



New York Life Insurance Company
51 Madison Avenue
New York, NY 10010
Tel. 212 576 5353 Fax 212 576 6886
skdavids@nyl.com

Sheila Kearney Davidson
Executive Vice President,
Chief Legal Officer & General Counsel

The Company You Keep®

July 21, 2015

Submitted via email: e-ORI@dol.gov, e-OED@dol.gov
Subject: RIN 1210-AB32, ZRIN 1210-ZA25

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Conflict of Interest Rule
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Office of Exemption Determinations
Employee Benefits Security Administration
(Attention: D-11712)
U.S. Department of Labor
200 Constitution Avenue NW, Suite 400
Washington DC 20210.

**Re: Definition of the Term "Fiduciary;" Conflict of Interest Rule – Retirement
Investment Advice RIN 1210-AB32, ZRIN 1210-ZA25**

Ladies and Gentlemen:

New York Life Insurance Company ("New York Life") appreciates the opportunity to comment on the Department of Labor's ("Department") notice of proposed rulemaking comprising an amendment to the regulation defining "fiduciary" advice under section 3(21) of the Employee Retirement Income Security Act ("ERISA"), as well as several proposed amendments to existing prohibited transaction class exemptions ("PTEs"), and the proposed new "Best Interest Contract" PTE ("BIC PTE") (collectively, the "Proposal").

We recognize the substantial effort that the Department has put into the Proposal. However, we believe that in its current form, the Proposal is unworkable and would actually weaken the ability of middle class Americans to secure a comfortable retirement. We have three primary concerns with the Proposal as drafted:

- It would effectively prohibit the sale of proprietary products by the very agents who are most knowledgeable about such products;
- It will encourage the sale of products that are ostensibly cheaper but that provide less secure financial guarantees; and
- It will limit the ability of middle income investors to access guaranteed products by discouraging commission-based sales.

We also have concerns about several other problematic provisions in the Proposal. This letter provides a description of our concerns, an analysis of the impact of the Proposal's problematic provisions, as well as proposed solutions that we believe constitute a better way to protect consumers.

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I. ABOUT NEW YORK LIFE

New York Life, founded in 1845, is the nation's largest mutual life insurance company. As a mutual company, New York Life has no stockholders. Our interests are aligned with those of our policyholders, who are our only constituency. New York Life is singularly focused on helping Americans of all ages and income levels achieve financial security. We provide life insurance, annuity and investment products to more than 6.5 million individuals and families.

New York Life has the highest possible financial strength ratings currently awarded to any life insurer from all four of the major credit rating agencies.¹ Our goal is to help our clients enjoy a comfortable and financially secure retirement, knowing that the guaranteed products they purchase from us are backed by our financial strength and 170-year history of meeting our promises.

New York Life's proprietary insurance and annuity products are offered primarily through a network of 12,000 licensed agents located in all 50 states. Our agents reflect the diversity of America. In 2014, 65 percent of New York Life's new agents were women or representatives of cultural markets -- including African-American, Chinese, Hispanic, Korean, South Asian and Vietnamese markets.

New York Life provides these financial professionals with extensive training, support and supervision. Their clients benefit from working with an agent who is deeply knowledgeable about New York Life's portfolio of products and therefore uniquely positioned to help identify the best solutions to address their clients' retirement and other financial security needs.

New York Life is the leading provider of retail guaranteed lifetime income products, which enable individuals to use a portion of their retirement assets to guarantee a stream of income for life. Specifically, New York Life is the industry leader in sales of both immediate annuities, in which the stream of guaranteed income begins as soon as the product is purchased, as well as deferred income annuities, in which the income stream begins at a designated date in the future (e.g., age 70).² In 2014, New York Life paid out over \$1 billion in "paychecks" (annuity benefits) to more than 130,000 payees.

While New York Life serves Americans across the financial spectrum, **our focus is the middle market**. Approximately 50 percent of our annuity customers have annual household incomes of less than \$75,000 a year, and about 70 percent have annual

¹ A.M. Best (A++), Fitch (AAA), Moody's Investors Service (Aaa), Standard & Poor's & (AA+). Source: Individual independent rating agency commentary as of July 1, 2015.

² In 2014, New York Life was leading seller of single premium immediate annuities (SPIAs) with a 22% market share, and the leading seller of deferred income annuities with a 42% market share. Source: LIMRA, U.S. Individual Annuity Sales Survey, Participants Report, Fixed Immediate and Deferred Income Annuities, Fourth Quarter 2014 results. (Fixed Immediate include Fixed Period Annuities.) Annuities are primarily issued by New York Life Insurance and Annuity Corporation, a wholly-owned subsidiary of New York Life Insurance Company.

household incomes of less than \$100,000 a year. Additionally, half of the annuities sold by New York Life agents have premiums of \$50,000 or less.

II. THE VALUE OF GUARANTEED INCOME, TRAINED AND WELL-SUPERVISED AGENTS, AND FINANCIAL STRENGTH

Before detailing our specific concerns with the Proposal, we believe it is important to emphasize that the Department's proposal fails to recognize the value of: (1) guaranteed lifetime income products; (2) guidance provided by trained, well-supervised professionals; and (3) the financial strength of the life insurers providing long-term guarantees.

A. Guaranteed Lifetime Income Products

In recent years, we have been pleased by the Administration's recognition that guaranteed lifetime income products are a tool that allows American retirees to effectively create their own "pension."³ For this reason, it is both surprising and concerning to us that the Department's Proposal would restrict Americans' access to such guarantees by impeding the sale of proprietary products and the use of commission-based compensation models.

In its February 2012 report, the Council of Economic Advisers ("CEA") recognized the increasingly important role of guaranteed lifetime income products offered by life insurers:

The shift in the retirement saving landscape away from lifetime income products has raised particular concern over longevity risk – the risk that retired workers will outlive their assets. The continued movement away from traditional DB plans toward 401(k) and hybrid DB plans means that fewer people can count on a guaranteed stream of pension income in retirement. Given declining but uncertain mortality, retirees are faced with the difficult task of choosing how much of their DC plan assets and other savings to spend in any given year. Retirees who live longer than expected may find themselves without sufficient assets at the point in their life when they are most vulnerable. This risk is particularly salient for

³ *Fact Sheet: The White House Conference on Aging, Section on "Facilitating the Availability of Lifetime Income Options,"* (July 13, 2015); *Use of Lump Sum Payments to Replace Lifetime Income Being Received By Retirees Under Defined Benefit Pension Plans*, IRS Notice 2015-49 (July 9, 2015); *Lifetime Income Provided Through Target Date Funds in Section 401(k) Plans and Other Qualified Defined Contribution Plans*, IRS Notice 2014-66 (Oct. 24, 2014); DOL Info Letter to J. Mark Iwry (Oct. 23, 2014); *Internal Revenue Bulletin Regulations on the Treatment of Qualified Longevity Annuity Contracts under the Required Minimum Distribution Rules*, Internal Revenue Bulletin: 2014-30 - July 21, 2014 – TD 9673; *Advanced Notice of Proposed Rulemaking Regarding Lifetime Income Illustrations*, 29 CFR Part 2520 (May 13, 2013); *Request for Information Regarding Lifetime Income Options for Participants and Beneficiaries in Retirement Plans*, 75 FR 5253, 5254 (Feb. 2, 2010).

women, who have longer expected lifespans than men and therefore are more susceptible to longevity risk....⁴

Annuities can help to mitigate some of the risk faced by retirees. In particular, annuities protect retirees against the risk of outliving assets For those individuals with the good fortune to live long lives, annuities augment the longevity insurance provided by Social Security benefits.⁵

As described by the Government Accountability Office (GAO), guaranteed lifetime income products offer several unique benefits:

Researchers have concluded that annuities have important benefits. For example ... it is more efficient to pool the risk of outliving one's assets [by purchasing an annuity] than to self-insure by accumulating enough assets to provide enough income in case one lives to a very old age. Annuities provide income at a rate that can help retirees avoid overspending their assets and provide a floor of guaranteed income to prevent unnecessarily spending too little for fear of outliving assets Annuities can also relieve retirees of some of the burden of managing their investments at older ages when their capacity to do so may diminish⁶

The CEA report also takes note of the "Annuity Puzzle," which is the disconnect between the benefit that guaranteed lifetime income products provide in mitigating risk and the fact that very few savers elect to purchase such products.⁷ As noted, several of the Administration's initiatives have been aimed at helping to overcome this "Annuity Puzzle" and promote greater understanding and use of guaranteed lifetime income products.

B. Guidance Provided by Trained, Well-Supervised Professionals

Despite the recognized benefits of guaranteed lifetime income annuities, those planning for retirement are unlikely to feel comfortable purchasing such a product without the assistance of an insurance agent. "Robo-advice" is generally not well suited for the decumulation phase of retirement, for many of the same reasons that "auto-annuitization" of a worker's savings generally is not appropriate. How much to annuitize, when to begin receiving payments, and what liquidity and other features would be helpful, are all difficult, if not impossible, questions to address through a computer-based questionnaire. Such programs do not allow for a two-way conversation about an individual's risk appetite, health, sources of other guaranteed income, liquidity needs, and other unique business and family needs that should be considered when evaluating the purchase of guaranteed lifetime income products.

⁴ Executive Office of the President, Council of Economic Advisers, "Supporting Retirement for American Families," Feb. 2, 2012, at 3.

⁵ *Id.* at 5.

⁶ U.S. Government Accountability Office, "Retirement Income: Ensuring Income Throughout Retirement Requires Difficult Choices," June 2011, at 8.

⁷ CEA report, *supra* note 4, at 7.

