Statement for the Record

Submitted to the

United States House of Representatives
Committee on Education and the Workforce
Subcommittee on Health, Employment, Labor, and Pensions

Protecting American Savers and Retirees from DOL's Regulatory Overreach

February 29, 2024

On behalf of

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The American Council of Life Insurers (ACLI) is pleased to submit this statement for the record on "*Protecting American Savers and Retirees from DOL's Regulatory Overreach*." ACLI thanks Chairman Bob Good (R-VA) and Ranking Member Mark DeSaulnier (D-CA) for holding this important hearing.

AMERICAN COUNCIL OF LIFE INSURERS

ACLI advocates on behalf of 275 member companies dedicated to providing products and services that promote consumers' financial and retirement security. Financial security is our core business, and retirement security for all Americans is a critical mission. We protect 90 million American families with financial products that reduce risk and increase financial security, including life insurance, annuities, retirement plans, long-term care insurance, disability income insurance, dental and vision benefits, and other supplemental benefits. As society and work change, we are committed to providing financial security solutions that protect all Americans, regardless of where and how they work, their stage in life, or the economic status of their household. Americans are living longer, and financial security in retirement is a big challenge facing our country. Life insurers help people achieve their financial and retirement security goals, through products that are available, accessible, and affordable to all.

ACLI members represent 93 percent of industry assets in the United States. Through a well-crafted partnership of the private solutions ACLI members provide, and public solutions that are necessary, we believe the benefits of financial security can be made available to all Americans. Accordingly, ACLI member companies offer insurance contracts and investment products and services to employment-based retirement plans (including defined benefit pension plans, 401(k), SIMPLE, SEP, 403(b), and 457(b) plans) and to individuals (through IRAs and annuities). Three out of five small employers — those with 99 or fewer employees — rely on life insurers' products and services in their employment-based retirement plans. ACLI members are also sponsors of retirement plans for their own employees. And there are more than 15 million annuity-based IRAs held by individuals. As product and service providers, as well as plan sponsors, life insurers understand that by adequately and consistently saving for retirement, effectively managing assets throughout retirement, and utilizing appropriate financial protection products, Americans can supplement Social Security and ensure retirement and financial security for life.

Americans face significant financial security challenges, and the life insurance industry plays a critical role in helping them plan, save and secure a guaranteed income in retirement. Life insurance companies pay out $13.3 billion in long-term care claims to cover extra care when needed; $91.7 billion in life insurance payments so families aren't left on their own after losing a loved one; $95.5 billion in annuity payments that families use to supplement income in retirement, pay for college, cover medical costs, or handle an unexpected expense; and $21.6 billion in disability income payments to workers who experience an unexpected illness or injury.[1] No other financial institutions provide Americans with the level of financial guarantees offered by life insurance companies.

DEPARTMENT OF LABOR'S MISGUIDED PROPOSED RULEMAKING EXERCISE

Given Congress' recent bipartisan legislative successes to ensure lifetime income products are an option for Americans, it is troubling that the DOL continues to attempt to restrict access to vital retirement savings options, specifically with their proposed rulemaking on ERISA's definition of investment advice fiduciary.

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[1] ACLI analysis of 2022 NAIC Annual Statement data.

Since 2010, the DOL has sought to fundamentally expand the definition of ERISA fiduciary investment advice that has been in place since 1975. The DOL's initial attempt, in 2010, was withdrawn in response to the more than 100 senators and representatives from both parties who urged DOL to coordinate rulemaking with the Securities and Exchange Commission (SEC) and provide a robust economic analysis, as well as workable ERISA prohibited transaction exemptions.

The DOL then proposed new regulations in 2015 and issued a final rule in April 2016 that reclassified nearly all financial professionals working with retirement savers as ERISA investment advice fiduciaries. Aspects of the final rule were delayed under the Trump administration. Then in June 2018, the Fifth Circuit Court of Appeals vacated the fiduciary rule noting the "unreasonableness" of the DOL's interpretation of ERISA and that the DOL's implementation of the rule constitutes "an arbitrary and capricious exercise of administrative power."

