Testimony of Hon. Bradford Campbell, Esq. Representing:

The Association for Advanced Life Underwriting/GAMA International,
The Committee of Annuity Insurers,
The Indexed Annuity Leadership Council,
The Insured Retirement Institute,
The National Association for Fixed Annuities,
The National Association of Independent Life Brokerage Agencies, and
The National Association of Insurance and Financial Advisors

Before

The U.S. Department of Labor
Employee Benefits Security Administration

Administrative Hearing on the Proposed Class Exemption Regulation "Improving Investment Advice for Workers & Retirees"

September 3, 2020

Introduction:

Thank you Acting Assistant Secretary Wilson, Deputy Assistant Secretary Hauser, and the other members of the panel for this opportunity to discuss the Department's proposed class exemption and its new interpretation of fiduciary investment advice.

My name is Bradford Campbell, and I am a partner with the law firm Faegre Drinker Biddle & Reath. I am here today to testify on behalf of seven organizations. We collectively represent insurance carriers; insurance intermediaries; and insurance producers, brokers, agents and agency leaders involved in making available life insurance and annuity contracts to millions of Americans. Our business is to provide for the financial security of American families. Our members assist people in making informed decisions to protect themselves from a variety of financial risks, from untimely death to outliving their retirement savings. To put it simply, we provide guarantees in an uncertain world, protecting people from risks that might otherwise devastate their lives.

The ability to insure against these risks is vital. It is equally vital, therefore, that Americans have access and choice to a wide array of insurance and annuity products—and to assistance from appropriate insurance and investment professionals—to allow them to best protect themselves from these risks.

My testimony today will focus on how the proposed class exemption and the new fiduciary guidance must be significantly modified to provide strong protection for participants and

beneficiaries while preserving essential access and choice to insurance and annuity products. In addition to the issues raised in our comment letters, we want to address two primary issues here today.

First, the proposed class exemption is designed to align with securities regulation, but insurance regulation is materially different in key respects. Its consumer protection goals are achieved in ways that create very different relationships between carriers, intermediaries and agents. As a result, the inherent supervision, control and co-fiduciary status baked into the proposal's Financial Institution/Investment Professional relationship simply do not fit with the independent insurance agent model. We believe the Department needs to provide alternative conditions for insurance transactions, using the NAIC Model rule on annuity recommendations as a guide, just as it has done for securities transactions using Regulation Best Interest as a guide.

Second, the guidance reinterpreting the 1975 fiduciary investment advice five-part test is fundamentally flawed. While at first acknowledging that the sale of insurance products is not ERISA fiduciary investment advice (a position consistent with the ruling of the Fifth Circuit), the guidance then goes on to create significant ambiguity in the application of the five part test, making it nearly impossible to know with any clarity where the Department thinks the line is drawn. The guidance effectively resurrects many of the problems of the vacated 2016 rule, and even worse, appears to have been effective immediately on publication, without review by the public. This seems inconsistent with the Secretary's recently promulgated PRO Good Guidance regulation.

Let me address these issues in more detail.

We Support the Department's Goal in the Proposed Class Exemption

We are generally supportive of the proposed class exemption with certain modifications. Conceptually, we believe the Department is correct that a broad-based exemption permitting reasonable compensation—including commissions and other transaction-based forms of compensation for ERISA advice fiduciaries—is necessary and in the best interest of participants and beneficiaries. We also agree that the Department should structure the exemption conditions to comport with other regulatory regimes. Reducing duplicative requirements helps participants by reducing costs.

Insurance Regulation is Fundamentally Different

However, for insurance and annuity transactions that do not involve securities, the conditions of the proposed class exemption simply do not fit with the basic structure of insurance regulation. If the Department wishes the exemption to be broad-based and widely used, it must be modified to provide for insurance-specific conditions as an alternative to the securities-specific conditions.

The relationships between insurance carriers, insurance intermediaries and agents are significantly different than the relationship between a broker-dealer and its registered representative. Some agents are employees of carriers. Some agents are affiliated with certain carriers, but are not employees. Some agents are completely independent. Some insurance

intermediaries carry out services on behalf of specific insurance carriers, while others operate networks of agents independently. All of these relationships have arisen in the state-regulated insurance marketplace because these different arrangements serve the best interests of consumers. As a result, however, there are significantly different degrees of control and supervision between carriers, intermediaries and agents.

Insurers don't supervise independent agents in the way that representatives giving fiduciary advice are supervised in the securities industry. Independent agents represent multiple insurers and are not controlled by a single insurance company or marketing organization. Insurance regulation is designed to foster this independence for the benefit of consumers—independent agents are subject to significant regulation and oversight, of course, but not primarily by insurers. The policies and procedures that Financial Institutions are required to adopt and enforce with respect to Investment Professionals do not have a valid analogue under insurance regulation.