As stated in the CEA report, some of the reasons why more Americans do not elect to purchase guaranteed lifetime income products include “concerns over the irrevocability of the choice to purchase an annuity; the desire to retain liquid assets in case of unexpected medical costs or a bequest to heirs; concerns over the complexity of annuities, their lack of transparency, or the long-term financial soundness of annuity providers; a lack of understanding of longevity risk and how lifetime income products can help manage it; or a lack of familiarity with annuity products, among other factors.”⁸

These factors are among those that make the role of a well-trained insurance agent so essential. Agents can explain and answer the saver’s questions about annuity products, whether the product is appropriate given the saver’s other assets and sources of lifetime income, and discuss the optional features of the annuity that may address any concerns the saver may have about liquidity or a bequest. This interaction is just one component of the support that clients need.

Moreover, a full-time New York Life agent is much better equipped to provide clients with assistance regarding the products that New York Life offers, as compared to an intermediary who is significantly less knowledgeable about our specific products and who is not subject to the operational and compliance framework provided by New York Life.

More broadly, because New York Life agents have the compliance and operational support of a major financial institution behind them, they are especially well prepared to assist individuals in: (1) determining how much they need to save to achieve financial security in retirement; (2) helping them increase their savings by examining their spending and savings habits and creating accountability through a sentinel effect; and (3) deploying those savings in the most effective manner in light of the individuals’ circumstances, which could include the purchase of lifetime income products as well as other financial products.

The value of financial guidance is validated by research. One study in Canada, published in May 2015, concluded that clients who had a financial advisor for 15 or more years had on average 173 percent more assets than clients who did not get financial advice.⁹ The study found that a higher savings rate by these clients and less money left in cash explained this differential, and it cites a number of earlier studies that reached similar conclusions. Similarly, a recent Vanguard study of actual client behavior found that the “discipline and guidance that an advisor might provide through behavioral coaching...can add 1% to 2% in net return.”¹⁰

Unfortunately, as described below, the Department’s Proposal makes it much less likely that a trained and well-supervised insurance agent will be able to provide

⁸ CEA report, *supra* note 6, at 7.

⁹ Claude Montmarquette and Nathalie Viennot-Briot, “The Value Of Financial Advice.” *Annals Of Economics And Finance* 16-1, 69 (2015). Available at: <http://aeconf.com/Articles/May2015/aef160104.pdf>.

¹⁰ Vanguard, “Putting a value on your value: Quantifying Vanguard Advisor’s Alpha,” March 2014, at 16.

guidance to middle-income savers. Without access to this support and coaching, a secure retirement may remain only an aspiration for many Americans.

C. Financial Strength to Back Long-Term Guarantees

The Department's Proposal fails to recognize the need for investors to consider a variety of factors in addition to cost when choosing an investment – and especially when purchasing guaranteed lifetime income products, an area where the lowest cost product may in fact be the most risky. Whether an insurer will be around to make the payments promised to the saver – over the next 10, 20, or even 50 years – is the most important question when a saver purchases a long-term guaranteed lifetime income product.

The Department has acknowledged the importance of financial strength in the context of annuity providers for defined benefit plans. The Department's guidance emphasizes, "The interests of those participants and beneficiaries who will receive annuities lies in receiving the safest available annuity."¹¹

III. EXECUTIVE SUMMARY

In our view, the Department's Proposal is unnecessarily broad, presents almost insurmountable compliance challenges, and – most importantly – will prevent American savers from receiving expert guidance and the benefits of guaranteed lifetime income from financially secure insurance companies like New York Life.

Consider the process that individuals typically use to purchase lifetime income:

- According to LIMRA, guaranteed lifetime income is available inside less than one percent of defined contribution plans.¹² That means that many savers can access lifetime income only by rolling over assets into an IRA, which can be done with the help of a qualified financial professional, such as a New York Life agent.
- Our agent will meet with the saver, thoroughly discuss the saver's current finances, anticipated future financial needs and other unique circumstances, and educate the saver about ways to ensure they do not outlive their income.
- As part of this conversation, the agent may present the option to rollover funds into an IRA, to purchase a guaranteed lifetime income product inside the IRA, and help the saver determine whether a New York Life annuity will help meet the individual's needs.

¹¹ 29 CFR § 2509.95-1, Interpretive Bulletin relating to the fiduciary standards under ERISA when selecting an annuity provider for a defined benefit pension plan.

¹² *Quarterly Retirement Perspectives*, LIMRA Secure Retirement Institute, Fourth Quarter 2013.

Unfortunately, we believe that the Department's Proposal will be highly disruptive to this process and will disadvantage small plan sponsors, plan participants, and IRA owners for the following reasons:

1. The BIC PTE and the proposed changes to PTE 84-24 establish a Best Interest standard that, as currently worded, would expose New York Life and its agents to claims that they make recommendations in their own financial interest if they sell proprietary products or receive transaction-based compensation (which is customary, appropriate and more cost effective for sales of insurance products). This would be the case even if the recommendation to purchase an annuity and to engage in a coincident rollover transaction is in the "best interest" of the investor, and any financial benefit to New York Life or the agent is merely incidental.
2. Similarly, the warranty provisions under the BIC PTE and the Range of Investment Options condition of the BIC PTE call into question the viability of the career agent model because an agent may not be able to exclusively sell proprietary products, receive transaction-based compensation, or qualify for health, welfare and retirement benefits provided by New York Life.
3. The Best Interest standard, the conditions of the BIC PTE, and the suggestion of a streamlined exemption overemphasize cost as the determinative factor in providing "investment advice," without consideration of the importance of the financial strength of the life insurer offering guaranteed lifetime income products.
4. The proposed definition of "investment advice" is so broad that practically all sales activities will be "investment advice" even in situations where no reasonable person would expect New York Life and its agents to act pursuant to a fiduciary standard.
5. The proposed carve-out from the fiduciary definition for the provision of investment education is too narrow to impart the information needed by participants to implement their investment decisions.
6. Other aspects of the BIC PTE, as proposed, would make compliance impossible. Among other things, these include the fact that a contract akin to an advisory agreement be entered into prior to the delivery of investment advice. In addition, the BIC PTE, on its face, does not appear to exempt compensation paid in connection with rollover transactions.

All of these issues raise serious questions about whether New York Life and its agents will be able to sell New York Life's proprietary products to American savers who participate in 401(k) plans and IRAs. We believe that this is not the intended result of the Department, which has expressed its support for making available guaranteed

lifetime income to American savers.¹³ Therefore, as described below in greater detail, we recommend that the Department make the following changes to the Proposal:

1. Affirmatively clarify that the sale of proprietary products and receipt of transaction-based compensation (e.g., commissions) is consistent with the Impartial Conduct Standards, which include the Best Interest standard.
2. Conform the Best Interest standard to the duty of loyalty under ERISA section 404(a).
3. Modify the warranty conditions and the Range of Investment Option conditions in the BIC PTE.
4. Extend existing regulatory safe harbors to the BIC PTE and PTE 84-24 so that an agent and insurance company will be deemed to satisfy the Impartial Conduct Standards under the BIC PTE and PTE 84-24 with regard to: (i) the recommendation for a defined contribution plan or IRA to purchase an annuity so long as the requirements under the Department's regulation for selection of annuity providers under defined contribution plans are met, and (ii) the recommendation to a defined benefit plan to purchase an annuity so long as the requirements of the Department's "safest available annuity" Interpretive Bulletin are met.
5. Modify the definition of fiduciary so that New York Life and its agents can engage in routine sales and marketing activities without triggering fiduciary requirements.
6. Narrow the definition of fiduciary and expand the education carve-out so that New York Life and its agents may provide information about investment alternatives to investors without triggering fiduciary requirements.
7. Clarify the requirements of the BIC PTE to ensure that it does not prevent insurers from providing health, welfare and retirement benefits to career insurance agents pursuant to the Internal Revenue Code ("Code").

New York Life believes that each of these changes is necessary to promote the sale of competitively priced products that provide guaranteed lifetime income to plan participants and IRA owners by career agents, who have the expertise and experience to explain which product is the right one for each client based upon his or her individual needs.

¹³ See Administration initiatives supporting lifetime income, *supra* note 3.

IV. THE PROPOSAL WILL LIMIT ACCESS TO QUALITY GUIDANCE AND GUARANTEED LIFETIME INCOME PRODUCTS

The following is a discussion of the most fundamental concerns that New York Life has identified in the Proposal, with a particular focus on those aspects of the Proposal that would impede the ability of New York Life and its agents to provide expert advice and guaranteed lifetime income products to middle income Americans. Following a discussion of each of the problematic provisions in the Proposal, we provide a summary of the provision's impact, as well as recommendations for specific changes to the Proposal that would help address our concern.

A. THE BEST INTEREST STANDARD

New York Life is very concerned that the Best Interest standard described in the Proposal would limit middle-income savers' ability to access guidance and guaranteed lifetime income products from financially strong institutions. First, the Proposal lacks clarity and fails to explicitly recognize that the offering of proprietary products that are backed by the financial strength and reputation of a company, and offered by career agents who are extensively trained and supervised, is in the best interests of investors. Second, while the Proposal does not explicitly ban the sale of proprietary products and the payment of differential compensation (e.g., commissions and benefits), the lack of clarity around the Best Interest standard will make it costly and very difficult, if not impossible, to comply with the standard.

1. Concerns

The Proposal ignores the demonstrable advantages to America's middle class of products backed by financially sound insurers and sold by a dedicated commissioned sales force and instead creates great uncertainty regarding the sale of proprietary retail and institutional products and the payment of differential compensation. The "best interest" standard and the principles-based approach articulated throughout the Proposal are very broad and vague. The Proposal does not provide any clear guidance or examples regarding compliant sales practices for companies that operate a career agency model.