Since that time, the SEC adopted Regulation Best Interest in June 2019, a rule that imposed enhanced obligations on broker-dealers that directly focused on addressing conflicts of interest. Then, the National Association of Insurance Commissioners (NAIC) in February 2020, adopted revisions to its annuity transactions model regulations that include enhanced standards for the sale of annuities and closely align with the SEC's Regulation Best Interest.

These initiatives impose an enhanced standards for broker-dealers and insurance producers that appropriately and effectively address potential financial conflicts of interest — the same potential conflicts the DOL was attempting to address in its flawed 2016 rulemaking. What's important to note is that both the SEC and NAIC expressed rejected a fiduciary standard because they recognized the importance of preserving affordable non-fiduciary professional financial assistance. Thus, unlike the 2016 DOL approach and the current DOL approach, the SEC and NAIC best interest models address potential financial conflicts of interest without denying those with low and moderate savings access to and guidance and information about a variety of financial savings products. Protecting consumer access is of vital importance.

Both the NAIC model, which has been adopted in 43 states, and the SEC's Regulation Best Interest, support the right of all consumers to access commission-based support or, when they can afford it, choose to pay for ongoing investment advice. It is highly likely that all 50 states will have an enhanced standard by the end of 2024. The effect of these state initiatives is to provide strong consumer protections no matter which state a consumer calls home. In fact, nearly 80 percent of U.S. consumers are now covered by enhanced consumer protections — without losing access to retirement options. By 2025, ACLI expects coverage to be 100 percent. Together, the NAIC best interest model and SEC Regulation BI provide a robust consumer protection for Americans planning for retirement. Yet, despite the advancement of these significantly enhanced consumer protections, the DOL discounted this progress and again released their proposed fiduciary regulatory package which will seriously disrupt everyone selling not only a lifetime income product, but potentially many other types of products in the course of their business.

It is unfortunate that the DOL continues to commit significant governmental resources for this controversial and unnecessary project. This "new" proposal incorporates many of the same inappropriately expansive and overly broad concepts as were included in the 2016 regulation that the Fifth Circuit vacated as inconsistent with the statutory text of ERISA. Like the 2016 regulation, the current fiduciary regulatory package proposal has several significant fatal flaws, is similarly inconsistent with the statutory text and, therefore, must be withdrawn. Specifically:

- It places an impermissible barrier between low- and moderate-income savers and financial professionals, denying them access to savings opportunities and retirement income solutions they want and need.
- It is contrary to current law in several respects, including:
  - It is contrary to congressional intent and violates the statutory limits Congress has placed on the department.
  - It improperly attempts to restructure the statute through the exemption process, imposing Title I fiduciary duties on Title II fiduciaries.
  - It provides IRA investors the ability to bring a private right of action not authorized by Congress.
  - It violates the First Amendment as a content-based, overbroad regulation of truthful sales speech about annuity products.
  - It violates the McCarran–Ferguson Act.
- It attempts to expand the definition of "investment advice fiduciary" under ERISA beyond the scope of what Congress intended when it promulgated ERISA, thereby implicating the Major Questions Doctrine.
- Its Regulatory Impact Analysis is flawed, incomplete, uses stale data, and fails to provide a credible basis for additional rulemaking.
- Its abbreviated comment period and the DOL's unprecedented holding of a hearing prior to the end of the comment period fail to provide stakeholders with a meaningful opportunity to participate in the rulemaking process, thereby violating the Administrative Procedure Act.
- The DOL ignored the changes in regulatory standards applicable to financial professionals selling retirement products that have been implemented since its last failed rulemaking attempt.
- Moreover, given the Fifth Circuit's clear and compelling decision as to the appropriate scope of ERISA's statutory definition, there is no legitimate basis for the DOL to engage in further rulemaking initiatives under section 3(21)(A)(ii) of ERISA, the definition of an investment advice fiduciary.

ACLI and our member companies have asked the department to withdraw the proposal and focus instead on partnering to implement retirement policy that helps – not hurts – Americans saving for a secure retirement.

