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Ms. Jeanne Wilson
Acting Assistant Secretary, Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

RE: Notification of Proposed Class Exemption – Improving Investment Advice for Workers & Retirees
ZRIN 1210-ZA29
Docket ID No. EBSA-2020-0003
Application No. D-12011

Dear Ms. Wilson:

The National Association of Insurance and Financial Advisors ("NAIFA") appreciates this opportunity to comment on the Department of Labor's ("Department") proposed class exemption for investment advice fiduciaries under ERISA and the Internal Revenue Code ("Code").[1] NAIFA supports your efforts to make broadly available a prohibited transaction exemption ("PTE") for investment advice fiduciaries working with ERISA Plans and Individual Retirement Accounts ("IRAs").[2] More detailed responses to the Department's proposal are below, but generally, NAIFA appreciates:

- The proposal's principles-based approach and neutrality with respect to different business models, products and compensation arrangements in the marketplace;

- The Department's efforts to promote regulatory efficiencies between the proposed PTE and other regimes governing overlapping industry actors, such as the Securities and Exchange Commission's ("SEC") Regulation Best Interest ("Reg BI") and the National Association of Insurance Commissioner's ("NAIC's") Annuity Suitability Model Law; and

[1] U.S. Department of Labor, Employee Benefits Security Administration, Notification of Proposed Class Exemption, *Improving Investment Advice for Workers & Retirees,* 85 Fed. Reg. 40834 (July 7, 2020).

[2] As used herein, "ERISA Plan" describes an employee welfare plan covered under Title I of ERISA; "IRA" is used to describe plans governed by Title II of ERISA and the Code; and "Plan" refers to a combination of both ERISA Plans and IRAs.

- Concurrent reinstatement in Department regulations of the well-settled five-part test for determining who is rendering fiduciary "investment advice" for purposes of ERISA and the Code.[3]

Overall, NAIFA thinks the proposed PTE – with the modifications described below – will benefit retirement investors by preserving access to a wide variety investment advice professionals, products, and compensation arrangements. The Department has struck the right balance between crafting a PTE with robust compliance obligations that serve the interests of investors, while avoiding an overly prescriptive approach or penalizing certain market segments or arrangements versus others, which has the potential to minimize competition and options for consumers – particularly for low- and middle-income families who cannot afford expensive advisory fees – and to cause industry participants to leave the marketplace because of dramatically increased compliance and administrative costs.

ABOUT NAIFA

Founded in 1890 as The National Association of Life Underwriters (NALU), NAIFA is the oldest, largest and most prestigious association representing the interests of insurance professionals from every Congressional district in the United States. Our mission – to advocate for a positive legislative and regulatory environment, enhance business and professional skills, and promote the ethical conduct of its members – is the reason NAIFA has consistently and resoundingly stood up for agents and called upon members to grow their knowledge while following the highest ethical standards in the industry.

BACKGROUND ON NAIFA MEMBER BUSINESS MODELS, MARKETS & CLIENTS

NAIFA members—comprised primarily of insurance agents, many of whom are also registered representatives—are Main Street advisors[4] who serve primarily middle-market clients, including individuals and small businesses. In some cases, our members serve areas with a single financial advisor for multiple counties. And often, our members' relationships with their clients span decades and various phases of clients' financial and retirement planning needs. For small business owners, our advisors encourage them to establish retirement savings plans for their employees, and then, following in-depth discussions to ascertain specific needs and concerns, help them to implement those plans.

Most of our members work in small firms—sometimes firms of one—with little administrative or back office support. Often, their business practices are dictated by the broker-dealer, insurance company, or independent intermediary with whom they work, including the format and provision of client forms and disclosures. They also are subject to transaction-level oversight and review by their overseeing financial institutions.

The retirement products most commonly offered by NAIFA members are annuity products (fixed and variable) and mutual funds. Some of our members are independent advisors working with independent broker-dealers or independent insurance intermediaries; others are affiliated with

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[3] *See,* Department of Labor, Final Rule, *Conflict of Interest Rule—Retirement Investment Advice: Notice of Court Vacatur*, 85 Fed. Reg. 40589 (July 7, 2020).

[4] For purposes of this comment letter, the term "advisor" refers generally to a NAIFA member who provides professional advice to clients in exchange for compensation.