As a mutual company focused on the long-term needs of our policyholders, New York Life's ability to sell proprietary products backed by our financial strength and through our 12,000 career agents who receive differential compensation is critical to serving the best interests of our policyholders. We train our agents to be experts and fully conversant in the advantages and value of New York Life's products. In addition, as a product manufacturer, we provide high levels of customer support to our policyholders, and we establish supervisory and oversight regimes that are designed to ensure compliance with applicable law. All of this ensures that the public will continue to have access to financial professionals and quality products to facilitate meeting their life insurance and lifetime income needs.

a. “Best Interest” Standard is Inconsistent with the Existing ERISA Standard

As a condition of receiving prohibited transaction relief under the proposed BIC PTE and PTE 84-24, a fiduciary agent must comply with the Impartial Conduct Standards, which include the Best Interest standard. In order to comply with the Best Interest standard, an agent and insurance company must act “... with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, *without regard to the financial or other interests of the Adviser, Financial Institution, any Affiliate, Related Entity, or other party...*”¹⁴ (emphasis added).

According to the Department, “[t]he best interest standard is defined to effectively mirror the ERISA section 404 duties of prudence and loyalty, as applied in the context of fiduciary investment advice.”¹⁵ It appears the Department added this condition, not to create new duties for plan fiduciaries, but to extend ERISA-type duties to IRA advisors, who are not subject to section 404.¹⁶

However, the operative language rephrases, rather than expressly incorporates, the section 404 duties. As a result, the Department risks creating for plans and IRAs a new and independent standard. At the least, this new standard will result in uncertainty for years to come. Beyond that, however, it establishes an even broader and potentially unachievable standard, particularly for those making recommendations with respect to proprietary products and services.

In particular, the Proposal’s language “without regard to the financial or other interests of the Adviser, Financial Institution, any Affiliate, Related Entity, or other party” could call into question one of the longstanding tenets of ERISA’s duty of loyalty – the concept of permissible incidental benefits. The duty of loyalty has been consistently interpreted to permit a fiduciary to benefit from a plan transaction so long as that benefit is incidental to a decision that is in the best interests of the plan participants. The U.S. Supreme Court has held that a fiduciary does not violate ERISA by taking action otherwise consistent with ERISA’s duty of loyalty but that incidentally benefits the fiduciary.¹⁷ Moreover, the Department has acknowledged and accepted this interpretation of ERISA’s fiduciary duty in several of its own Advisory Opinions.¹⁸

¹⁴ Prop. BIC PTE §VIII(d), 80 FR 21987 (emphasis added); see also Prop. PTE 84-24 §VI(b), 80 FR 22020;.

¹⁵ 80 FR 21970.

¹⁶ *Id.*

¹⁷ See *Hughes Aircraft v. Jacobson*, 525 U.S. 432, 445–46 (1999); *Lockheed Corp. v. Spink*, 517 U.S. 882, 893–94 (1996).

¹⁸ See, e.g., A.O. 2011-05A (Feb. 3, 2011); 2001-01A (Jan. 18, 2001), and 2003-04A (Mar. 26, 2003).

b. New Standard Limits Sales of Proprietary Products

Despite the Department's statements that the Proposal is intended to preserve current business models, several aspects of the Proposal appear to limit the sale of proprietary products. As currently proposed, the "without regard to the financial or other interests" language in the Best Interest standard could be interpreted to preclude the sale of proprietary products altogether.

The Department's Proposal does not provide any clear guidance or examples regarding compliant sales practices, particularly with regard to the sale and recommendation of proprietary products. The outcome is a standard that appears to favor certain business models at the expense of others – and that would prevent the very agents who are most knowledgeable about a company's products from offering those products.¹⁹

Additionally, the BIC PTE could be read to suggest that a career agent's sale of only proprietary products is the exception, rather than the rule, permitted under the PTE. One of the requirements of the BIC PTE is that:

The Financial Institution offers for purchase, sale or holding, and the Adviser makes available to the Plan, participant or beneficiary account, or IRA for purchase, sale or holding, a range of Assets that is broad enough to enable the Adviser to make recommendations with respect to all of the asset classes reasonably necessary to serve the Best Interests of the Retirement Investor in light of its investment objectives, risk tolerance, and specific financial circumstances.²⁰

In the alternative, rather than complying with this "broadly available" standard, the "Financial Institution may limit the Assets available for purchase, sale or holding based on whether the Assets are Proprietary Products, generate Third Party Payments, or for other reasons, provided that" certain disclosure requirements are met. In addition, the Financial Institution must make a "specific written finding that the limitations it has placed on the Assets made available to an Adviser for purchase...do not prevent the Adviser from providing advice that is in the Best Interest of the Retirement Investor...or otherwise adhering to the Impartial Conduct Standards."²¹

The Department's articulation of the "broadly available" requirement and the exception thereto can be interpreted as being particularly prejudicial to career agents and their associated insurance companies. First, New York Life and its agents must justify why they do not offer one or more other insurance company's products. Second, New York Life and its agents must justify why the receipt of employee benefits as a

¹⁹ The Department has recognized the need to provide relief for the sale of proprietary products to plans since the enactment of ERISA. See, e.g., ERISA Section 408(b)(5); PTE 77-3; PTE 84-24; A.O. 2000-15A (Nov. 15, 2000).

²⁰ Prop. BIC PTE § IV(a), 80 FR 21970.

²¹ Prop. BIC PTE § IV(b)(1), 80 FR 21985–86.

condition of selling only Proprietary Products does not incent them to act in a manner that is not in the Best Interest of the investor or otherwise not comply with the Impartial Conduct Standards. However, no such justification is required by insurance companies that use an independent agent delivery model or their agents. This distinction appears to put New York Life and its agents at a disadvantage even though, as explained above, the use of a career agent sales force in our view is beneficial to investors.

Without rules that clearly define the methodology and processes that firms need to implement in order to recommend proprietary products to plans and IRAs, the likelihood looms large that even a strong process ensuring compliance with applicable standards will be second guessed by private plaintiffs in costly and protracted class action litigation, or challenged by the Department in enforcement actions. This risk will potentially only increase the “guaranteed retirement income gap,” increase costs, make needed retirement advice less available to the Americans that need them the most, and pose a serious challenge to ensuring that individuals can retire “with dignity after a lifetime of hard work.”²²

c. “Best Interest” Standard Effectively Limits the Payment of Compensation that is not “Levelized”

Under the Proposal, the language “without regard to the financial or other interests of the Adviser, Financial Institution, any Affiliate, Related Entity, or other party” discussed above directly calls into question the ability of an agent to recommend a product that pays compensation that is not levelized. We understand that when the Department refers to “levelized” compensation, it means that compensation does not vary by product type. One of the examples that the Department provides in its Proposal also seems to suggest that any variation in compensation across product categories must reflect an analysis of the time and expense involved in providing advice about the product.²³ We also believe that “levelized” compensation could be interpreted to require that commissions be paid in equal amounts over the life of the investment.

In addition, an advisor wishing to use the BIC PTE must “affirmatively warrant” that neither the Financial Institution nor an Affiliate or Related Entity “uses quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation or other actions or incentives to the extent they would *tend to encourage* individual Advisers to make recommendations that are not in the Best Interest of the Retirement Investor.”²⁴ The Department has stated that the BIC PTE is designed to preserve “common fee practices” (subject to compliance with “basic standards”) as the definition of fiduciary advice is expanded. Although the Department

²² Fact Sheet, Department of Labor Proposes Rule to Address Conflicts of Interest in Retirement Advice, Saving Middle-Class Families Billions of Dollars Every Year (Feb. 23, 2015), *available at* <http://www.dol.gov/ebsa/newsroom/fsconflictsofinterest.html>

²³ 80 FR 21971.

²⁴ Prop. Reg. II (d)(4) (“Material Conflicts Rule”), 80 FR 21984.

asserts that the PTE's Material Conflicts rule "does not mandate" fee leveling,²⁵ which is, of course, not a common practice, the Proposal appears to effectively do just that. The language of the rule is so broad, vague and subjective that it will drive advisers to change their compensation practices in a way that harms consumers or exit the small plan and IRA market altogether to avoid class action lawsuits that challenge current fee practices as violating the "tend to encourage" language.

Requiring commissions to be level among all products within a given category does not reflect the diversity of product offerings among companies. For example, companies offer a wide variety of annuities and mutual funds. Requiring the same commissions to be charged for each annuity and for each mutual fund would be tantamount to requiring a doctor to earn the same fee for every eye surgery that the doctor performs, regardless of the complexity and quality of the operation.

Beyond our concern about the Department's view that commissions may not vary by the product sold, we are concerned that the Department's Proposal reflects a bias for fee-based advice or at a minimum, for compensation that is paid in equal installments throughout the term of a product. As described in detail below, upfront commissions help to incent agents to advise smaller investors. A policy that encourages the use of fee-based compensation or that commissions be paid over the duration of a product would be particularly harmful to such investors.

New York Life's commissions on annuity products average between 3-4.5% of the assets invested, which translates to **.25-.5% annually** when amortized over the average duration of the product. This commission-based model is therefore much more economical and appropriate for annuities than an asset-based model, which typically involves an annual fee of 1% of assets.²⁶ For example, an individual would pay an upfront commission of **\$1,625** for a \$50,000 guaranteed lifetime income product that provides a guaranteed annual income of **\$3,214** for approximately 20 years, as compared to the same individual paying **\$10,000** (\$500 each year) to a fee-based investment adviser to manage the \$50,000 in assets over that same 20-year period (and without obtaining the benefit of a guaranteed stream of income).

Importantly, most insurers, including New York Life, frequently pay a larger portion of a commission in the early years of the annuity contract in order to incent an agent to advise smaller investors. While the total amount of compensation paid by the investor does not increase with the use of an upfront commission, the agent is compensated at the time of the transaction for the time it takes to explain how annuities work and which annuity is the most suitable for the investor.²⁷ By design, guaranteed lifetime income products achieve a client's objective for a guaranteed stream of income

²⁵ 80 FR 21971.