REAL WORLD IMPLICATIONS: DOL'S PROPOSAL WOULD DENY ACCESS TO ANNUITIES

Many Americans turn to annuities to provide monthly pension-like income in retirement. Annuities are a product sought and used by middle-income Americans. The median household income among annuity owners in 2022 was $76,000 a year while median household income in the U.S. is $63,000.[2] Annuities are the only financial product in the marketplace that guarantees income throughout retirement, distinguishing them from mutual funds and other investments. There are a wide variety of annuities available in the marketplace. Some provide immediate income and others provide income later in life. Some annuities offer market exposure and liquidity. Others provide

[2] ACLI analysis of the Federal Reserve Survey of Consumer Finances, 2022.

protection against loss of principal. There are costs to providing lifetime income guarantees and retirement savers pay for the financial certainty of lifetime income when they purchase annuities.

Americans learn about the benefits and features of annuities from financial professionals who are typically compensated by commissions for the sale of the annuity from insurers. Life insurers have long sought to structure their compensation arrangements in a way that encourages insurance agents and broker-dealers to devote appropriate time and attention to consumers in the sale of annuities. For that reason, insurers typically pay a sales commission upon the completion of an annuity sale to compensate agents and broker-dealers for the significant effort involved in learning about and marketing and selling annuity products. Most annuities today are sold on a commission-based compensation structure.

The DOL's proposed fiduciary regulatory package would upend the marketplace for commission-based sales by broadly expanding the definition of fiduciary investment advice under ERISA to include virtually all financial service interactions in the retirements savings setting that could be construed to involve a "recommendation" of almost any investment product, strategy or service. Under this proposal, Americans would be forced to either forgo retirement information and guidance or engage a fiduciary investment adviser for any help with retirement finances, from taking the first steps to save for retirement to addressing their income needs in retirement.

Before the DOL's 2016 regulation was vacated by the Fifth Circuit, the response by the financial services industry to the imposition of the regulation's fiduciary-only approach on non-fiduciary transactional sales activity resulted in more than 10 million American workers' accounts, with $900 billion in savings, losing access to professional financial guidance, according to a 2018 Deloitte study. These results should not surprise anyone. It was never appropriate to impose a fiduciary duty on persons engaged in traditional transactional sales speech.[3] Congress, the SEC and the NAIC have therefore specifically declined to do so. It should not be surprising that financial professionals and the firms for whom they worked moved away from the business of selling products and services following the release of the 2016 regulation that sought to de-incentivize sales and marketing activities.

Since 2018, a Quantria Strategies study found the 2016 fiduciary regulation would have:

- reduced the projected accumulated retirement savings of 2.7 million individuals, comprised of American workers with incomes below $100,000, by approximately $140 billion over 10 years; and
- leveled the most adverse effects on Blacks and Hispanics, reducing projected accumulated IRA savings by approximately 20 percent over 10 years and contributing to an approximately 20-percent increase in the wealth gap attributable to IRAs for these individuals.[4]

It is critical to understand what the actual implications of a fiduciary-only approach are on Americans, as demonstrated by the Quantria Strategies review of actual data. ACLI cautions against reliance on studies that assume that all financial professionals will agree to serve in a fiduciary capacity, that they will accept increased litigation risk and lower compensation for this

[3] In the Department of Labor's 2010 proposal to amend the definition of fiduciary (75 FR 65263), the Department recognized the dichotomy between advice for a fee and sales and marketing activities by providing a "sellers exception."
[4] Hispanic Leadership Fund, Analysis of the Effects of the 2016 Department of Labor Fiduciary Regulation on Retirement Savings and Estimate of the Effects of Reinstatement, November 8, 2021.

risk. Like the DOL's own analysis, efforts to analyze the potential impact of the DOL's proposed rule must avoid a static and narrow focus on a reduction in explicit fees with all else remaining constant. That disregards how or even if the proposed rule would impact the overall availability of information about or supply of financial security products, and instead assumes that somehow the supply of these is inelastic. This assumption is clearly wrong, as demonstrated in ACLI's comment letter.[5]

JURISDICTIONAL REGULATORY OVERREACH

The McCarran-Ferguson Act, passed by Congress and signed into law in 1945, entrusts states with the authority and responsibility for the regulation of the business of insurance. The sales and marketing of insurance products fits squarely within the boundaries of the "business of insurance" for a company to be in business and to market and sell goods and services. The preemptive authorities under ERISA do not extend to the business of insurance.