Alternative Compliance with NAIC Model Rule #275 Conditions

As the Department notes in the Preamble, the National Association of Insurance Commissioners recently adopted a new model rule for annuity recommendations providing a best interest standard of care. The new model rule represents several years of intense study and debate by insurance regulators, academic experts and insurance professionals, taking into account the different business models and structures in the insurance marketplace.

Like Regulation Best Interest does for securities, the new NAIC model rule can serve as a framework for conditions in the class exemption for insurers.

Acknowledgement of Fiduciary Status

In addition, the proposed exemption would be available only if fiduciary status was acknowledged. This prevents the exemption from being used as a protective measure in case a prohibited transaction has been committed. Furthermore, this acknowledgement can cause confusion for investors, create a private right of action in the context of IRAs, and is not needed. We recommend it be removed.

Five Part Test Interpretive Guidance Fundamentally Flawed

We are very concerned about the implications of the new guidance interpreting the 1975 regulation's five part test. The Department appears to have discovered new meaning in the 45-year old text and reversed long-held views regarding rollover and distribution recommendations. We believe these new views are inconsistent with the law and the Fifth Circuit Ruling in the *Chamber* case, and that they resurrect many of the concerns we had about the now vacated 2016 fiduciary rule, but without even the benefit of a regulatory review process.

Sales Assistance is Not Fiduciary Advice

The reality is that most insurance and annuity transactions are not fiduciary advice because they are sales transactions that Congress never intended to be considered "advice for a fee," or as the 5th Circuit put it, "Transforming sales pitches into the recommendations of a trusted adviser mixes apples and oranges." We agree with the portion of the guidance that reads, "the one-time

sale of an insurance product, does not by itself confer fiduciary status under ERISA or the Code, even if accompanied by a recommendation that the product is well-suited." We also agree that all five parts of the five part test must be met. Where we disagree is with the remarkable new interpretations of the five parts that serve to undermine these basic principles.

For example, the Department provides two new ways to suggest that advice provided only once is actually advice provided on a "regular basis." In our view, neither one would survive court scrutiny as a reasonable interpretation.

The first—the anticipated ongoing relationship—is predicated not on actions, but on intentions. If I meet once with an Investment Professional and she recommends a rollover, the Department would have us believe that we are meeting on a regular basis because we plan on meeting again in the future for additional recommendations. If this is what regular basis means, then it turns out I have been going to the gym on a regular basis for months now. But, in all seriousness, fiduciary status cannot hinge on whether an intended future event may happen, and something that has only happened once simply cannot be occurring on a regular basis.

The second—the ongoing relationship—is predicated on preceding non-ERISA recommendations counting as ERISA fiduciary advice. If I met with an investment professional in the past regarding unrelated securities or financial instruments, then her first recommendation regarding a rollover would be viewed by the Department as regular basis advice. This interpretation is also unreasonable, as the prior relationship had nothing to do with ERISA—selling me a term life insurance policy may be recommending a financial instrument, but it is not related in any way to ERISA fiduciary advice.

We are also very troubled by the Preamble's warning that "…agents who receive trailing commissions on annuity transactions may continue to provide ongoing recommendations or service with respect to the annuity."

First, trailing compensation has nothing to do with whether fiduciary advice is being provided—a commission, whether paid immediately or over time, is simply compensation for a transaction. The Department should clearly state that trailing compensation is not evidence of a fiduciary relationship.

Second, providing ongoing services is beneficial to consumers and has nothing to do with whether fiduciary advice is being provided. Answering basic questions, providing educational information, and assisting in completing and filing forms are all services. The Department should clearly state that providing services is not evidence of a fiduciary relationship.

Finally, the guidance suggests that any best interest recommendation, such as under the NAIC model rule or Regulation Best Interest should be considered as meeting the "primary basis" test. These best interest standards were adopted specifically in lieu of a fiduciary standard. It is peculiar indeed to say that compliance with a non-fiduciary standard is evidence of fiduciary conduct.

Conclusion:

Let me close by stating again that we believe a modified form of the class exemption should proceed, but the Department needs to rescind and fundamentally reexamine its fiduciary guidance. As we explained in detail in our comment letters, the guidance is not just bad policy, but cannot be justified on its face as a reasonable interpretation of the 1975 regulation.

We believe the changes we've advocated here serve the best interests of our clients, and will ensure they have access to the products and services that best meet their individualized needs.