²⁶ PriceMetrix, *State of Retail Wealth Management*, March 30, 2015.

²⁷ The reluctance of individuals to act on their own to annuitize some of their savings is one of the reasons the Administration has supported policies that promote annuities. It also is why agents need to spend a considerable amount of time educating clients about the benefits of creating a guaranteed stream of income and discussing clients' concerns and potential mechanisms to mitigate those concerns.

regardless of future financial scenarios and, therefore, do not require substantial ongoing support from an agent. As such, the rate at which a commission is paid out to is front-loaded to compensate the agent in the early years of the contract, at the time when the he or she performs most of the work related to the product.

A requirement that the commissions be paid in a level amount throughout the terms of the contract – \$81.25 each year for the \$50,000 lifetime income product described above – would be very harmful to those savers with small balances. The immediate compensation provided to an agent would provide such a small incentive that it would make it unlikely that agents would be willing to devote the time and resources required to effectively provide guidance regarding guaranteed lifetime income products.

Moreover, the compensation practices of any insurer that does business in New York State, including New York Life, are governed by Section 4228 of the New York Insurance Law. Section 4228 limits both the commissions and non-cash compensation that can be provided to agents selling annuity products, and requires disclosure of all commission and non-cash compensation (e.g., health benefits) received in conjunction with the sale of annuity products.

d. Best Interest Standard Raises Questions about Provision of Health Care, Retirement Benefits and Other Employee Benefits to Career Agents

Many career life insurance agents are entitled to statutory employee²⁸ status under the Code through their contracts with their career companies. If they are engaged on a full-time basis in the sale of life insurance and annuities on behalf of their career companies, they can be treated pursuant to the Code as employees for certain health, welfare and retirement benefit purposes and for FICA tax purposes.²⁹ The Code requires, among other things, that the agent be a full-time life insurance salesperson for his or her career company, primarily focused on selling that company's life and annuity products. New York Life and many life insurance companies use this provision to characterize their agents as statutory employees, rather than independent contractors, and provide them with health, welfare and retirement benefits.

Thus, pursuant to the Code, career agents are required to primarily sell proprietary products in order to receive certain employee benefits, including health care coverage and retirement benefits, from New York Life. However, the terms of the BIC PTE appear to challenge the ultimate viability of career agent status for tax purposes. It would be unfortunate, and at odds with the Administration's policy to encourage health benefits coverage and pension benefits, if the DOL's proposal precluded the provision of health, welfare and retirement benefits to thousands of families.

²⁸ See 26 U.S.C. §§ 3121(d)(3)(B), 7701(a)(20) (2014).

²⁹ *Id.*

Moreover, the proposed Impartial Conduct Standards could be used by class action lawyers to challenge as an “impermissible conflicts” the health, welfare and retirement benefits that New York Life provides to its agents. As discussed, pursuant to the “Best Interest” standard under the BIC PTE and PTE 84-24, the agent or insurance company must act “without regard to the financial or other interests of the Adviser, Financial Institution any Affiliate, Related Entity, or other party.” Further, under the BIC PTE, the agent and the insurer must warrant that the insurer, Affiliates and Related Entities do not have incentive programs in place that “tend to encourage individual Advisers to make recommendations that are not in the Best Interest of the Retirement Investor.” New York Life is concerned that a plaintiff’s attorney would use these provisions against career agents and insurers, who are required to focus on the sale of proprietary products in order to receive these important employee benefits.

2. Impact

Without rules that clearly define the methodology and processes that firms need to implement in order to recommend proprietary products to plans and IRAs under a “best interest” standard and pay differential compensation, even strong processes are likely to be second guessed or challenged through litigation. These risks created under the current Proposal will create additional costs and limit the availability of guidance and guaranteed products provided to middle-income savers by well-trained agents.

3. Solutions

Because access to retirement investing expertise and to guaranteed lifetime income products are, for many workers, critical elements to a successful retirement, we urge the Department to: (a) affirmatively clarify that the sale of proprietary products and receipt of differential compensation are consistent with a Best Interest standard; (b) align the Best Interest standard with the existing ERISA fiduciary standard; (c) provide clear guidance regarding how differing levels of compensation for different products may be paid to advisers; (d) modify PTE 84-24 and the BIC PTE to allow guaranteed lifetime income products to rely on existing regulatory safe harbors; and (e) clarify that the requirements of the BIC PTE do not threaten the provision of health insurance and other employee benefits to career agents.

a. Affirmatively clarify that the sale of proprietary products and receipt of differential compensation are consistent with a Best Interest standard

The Department has suggested that its goal in developing this Proposal is to preserve current business models and practices. However, for the reasons outlined above, this proposal could have the opposite effect. If the Department does not intend to preclude common practices, including the sale of proprietary products or receipt of differential compensation, the Proposal should explicitly and affirmatively clarify that such practices are consistent with the Best Interest standard. Specifically, we would urge the Department to clarify in the preamble to the final prohibited transaction exemptions that the sale of proprietary products does not violate the Best Interest

standard. Particularly in the event the Department retains the final clause of the proposed Best Interest standard (i.e. the “without regard to” provision), it is absolutely critical that this clarification be made. Equally importantly, we urge the Department to make clear that the payment of “differential compensation,” in and of itself, is a permissible practice, consistent with the Best Interest standard.

b. Align the Best Interest standard with the existing ERISA fiduciary standard

Rather than create yet another fiduciary standard that would create confusion and have to be interpreted anew by federal and state courts, we urge the Department to provide much needed certainty to advisors and their clients by explicitly incorporating into the Best Interest standard the existing, well-developed fiduciary standard under section 404 of ERISA. This would ensure that, as intended by the Department, that the standard would be “interpreted in light of forty years of judicial experience with ERISA’s fiduciary standards and hundreds more with the duties imposed on trustees under the common law of trusts.”³⁰

Specifically, we urge the Department to modify the Best Interest standard in PTE 84-24 and the BIC PTE to require that the fiduciary act:

“with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, ~~without regard to the financial or other interests of the Adviser, Financial Institution, any Affiliate or other party~~ and (ii) solely in the interest of the Retirement Investor, in each case as such standards have been interpreted under Section 404 of ERISA”.

c. Clarify the conflict mitigation requirements in the BIC PTE

We also urge the Department to consider a clearer, more direct approach to conflict mitigation, substituting the following for section II(d)(4) of proposed BIC PTE:

“(d) Warranties. The Adviser and Financial Institution affirmatively warrant the following:

4) The use, by Neither the Financial Institution, or (to the best of its knowledge) any Affiliate or Related Entity of uses quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation or other actions or incentives ~~to the extent they would tend to encourage~~ has not caused, or will not cause, the individual Advisers to make recommendations that are not in the Best Interest of the

³⁰ 80 FR 21970.

~~Retirement Investor. Notwithstanding the foregoing, the contractual warranty set forth in this Section II(d)(4) does not prevent the Financial Institution or its Affiliates and Related Entities from providing Advisers with differential compensation based on investments by Plans, participant or beneficiary accounts, or IRAs, to the extent such compensation would not encourage advice that runs counter to the Best Interest of the Retirement Investor (e.g., differential compensation based on such neutral factors as the difference in time and analysis necessary to provide prudent advice with respect to different types of investments would be permissible."~~

d. Modify PTE 84-24 and the BIC PTE to allow guaranteed lifetime income products to rely on existing regulatory safe harbors

Finally, we also believe that the proposed BIC PTE and PTE 84-24, as proposed, should be amended so that each exemption allows the Impartial Conduct Standards to be satisfied with respect to an agent's recommendation of an annuity product where the plan or IRA fiduciary has satisfied the provisions of 29 CFR § 2550.404a-4, in the purchase of the recommended annuity, with respect to an individual account plan or IRA recommendation, or the provisions of 29 CFR § 2509.95-1, with respect to a defined benefit plan recommendation.

As the Department notes in its Proposal, the market for retirement advice has changed dramatically since ERISA was implemented in 1975. Specifically, as the number of defined benefit plans has declined, individuals, rather than large employers and money managers, have increasingly become responsible for managing their retirement assets in IRAs and participant-directed plans.³¹ A corollary to that phenomenon is that individuals have also become increasingly responsible for taking the necessary steps to provide for the conversion of amounts accumulated in IRAs and participant-directed plans into a lifetime stream of income. Participants interested in the security and peace of mind that lifetime income products provide generally acquire those products in the IRA rollover market, both because most 401(k) plans do not offer guaranteed lifetime income distributions options and because individuals often desire individualized advice from an agent when faced with the decision of whether to exchange a lump sum of money for a stream of future payments.³²

Under the Department's Proposal, New York Life agents who recommend annuity products to client plans, participants, beneficiaries and IRA holders would be characterized as advice fiduciaries and would require exemptive relief for the receipt of compensation in connection with the sale of those products. For recommendations of variable annuity products to Retail Investors, the exclusive exemption available would be the BIC PTE. For recommendations of fixed annuity products to retail investors, and for recommendations of fixed and variable products to institutional investors, PTE 84-24 is available as a source of exemptive relief. Both such exemptions condition relief on

³¹ 75 FR 21932 (Apr. 20, 2015).

³² See CEA Report discussion of the Annuity Puzzle, *supra* note 4 at 7.

the satisfaction of substantially similar “Impartial Conduct Standards” requiring, among other things, that a recommended annuity product be in the advice recipient’s “Best Interest” (i.e., advice that reflects the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances and needs of the advice recipient.)

