

February 27, 2024

The Honorable Bob Good
Chair
Subcommittee on Health, Employment,
Labor, and Pensions
United States House of Representatives
2175 Rayburn
Washington, DC 20515

The Honorable Mark DeSaulnier
Ranking Member
Subcommittee on Health, Employment,
Labor, and Pensions
United States House of Representatives
2175 Rayburn
Washington, DC 20515

RE: NAFA Statement for the Record – Hearing of the House Committee on Education & the Workforce – Subcommittee on Health, Employment, Labor, and Pensions
Protecting American Savers and Retirees from DOL’s Regulatory Overreach
February 15, 2024

Dear Chair Good and Ranking Member DeSaulnier:

On behalf of NAFA, the National Association for Fixed Annuities, thank you for the opportunity to provide a statement for the record to the House Committee on Education and the Workforce – Subcommittee on Health, Employment, Labor, and Pensions regarding the U.S. Department of Labor’s latest proposal to amend the regulatory definition of persons who render investment advice as fiduciaries for purposes of Title I of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”) and the parallel regulations under section 4975 of the Internal Revenue Code of 1986, as amended (the “Code”). Comments are also provided concerning the Department’s proposals to amend Prohibited Transaction Exemption 84-24 (“PTE 84-24”) and Prohibited Transaction Exemption 2020-02 (“PTE 2020-02” and collectively with the proposals to amend the fiduciary investment advice definition and PTE 84-24, the “Proposal”).

NAFA is a national trade association exclusively dedicated to promoting improved awareness and understanding of fixed annuities, including the vital role fixed annuities serve in supporting American workers’ long-term retirement savings and income needs. NAFA is the only association whose sole purpose is to advocate for the beneficial retirement security mission served by the fixed annuity distribution community. NAFA informs and educates legislators, regulators

and the American public about the unique benefits fixed annuities make available to those who are either planning for or have entered retirement.

Members of NAFA include more than 80 insurance carriers and independent marketing organizations that work with tens of thousands of individual producers who engage in the offer and sale of fixed annuities. Relying on the support of each and every one of them, NAFA helps protect consumers by guiding its members to adhere to applicable standards of market conduct and ethical behavior.

Whether someone needs income today or in the future, fixed annuities are the only products that protect consumers against the risks of investment losses associated with market fluctuations and the risk of outliving one's savings in retirement. NAFA is dedicated to promoting and safeguarding the unique value of fixed annuities and the role fixed annuity products serve in insuring working Americans' retirement savings and income.

For the reasons described more fully below, NAFA believes the Department's 2023 fiduciary advice Proposal, including proposed amendments to PTE 84-24 and PTE 2020-02, reflects fundamental misunderstandings of fact and law that would, if allowed to proceed, wreak havoc on consumer access to retirement products that are today readily available through well-regulated insurance distribution channels. NAFA believes that the Department's proposed rulemaking package is fatally flawed and should be withdrawn in its entirety.

This latest rulemaking package represents the Department's fourth attempt at imposing a new fiduciary standard on investment advice. NAFA has been at the forefront of combatting the Department of Labor's continued efforts to move well beyond its rulemaking authority. This fourth iteration of its tired fiduciary rule is the most offensive yet, as it flies in the face of the Fifth Circuit vacatur of the 2016 fiduciary rule that NAFA and other industry groups worked so hard to overturn. Moreover, it seeks to tilt the playing field toward fee-based advice, which would ultimately leave millions of middle- and low-income retirement savers devoid of the products and professional advice they need to retire securely.

Inexplicably, the Department’s 2023 Proposal repeats all of the same errors that proved fatal to its 2016 rulemaking. If anything, it enlarges the problem by assigning fiduciary status on an even grander scale than before, inasmuch as the 2023 Proposal contains none of the carve-outs from fiduciary status of the vacated 2016 rule. NAFA is deeply concerned that the Proposal is so sweeping in nature that it calls into question where the dividing line lies to distinguish non-fiduciary sales activity from fiduciary investment advice. Just as the 2016 rule did before it was vacated, the Proposal will limit accessibility to investment products and services by virtue of the lack of any clear lines for parties to use for purposes of structuring their relationship as non-fiduciary when there is a desire to do so.

In the process of crafting this flawed rulemaking package, the Department took direct aim at fixed index annuities, using outdated data and biased conclusions to support its desperate attempts to implement burdensome overreach in the name of “consumer protection” and the elimination of “junk fees.” In reality, fixed and fixed index annuities, typically sold on a transaction basis, are the only products that protect consumers against the risks of investment losses associated with market fluctuations and the risk of outliving one’s savings in retirement.

The Department advances the mistaken view that sales of fixed products are driven only by sales incentives and reflect a lax regulatory regime. In fact, sales of fixed products are driven by market demand, which is only increasing as retirees seek protection from volatile investment markets. These increases reflect the value consumers place in the product.