Furthermore, DOL has no authority to regulate agents compensated solely for the sale of insurance products. Under the McCarran-Ferguson Act, the "business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business" and "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance…."

To that end, the state regulatory oversight of insurance products and enforcement of insurance sales regulations is comprehensive. Oversight is achieved through the NAIC, whose members are chief insurance regulators from the 50 states, the District of Columbia, and the U.S. territories. Additionally, the states' enforcement regimes also extend to the entire insurance marketplace for products including disclosure requirements, professional standards for agents, and supervisory controls.

The NAIC's significant updates to the Suitability in Annuity Transactions Model Regulation (#275), in which they established a best interest standard that harmonized with the SEC's regulation best interest, was comprehensive. It was also a process that the DOL had direct interactions with. In contrast, the DOL's own proposed regulation process failed to engage or coordinate substantively with the NAIC and its members. The NAIC in its comment letter to the DOL specifically states: "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."[6]

CONGRESSIONAL INTENT AND PUBLIC POLICY TO ADDRESS RETIREMENT CHALLENGES

Congress was specific and intentional in the passage of ERISA in 1974. Should there need to be statutory adjustments to key ERISA definitions, it is Congress, not DOL, who should consider whether to revise the law to impose a fiduciary status on commission-based sales activities. It is Congress that has the authority to determine whether the SEC's Regulation Best Interest and the states' best interest efforts implementing the NAIC model rule adequately protect consumers while preserving commissioned-based services. Forty-one state legislatures and state insurance departments under existing authorities have adopted the NAIC Model. The states did so with rules

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[5] ACLI Comment Letter on DOL Fiduciary Rule found at: https://www.acli.com/-/media/public/pdf/leadership-initiatives/consumer-protection/acliltrdolfiduciary010224.pdf

[6] National Association of Insurance Commissioners, comments to the Department of Labor on their proposed amendments to the Definition of "Fiduciary" at 29 CFR Part 2510.3-21(c), and proposed amendments to each of Prohibited Transaction Exemptions 84-24 and 2020-02, 2023, found at: https://content.naic.org/sites/default/files/government-affairs-rin-1210-ac02-def-fiduciary.pdf

tailored to preserve the role of sales professionals selling commission-based products to consumers. It is Congress that has the role to examine whether federal laws should change and the costs and benefits of such change for investors and service providers.

Additionally, the passage of the Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019 and the SECURE 2.0 Act in 2022 were the most comprehensive retirement packages passed since the *Pension Protection Act* in 2006 and are expected to prove instrumental in increasing access to retirement plans. Additionally, they took numerous steps to not only improve access to lifetime income, but to ease burdensome regulations that overcomplicated the use of these products. Still, there is more work to be done.

Lawmakers from both the House and Senate are working to build upon this progress, and we ask policymakers to continue to look to public and private collaborators that can help implement the recently enacted public policy proposals that address savings challenges and help Americans ensure a secure retirement. We also ask policymakers to continue providing incentives to retirement savings and promoting guaranteed retirement income products. Focusing on ways to help more people achieve a financially secure retirement — increasing savings rates, access to workplace-based retirement plans and lifetime income security for *all* Americans — are all key to financial security.

As Congress continues to look for opportunities to increase Americans' financial security, one critical element is the removal of barriers to lifetime income products. Removing barriers to annuities, as well as modernizing existing law, provides savers with the option to ensure they have income for life. Public policy changes to increase access to annuities through the workplace help to build a financial safety net that is critical in retirement.

CONCLUSION

The life insurance industry is proud to serve retirement savers and play a critical role in offering the only retirement product that provides guaranteed income for life. We take offense to the nefarious characterization that the DOL and Administration have attempted to make of these products and those that sell them. On behalf of the ACLI member companies, we appreciate the subcommittee's interest in this issue, and we hope that our input provides clarity and perspective as to why the DOL's proposal has significant fatal flaws and should be completely withdrawn.