The Department has noted that the Impartial Conduct Standards are based on longstanding concepts derived from ERISA, specifically the duties of prudence and loyalty under section 404 of ERISA, and from the law of trusts.³³ In this regard, New York Life notes that the Department has provided its guidance, including safe harbor guidance, concerning the satisfaction of section 404(a)(1)(B) of ERISA by plan fiduciaries in connection with the selection of an annuity product for defined benefit plans and defined contribution plans.³⁴ As the Department is well aware, the development of the annuity selection safe harbor was initially focused on the selection of termination annuities for defined benefit plans and resulted in the issuance of Interpretive Bulletin (“IB”) 95-1 in 1995. IB 95-1 was amended in 2007 and 2008 to clarify that the Bulletin (and its “safest available” standard) only applied to defined benefit plan annuity purchases. In 2007, the Department proposed a new safe harbor under Regulation §2550.404a-4, applicable to individual account plans. That regulation was finalized in 2008. As particularly relevant to the sale of guaranteed income annuities to defined contribution plans and IRAs, we believe that compliance with the terms of the safe harbor ought to sufficiently demonstrate compliance with the Best Interest standard under PTE 84-24 and the BIC PTE.

We therefore propose that, in the case of a sale of an annuity product to a defined contribution plan or IRA, the Department modify PTE 84-24 and the BIC PTE to extend to PTE 84-24 and the BIC PTE, respectively, the Department’s safe harbor regulation for the selection of annuity providers for the purpose of benefit distributions from individual account plans. Under our proposal, the Impartial Conduct Standards under PTE 84-24 and the BIC PTE would be deemed to have been met where the purchase of the annuity contract by a defined contribution plan or an IRA satisfies the requirements of this safe harbor. Specifically, the safe harbor for individual account plans provides that in the selection of the annuity contract the following conditions or requirements must be satisfied: (1) engage in an objective, thorough and analytical search for the purpose of identifying and selecting providers from which to purchase annuities; (2) appropriately consider information sufficient to assess the ability of the annuity provider to make all future payments under the annuity contract; (3) appropriately consider the cost (including fees and commissions) of the annuity contract in relation to the benefits and administrative services to be provided under such contract; (4) appropriately conclude that, at the time of the selection, the annuity provider is financially able to make all future payments under the annuity contract and the cost of the annuity contract is reasonable in relation to the benefits and services to be provided under the contract; and (5) if necessary, consult with an appropriate expert

³³ 75 Fed. Reg. 21970, 22014 (Apr. 20, 2015).

³⁴ See, respectively, 29 CFR § 2509.95-1 and 29 CFR § 2550.404a-4.

or insurance agent for purposes of compliance with the provisions of the safe harbor. Of course, under the Proposal, a New York Life agent would qualify as an expert and be in a position to consult with the Retirement Investor as appropriate.

In the case of a sale of an annuity product to a defined benefit plan, we would propose that the Department modify PTE 84-24 and the BIC PTE to extend to PTE 84-24 and the BIC PTE, respectively, the Department's "safest available annuity" criteria for the selection of annuity providers for the purpose of benefit distributions from defined benefit plans. Under our proposal, the Impartial Conduct Standards of the proposed exemptions would be deemed to have been met where the purchase of the annuity contract by a defined benefit plan satisfies the "safest available annuity" criteria under IB 95-1. Specifically, the following requirements or conditions must be satisfied:

(1) conduct an objective, thorough and analytical search for the purpose of identifying and selecting providers from which to purchase annuities; (2) consider the quality and diversification of the annuity provider's investment portfolio; (3) consider the size of the insurer relative to the proposed contract; (4) consider the level of the insurer's capital and surplus; (5) consider the lines of business of the annuity provider and other indications of an insurer's exposure to liability; (6) consider the structure of the annuity contract and guarantees supporting the annuities, such as the use of separate accounts; and (7) consider the availability of additional protection through state guaranty associations and the extent of their guarantees.

To enable the existing regulatory safe harbors for individual account plans and defined benefit plans to be available for annuity purchases by plans and IRAs under the BIC PTE and PTE 84-24, New York Life urges the Department to make the following modifications to the Proposal:

- Section II(c) of the BIC PTE should be modified by the addition of the following language, flush to the margin of that section, following subsection (3) thereof:

The Adviser and the Financial Institution shall be deemed to have satisfied subsection (1) of this Section II(c) with respect to the recommendation of an annuity contract to a Retirement Investor where (i) with respect to the recommendation of an annuity contract to an individual account plan, plan participant or beneficiary or to an IRA, the purchase of the annuity contract satisfied the provisions of 29 CFR § 2550.404a-4, or (ii) with respect to the recommendation of an annuity contract to a defined benefit plan fiduciary, that the purchase of the annuity contract satisfied the provisions of 29 CFR § 2509.95-1.

- Section II of PTE 84-24, as it is proposed to be amended, should be modified by the addition of the following language, flush to the margin of that section, following subsection (b) thereof:

The Adviser and the Financial Institution shall be deemed to have satisfied subsection (a) of this Section II with respect to the recommendation of an

annuity contract where (i) with respect to the recommendation of an annuity contract to an individual account plan, plan participant or beneficiary or to an IRA, the purchase of the annuity contract satisfied the provisions of 29 CFR § 2550.404a-4, or (ii) with respect to the recommendation of an annuity contract to a defined benefit plan fiduciary, that the purchase of the annuity contract satisfied the provisions of 29 CFR § 2509.95-1.

In the event the Department determines not to include these requested modifications to the BIC PTE and PTE 84-24, we urge the Department to make clear in the preamble to the final exemption that where an annuity purchase satisfies one of the existing regulatory safe harbors, the agent and insurer may rely on the safe harbor as an indication of satisfying the Best Interest standard.

B. LOWEST COST SHOULD NOT BE SOLE DETERMINATIVE FACTOR

Based on the Administration's press releases and related fact sheets, the costs of retirement products appear to be a focal point of the Department's Proposal. The Department's request for comments about a "low-cost exemption" further suggests that the Department believes cost should be the primary factor that determines which product is in a client's best interests. New York Life does not support the concept of a streamlined exemption for "certain high-quality low-fee investments", as it erroneously ignores the quality and strength of the guarantees associated with a product.³⁵

1. Concern

The implied preference for advice related to "certain high-quality low-fee investments" is contrary to previous expressions by the Department and the courts that ERISA does not require (or even permit) a fiduciary to recommend or select investments based solely on cost. Instead, ERISA requires a review of quality of services and other factors in addition to cost. Notably, the Proposal's focus on costs is at odds with the Department's own guidance with respect to the selection of an annuity provider for defined benefit plans and defined contribution plans³⁶, as discussed above in the context of our request to modify the BIC PTE and PTE 84-24 to authorize reliance on existing regulatory safe harbors (See part IV.A.3.d. above).³⁷

³⁵ 80 FR 21948. Such an exemption would also seem to undermine the Department's goal of establishing a single Best Interest standard that would apply to all retirement products.

³⁶ 29 CFR § 2509.95-1; 29 CFR § 2550.404a-4.

³⁷ Notably, the costs associated with lifetime income products is not primarily impacted by the compensation paid to career agents. As noted above, any insurer who does business in New York State, including New York Life Insurance Company and NYLIAC, is governed by Section 4228 of the New York Insurance Law, and this statute applies to that insurer nationwide. This law limits both the commissions and non-cash compensation that can be provided to agents selling annuity products. See N.Y. Ins. Law § 4228 (McKinney 2014). Section 4228 is applied extraterritorially by New York State's Department of Financial Services. The DFS has a well-earned reputation for consumer advocacy. If a company provides payments to an agent that exceed the limits or a company exceeds the aggregate limits set forth in Section 4228 it must take steps to bring expenses into compliance and recover any excess payments.

Finally, the Department has seemed to suggest that the streamlined exemption for “certain high-quality low-fee investments” would favor passive investment vehicles (e.g., index funds) over actively managed funds. However, index funds are not necessarily the most appropriate investments for all investors. While some investors may not wish to pay for active management, many believe that active management can add value.

2. Impact

The adoption of a “low cost” exemption may dissuade agents from selling and insurers from creating products that offer guaranteed lifetime income -- in opposition to the Administration’s stated goal of supporting lifetime income. These products are more expensive because of the lifetime guarantees they provide. Guarantees are backed by an insurer’s general account, which must be adequately funded so the insurer can satisfy the guarantees for many years into the future and remain solvent.

Additionally, if the Department were to identify certain investments as meeting the proposed “low cost” exemption, it would create the perception that such products have the tacit approval of the Department. However, plan fiduciaries and IRA owners, with the help of their advisers, should be the ones to make determinations as to what investments are prudent and appropriate – rather than the Department.

3. Solutions

a. Extend Existing Regulatory Safe Harbors to Guaranteed Lifetime Income

As discussed in part IV.A.3.d. above, the proposed BIC PTE and PTE 84-24 should each be modified to allow the Best Interest standard to be satisfied with respect to the recommendation of an annuity product where the provisions of 29 CFR § 2550.404a-4, in the case of an individual account plan or IRA recommendation, or the provisions of 29 CFR § 2509.95-1, in the case of a defined benefit plan recommendation, have been satisfied.

As discussed in more detail above, this proposal would not only promote guaranteed lifetime income, but would also ensure that participants and IRA holders would be able to avail themselves of products guaranteed by highly rated and financially strong companies like New York Life.

b. Eliminate Low Cost Exemption

We believe that the Department should not pursue an exemption that focuses solely on a product’s cost. An exemption based solely on cost is at odds not only with the Government’s own initiatives regarding guaranteed lifetime income, but has the potential to put at risk, rather than promote and encourage, retirement savings for American workers.

II. ADDITIONAL CONCERNS

In addition to the concerns discussed above, which would fundamentally affect the ability of American savers to continue receiving the benefits of expert advice from trained and well-supervised career agents and guaranteed lifetime income products from financially secure insurance companies, New York Life has several additional concerns related to the Proposal that are discussed in detail below.