In seeking financial security, Americans value and require the freedom to choose the forms of financial advice and the retirement products that are a fit for their individual needs. This is why annuity sales are up – not because of unregulated sales practices – but because people want, need, and are attracted to risk-reducing fixed and fixed index annuity products. Implementing this unnecessary rule will only hurt low-to-middle income workers, retirees and their families.

To be clear, NAFA strongly supports a best interest standard for annuity transactions. To date, 43 states have adopted the enhanced consumer protections for annuity transactions set forth

in the current NAIC best interest model law¹. Under the NAIC Model, insurance producers and other annuity professionals are required to act in the best interest of their clients when making recommendations to purchase an annuity. The NAIC Model requires an assessment of the consumer's needs and that insurance products only be recommended if they advance those needs. NAFA and its membership worked in close cooperation with the NAIC as it worked to develop the model regulation through a deliberative process that reflected input from a wide variety of regulatory, industry and consumer stakeholders.

NAFA believes the NAIC best interest standard strikes a proper balance between an enhanced standard of care for annuity professionals that requires responsible and informed sales conduct and a workable regulatory framework that allows consumer access to essential retirement advice and products. The continued availability to such access is essential to ensure a safe and predictable retirement for the millions of Americans who need and value annuities as part of their retirement plan.

Some specific problems with the Proposal include:

- The false assumption on the part of the Department that it holds the authority to comprehensively regulate standards of conduct applicable to broker-dealers, registered investment advisers, and insurance agents;
- Jettisoning the “primary basis” prong of the five-part test for determining fiduciary status as set forth in the Department’s longstanding 1975 regulation;
- The Department’s failure to reconcile the Fifth Circuit's Chamber decision by simply making all rollover transactions fiduciary in nature without regard to what type of services or product offerings an independent agent is providing a client;

¹ An additional half-dozen states are currently poised to adopt the NAIC model best interest standard. In fact, only two jurisdictions – New Jersey and the District of Columbia – have yet to undertake formal rulemaking. Importantly, all of the states that have or will soon adopt the best interest standard conform in all significant particulars to the model rule, providing broad consensus and uniform applicability across the majority of U.S. jurisdictions and ensuring robust and consistent consumer protections for the vast majority of Americans who purchase an annuity.

- Radically amending PTE 84-24, overturning the settled expectations of the life insurance and annuity provider community – formed over a period of more than 40 years;
- The Department's preference for PTE 2020-02, which is largely designed around a broker-dealer distribution model, which ignores the fact that different segments of the industry are subject to differing bodies of law and regulatory oversight; and
- Placing unnecessary, administratively burdensome and risk-inducing requirements upon insurance carriers and independent producers, which could ultimately put many small businesses and entrepreneurs out of business, leaving a sea of retirement-nearing and retirement-ready individuals left without professional financial help.

NAFA and its membership are dedicated to making risk-reducing fixed and fixed index annuity products widely available to Americans of all walks of life as they plan for and prepare for retirement. Retirement investors seek out and rely upon these products as a safe haven against the investment volatility and longevity risks they would otherwise be left to confront alone. The fixed and fixed index annuity community adheres to high standards of conduct under applicable state law when engaged in the sale of fixed annuities to make sure that a recommended product is a fit for and effectively serves the best interest of the retirement investor. The Proposal would disrupt the operation of the fixed and fixed index annuity marketplace by throwing up an array of new regulatory impediments that are poorly suited to the structures of the fixed product provider community, and that would tilt the playing field against independent producers — ultimately harming consumers.

The series of unnecessary and overly burdensome prohibited transaction exemption amendments contained in the Department's 2023 rulemaking proposal are inextricably intertwined with, and a reflection of, the underlying proposal to amend the definition of "investment advice fiduciary." As noted above, that underlying proposal exceeds the Department's statutory authority,

directly contradicts the Fifth Circuit’s *Chamber of Commerce* decision and inappropriately seeks to confer fiduciary status on financial services professionals and providers who interact with retirement investors in blanket fashion. The Department’s preamble explanation that it “generally intends discreet aspects of this regulatory package to be severable” ignores the comprehensive nature of the proposal, which is clearly not amenable to severance.

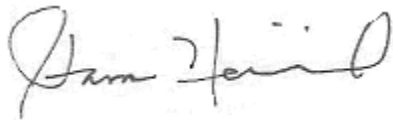
NAFA reiterates that the Department’s 2023 fiduciary advice Proposal, including proposed amendments to PTE 84-24 and PTE 2020-02, reflects fundamental misunderstandings of fact and law that would, if allowed to proceed, wreak havoc on consumer access to retirement products that are today readily available through well-regulated insurance distribution channels. NAFA believes that the Department’s proposed rulemaking package is fatally flawed, not amendable to severance, and should be withdrawn in its entirety.

We appreciate the opportunity to comment on this critical matter. Please feel free to contact the undersigned at cjd@nafa.com or pam@nafa.com if you should have any questions or if we could provide additional information.

Sincerely,



Charles J. DiVencenzo, Jr.
President & Chief Executive Officer
National Association of Fixed Annuities



Pam Heinrich
General Counsel & Director of Government Affairs
National Association of Fixed Annuities