(or captives of) product providers and are restricted to some degree in the products they are permitted to sell.

From our members' perspective, it is more important than ever that Americans are encouraged to save, have access to professional advice, and have access to appropriate retirement savings products. Specifically, employers need reliable advice on the design and investment options of their retirement plans, and employees need to be educated on the importance of saving early for retirement, determining their risk tolerance, and evaluating the investment options available through their workplace retirement plan. And individuals without access to an employer retirement plan need education and guidance about other retirement savings vehicles.

Simply put, American investors need *more* personalized assistance and more options with respect to retirement planning and saving, not less. The Department's proposed PTE, with some revisions, would allow professionals acting as investment advice fiduciaries to continue serving their clients and offering the products and compensation arrangements that make the most sense for those clients *without* unnecessarily driving up the cost of that advice with unnecessary and unduly burdensome compliance requirements.

ERISA BACKGROUND

The proposal makes brief reference to the Fifth Circuit Court of Appeals' decision in *Chamber of Commerce of the United States v. U.S. Department of Labor*,[5] which vacated the Department's 2016 final rule redefine who is an investment advice fiduciary under ERISA and the Code.[6] The contents of that opinion and the authorities discussed at length therein inform and support several of our comments on the current proposal and our recommended revisions to the proposed PTE. We therefore include this background discussion as a framing reference for the specific points raised below.

Throughout the opinion, the court emphasizes the different statutory structures for, and scope of Department authority over, Title I ERISA Plans and IRAs addressed in Title II of ERISA. Among the fundamental differences, ERISA Plan fiduciaries are subject to statutory duties of loyalty and prudence, but IRA fiduciaries are not.[7] Moreover, as the court notes, Congress conferred on the Department "far-reaching authority" to regulate fiduciaries to Title I ERISA Plans; it did not authorize "parallel" authority over IRA fiduciaries.[8] In fact, the Department has "no direct statutory authority to regulate [IRA fiduciaries]."[9] Ultimately, the court concluded that the differing statutory structures and authorities "cannot mean that [the Department] may comparably regulate fiduciaries to ERISA plans and IRAs."[10]

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[5] 885 F.3d 360 (5th Cir. 2018).

[6] U.S. Department of Labor, Employee Benefits Security Administration, Final Rule, *Definition of the Term 'Fiduciary'; Conflict of Interest Rule—Retirement Investment Advice*, 81 Fed. Reg. 20946 (Apr. 8, 2016).

[7] *Id.* at 364; *see also,* 29 U.S.C. § 1104(a)(1)(A)-(B), 26 U.S.C. § 4975(a), (b), (f)(8)(E).

[8] *Id.* at 364.

[9] *Id.* at 381.

[10] *Id.* at 381.

For purposes of the current proposal, the relevant commonalities between ERISA Plan fiduciaries and IRA fiduciaries are limited to:

- The same definition of "investment advice" fiduciary;[11] and
- A ban on engaging in prohibited transactions.[12]

Within this common framework, and subject to the important limitations noted above, the Department's authority, for both ERISA Plans and IRAs, extends to interpreting the "investment advice" definition and to granting exemptions from prohibited transactions when certain conditions are met.[13] Notably, as articulated by the Fifth Circuit, the Department's PTE authority is *not* so broad as to allow the Department to expand its authority to reach new actors or transactions not contemplated in statute, impose extensive affirmative obligations on regulated persons that go beyond the duties ERISA imposes on them, or expose regulated persons to liability outside of what is enumerated and permitted in the law.[14]

Aside from the scope of Department authority over ERISA Plans and IRAs, respectively, the other primary focus of the Fifth Circuit opinion is the dichotomy between "investment advice" and isolated sales or transactional activity – a distinction recognized in common law, ERISA's text and structure, and forty-plus years of Department regulations and sub-regulatory guidance. Fundamentally, "investment advice" encompasses common law fiduciary principles, namely a "special relationship of trust and confidence" between fiduciaries and their clients.[15]

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[11] 29 U.S.C. 1002(21)(A)(ii) ("[A] person is a fiduciary with respect to a plan to the extent . . . he *renders investment advice for a fee or other compensation*, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so . . . ."); 26 U.S.C. 4975(e)(3)(B) ("[T]he term 'fiduciary' means any person who … *renders investment advice for a fee or other compensation*, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so . . . .") (emphasis supplied).

