Testimony of Chantel Sheaks, Vice President of Retirement Policy, U.S. Chamber of Commerce, Regarding Proposed Regulation: Retirement Security Rule: Definition of an Investment Advice Fiduciary and Related Amendments to Six Prohibited Transaction Exemptions

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My name is Chantel Sheaks, and I am the Vice President of Retirement Policy at the U.S. Chamber of Commerce. The Chamber represents nearly every aspect of the retirement world, including employers, plan sponsors, service providers, pension consultants, and asset managers. Unfortunately, because of the timing of the comment period, our comment letter isn't finished, and we have not yet discussed this proposal with all of our members. In fact, I have a call with a member today at 1 pm to discuss how the proposed regulation impacts them.

Given the breadth of the proposed regulation and the significant changes not only to PTE 2020-02, but also to PTE 84-24, which insurers have been using for nearly 40 years, and several other PTEs, it has taken significant time for our members to fully understand and recognize the impact the proposals will have on their businesses. It also has been difficult to receive feedback and truly understand the impact on business given that the comment period spans three nationally recognized holidays and other holiday observances.

As such, my testimony today will focus on questions that we have for DOL. Because I only have 10 minutes, I know it isn't possible for DOL to respond at this time to the questions that I am posing. However, given that DOL stated that "one benefit of holding the public hearing before the comment period closes is that the testimony will inform the comments EBSA receives," I ask that DOL commit to providing answers to these questions and making them publicly available well in advance of the January 2, 2024 comment due date. I am happy to submit the Chamber's questions in writing for the record to assist in this request.

Today, I will focus on the following areas:

- Process
- Scope
- Severability
- Jurisdiction, and
- Economic Impact

<u>Process</u>

With respect to process:

- Has EBSA ever held a hearing on a proposed regulation during the comment period? If so, for what proposed regulation and why?
- Generally, DOL affords at least 60 days (and with respect to the 2016 rule, 75 days) for comments on proposed rules and for comments on proposed amendments to PTEs. For example, for the proposed amendment to the QPAM exemption, DOL provided an additional 15 days for the comment period. Can DOL explain why it feels that the 60-day comment period for a proposed regulation and amendments to six PTEs is appropriate?
- There are over 180 instances in the proposals in which DOL asks for comments both on substance and economic impacts. Is there a reason why DOL issued a proposed regulation and proposed amendments to six PTEs rather than a Request for Information given the number of unknowns in DOL's analysis?
- PTE 2020-02 has been fully enforceable for less than 15 months. Can DOL explain why it thought the PTE should be amended so soon? Has DOL investigated any Financial Institutions or Investment Professionals and found specific issues or areas of concern during the 15-month enforcement period that would necessitate immediate amendments?

Scope

With respect to scope:

- In the preamble to the Proposed Regulation, DOL states that:
  "The Department considered proposing a definition of an investment advice fiduciary that would be broader in scope, similar to the 2016 Final Rule. In promulgating the 2016 Final Rule, the Department expanded the definition of a fiduciary beyond the five-part test included in the 1975 regulation."
  Given that the proposed regulation eliminates the current regular basis test, the primary basis test and the mutual agreement, arrangement or understanding test, can DOL explain how it narrowed the scope in the proposed regulation and what entities would not be covered under the proposed regulation compared to the 2016 Final Regulation?

