that of the SEC and NAIC, the DOL imposes a much more expansive standard. The Proposal's outright prohibition of whole categories of compensation that are permitted under other best interest rules, creation of a new set of oversight rules, conflation of sales activity and fiduciary advice, inclusion of fiduciary acknowledgments (and imposition of the associated fiduciary liability) as a condition to use the most widely applicable prohibited transaction exemption, and creation of ineligibility penalties for unrelated activities (to name a few) undercut the idea that the Proposal is merely intended to "level the playing field" and fill in any remaining corners of the market that currently do not benefit from a "best interest" standard. In short, the Proposal would impose wholly new duties – well beyond the "best interest" regimes of the SEC and NAIC – and impose severe consequences for compliance failures.

The Proposal will ultimately result in uncertainty around the offer and sale of annuities, the only products that can offer retirement investors guaranteed income in an increasingly "pension-less" retirement world. That result conflicts with the bipartisan Congressional policy reflected in the SECURE Act of 2019 and SECURE Act 2.0 of 2022 ("SECURE Acts"), both of which strengthened America's retirement system by facilitating retirement investors' access to, and use of, annuities within retirement plans. As an example, the SECURE Acts created a safe harbor for plan sponsors in their selection of annuity providers for their plans. This was added to address plan sponsors' hesitation to add annuity products to their plans because of the unclear liability associated with that decision. Additionally, defined contribution plan benefit statements are now required to disclose monthly payments the participant would receive if the participant elected to receive an annuity. Requiring these disclosures helps retirement investors think about and understand how their savings can translate into an income stream in retirement. Congress also included provisions that eliminate barriers and increase incentives for qualifying longevity annuity contracts ("QLACs") and change RMD rules to benefit participants who elect to annuitize IRA assets. In brief, the uncertainties and complexities surrounding the Proposal will

discourage financial professionals and insurers from engaging in this market, undermining the policies embodied in the SECURE Acts.

Other Areas of Significant Concern

The DOL's repeated attempts to adopt sweeping fiduciary standard regulations give the impression that the DOL is dismissive of the extensive and thoughtful feedback received from the industry for over a decade and of the implications of the Fifth Circuit's decision to vacate the 2016 Final Rule and has not fully evaluated the current environment or the needs of retirement investors. Indeed, the Proposal contains several problematic provisions that render it unworkable. Highlighted below are select issues of particular importance to Pacific Life, as a participant in the retail annuity market and the pension risk transfer, and other institutional markets.

Overly Broad Defined Terms and No Carve-Outs

The Proposal is crafted so broadly that it stretches the ordinary understanding of terms like "recommendations" and relationships of "trust and confidence". Further, certain provisions and terms currently leveraged by the Proposal were designed for retail interactions and are not suited for the business-to-business interactions that regularly take place in the pension risk transfer and institutional marketplace. The fact that the DOL felt it necessary to clarify in the preamble that the Proposal should not apply to a used car salesman is evidence enough that the Proposal was drafted using overly broad terms. The result is that nearly all financial professionals interacting with Retirement Investors could be deemed fiduciaries, whether that is what the parties reasonably expect.

<u>Recommendation</u>

The DOL has stated that the Proposal is more narrowly tailored than the 2016 Final Rule, but, in fact, the Proposal is as broad as (if not broader than) the 2016 Final Rule. Importantly, Pacific Life fundamentally disagrees with the notion that all sales conversations can or should create a fiduciary relationship. The DOL's focus should be surgical and clarify that, in the retail market, the term "recommendation" will be interpreted consistently with the regulatory framework already created by the SEC and the Financial Industry Regulatory Authority ("FINRA").

As for the institutional market, product sales are typically concluded through arms-length transactions between an insurance company, on the one hand, and plan fiduciaries (often advised by consultants or other financial professionals), on the other hand, in circumstances where it is well understood that plan fiduciaries are not looking to an insurance company for impartial investment advice. The insurance company is a product provider that is being selected by the plan fiduciary with the input of trusted advisors, often through a competitive RFP process involving multiple product providers. The independent and professionally negotiated sales process culminating in tailored solutions and contracts provides robust protections to retirement investors. Treating these transactions like a retail interaction between a consumer and financial advisor imposes an ill-fitting set of standards and requirements on this process and overlooks the protections that retirement investors already receive in the marketplace.