[12] *See* 29 U.S.C. 1106; 26 U.S.C. 4975(a).

[13] Exemptions may be granted if the Department finds them to be: administratively feasible; in the interests of the plan and of its participants and beneficiaries; and protective of the rights of participants and beneficiaries of the plan. 29 U.S.C. § 1108(a); 26 U.S.C. 4975(c)(2).

[14] 885 F.3d at 381-382 (stating that the Department "abused" its PTE power when it created exemptions to attempt to blunt over-inclusion of new actors and transactions as fiduciary, imposed burdensome and extensive affirmative obligations to effectively take the place of the duties of prudence and loyalty, and expanding liability exposure beyond what is contemplated in ERISA and the Code); *see also, id.* at 384 ("Together, the Fiduciary Rule and the BIC Exemption circumvent Congress's withholding from DOL of regulatory authority over IRA plans. The grafting of novel and extensive duties and liabilities on parties otherwise subject only to the prohibited transactions penalties is unreasonable and arbitrary and capricious.").

Notably, there are separate statutorily-prescribed remedies for Plan and IRA fiduciaries who engage in non-exempt prohibited transaction. For ERISA Plan fiduciaries, a civil cause of action may be brought by Plan participants or beneficiaries or the Department. 29 U.S.C. 1132. For IRA fiduciaries, on the other hand, the *sole remedy* is imposition of a tax on the person participating in the non-exempt prohibited transaction. 26 U.S.C. 4975(a).

[15] 885 F.3d at 370 ("Fiduciary status turns on the existence of a relationship of trust and confidence between the fiduciary and client."); *see generally,* 885 F.3d at 368-377.

In regulations codified contemporaneously with ERISA's passage, the Department established its now-reinstated five-part test to determine what constitutes "investment advice" under ERISA and the Code. Specifically, institutions and individual professionals become investment advice fiduciaries *only if* they:

- Render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing, or selling securities or other property
- on a regular basis
- pursuant to a mutual agreement, arrangement, or understanding with the Plan, Plan fiduciary or IRA owner that
- the advice will serve as a primary basis for investment decisions with respect to Plan or IRA assets, and that
- the advice will be individualized based on the particular needs of the Plan or IRA.[16]

The Fifth Circuit discusses at length how the various prongs in this test reflect the ongoing, non-isolated nature of "investment advice" and the client relationships based on such advice, in stark contrast to investment salespeople who engage in one-time transactions and may deliver advice or "pitches" solely incidental to a sale.[17]

When Congress passed ERISA and the Department promulgated its 1975 regulations, there existed a long and clear distinction between investment advisers registered under the 1940 Investment Adviser Act (who are considered fiduciaries under that Act) on the one hand, and broker-dealers, stockbrokers, insurance salespeople, and the like on the other. The former earn compensation for rendering regular advice within an underlying relationship of trust and confidence, usually under a flat fee structure; the latter engage in episodic sales activities and receive compensation for completed sales (not the accompanying pitch or incidental advice). The court ultimately concludes that the Department's 2016 final rule – unlike its longstanding five-part test – "improperly dispense[d] with this distinction" by lumping individual sales transactions and stand-alone advice in with fiduciary investment advice.[18]

The court's analysis of investment advice versus sales activity is especially relevant to the Department's current proposal and our comments below. The opinion makes multiple references, for instance, to rollover recommendations as one-time transactions that do *not* satisfy the five-part test for investment advice.[19] Indeed, among the fatal flaws of the 2016 final rule, the court identified its "express inclusion" of "one-time IRA rollover or annuity transactions where it is ordinarily inconceivable that financial salespeople or insurance agents will have an

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[16] 29 CFR 2510.3-21(c)(1) (Oct. 31, 1975); 26 CFR 54.4975-9(c) (Oct. 31, 1975). In direct response to the Fifth Circuit's decision, the Department formally re-codified this test via a technical amendment published in the Federal Register on July 7, 2020. *See,* Department of Labor, Final Rule, *Conflict of Interest Rule—Retirement Investment Advice: Notice of Court Vacatur*, 85 Fed. Reg. 40589 (July 7, 2020).

