

NAFA Seeks Revisions to DOL Fiduciary Proposal

NAFA, the National Association for Fixed Annuities, appreciates the Department of Labor's (DOL's) efforts to re-draft its 2010 fiduciary proposal to provide enhanced protections for consumers in the retirement marketplace. The DOL has appropriately recognized that fixed annuities are insurance products, not securities, and are typically sold through insurance distribution channels that are not focused on investments, as are securities.¹ However, NAFA believes that many of the DOL's well-intended proposals require significant refinements to prevent tremendous disruption in the distribution and sale of fixed annuities. Without such changes, consumers would lose access to products that provide principal protection and lifetime income. These consequences would disproportionately impact lower and middle income consumers and the small businesses that serve them. At a time when a huge retirement savings gap exists, compounded by the fact that Americans are living longer, regulatory efforts must not hinder the principal-protected savings and lifetime income options uniquely provided by fixed annuities. Accordingly, NAFA will file a comment letter explaining its concerns and identifying suggestions on how to make DOL's proposals workable. Hopefully, the DOL is open to constructive revisions, but NAFA will maintain ongoing communications with Congress to review how reasonable legislative provisions might be crafted if industry's key concerns cannot be resolved in the regulatory process.

Current DOL Proposals

The DOL "fiduciary rule" proposals include a base statutory change that would amend the fiduciary definitions in ERISA and the Internal Revenue Code. Essentially, as drafted, all financial and retirement professionals, including insurance agents selling fixed annuities, would be considered as giving "investment advice" and, therefore, would be deemed "fiduciaries" with respect to sales transactions involving employer plans and IRAs. As a covered fiduciary, ERISA and the IRC impose prohibited transaction rules that affect compensation and business activities that might present conflicts of interest. However, the DOL has

¹ Fixed Annuities are Non-Securities Insurance Products - An increasing number of individuals and families are utilizing fixed annuities, especially for longevity retirement protection. Total fixed annuity sales in 2014 were approximately \$89.4 billion, up 40% from just two years ago. A fixed annuity is not treated as a security and is the only product that allows individuals to accumulate retirement savings, protects those savings from market losses, and guarantees income that lasts a lifetime. Furthermore, as insurance, they are regulated primarily by a state-based regulatory and compliance framework. Life insurance companies are subject to comprehensive regulation as they develop, advertise and sell annuity products. Agents and advisors must adhere to robust suitability standards, accuracy and truthfulness in advertising regulations, and product disclosure principles, while participating in continuing education and training courses required by both the state and insurance company. Insurance agents must be licensed in each state in which they operate. Additionally, most states require annuity contracts to include a "free look" period for consumers, during which time an annuity purchaser may terminate the contract without penalty for any reason and get a full refund of any premiums paid. And, if a state regulator finds a sale to be unsuitable, the insurance carrier must refund 100 percent of premium paid. All of these protections have led to strong consumer demand and high consumer satisfaction rates.

statutory authority to provide exemptions to these prohibitions (prohibited transaction exemptions or PTEs) in both ERISA and the IRC. In its proposal, the DOL has updated existing PTEs, including PTE 84-24, which is an insurance-focused PTE, and has proposed a new Best Interest Contract Exemption (BICE), which is securities focused. NAFA believes that PTE 84-24 is the only potential viable regulatory option for insurance companies and agents who offer fixed annuities to obtain relief under the proposed new standards. However, a number of essential changes are needed to PTE 84-24 and to the proposed base statutory definition of fiduciary to make DOL's proposals workable.

Examples of Needed Changes

- **Seller's Exception** — DOL acknowledges the practicality of a seller's exception, but has limited it to large plans such that most sales-only transactions would not be exempt. NAFA advocates a broader seller's exception that would exempt insurance agents who fairly and fully disclose to the consumer that they are selling products and not providing fiduciary investment advice.
- **Retirement Education Exception** — The proposed rule provides a "carve out" for retirement education information. However, as drafted it does not allow a retirement adviser to discuss specific product options under the proposed carve out. Accordingly, insurance agents will not be able, for example, to provide basic education regarding any particular fixed annuity product to current or prospective clients without falling under fiduciary obligations. NAFA believes that DOL should refine its proposals to allow such educational activities. It could do so by using DOL Interpretive Bulletin 96-1, which contains a number of workable concepts, as a guide.
- **"Best Interest" Standards** — Although most sales transactions involving fixed annuities should fall within the seller's and education exceptions, and will therefore be subject to State regulation instead of DOL's, in a number of cases circumstances may be such that fiduciary restrictions will apply. Therefore, NAFA will also be working with industry colleagues to develop more appropriate language regarding such things as what is required to meet a "best interest" standard (e.g., what range of product offerings may be required; or what is considered "reasonable compensation").

If you have questions or comments, please contact NAFA's Washington, D.C. representatives, Cliff Andrews (202-577-5467; Cliff@CapCityAdvocates.com) or Wright Andrews (202-441-6012; wandrews@andrewsdclaw.com).