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NAFA Warns of Adverse Consequences from DOL's Proposed Class Exemption

Comment Letter Seeks Relief for Insurance Professionals

WASHINGTON (Aug. 7, 2020) — NAFA, the National Association for Fixed Annuities, submitted a letter in response to the Department of Labor's request for comments regarding its Notification of Proposed Class Exemption, "Improving Investment Advice for Workers and Retirees. While NAFA commends the Department's stated interest in aligning the new proposed exemption with the enhanced standards of conduct now required by other federal and state regulators, the comment letter details NAFA's concerns regarding the Department's new interpretation of the five-part test for determining fiduciary status under the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code, and its potentially harmful implications for insurance agents and financial professionals who sell fixed annuities.

"NAFA would like to thank the DOL for its technical amendment and final rule implementing the vacatur of the 2016 fiduciary rule that NAFA and other groups worked so hard to overturn. However, we fear that this new proposed class exemption walks us back in creating conflicting regulatory oversight, specifically propagating an environment rife with disruption and uncertainty for insurance professionals and the products they offer.

"As an organization uniquely dedicated to promoting the awareness and understanding of fixed annuities, we continually seek to protect financial professionals who sell these important products from being miscategorized as investment advice fiduciaries. Insurance professionals are already subject to a comprehensive framework of state-based regulations, including standards of care in the recommendation and sale of annuity products, which under the recently revised NAIC model regulation requires annuity sellers to act in the best interest of their clients," said Chuck DiVencenzo, NAFA President and CEO. "We believe that a reinterpretation of what constitutes

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fiduciary activity, particularly in regard to the vast majority of insurance professionals doing business with respect to ERISA plan rollovers and IRA transactions, could be detrimental to the industry and therefore minimize consumer access to the products and professional advice they need to retire more securely.”

Key points within NAFA’s letter include:

- that the new guidance effectively sweeps away nearly five decades of Department fiduciary governance in its reinterpretation of ERISA’s five-part test to determine fiduciary status, disproportionately impacting insurance professionals;
- under the new guidance, the determination of whether or not one is an investment advice fiduciary will rise or fall on opaque and largely unspecified “facts and circumstances” that, by necessity, will be adjudicated after the fact;
- the reinterpretation of the fiduciary standard is out of line with the opinion of the Fifth Circuit in overturning the 2016 fiduciary rule and the President’s executive orders regarding fair and transparent administrative rulemaking; and
- specific suggestions for revising the Proposed Exemption to acknowledge the functional and operational differences between the insurance industry model and the securities industry, thereby protecting independent annuity distribution from undue burden.

Though the Department has stated its intent to align with other regulatory bodies across the financial services industry to promote a more uniform best interest conduct standard, NAFA believes significant work must be done to achieve this goal. The organization will continue to work with the DOL to obtain workable modifications that protect its members and consumers nationwide.

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About NAFA

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 85% of fixed annuities sold by independent agents, advisors and brokers. NAFA was founded in 1998. For more information, visit www.nafa.com.