[17] 885 F.3d at 364-376.

[18] *Id.* at 372; *see also, id.* at 374 ("Substantial case law has followed and adopted DOL's original dichotomy between mere sales conduct, which does not usually create a fiduciary relationship under ERISA, and investment advice for a fee, which does.").

[19] *Id.* at 365, 380.

intimate relationship of trust and confidence with prospective purchasers."[20]

Within this legal backdrop, the current proposal and accompanying recodification of the five-part test represent a marked improvement vis-à-vis the 2016 final rule in adherence to Congressional intent, ERISA's text and structure, and common law. As discussed in further detail below, however, we recommend that the Department amend its proposal to further align it with the foundational legal parameters described above.

COMMENTS & RECOMMENDATIONS REGARDING THE PROPOSED PTE

I. To avoid confusion, the Department should remove all discussion and statements in the proposal's preamble that do not comport – or could be interpreted not to comport – with the law and the Fifth Circuit's *Chamber of Commerce* opinion*.*

As noted above, contemporaneously with publication of this proposal and in response to the Fifth Circuit's vacatur of its 2016 final rule, the Department re-codified its 1975 five-part test for determining whether an institution or professional is an investment advice fiduciary under ERISA and the Code. Unlike the 2016 rule, the Fifth Circuit references the five-part test throughout its opinion as appropriately aligned with common law fiduciary principles and as a proper implementation of ERISA's investment advice fiduciary provisions. That test has spawned decades of sub-regulatory guidance from the Department and case law following and adopting its approach.

Some parts of the proposal's preamble, however, appear to – almost off-handedly – reinterpret the test and its elements in a manner that is not consistent with the legal framework described above. Specifically, some preamble language may be read to conflate "investment advice" and isolated transactions or recommendations, or assume that such one-time interactions fall within the realm of "investment advice." Examples of such statements include:

- "This notice also *sets forth the Department's interpretation of the five-part test of investment advice fiduciary status* and provides the Department's *views on when advice to roll over Plan assets to an IRA could be considered fiduciary investment advice* under ERISA and the Code."[21]
- "The exemption's relief would extend to prohibited transactions arising as a result of *investment advice to roll over assets from a Plan to an IRA*…."[22]
- "The exemption specifically covers compensation received as a result of *investment advice to roll over assets from a Plan to an IRA*."[23]
- "[The exemption] would cover compensation received as a result of *investment advice to acquire, hold, dispose of, or exchange securities and other investments*. It would also cover

[20] *Id.* at 380.

[21] 85 Fed. Reg. at 40835.

[22] *Id.* at 40836.

[23] *Id.* at 40838.

> compensation received as a result of <u>*investment advice to*</u> *take a distribution from a Plan or to roll over the assets to an IRA*, or from investment advice regarding other *similar transactions including (but not limited to) rollovers* from one Plan to another Plan, one IRA to another IRA, or from one type of account to another account (*e.g.,* from a commission-based account to a fee-based account)."[24]

As the Fifth Circuit made clear, isolated sales transactions accompanied by incidental advice do *not*, by themselves, constitute "investment advice." Essential components of "investment advice" are regularity of the advice rendered and an underlying special relationship of trust and confidence between investment professional and client. The quotations listed above could be interpreted as disregarding these fundamental requirements and imposing fiduciary status on new actors and transactions that do not satisfy all elements of the five-part test.

Particularly troubling in this respect is the Department's preamble discussion regarding rollover transactions. The Department states at the outset of its rollover discussion that "all prongs of the five-part test must be satisfied" for an advice provider to be a fiduciary, including the "regular basis," "mutual understanding," and "primary basis" prongs.[25] But then, the Department appears to back away from that fundamental premise by asserting that isolated rollover advice paired with "*an anticipated ongoing relationship*" or circumstances in which regular advice "*will be*" rendered in the future may give rise to fiduciary status.[26]

Further, the Department states that when an advice provider "establishes a new relationship" with a client and recommends a rollover of assets from a Plan to an IRA, that recommendation "*may be seen as the first step in an ongoing advice relationship that could satisfy the regular basis prong of the five-part test*…."[27] And, in a passing footnote reference, the Department suggests that insurance salespeople who engage in one-time sales transactions could trigger fiduciary status under ERISA and the Code if they "*contemplate* an ongoing advice relationship with a customer" by, for example, "receiv[ing] trailing commissions on annuity transactions" and continuing to provide services with respect to the annuity.[28]

A forward-looking or "what if" approach like the one contemplated in this portion of the preamble does not comport with the five-part test, ERISA, or common law fiduciary principles. That a relationship of trust and confidence *may* develop or that regular advice *may* be rendered in the future – let alone that trailing compensation may be paid on the sale of a particular product – does not transform one-time recommendations or transactions into fiduciary investment advice now.