A. THE PROPOSED DEFINITION OF “FIDUCIARY”

New York Life is concerned that the proposed changes to the fiduciary definition are so broad that agents, insurance companies, Affiliates and Related Entities will almost always become fiduciaries for purposes of ERISA and the Code when they engage in routine sales to plans and IRAs. They could even become fiduciaries when they engage in activities incidental to the sales process and in circumstances where no plan fiduciary, plan participant, or IRA owner would reasonably expect that an agent or insurance company is acting pursuant to a fiduciary standard.

1. Concerns

The Department is proposing to eliminate the current five-part test and replace it with a two-part test that requires an Adviser and Financial Institution to determine (i) if recommendations of certain types (“Covered Advice”) will be made for compensation, and (ii) if so, whether the advice is rendered pursuant to a written or verbal agreement, arrangement or understanding that the advice is individualized to, or that such advice is specifically directed to, the advice recipient for consideration in making investment or management decisions with respect to securities or other property of the plan or IRA.” A “recommendation” is defined in the Proposal as “a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action.”³⁸ In the Preamble, the Department states that the parties must have a “meeting of the minds” (i.e., agreement or understanding) that the advice is individualized or specifically directed to the plan or IRA, but no such “meeting of the minds” is required with regard to “the extent to which the advice recipient will actually rely on the advice.”³⁹

The proposed changes to the fiduciary definition are so broad that agents, insurance companies, Affiliates and Related Entities are at risk of being considered fiduciaries for purposes of ERISA and the Code when they engage in common, every day interactions with individuals in their communities. For example, if an agent and a friend in the community spark up a conversation waiting in line in the grocery store, and the friend asks the agent questions about New York Life’s annuities – the agent would have to decline to respond or be considered a fiduciary (and pull out a contract for the friend to sign). Or, to use a modern example, if the same friend posted on Facebook a question about whether the friend should rollover her assets from a 401(k) plan or take

³⁸ 80 FR 21960.

³⁹ 80 FR 21940.

a distribution, the agent could not provide assistance respecting a possible rollover from her 401(k) plan without first sending her friend a contract to sign . Finally, suppose an insurance company sends a flyer to several pension plan fiduciaries announcing a new investment management service and recommending that the fiduciaries consider using the new service. If any of the plans follow up on the offer, would the insurer become a fiduciary when the flyer was sent out?

Moreover, the proposed fiduciary definition is so broad that agents, Insurance companies, Affiliates and Related Entities will almost always become fiduciaries for purposes of ERISA and the Code when they engage in routine sales to plans and IRAs. They could even become fiduciaries when they engage in activities incidental to the sales process. For example, mere conversations about available products and services (e.g., sales presentations) could be construed as fiduciary advice. In addition, the submission of an RFP response could be considered advice to the extent the RFP includes a sample fund line up or discusses certain products and services.

The Proposal's underlying premise that virtually every sales interaction involves fiduciary advice is inconsistent with normal business practices in which a buyer of a product or service would not reasonably expect that the seller will act as a fiduciary during the sales process.⁴⁰ Unfortunately, while the Proposal includes a few "carve-outs" from the definition, the only carve-out that addresses sales activities does not apply to IRAs and small participant-directed defined contribution plans, which make up a substantial majority of the retirement marketplace. Further, unlike the current regulation under which all five elements of the five-part test must be met before fiduciary status is imposed, the Proposal essentially shifts the burden to the Adviser and Financial Institution to prove that it should not be treated as a fiduciary under the Proposal by demonstrating compliance with a carve-out.

2. Impact

The breadth of the definition of fiduciary investment advice, the limited nature of the carve-outs and the shift of the burden of proof will effectively require agents, insurance companies, Affiliates, and Related Entities to assume fiduciary status even in situations in which no plan fiduciary plan participant or IRA holder could reasonably expect that the Adviser or Financial Institution to be acting in a fiduciary capacity. As a result, they will be required to assume the costs associated with complying with (or failing to comply with) the BIC PTE or other potentially available exemptions, even when there is no expectation on the part of the plan or IRA that the Adviser or Financial Institution is acting other than in its own interest as a product distributor. The result may be that that insurance companies and agents are not willing to sell their products,

⁴⁰ See e.g., Renfro v. Unisys Corp., 671 F.3d 314, 324 (3rd Cir. 2011) ("When a person who has no relationship to an ERISA plan is negotiating a contract with that plan, he has no authority over or responsibility to the plan and presumably is unable to exercise any control over the trustees' decision whether or not, and on what terms, to enter into an agreement with him. Such a person is not an ERISA fiduciary with respect to the terms of the agreement for his compensation.", citing F.H. Krear & Co. v. Nineteen Named Trs., 810 F.2d 1250, 1259 (3rd Cir. 2011).

including those that provide guaranteed lifetime income, to small plans and IRAs. This would be an unfortunate result because these markets are already underserved.

Plans of all sizes and IRAs may be impacted in other ways. For example, New York Life and its affiliates provide investment management and advisory services. It would appear that, under the Proposal, the marketing of these services could involve “investment advice.” Such marketing helps plans and investors learn about the services that are available in the marketplace, with the expectation that further exchanges of information will follow if the plan or investor is interested in the products and services described in the marketing material. A consequence of imposing fiduciary status at this point in the marketing process will be a restriction on the flow of appropriate marketing information at this initial phase, which will disadvantage plans as they attempt to engage in initial fact-finding about providers of desired financial services.

3. Solutions

For these reasons, we urge the Department to modify the definition of “investment advice” under the regulation so that Advisers and Financial Institutions can engage in a routine sale process without becoming fiduciaries.

a. Delete the “specifically directed” prong

Under the Proposal, fiduciary status arises virtually any time that a communication is made that is in any way suggestive of a plan investment or investment management activity and is either individualized for, or is *specifically directed to*, an advice recipient for consideration. In our view, whether a recommendation is “specifically directed to” the recipient is irrelevant to the question of whether the parties to that communication should be viewed as having a fiduciary relationship.

Institutions that offer products and services in the retirement plan marketplace generate targeted communications every day in the course of advertising and marketing to potential clients. Providers and distributors of annuities and other financial products require the freedom to utilize targeted marketing communications to identify consumers with an interest in potentially purchasing those products. Yet, under the Department’s Proposal, a mass mailing or telephone campaign describing the range of New York Life insurance products and their key features and pricing, could be characterized as “specifically directed” to the recipients and thus potentially investment advice. It defies common sense to suggest that these types of generalized, albeit “specifically directed,” marketing communications should result in the establishment of a fiduciary relationship. If financial institutions cannot even contact potential clients without assuming fiduciary status, retirement investors may never learn about products and services that may fit their needs.

We propose that the “specifically directed to” prong of the definition be deleted so that Advisers and Financial Institutions can engage in a routine sale process without becoming fiduciaries.

b. Revise the “individualized” prong

New York Life strongly believes that the “individualized to the advice recipient” element of paragraph (a)(2)(ii) should be modified to describe the nature of individualization that is needed to give rise to fiduciary status on the part of the advice provider. In our view, it is only where a communication to a retirement investor is sufficiently tailored, within the context of a particular relationship or a particular investor’s needs, to provide a basis for the investor’s reliance on an advice recommendation, that a fiduciary relationship should arise.

The objective of a revised fiduciary definition should be to impose fiduciary standards on those who undertake to, or create the expectation that they will be acting in a position of trust with respect to the advice recipient. The DOL has stated throughout the preamble that it views as “fiduciary” in nature those investment recommendations where there is an expectation that the advice provider will provide unbiased and impartial advice that is in the recipient’s best interest.⁴¹

New York Life supports assigning fiduciary status and standards of conduct in the context of a relationship where there is a reasonable expectation that the adviser has assumed a duty to act impartially and provide advice solely in the interest of the advice recipient as such standard has been interpreted under section 404 of ERISA, but we do not agree that all investment recommendations should be held to such a high standard when there is no reasonable expectation by either party that the adviser will act in this capacity.

We understand the Department’s reasoning in wishing to eliminate the requirement of a “mutual agreement” regarding how the advice will be utilized by the recipient. Nonetheless, we believe that there should be some arrangement, agreement, or understanding that the advice is sufficiently individualized and provided under circumstances in which it is reasonable for the advice recipient to rely on that advice.

We recommend that the Department implement the following revision –

(2) Such person, either directly or indirectly (e.g., through or together with any affiliate),—

...
(ii) Renders the advice (A) pursuant to a written or verbal agreement, arrangement or mutual understanding that the advice is individualized to ~~or that such advice is specifically directed to~~, the advice recipient for consideration in making investment or management decisions with respect to securities or other property of the plan or IRA, and (B) under circumstances creating a reasonable expectation on the part of

⁴¹ See, e.g., 80 FR 21938 (the proposal “avoids burdening activities that do not implicate relationships of trust and expectations of impartiality.”); 80 FR 21941 (“In each instance, the proposed carve-outs are for communications that the Department believes Congress did not intend to cover as fiduciary ‘investment advice’ and that parties would not ordinarily view as communications characterized by a relationship of trust or impartiality”).

the advice recipient that advice will be provided in the best interest of the advice recipient.

c. Interpret “Recommendation” in conformance with intent of ERISA

Under the Proposal, a recommendation is “a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action.” Though New York Life appreciates that the Department has taken this definition from FINRA guidance in an effort to coordinate its rulemaking with other regulators, we nevertheless believe that the articulated definition is over-inclusive.

FINRA guidance focuses not on the existence of a mere suggestion, but on whether there has been a communication that might reasonably be viewed as a “call to action” that might reasonably influence an investor to trade a particular security or group of securities.⁴² New York Life believes that such FINRA guidance may usefully be applied to distinguish a zone of information that may be provided about investment products and services that objectively describes the features of an investment product or service (including performance and benchmarking information) but that falls well short of a “recommendation.” The definition of “recommendation” should *not* preclude a provider from marketing products and communicating with potential investors and purchasers about the provider’s products without becoming a fiduciary.