- Could DOL explain the difference between a sales pitch or marketing and investment advice under the proposed regulation, especially in the institutional context?
- Paragraph (c)(1)(i) provides that an entity is a fiduciary if the person "either directly or indirectly has discretionary authority or control with respect to purchasing or selling securities or other investment property for the retirement investor." Did DOL intend to make someone a fiduciary if they or an affiliate have discretionary authority or control over any assets of a retirement investor, including assets that have no connection with Title I or Title II of ERISA?
- Both PTEs 2020-02 and 84-24 contain provisions that would limit eligibility. One new provision is that an entity cannot rely on either PTE for 10 years if a foreign affiliate is convicted of any one of a litany of crimes unrelated to ERISA or Title II assets. For example, if a foreign affiliate of a Financial Institution in Taiwan is convicted of theft, a Financial Professional in the United States who works for the Financial Institution can no longer rely on PTE 2020-02 when providing investment advice to a participant in Nebraska. Can DOL explain how revoking eligibility for PTE 2020-02 based on a theft in Taiwan by an affiliate of the Financial Institution is related to a Financial Professional providing advice to a participant or beneficiary in the United States and how this limitation helps participants or beneficiaries?
- Similarly, PTE 2020-02 states that an entity will not be able to rely on PTE 2020-02 if DOL finds the entity has "engag[ed] in a systematic pattern or practice of failing to … report [prohibited] transactions to the IRS on Form 5330 and pay the resulting excise taxes…." Can DOL explain what would constitute a "systematic pattern or practice" and DOL's reasoning for applying the same consequence for this failure as applied for felony misconduct?

Severability

With respect to severability,

- Given that DOL has now cast the net so wide for who is considered a fiduciary for purposes of providing investment advice for a fee, for many entities to provide investment advice, they now must rely on an exemption to be able to conduct business. Furthermore, DOL has narrowed the exemptions that may be used for fiduciary advice to only PTE 2020-02 or PTE 84-24, but only for independent

producers. Can DOL explain how the proposed regulation, PTE 2020-02, and PTE 84-24 are not interdependent if someone who is now a fiduciary under the proposed regulation would be unable to conduct business were it not for having to use either PTE 2020-02 or PTE 84-24?

Jurisdiction

With respect to jurisdiction,

- One prong of the new regular basis test under the proposed regulation is that an entity "makes investment recommendations to investors on a regular basis as part of their business." Does DOL believe that it has jurisdiction over any entity that makes any investment recommendations, regardless of whether those assets are in Title I or Title II plans?
- The Proposed Regulation does not define "best interest." However, PTE 2020-02 defines it as:

  Investment advice will be in the Retirement Investor's "Best Interest" if the advice:

  > (A) reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor; and
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  > (B) does not place the financial or other interests of the Investment Professional, Financial Institution or any Affiliate, Related Entity, or other party ahead of the interests of the Retirement Investor, or subordinate the Retirement Investor's interests to their own.

  Can DOL explain how this is different from the ERISA standards under ERISA Section 404(a)?
- The Proposed Amendments to PTE 84-24 import requirements similar to PTE 2020-02 for independent producers and would require insurers, who DOL admits are not ERISA fiduciaries, to have policies and procedures that impose substantive requirements on insurers, such as prudently reviewing each recommendation to ensure it meets the Impartial Conduct Standards, mitigating conflicts of interest which require eliminating certain pay structures, including a customer complaint process, certifying whether

independent producers are qualified to sell the products, and a retroactive review that also imposes substantive requirements. Can DOL explain how it has authority to impose substantive requirements on insurers who are not fiduciaries and who are otherwise not covered by ERISA?

Economic Impact

Given the timing of when comments are due, it will be very difficult for commenters to do a full assessment of the economic impact. However, below are a few questions we have, and our comment letter will detail more.

- In the economic impact analysis, DOL assumes that all firms use PTE 2020-02 for all lines of business, even though it is not required. DOL then uses this assumption to conclude that the cost of compliance with the proposed regulation and amended PTE 2020-02 will be minimal. What was the basis for this assumption?
- In reality, not all firms elected to use PTE 2020-02, but many will now be forced to do so because of the expanded scope of the proposed regulation. Our member firms who did voluntarily elect to use PTE 2020-02 have told us that it took 100s of people 1,000s of hours. Has DOL considered not only how much it will cost firms who were not using PTE 2020-02 to come in compliance but also the cost impact of changing PTE 2020-02 for those who adopted the PTE so soon after it became fully enforceable?
- Could DOL explain how it concluded that the proposed regulation and PTE 2020-02 align with "other regulators' rules and standards of conduct," when the disclosures, review, and compensation are different, such as with respect to the Securities and Exchange Commission's Reg BI?

Thank you for the opportunity to testify on this important issue.