We strongly urge the Department to observe its own five-part test and the clear directives of the Fifth Circuit and remove all discussion and statements in the preamble that suggest – or could be interpreted to suggest – that one-time transactions or recommendations (e.g., rollover recommendations) constitute fiduciary investment advice. Removing all such confusion from

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[24] *Id.*

[25] *Id.* at 40839.

[26] *Id.*

[27] *Id.* at 40840.

[28] *Id.*, at n. 41.

the preamble is essential to following the letter of the law and to clearly identifying the universe of investment advice fiduciaries who may need to take advantage of the proposed PTE.

II. The Department should amend the proposed Impartial Conduct Standards to focus on enforceable, objective compliance criteria suitable for a PTE and not impose subjective requirements stemming from ERISA's duties of prudence and loyalty or requirements that ignore the dynamics of the five-part investment advice test.

While we appreciate the Department's general effort to align the proposed PTE with the SEC's Regulation Best Interest ("Reg BI")[29] and to promote regulatory efficiencies, we urge the Department to bear in mind important distinctions between the SEC's regulation and ERISA's investment advice fiduciary framework. Most importantly, Reg BI establishes a *transactional*, per-recommendation standard of conduct designed for sales activity by broker-dealers and their registered representatives; it intentionally and explicitly is *not* an ongoing fiduciary standard akin to the one imposed on investment advisers by the 1940 Act (or, indeed, that imposed on ERISA Plan fiduciaries). Not all of the elements of Reg BI, therefore, are likely to be appropriate or necessary for an exemption that will only be used by investment advice fiduciaries.

A. <u>The Department should consider whether imposition of a "Best Interest" requirement is appropriate or necessary within this PTE context</u>.

The Best Interest requirement under the proposed PTE is, as the Department states: "based on longstanding concepts derived from ERISA and the high fiduciary standards developed under the common law of trusts, and is intended to comprise objective standards of care and undivided loyalty, consistent with the requirements of ERISA section 404."[30] The Department also notes: "While the Code does not expressly impose a duty of loyalty on fiduciaries, the best interest standard proposed here is intended to ensure adherence to the 'highest fiduciary standards' when a fiduciary advises a Plan or IRA owner under the Code."[31]

First, imposition of ERISA's Title I duties of prudence and loyalty on IRA fiduciaries directly contravenes the Fifth Circuit's *Chamber of Commerce* opinion and the Department's limited scope of authority over these fiduciaries. Second, for ERISA Plan fiduciaries, it is superfluous to impose these obligations via a PTE because those fiduciaries already are bound by "the highest fiduciary standards" under ERISA section 404. This is an example of a Reg BI feature that is appropriate in the SEC's regulatory context, but here, due to ERISA's very different construct, is both inappropriate in its reach over IRA fiduciaries and unnecessary in its application to ERISA Plans.

B. <u>The Department should remove the pre-transaction fiduciary status disclosure requirement to avoid consumer confusion</u>.

The proposed PTE would require Financial Institutions to deliver a written statement "that the Financial Institution and its Investment Professionals are fiduciaries under ERISA and the Code,

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[29] Securities and Exchange Commission, Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 Fed. Reg. 33318 (July 12, 2019).

[30] *Id.* at 40842.

[31] *Id.* at n. 50.

as applicable, with respect to any fiduciary investment advice provided by the Financial Institution or Investment Professional to the Retirement Investor." This requirement presents multiple concerns.