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At its worst, the injection of unclear and ill-fitting regulatory requirements serves to incentivize litigation that enriches plaintiffs' attorneys over retirement investors.

Retirement Investors

Communications with certain parties, such as licensed financial professionals who are fiduciaries to their plan clients, should not be considered communications with Retirement Investors, and thus, not categorized as fiduciary investment advice. In the 2016 Final Rule, the DOL included an exception for certain transactions with independent fiduciaries with financial expertise. This exception does not re-emerge in the Proposal. Any additional rulemaking establishing a fiduciary standard should clarify that interactions with individuals/entities and plan sponsors and other independent plan fiduciaries, absent a formal written agreement stating otherwise, are not treated as fiduciary investment advice.

Problematically, the Proposal defines the term "IRA" to include health savings accounts described in section 223(d) of the Code. Health savings accounts are only subject to ERISA and fiduciary standards under specific circumstances and the Proposal will introduce confusion as to whether and when plans, plan sponsors, HSA administrators, and their advisors will be deemed a fiduciary.

Ultimately, any standard of conduct rule should establish a set of clearly defined circumstances under which insurance company representatives can meet with licensed financial professionals, plan consultants, or plan fiduciaries and discuss their products, without inadvertently triggering fiduciary status under ERISA.

Compensation

The McCarran-Ferguson Act, 15 U.S.C. Section 1011-1015, passed by Congress and signed into law in 1945, empowers States with the authority and responsibility to regulate the business of insurance. The sales and marketing of insurance products fit squarely within the boundaries of the "business of insurance." ERISA does not, and therefore DOL may not override the role of the States to regulate insurance under the McCarran-Ferguson Act.

While prior prohibited transaction exemptions or "PTEs" (e.g., PTE 84-24) have required compensation derived from insurance sales to be "reasonable" in order to use the PTE, the Proposal so fundamentally impacts the business of insurance (e.g., by prohibiting certain types of customary sales compensation to sales representatives whom the DOL considers investment advice fiduciaries) as to call into question the boundaries established under the McCarran-Ferguson Act.

Unreasonable Implementation Period

The DOL has significantly underestimated the amount of time annuity providers and distributors would need to come into compliance with the operational changes required by the Proposal. As noted above and in the commentary provided by the American Council of Life Insurers, the Insured Retirement Institute, and the Committee of Annuity Insurers, the Proposal imposes a different set of requirements on the retail annuity market than currently exists, and will require significant operational changes by

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carriers and distributors (potentially affecting their compliance processes and oversight procedures, distribution contracts, employee compensation arrangements, and information technology systems, to name a few). As for the institutional market, the Proposal will require an even greater departure from existing processes. Put simply, it would be impossible for most, if not all, impacted parties to assess and implement the highly complex requirements and conditions included in the Proposal in just 60 days. This unreasonable and unworkable timeframe creates unnecessary and excessive compliance and litigation risks, without off-setting benefits.

The DOL has offered no compelling rationale for this extraordinarily compressed, unworkable, and unprecedented implementation timeline, and as such, we believe this timeline is arbitrary and capricious.

Conclusion

While Pacific Life supports the enactment of a *uniform* and *reasonable* standard of conduct framework for financial professionals that preserves consumer access to a variety of advice models and retirement products, we do not believe the DOL has achieved that with the Proposal. Nor do we believe that the DOL has the authority to adopt the Proposal.

Pacific Life appreciates the DOL's desire to ensure that American retirement investors are receiving advice in their best interest. To achieve our shared goals for American retirement investors to save for a secure retirement and receive advice that is in their best interest, Pacific Life respectfully requests that the DOL withdraw the Proposal and redirect its resources to other, more pressing areas to help Americans secure their retirement savings.

Sincerely,

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