January 2, 2024

Submitted via https://www.regulations.gov

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

Re: Notice of Proposed Rulemaking on Definition of Fiduciary: RIN 1210-AC02

Dear Ms. Grillo-Chope:

On behalf of the National Association of Professional Insurance Agents (PIA)[1], I hereby submit the following comments in response to the Notice of Proposed Rulemaking (hereinafter referred to as "the NPRM" or "the proposal") that would revise the regulatory definition for the term "investment advice fiduciary" for purposes of Titles I and II of the Employee Retirement Income Security Act (ERISA).[2] The proposal was published by the Employee Benefits Security Administration (EBSA) of the U.S. Department of Labor (DOL) on November 3, 2023. Unfortunately, PIA expects the DOL's proposal to drastically limit public access to retirement investment advisors and their expertise.

I. Introduction and Background

The existing regulatory definition of an investment advice fiduciary has been in place for the purposes of Titles I and II of ERISA since 1975. The DOL's NPRM asserts that the proposed definition will better reflect the purpose of ERISA and will better protect the interests of retirement investors. The revised definition would categorize a person as an investment advice fiduciary if they "provide investment advice or make an investment recommendation to a retirement investor"; if said advice is provided "for a fee or other compensation, direct or indirect"; and if the person making the recommendation:

- Either directly or indirectly has discretionary control over the sale or purchase of securities or other types of investments for a retirement investor; or

[1] By way of background, PIA is a national trade association founded in 1931. It represents member insurance agents in all 50 states, Puerto Rico, Guam, and the District of Columbia. PIA members are small business owners and insurance professionals providing insurance products and services in communities across America.
[2] See https://www.regulations.gov/document/EBSA-2023-0014-0001 (last visited on December 28, 2023).

- Makes investment recommendations routinely as part of their business, and the recommendations are provided under circumstances indicating that those recommendations are based on each retirement investor's specific needs or circumstances as a basis for making decisions in the investor's best interests; or
- Represents or acknowledges that they are acting as a fiduciary when making investment recommendations.

The NPRM's stated goal is to apply ERISA's fiduciary standards uniformly to all advice retirement investors receive; the DOL claims this change will "ensure" "retirement investors' reasonable expectations are honored" when they receive advice from finance professionals.

PIA takes issue with the NPRM's failure to account for existing state and federal regulatory oversight of investment advisors and the DOL's refusal to provide sufficient time in which to review and comment on the NPRM. Additionally, to the extent that the NPRM applies to insurance agents acting as investment advisors, insurance activity is properly and sufficiently regulated at the state level in accordance with the McCarran-Ferguson Act of 1945 (McCarran-Ferguson)[3] and is therefore beyond the scope of the DOL's regulatory reach.

II. State Regulation of Insurance Investment Advice

The business of insurance is regulated by the individual states, not by the federal government, pursuant to common law before 1945 and McCarran-Ferguson thereafter. In the decades since, Congress has regularly reiterated its support for the existing state-based system of insurance regulation.

In 2020, recognizing its obligation to regulate insurance agents acting as financial advisors, and responding to the promulgation by the U.S. Securities and Exchange Commission (SEC) of its "Regulation Best Interest" (referred to elsewhere herein as "Reg BI"), the National Association of Insurance Commissioners (NAIC) revised its *Suitability in Annuity Transactions Model Regulation* to require insurance agents to act in consumers' best interests when recommending annuities. The updated model imposes on insurance agents a "best interest" requirement composed of four simultaneous obligations: obligations of care, disclosure, conflict-of-interest, and documentation. The revision echoes the "best interest" standard created by the SEC's Reg BI.

According to the NAIC, as of December 2023, 41 of 52 jurisdictions have implemented the revised model, and five additional jurisdictions are actively pursuing its implementation.[4]

The NAIC's 2020 work and states' overwhelmingly favorable response to it show that state regulators understand that some insurance agents normally make financial recommendations to their customers and may be compensated differently for products purchased because of those

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[3] See https://www.iii.org/publications/insurance-handbook/regulatory-and-financial-environment/mccarran-ferguson-act#:~:text=The%20McCarran%20Ferguson%20Act%20was,insurers%20from%20federal%20antitrust%20laws (last viewed on January 2, 2024).
[4] See https://content.naic.org/sites/default/files/government-affairs-rin-1210-ac02-def-fiduciary.pdf (last viewed on January 2, 2024).

recommendations. Consumers deserve to understand their agent's compensation structure and to feel confident that their agent's recommendations are guided by their suitability to consumers' needs. However, the DOL need not revise its definition of "investment advice fiduciary" for consumers to be protected.