First, the disclosure requirement is triggered by, and must precede, any transaction with a Retirement Investor. This per-transaction framework does not make sense, given the ongoing and regular nature of any investment advice that satisfies the five-part test. As discussed above, one-time or isolated transactions do not satisfy the test. Fiduciary status is established via the rendering of regular advice within a special relationship of trust and confidence; thus, providing consumers with "fiduciary" notices for every transaction undermines the letter and spirit of that structure and will only confuse consumers about the true nature of the relationship (i.e., in that it is *not* a transactional relationship).

The proposed per-/pre-transaction disclosure requirement also runs the risk of Financial Institutions and Investment Professionals who are *not* in fact acting as investment advice fiduciaries providing consumer disclosures stating that they are acting in such a capacity *in case* an ongoing relationship is later established with the customer. This over-inclusion issue becomes especially problematic if the Department does not, as discussed above, remove confusing language from the preamble suggesting that one-time transactions may by themselves be investment advice if there is *anticipation* of a future fiduciary relationship.

Additionally, the specific language in the requirement is overly broad and vague. The disclosure requires Financial Institutions to state that it and "*its Investment Professionals*" are fiduciaries "with respect to any fiduciary investment advice provided." This language would appear to consumers to characterize all Investment Professionals working for a single Financial Institution the same – as fiduciaries. It also does not provide substantive or helpful information to consumers who are not familiar with the nuances of "fiduciary investment advice" versus sales activity versus any other type of advice. Rather, as likely read and understood by a layperson, the "fiduciary" reference here simply – and misleadingly – suggests that everyone working for the Financial Institution is a fiduciary whenever s/he gives the customer any advice.

For reasons outlined above, it may be confusing to consumers to require that the other disclosure requirements – description of services provided and material conflicts of interest – be provided on a per-/pre-transaction basis. Those disclosures may be more appropriately delivered on an annual or other periodic basis after the investment advice fiduciary relationship has been established and to the extent the Institution/Professional intends to or has relied on the PTE to receive otherwise prohibited compensation. Generally, however, these disclosures are likely to be more helpful to consumers because they deliver practical information about the relationship and services provided, and do not rely on or assume consumers' knowledge of sophisticated or complex legal concepts or terminology (e.g., "fiduciary investment advice").

Ultimately, the proposed fiduciary status disclosure is not mechanically suitable for ongoing investment advice fiduciary relationships, does not provide meaningful information to consumers beyond the other disclosure requirements, and is likely to lead to unnecessary consumer confusion. We therefore encourage the Department to remove this requirement from the proposed PTE. We also urge you, to the extent you retain them in a final PTE, to reconsider the delivery requirements for the other disclosures.

C. <u>The Department should not impose enhanced documentation requirements on rollover recommendations as part of Financial Institutions' policies and procedures obligations</u>.

The Department proposes to impose heightened documentation requirements for rollover recommendations as part of Financial Institutions' required policies and procedures to promote compliance with the PTE and mitigate potential conflicts of interest. For reasons already stated, singling out rollover advice and transactions for additional affirmative obligations is not appropriate because they do not, outside of the context of an ongoing investment advice context, give rise to fiduciary status.

By imposing this requirement, the Department will likely encourage Financial Institutions to broadly levy on their Investment Professionals burdensome obligations related to *non-fiduciary* rollover transactions and one-time recommendations. Again, this becomes even more concerning if the Department does not remove confusing language regarding rollovers as fiduciary investment advice from the preamble.

Additionally, the preamble discussion related to this particular requirement appears to further single out isolated rollover recommendations by enumerating various "considerations" to support a "prudent" rollover recommendation in compliance with the PTE.[32] These "considerations" are not referenced in the proposal with respect to any other types of recommendations, isolated or not.

Focusing on particular, potentially isolated recommendations (e.g., rollovers, sales pitches on proprietary products, etc.) for heightened scrutiny or additional affirmative PTE obligations does not comport with the investment advice framework in ERISA or the five-part test. It also undermines the Department's stated objective of creating a product- and compensation model-agnostic PTE. The Department should therefore remove any such "special" transaction-based references and requirements throughout the PTE and the preamble.