That being said, it appears that the Department is seeking to cover any conversations or communications where the advice provider is in a position of trust with respect to the advice recipient. New York Life nevertheless believes that the Department should not construe every interaction by an agent with ERISA plans, ERISA plan participants and beneficiaries, and IRA holders as undertaking to provide unbiased investment advice solely in the client’s interest. Further, New York Life believes the Department should interpret “recommendation” to not include sales activities in the investment space, where sellers attempt to sell products in exchange for compensation for their sales activities. These are appropriate activities in the ERISA context and should not be eliminated, which the regulatory scheme proposed by the Department threatens to do.

d. Clarify the impact of fiduciary status on registration as an Investment Adviser

Lastly, before the Proposal becomes effective, we request that the Department ask the SEC to provide guidance that registered representatives of New York Life’s broker-dealer who are deemed to be giving fiduciary advice under the Department’s expanded definition are not required to also register as investment advisers under the Investment Advisers Act (the “Advisers Act”). Many agents and their agencies do not register as advisers under the Advisers Act because they do not provide advice as

⁴² See NASD Notice to Members 01-23.

defined in the Advisers Act or are otherwise exempt from registration under the Advisers Act. The agents and their agencies should not be required to register under the Advisers Act, which may result in significant cost to these agents and agencies even though they may provide “investment advice” as defined in the Proposal.

B. INVESTMENT EDUCATION

New York Life supports the Department’s proposal to recognize that investment education is not, and should not, be treated as investment advice under ERISA, based on principles articulated in Interpretive Bulletin 96-1.⁴³ While not perfect, we believe that the framework reflected in IB 96-1 has led to greater access to educational information for countless individuals over the past two decades, thereby improving their chances at a financially secure retirement.

1. Concern

The Proposal eliminates paragraphs (d)(3)(iii) and (4)(iv) of IB 96–1, which currently permit the use of asset allocation models that refer to specific investment products available under the plan or IRA as long as certain disclosure requirements are met. The Department, based upon its own experience and public comments, believes that asset allocation models populated with actual investment alternatives available under the plan or IRA “function as tailored, individualized investment recommendations, and can effectively steer recipients to particular investments, but without adequate protections against potential abuse.”⁴⁴

2. Impact

We agree with the Department that modifications to the definition of education represent “a significant change”⁴⁵. In response to the Department’s query, we do not believe that the change is “appropriate.” We believe it would have the effect of dramatically reducing the value of participant education initiatives by making it exceedingly difficult, if not impossible, to impart the information needed by participants to implement their investment decisions.

3. Solutions

There are two less drastic ways of addressing the potential for abusive “steering” identified by the Department:

- The incidence of steering could be limited if the Department requires that if “a model asset allocation identifies or matches any specific investment alternative available under the plan with a generic asset class, then all

⁴³ 29 C.F.R. § 2509.96-1 (“IB 96-1”).

⁴⁴ 80 FR 21945.

⁴⁵ 80 FR 21945.

investment alternatives under the plan with similar risk and return characteristics must be similarly identified or matched.”⁴⁶

If this approach is adopted, the Department should be practical. For example, where the number of available investment alternatives within an asset class is so large that describing them all is likely to confuse, rather than enlighten, the education recipient, the Final Rule should permit asset allocation models to identify a representative subset of alternatives, as long as the subset is selected based on neutral factors and does not disproportionately identify alternatives which result in the most compensation being paid to the adviser or financial institution.

- Any potential for abuse on the part of the model provider would be eliminated if the plan sponsor or independent plan fiduciary were permitted to select the specific investment options included for each asset class in the portfolio.

C. ADDITIONAL COMMENTS ON THE BEST INTEREST CONTRACT EXEMPTION

If the Department’s regulation is adopted as proposed, we believe that most sales presentations to plan fiduciaries and IRA holders will be characterized as involving fiduciary advice or, at the least, a meaningful risk that such advice will be found to have been provided, whether a fiduciary relationship is intended by the parties or not. In that case, the BIC PTE will become an essential part of insurance company’s compliance strategy in its dealings with covered ERISA plans, participants and IRA holders. However, New York Life is concerned about several aspects of the BIC PTE which, if finalized as proposed, will make compliance with the BIC PTE extremely difficult, if not impossible.

1. Concerns

a. The Written Agreement Requirement is Impractical

The BIC PTE requires that the Retirement Investor enter into a tri-party agreement with the Financial Institution and the Adviser before any investment advice is provided to the Retirement Investor. We have three concerns with this requirement.

First, requiring a contract this early in the process is simply untenable in the normal course of business dealings between a prospective client and the Adviser and Financial Institution. Because the Proposal creates a fine, and faint, line between identifying the products or services that New York Life is offering and “suggesting” as a fiduciary that the Retirement Investor choose one of those products, New York Life agents must assume that every conversation is a fiduciary one. It will be impractical, and we believe unacceptable to New York Life’s prospective client, to require him to

⁴⁶ IB 96-1, 61 FR 29586, 29587 (June 11, 1996) (exposure draft).

enter into an agreement before he can receive any meaningful information about what services and products New York Life may be able to offer.

Initial conversations between an agent and a potential client are focused on getting to know each other and allowing the potential client an opportunity to evaluate the credibility and likeability of the agent. Many conversations do not proceed beyond this first stage, often because individuals are often reluctant to take time out of their busy lives to discuss difficult and sensitive issues like financial security and retirement planning. Requiring potential clients to sign a lengthy contract during this stage of the process will make it only less likely that the individuals will overcome their natural reluctance to engage in a conversation about how to improve their financial security.

Second, the fact that an agreement is required for only one type of investment (e.g., retirement plans and IRAs) will distort individuals' financial decision making. For example, during the sales process, a New York Life agent will gather a significant amount of information about a prospective client so that the Adviser may make a determination as to the likely insurance and financial needs of the prospective client. The client typically directs the agent as to the type of products or services in which he or she is interested. However, as discussions progress, the prospective client may ask about investing IRA assets or rolling over retirement plan assets to an IRA. Based upon the Proposal, the agent will be required to stop all discussions about the IRA or rollover until the prospective client signs an agreement. This result will be unpalatable to the prospective investor; we believe that individuals will be concerned that the written agreement imposes obligations on them, and they will abandon, or unnecessarily delay, discussions regarding retirement plan assets or IRAs.

Third, it is unnecessary to require individual Advisers to sign the written agreement. The provisions required to be included in the written agreement largely address the Financial Institution's oversight of the Adviser. It adds no protection for the Retirement Investor to require the Adviser to individually be party to this type of agreement and simply adds to the administrative burden of the written agreement condition.

Fourth, if the purpose of the written agreement is to ensure that the Financial Institution provides the required disclosures and is contractually bound by the Impartial Conduct Standards and Warranties described in Part II(A), an affirmative consent (signature) by the Retirement Investor is not necessary.

Lastly, the Investment Advisers Act of 1940 exempts from registration those registered insurance representatives who provide advice that is "incidental" to their sales activities. Advice is not considered incidental if it is provided for an asset-based fee (rather than a commission) and/or pursuant to a written advisory agreement. New York Life is concerned that compliance with the BIC PTE's written agreement requirement would necessarily subject our agents to the registration requirement under the Advisers Act.

b. The Scope of the Exemption is not Broad Enough

As we previously noted, the BIC PTE is potentially an important exemption on which New York Life and its agents will be required to rely. In our view, while the BIC PTE suffers from *over-breadth* in a number of respects, as discussed above, its reach—and potential benefit—is severely limited by *under-inclusiveness*.

First, as currently proposed, the BIC PTE is available only to Retirement Investors, defined as participants with authority to direct plan investments or take a distribution, IRA owners, and the sponsor of a non-participant-directed plan with fewer than 100 participants when acting as an investment fiduciary for the plan.

The BIC PTE is the most protective of any exemption the Department has issued and we understand that the Department believes that “retail investors” are the most vulnerable to dishonest practices. However, given the proposed modifications significantly narrowing the exemptive relief available under existing class exemptions (PTE 84-24, 75-1 and 86-128), there has resulted a gap in exemptive relief available to less vulnerable investors. For example, as the exemptions are currently proposed, there would be no relief for a recommendation of a non-proprietary mutual fund to a plan fiduciary of a participant-directed plan if the adviser is compensated through revenue sharing.

Second, as currently proposed, the BIC PTE is only available for advice provided in connection with Assets. However, this limitation is unnecessarily limiting. The definition of Asset precludes the sale of unregistered securities to Retirement Investors even though under securities laws those investors can purchase such securities. In addition, the definition of Asset may be interpreted to not include advice regarding a rollover into an IRA that subsequently is invested in an Asset.

c. The Disclosure Conditions of the BIC PTE are Overly Burdensome and Unnecessary

The Department proposes to condition the BIC PTE on an agent’s and insurance company’s compliance with substantial point of sale, website, and annual disclosure requirements. New York Life believes that these disclosure requirements will require significant financial and human capital investments. Yet, it is not clear to New York Life that these disclosure requirements will help Retirement Investors understand the fees that apply to their plans and IRAs and help them make better investment decisions in conjunction with the advice provided by our agents. In addition, we contend that Section 408(b)(2) of ERISA already provides for the appropriate disclosures. Financial Institutions have devoted significant financial and compliance resources to complying with the Department’s 408(b)(2) disclosure regulation.

