



December 21, 2023

Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC 20210

Re: RIN 1210-AC02-Definition of Fiduciary

On behalf of the National Association of Insurance Commissioners (NAIC)¹, we appreciate the opportunity to provide comments on the Department of Labor's (DOL) proposed "Retirement Security Rule: Definition of an Investment Advice Fiduciary" and proposed amendments to the prohibited transaction exemptions (PTEs) (collectively, the "Proposed Rule").

While the NAIC typically refrains from commenting on the rule proposals of fellow regulators unless they are directly preemptive of our authorities, in this instance, we are compelled to respond given the potentially significant impact the Proposed Rule would have on insurance consumers and access to lifetime income products in retirement. We also feel compelled to respond to commentary, used by the Administration to justify the proposal, that disparages the ongoing work of state insurance departments to adopt and enforce comprehensive and consistent standards of care for annuity products.

We are disappointed that the DOL did not engage or coordinate substantively with NAIC members—the chief insurance regulators from the 50 states, the District of Columbia, and the U.S. territories—before promulgating the current Proposed Rule. While the DOL has interacted with NAIC staff and members, those discussions were

¹ As part of our state-based system of insurance regulation in the United States, the National Association of Insurance Commissioners (NAIC) provides expertise, data, and analysis for insurance commissioners to effectively regulate the industry and protect consumers. The U.S. standard-setting organization is governed by the chief insurance regulators from the 50 states, the District of Columbia and five U.S. territories. Through the NAIC, state insurance regulators establish standards and best practices, conduct peer reviews, and coordinate regulatory oversight. NAIC staff supports these efforts and represents the collective views of state regulators domestically and internationally. For more information, visit www.naic.org.



focused almost exclusively on aspects of the NAIC model and provided no opportunity for discussion of DOL's own work or thinking. We acknowledge the administrative limitations on DOL's ability to share or discuss the text of proposed rules, but substantive policy questions can and should be discussed with fellow regulators, even if in the abstract, to avoid duplication or conflict. DOL should demonstrate interest in coordination and harmonizing our respective rules given their overlapping impact on the same population of companies, industry participants, and customers. Only after the Proposed Rule text was released did DOL engage directly with insurance commissioners, albeit with a limited 30-day exposure period underway to digest and assess the proposal.

We are also greatly disappointed in, and fundamentally disagree with, the Administration's characterization of state consumer protections around annuity sales as "inadequate" and providing "misaligned incentives."² The rationale and justification for DOL's work should stand on its own as complementary to robust state efforts and should not mischaracterize differences in regulatory philosophy as an absence of regulatory competence or efficacy in this space.

In the seven years since the DOL last put forward a similar fiduciary proposal, the regulatory landscape for annuities has changed dramatically due, in large part, to the diligent work of state regulators and their legislative counterparts. While the DOL has shared jurisdiction with the states with respect to insurance products sold through Employee Retirement Income Security Act of 1974 (ERISA) plans, such as annuities, states' regulatory responsibilities extend to the entire market for such products, including disclosure requirements, professional standards of conduct for agents, and supervisory controls. In short, state insurance regulations cover *all* annuity products, not just those purchased within ERISA plans.

State Consumer Protections are Comprehensive and Consistent

Following extensive deliberations and input from state regulators, consumer representatives, and the insurance industry, the NAIC made significant revisions to its *Suitability in Annuity Transactions Model Regulation* (#275), adopting a best interest standard. The standard requires producers and insurers, when making annuity recommendations, to act in the best interest of the consumer, without placing their

² <https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/31/fact-sheet-president-biden-to-announce-new-actions-to-protect-retirement-security-by-cracking-down-on-junk-fees-in-retirement-investment-advice/>



financial interest ahead of the consumer's interest. These amendments were designed to be consistent with the U.S. Securities and Exchange Commission's (SEC) Regulation Best Interest to ensure a high degree of harmonization among regulatory platforms.

To meet the new standard, states require that insurance agents and carriers act with "reasonable diligence, care, and skill" in recommending an annuity. The recommended annuity must also appropriately address the specific consumer's "financial situation, insurance needs and financial objectives." Model revisions also included enhancements to supervision to assist with compliance, and development of additional guidance to respond to common state implementation questions to promote consistency not just in text but in practice. To date, 41 states have implemented—and five states are actively pursuing adoption of—the NAIC's best interest enhancements.

Currently, the NAIC is working with states to coordinate a two-phase implementation review of the top 25 annuity writers in the United States. The purpose of these implementation examinations is to ensure that companies are appropriately incorporating and executing the enhanced standards in their policies and procedures.

Retirement Savings Gap

Amid these ongoing state regulatory efforts to enhance consumer protections, the elderly population in the U.S. has continued to grow at an unprecedented rate, while the working-age population has contracted, placing an increased strain on public assistance programs like Social Security and exacerbating the retirement savings gap. Further, defined-benefit pension plans have been largely replaced by defined-contribution plans in the workplace, which offer less certainty to retirement savers. And nearly half of all workers do not have access to an employer-sponsored retirement plan. Given these challenges, DOL should be encouraging, not potentially limiting, access to well-regulated retirement guidance and products such as annuities that could help to bridge the retirement savings gap. There are few retirement security products that protect consumers from their own longevity risk and provide lifetime income, except annuities. Regulators, state or federal, should not substitute our own judgement for those we intend to protect by potentially denying them access to such products when they are appropriate to the retiree.



Indeed, bipartisan Congressional efforts, such as the SECURE Act in 2019 and a follow-up effort in 2022, and multiple Administrations of both parties have consistently recognized the importance of lifetime income products in closing the retirement security protection gap. At the same time, Congress has consistently reaffirmed the states' role as the primary regulators in this area. We view these federal efforts as complementary to our own, and we have met the responsibility to regulate with collaborative action and resolve. We fear DOL's latest attempt at a fiduciary rule could undermine this important work.

Thank you for the opportunity to comment.

Chlora Lindley-Myers
NAIC President
Director
Missouri Department of Commerce
and Insurance

Andrew N. Mais (*He/Him/His*)
NAIC President-Elect
Commissioner
Connecticut Insurance Department

Jon Godfread
NAIC Vice President
Commissioner
North Dakota Insurance Department

Scott White
NAIC Secretary-Treasurer
Commissioner
Virginia Insurance Department