D. <u>The Department should not require ongoing monitoring of investments that possess "unusual complexity and risk."</u>

In the preamble of the PTE, the Department suggests that certain investments that possess "unusual complexity and risk" may require ongoing monitoring to protect the investor's interests (i.e., an Investment Professional may be unable to meet the exemption's best interest standard unless a mechanism is in place for such monitoring).[33]

The proposal does not define which investments would qualify as "unusually complex or risky," nor does it identify a specific standard or set of criteria for Investment Professionals or Financial Institutions to determine which investments might be subject to this broad standard. This ambiguity will make it very difficult—if not impossible—for Investment Professionals and Financial Institutions to determine their compliance obligations absent a complex, product-by-product/investment-by-investment analysis.

Regardless of the scope of the definition, however, annuities and life insurance products should not be subject to an ongoing monitoring requirement, as they are neither "complex" nor "risky."

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[32] *Id.* at 40845.

[33] *Id.* at 40843.

Annuities, for instance, are "buy-and-hold" investments whose primary purpose is to provide steady access to income over an investor's lifetime. They are regulated and/or approved under federal and state regulatory regimes (e.g., Reg BI, FINRA rules, NAIC model laws and regulations), none of which require them to have monitoring protocols in place. Instead, these frameworks regulate the products and promote comprehensive disclosure, facilitating consumer education and consumer choice.

Moreover, it is uncertain how Investment Professionals or Financial Institutions would undertake such "ongoing monitoring" for annuity and life insurance products or what its ultimate purpose would serve. In general, clients have no specific obligations after their initial investment. In fact, they generally cannot terminate an annuity or life insurance policy without absorbing a fairly strict and hefty penalty. As such, any decision by a client to terminate their contract or policy would occur based on a development in the client's life, not external circumstances. How a professional or institution would monitor for such events over time is unclear.

Given the potential for conflict with other regulatory requirements, the heightened compliance burdens, and the potential for significant confusion across Investment Professionals and Financial Institutions, the Department should not impose ongoing monitoring requirements based on a vague standard of "unusual complexity and risk." If, however, the Department determines that such ongoing monitoring is necessary for "unusually complex and risky" products, it should explicitly exclude all life insurance and annuities products from the ambit of this obligation.

III. **The Department should not utilize overly punitive eligibility criteria to extend supervisory authority over IRA fiduciaries.**

As noted above, the Department does not have direct regulatory authority over IRA fiduciaries and the sole remedy for IRA fiduciaries engaging in non-exempt prohibited transactions is imposition of an excise tax. Moreover, the Fifth Circuit's *Chamber of Commerce* opinion makes clear that it is impermissible for the Department to attempt to use its PTE authority to extend its reach over IRA fiduciaries or impose additional liabilities on them. The unusually robust eligibility provisions in the proposed PTE, particularly as they relate to individual Investment Professionals, could be perceived as such an attempt.

Under the proposal, following rather cursory notice and hearing processes, Investment Professionals would become ineligible for the PTE immediately upon receipt of a written ineligibility notice from the Department. Of course, practically speaking, ineligibility forecloses Investment Professionals acting as investment advice fiduciaries from receiving variable or third-party compensation (i.e., it has a significant and punitive impact on professionals with commission-based business models).

Such ineligibility determinations by the Department may be based on "a systematic pattern or practice of violating the conditions of this exemption" or "intentionally violating the conditions of this exemption." These grounds for ineligibility are troubling in light of the way the PTE is currently constructed. For instance, as drafted, the PTE effectively imposes ERISA's Title I duties of prudence and loyalty on IRA fiduciaries via the Best Interest requirement. It also contemplates fiduciary status for professionals who make isolated rollover recommendations but *may* render regular advice in the future. Reading all of these elements together, the current proposal could appear to give the Department authority to supervise and penalize actors (sometimes even non-fiduciary actors) in a manner that goes beyond what is authorized in ERISA.

IV. The Department should revise the definitions of "Financial Institution" and "Plan" to expand availability of the PTE to insurance intermediaries and to clarify that advice pertaining to employee welfare plans without an investment component is not fiduciary investment advice.

A. "Financial Institution" should include insurance intermediaries like independent marketing organizations ("IMOs") that act as investment advice fiduciaries.

The retirement products most commonly offered by NAIFA members are annuity products (fixed and variable) and mutual funds – products often with a commission-based compensation framework. Roughly one-third of NAIFA members work in the independent channel (i.e., with multiple insurance companies) with IMOs or similar independent institutions. Accordingly, it is very important to our members that this proposed exemption present a feasible option under which common business practices and compensation arrangements/channels can be preserved by extending PTE eligibility to these independent institutions that are acting as investment advice fiduciaries.