Moreover, the disclosure requirements included in the BIC PTE would require forward looking projections regarding future investment performance over 1, 5 and 10 year periods. FINRA rules regarding communication with the public prohibit projection

of future investment performance, and advertising rulings under the Advisers Act prohibit projections of investment returns.

d. The Exemption for Agreements in Existence Prior to the Effective Date of the BIC PTE Is Inadequate

The Department proposes under the BIC PTE an Exemption for Pre- Existing Transactions pursuant to which an agent, insurance company, Affiliates, and Related Entities will not be held liable for transactions that occurred prior to the effective date of the BIC PTE as long as certain conditions are met. New York Life believes that this relief is inappropriate and unhelpful. First, by providing for an exemption, the Department implies that an exemption was needed because the agent and insurance company were fiduciaries. However, we do not believe this to be the case. The Department's provision of the exemption implies that a fiduciary relationship existed and thus exposes New York Life and its agents to such claims. Second, the application of such an exemption is impractical. A financial institution like New York Life has hundreds of thousands of agreements already in place. We simply could not review all of those agreements for purposes of determining whether a fiduciary relationship exists and update for the BIC PTE within any reasonable time frame.

2. Impact

The limits of the BIC PTE and the burdensome disclosure requirements of the BIC PTE raise serious questions regarding whether agents and insurance companies can meet the requirements of the BIC PTE, while still meeting the needs of their clients. In addition, the BIC PTE may result in additional compliance costs associated with registration under the Advisers Act (e.g., all advisers would need to be licensed as Registered Investment Advisers). In the face of significant compliance and litigation risks, the agents and insurance companies may be less willing to make recommendations that Retail Investors need in order to minimize this risk.

3. Solutions

a. Modify the Written Agreement Requirement

To address each of the first three concerns involving the BIC PTE's agreement requirements, we propose that Section II(a) of the BIC PTE be amended as follows:

~~Contract. Prior to recommending that the Plan, participant or beneficiary account, or IRA purchase, sell or hold the Asset Prior to the execution of the recommended purchase or sale subject to relief under Section I, the Adviser and Financial Institution enters into a written contract with the Retirement Investor that incorporates the terms required by Section II(b) – (e). An agreement shall not fail to satisfy this provision solely because the agreement of the Retirement Investor was obtained by negative consent.~~

b. Expand the Scope of the Exemption

As we previously noted, the BIC PTE is potentially an important exemption on which New York Life and its agents will be required to rely. In our view, while the BIC PTE suffers from *over-breadth* in a number of respects, as discussed above, its reach—and potential benefit—is severely limited by *under-inclusiveness*.

(i) Expand the Covered Recipients of Advice

We see no reason why the relief provided by the BIC PTE should not be extended to any recommendations made to all types of advice recipients so long as the Adviser can satisfy the exemption's conditions.

(ii) Expand the Types of “Assets” that May Be Recommended

We also request that the definition of “Asset” be broadened. First, “Assets” should include an interest in a private fund if the Retirement Investor is an “accredited investor” under SEC Rule 501 of SEC Regulation D⁴⁷ promulgated under section 4(a)(2) of the Securities Act of 1933, as amended (“Securities Act”). In addition, “Assets” should include any asset with respect to which the Retirement Adviser is receiving advice from a professional, regulated asset manager subject to supervision by a state or federal agency with examination and enforcement authority.

The owner of an IRA that is accredited investor is permitted to purchase an interest in an investment fund without subjecting interests in the fund to registration under the Securities Act. Yet, the BIC PTE perpetuates this notion that small plans and IRA holders are “vulnerable” and lack financial sophistication. To the contrary, we believe that plan fiduciaries or IRA owners who are sophisticated investors or who are advised by regulated advisers can make fully informed, sound investment decisions and relief for those decisions should be entitled to relief under the BIC PTE.

Second, we request that the Department clarify that the BIC PTE applies to a recommendation to transfer assets to a specific IRA either from a qualified plan or from another IRA. Pursuant to the Department’s much expanded definition of fiduciary advice, a typical rollover transaction could potentially involve four separate fiduciary recommendations: (i) a recommendation to take a distribution “from” the plan; (ii) a recommendation to hire the Adviser; (iii) the recommendation to roll over to an IRA; and (iv) the recommendation regarding how to invest the assets of the IRA.

Third, as discussed above, the Department should clarify that the marketing and sales of “fee only” investment advice and investment management services is not “investment advice” so long as no compensation is paid to any firm or individual in connection with the marketing and sales of such services. Alternatively, the Department should clarify that the BIC PTE would cover the recommendation of oneself or a third-party for fiduciary services. If the Department insists on subjecting this marketing to

⁴⁷ 17 C.F.R. § 230.500, et. seq.

fiduciary standards, we request that the BIC PTE be revised to provide relief for this type of “advice.”

To address these three points, we propose the following revision to Section VIII(c):

(c) An “Asset,” for purposes of this exemption, includes only the following investment products: IRAs, investment management or advisory agreements, bank deposits, certificates of deposit (CDs), shares or interests in registered investment companies, bank collective funds, insurance company separate accounts, exchange-traded REITs, exchange-traded funds, corporate bonds offered pursuant to a registration statement under the Securities Act of 1933, agency debt securities as defined in FINRA Rule 6710(l) or its successor, U.S. Treasury securities as defined in FINRA Rule 6710(p) or its successor, insurance and annuity contracts, guaranteed investment contracts, and equity securities within the meaning of 17 CFR 230.405 that are exchange-traded securities within the meaning of 17 CFR 242.600. Excluded from this definition is any equity security that is a security future or a put, call, straddle, or other option or privilege of buying an equity security from or selling an equity security to another without being bound to do so. An “Asset” also includes an interest in a private fund where either (i) the Retirement Investor is an “accredited investor” under SEC Rule 501 of SEC Regulation D⁴⁸ promulgated under section 4(a)(2) of the Securities Act of 1933, as amended or (ii) the Retirement Investor has received advice from a U.S. bank, trust company, insurance company or registered investment adviser.

c. Modify the Disclosure Requirement

New York Life urges the Department to remove the various disclosure requirements from the BIC PTE (e.g., Compensation Disclosure – Point of Sale & Annual, Website Disclosure, etc.). We contend that Section 408(b)(2) of ERISA already provides for the appropriate disclosures. Financial Institutions have devoted significant financial and compliance resources to complying with the Department’s 408(b)(2) disclosure regulation. Therefore, for purposes of IRAs and ERISA plans covered by the BIC PTE, the Department should require that financial institutions provide disclosures similar to those already required under the Department’s own 408(b)(2) regulation.

d. Provide for Grandfathering of Prior Agreements rather than an Exemption for Prior Conditions

New York Life urges the Department to carefully consider the legal uncertainties and administrative burdens imposed by the proposed BIC PTE when it considers a final rule. We propose that all arrangements or agreements between an Adviser and a Retirement Investor entered into before the effective date of the exemption be excepted

⁴⁸ 17 C.F.R. § 230.500, et. seq.

from the requirements of the BIC PTE, provided that when entered into they were in compliance with then current law. This would ensure all existing sales and new transactions under those agreements (e.g., additional deposits, re-allocation, follow-up communication, etc.) are covered by prior law.

D. HEALTH AND WELFARE PLANS

It appears that “investment advice” could include a recommendation of a life, health, disability or other insurance policy to a plan fiduciary or participant. An insurance policy providing plan benefits might reasonably be characterized as “other property” within the meaning of the advice definition.⁴⁹ In addition, a footnote to the proposed BIC PTE states that such exemption may be used to exempt transactions involving health and welfare plans.⁵⁰

Yet, the Department’s entire analysis and the focus of the proposed regulation and the exemptions are clearly the investment of plan assets and the marketing of investment products and services to retirement plans and IRAs. Before those marketing insurance policies to welfare plans are subjected to fiduciary standards and specifically the onerous conditions of the BIC PTE, we request that the Department specifically consider whether there is sufficient evidence to support the extension of fiduciary standards to the sale of insurance to welfare plans and participants.

E. EFFECTIVE DATE

In order to accommodate the immense burden of operational compliance, we request an extension of the effective date to two years after the date the final regulation and exemptions are published in the Federal Register. In addition, we would urge the Department to publish an interim rule or otherwise publicize the changes it intends to make to the Proposal, so as to allow the Department the opportunity to receive public feedback on such changes before issuing a final rule.

III. CONCLUSION

Tremendous changes in how Americans pay for retirement over the last 40 years have created significant challenges for millions of people who lack the funds, knowledge, or wherewithal to go it alone or hire a fee-based adviser. At the same time, market forces have created a variety of models for people seeking advice on how to replicate the guaranteed lifetime income that traditional pensions used to provide.

⁴⁹ Proposed Exemption, PTE 77-9 41 FR 56760, 56762 (Dec. 29, 1976) (stating an insurance agent could provide fiduciary investment advice by recommending an insurance contract or annuity); *Ehlen Floor Covering, Inc. v. Lamb*, 859 F. Supp. 2d 1285, 1296 (M.D. Fla. 2012). (holding that life insurance contracts could constitute a security or other property.)

⁵⁰ 80 FR 21966 n. 18 .

We share the Department's desire to assure a secure retirement for all Americans. Our mutual company model and career agency system is ideally suited for this challenge. We build products that offer iron-clad guarantees, we operate our company so that we can meet those guarantees in any economic climate, and we train and deploy agents whose mission is to help Americans prepare for the risks and opportunities that life brings.

However, as set forth above, we are concerned that the Proposal, without our recommended changes, will make retirement less secure for many Americans by increasing costs and reducing access to guidance and guaranteed income.

Thank you for reviewing our suggested modifications to the Proposal, and for the opportunity to provide our feedback. If you have any questions or need additional information regarding this submission, please feel to contact me at (212) 576-5353.

Sincerely,

A handwritten signature in blue ink, appearing to read "Sheila Davidson", with a long horizontal flourish extending to the right.

Sheila K. Davidson
Executive Vice President, Chief Legal Officer & General Counsel
New York Life Insurance Company