As presently written, ERISA sets forth strict fiduciary standards and rules on prohibited transactions, irrespective of the specific category to which a covered adviser belongs. The NPRM, if adopted as proposed, represents a drastic and burdensome change to current requirements applicable to insurance agents who sell retirement investment products. Its implementation could drive agents out of the business of selling retirement products. For agents that remain, the revision would subject them to increased liability exposure amidst an array of confusing regulatory frameworks whose applicability could vary within a single client encounter, depending on the product or service being offered. The revision could also reduce the range of products and services available. These unintended consequences would lead to less consumer access to retirement products and higher costs for those able to afford them.

The NPRM would be redundant for advisers, like insurance agents, who are already comprehensively regulated by existing ERISA law, other federal laws or regulations, or state laws or regulations. The DOL should withdraw its NPRM.

III. Interaction Between State and Federal Regulation

The DOL and the NAIC routinely regulate overlapping constituencies, including insurance consumers, carriers, and other members of industry. State and federal regulators often collaborate to avoid duplication and inconsistency across regulatory regimes; to wit, after the SEC promulgated the Reg BI standard, the NAIC revised its annuity suitability model to better support the SEC's new standard.

The DOL last proposed a revision to the ERISA fiduciary rule in 2015, and a federal court ultimately invalidated the 2016 final rule. In the intervening years, the SEC implemented Reg BI, and, in response, the NAIC revised its annuity suitability standard. The retirement landscape has since changed as well: defined-benefit pension plans have been largely replaced by defined contribution plans, which reduced the reliability of workers' retirement investments. Plus, nearly half of all workers presently have no access to employer-sponsored retirement plans at all.

Considering the many obstacles preventing workers from appropriately investing in their retirements, and the diligence with which states are already addressing this issue, the DOL's work in retirement investments should complement—and not undermine—existing state efforts to protect consumers' retirement investments and encourage greater access to affordable retirement investment products.

IV. Rushed Comment Period; Refusal to Extend Time

The DOL previously proposed revisions to the definition of an investment fiduciary in 2010 and 2015. Both prior proposals allowed at least 90 days for public review and comment. This time, the DOL allocated to itself nearly three years to promulgate a new definition, but, despite the current NPRM's expansive scope and 500 pages, a mere 60 days were allocated for notice and comment. This brief comment period overlapped with several federal and religious holidays,

leaving 39 workdays for interested parties to review and comment on the NPRM. The DOL rejected requests from several interested parties[5], including Rep. Virginia Foxx (R-NC), the chairwoman of the House Committee on Education and the Workforce[6], to extend the comment period.

The DOL held a public hearing during the comment period. Had it been scheduled for after the comment period had closed, the hearing might have provided the DOL and members of the public with a chance for potentially meaningful dialogue. As scheduled, however, the hearing appeared to be, at best, a formality. At worst, the hearing deceived members of the public as to the inherent value and weight of the testimony offered.

In fact, the hearing was held so soon after the NPRM's publication that many witnesses testified that they had not thoroughly reviewed it before the hearing and acknowledged a hope that their written comments would address issues their oral remarks had not.

V. Conclusion

Despite the substantial time that has passed since it last attempted to revise the fiduciary rule, the DOL appears not to appreciate the merit of a legitimately narrow and well-tailored proposal. The current NPRM would unnecessarily burden independent agents and would be duplicative of multiple existing state and federal regulations. For all the reasons set forth herein, this proposal, like its predecessor, is poised to generate extensive and costly litigation. We respectfully request that the DOL withdraw this NPRM in its entirety.

PIA recognizes and appreciates the considerable thought and effort that the DOL has given and continues to give to this issue, and we are grateful for the opportunity to provide the independent agent perspective. Please contact me at Lpachman@pianational.org or (202) 431-1414 with any questions or concerns. Thank you for your time and consideration.

Sincerely,

Lauren G. Pachman
Counsel and Director of Regulatory Affairs

[5] See https://www.napa-net.org/sites/napa-net.org/files/Trade%20group_fiduc%20rule%20comment%20period%20letter_110823.pdf (last viewed on January 2, 2024).
[6] See https://edworkforce.house.gov/uploadedfiles/11.17.23_final_fiduciary_rule_comment_period_letter_to_dol.pdf (last viewed on January 2, 2024).