The Department proposes to limit "Financial Institutions" eligible to utilize the PTE to registered investment adviser firms, banks, insurance companies, and registered broker-dealers. After acknowledging in the preamble that insurance companies often sell insurance and annuity products through independent channels, rather than through registered investment advisers and broker-dealers, the Department suggests that insurance companies can create oversight and compliance systems for independent insurance agents "through contracts with intermediaries such as independent marketing organizations (IMOs), field marketing organizations (FMOs) or brokerage general agencies (BGAs)."[34] It then posits that these independent institutions may separately apply to the Department for prohibited transaction relief "on the same conditions as apply to the Financial Institutions covered by the proposed exemption."[35]

The Department's suggested approach creates an unnecessary level of complexity in the proposed PTE's compliance structure and will create needless disruption for businesses and professionals operating in the independent channel. The Department contemplates future eligibility for IMOs under the same terms as currently-defined Financial Institutions, signaling some confidence that IMOs have the capacity to fulfill the obligations imposed on Financial Institutions under the PTE. And suggesting that a Financial Institution's supervisory duties could be contracted out to an IMO for purposes of the PTE further signals confidence in IMOs' ability to serve these functions. Finally, IMOs would be subject – on par with other Financial Institutions – to the PTE's requirements (and to penalties under ERISA and the Code for engaging in non-exempt prohibited transactions, should they fail to satisfy the PTE).

Based on the foregoing, there is no need or compelling rationale to create a dual track for eligibility and delay availability of the PTE for this important independent sector in the marketplace. We therefore urge the Department to include insurance intermediaries and other independent institutions in the definition of "Financial Institution."

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[34] *Id.* at 40837.

[35] *Id.* at 40838.

B. <u>The Department should add language to the PTE's "Plan" definition to clearly exclude non-cash-value welfare benefit plans that do not have an investment component</u>.

As drafted, the proposal defines "Plan" broadly to include employee welfare benefit plans and employee pension benefit plans.[36] Many welfare benefit plans, as you know, offer non-cash-value benefits such as health, life, and disability coverage. These plans do not have an investment component and are not designed to generate income, increase wealth, or serve as a savings vehicle.

The Department clarified in its 2016 final rule that advice pertaining to these welfare plans without an investment component was not intended to be treated as fiduciary investment advice under ERISA or the Code.[37] More specifically, the Department stated, "[It] does not believe that the definition of investment advice in ERISA's statutory text, the Department's 1975 regulation, or the prior [exemption] proposals are properly interpreted or understood to cover a recommendation to purchase group health, disability, term life insurance or similar insurance policies that do not have an investment component."

Accordingly, the Department added clarifying language to the definition of "investment property" in its 2016 final rule explicitly excluding "health insurance policies, disability insurance policies, term life insurance policies, and other property to the extent the policies or property do not contain an investment component."[38] We urge the Department, in the interest of clarity and certainty, to take similar action here and revise the definition of "Plan" in the same fashion, so that it reads:

> "'Plan' means any employee benefit plan described in ERISA section 3(3) and any plan described in Code section 4975(e)(1)(A). The term 'Plan' does not include health insurance policies, disability insurance policies, term life insurance policies, and other property to the extent the policies or property do not contain an investment component."

* * *

We very much appreciate the Department's efforts to create a workable and broad-based PTE for investment advice fiduciaries to ERISA Plans and IRAs and your consideration of our comments. Please do not hesitate to contact me if I can provide further information or answer any questions.

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[36] *See* 29 U.S.C. 1002(3).

[37] *See,* Department of Labor, Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20946, 20962 (Apr. 8, 2016), https://www.govinfo.gov/content/pkg/FR-2016-04-08/pdf/2016-07924.pdf ("It was *not the intent of the proposal to treat as fiduciary investment advice, advice as to the purchase of health, disability, and term life insurance policies to provide benefits to plan participants or IRA owners if the policies do not have an investment component. It would depart from a plain and natural reading of the term "investment advice"* to conclude that recommendations to purchase group health and disability insurance constitute investment advice.") (emphasis supplied).

[38] *Id.*

Sincerely,

Cammie Scott
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President