The COMMITTEE
of
ANNUITY
INSURERS

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U.S. Department of Labor
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Room N-5655
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Employee Benefits Security Administration
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Re: *Definition of the Term Fiduciary; Conflict of Interest Rule (RIN 1210-AB32)*
Proposed Amendment to Proposed Partial Revocation of Prohibited Transaction Exemption 84-24 (ZRIN: 1210-ZA25)
Proposed Best Interest Contract Exemption (ZRIN 1210-ZA25)

We are writing on behalf of the Committee of Annuity Insurers (the "Committee") in follow up to the Committee's testimony at the Department of Labor's (the "Department's") Public Hearing on Conflicts of Interest conducted August 10-13, 2015 ("the hearing"). The Committee is a coalition of life insurance companies formed in 1981 to participate in the development of federal policy with respect to annuities. The Committee's current 29 member companies represent more than 80% of the annuity business in the United States and are among the largest issuers of annuity contracts to IRAs and employer-sponsored retirement plans. A list of the Committee's member companies is attached.

This letter supplements the Committee's previous comment letter submitted on July 21, 2015 by offering clarification and further background on some of the key issues raised during the hearing. In this follow up letter, we:

- Summarize how the proposal, in various ways, will have the effect of discouraging use and understanding of annuities and other guaranteed income products.
- Provide follow-up comments regarding the changes needed to the proposal's definition of "investment advice," including addressing insurance companies acting as issuers, or manufacturers, of annuity contracts.
- Provide specific follow-up comments on the changes needed to the Department's proposed prohibited transaction exemptions, including the Best Interest Contract Exemption.

- Discuss our concerns regarding the overall process of the rulemaking, including a discussion of the rule's effective date, regulatory impact analysis, and the Committee's request for a re-proposal prior to finalizing the rule.

We continue to be heartened by the Department's sincere and repeated assurances that the rule proposal does not seek to pick winners and losers, or to ban specific types of product distribution, such as brokerage or proprietary sales; specific types of compensation, such as commissions; specific types of investment strategies, such as actively managed funds; or specific types of products, such as annuities with their important lifetime income guarantees. Our comments are aimed to implement those assurances.

I. **How the proposal discourages understanding and use of lifetime income products.**

During the August hearing, Department panelists expressed support for lifetime income options and emphasized the value of such products.[1] Committee members appreciate and commend the Department for publicly recognizing the value of annuities.

On the other hand, Department officials appeared skeptical that the proposal would reduce access to, understanding, and use of lifetime income options such as annuities. In our July comment letter, we laid out some specific concerns regarding the proposal which, taken together, will have the unintended and unfortunate consequence of making it harder, not easier, to ensure Americans have the income they need in retirement:

- The proposed definition sweeps in sales conversations where there is no reasonable expectation of fiduciary status, which *takes away* choices by turning ordinary sales conversations into fiduciary undertakings. Insurers may have to limit and restrict annuity sales to plans and IRAs, either because they are unwilling to take on fiduciary status or are unwilling or unable to comply with a prohibited transaction exemption.[2]
- The Best Interest Contract Exemption (BICE) discourages the sale and the use of annuities through a number of provisions that many commentators have identified:[3]
    - The requirement to offer a "broad" range of asset classes disadvantages annuity issuers and their agents and brokers who focus on a particular product or set of similar products.
    - The requirement for a "Total Cost" disclosure suited for mutual funds, not annuities.
    - The requirement to act "without regard to the financial or other interests" of the adviser or insurance company.

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[1] Conflict of Interest Proposed Rule, Related Exemptions, and Regulatory Impact Analysis Hearing Transcript ("Hearing Transcript") 528:19 – 530:10.

[2] Committee of Annuity Insurers Comment Letter Regarding Fiduciary Proposal (July 21, 2015) ("CAI July Comment Letter") 23 – 26.

[3] CAI July Comment Letter 35 – 41.

    - The requirement not to have any compensation policy that will "tend to encourage" recommendations that are not in the best interest of the client, which we and a number of other commenters believe will discourage long accepted insurance commission practices because of concern that it will be very difficult to prove that a particular insurance commission is specifically justified by the time and expertise needed by the agent or broker.
- PTE 84-24, which has become critical for nearly every sale of an annuity, needs to be adjusted in several very important ways, as detailed in Section IV of our comment letter.[4]
- The Department's changes to the education carve-out will make it difficult to provide information of any substance to the owner of an annuity (see more comments on this topic below).[5]

Based on the above referenced concerns, the Committee would like to reiterate its belief that the proposed rule will reduce access to, understanding, and use of lifetime income options such as annuities. The Committee encourages the Department to further consider the proposed rule's impact on the availability of such products in light of these concerns.

II. Follow up regarding the meaning of "recommendation."

A. Communications that constitute a recommendation.

Committee members are concerned that the proposed rule does not clearly distinguish between communications that constitute a "recommendation" triggering a fiduciary relationship and communications that do not. With the exception of appraisals, the proposed rule does not trigger an investment advice fiduciary relationship unless there is a "recommendation," which is defined as "a communication that, based on its content, context, and presentation would be viewed as a *suggestion* that the advice recipient engage in or refrain from taking a particular action." As we discussed in our previous comment letter, we believe a "suggestion" is *too low a bar* to trigger an investment advice fiduciary relationship and urge the Department to revise the definition of "recommendation" to expressly require a "call to action" or "advocacy for a course of action." After all, the word suggestion can mean as little as a "faint hint or indication."[6]

At the hearing, Department officials repeatedly emphasized that the Department intended a recommendation to require a "call to action," even though the proposal contains no such requirement.[7] (Although the preamble to the proposed rule references FINRA Policy Statement 01-23 in relation to the definition of a "recommendation," the proposed rule's actual definition of a "recommendation" does not expressly mention a "call of action.") Committee members urge

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[4] CAI July Comment Letter 16 – 23.

[5] CAI July Comment Letter 28 – 30.

[6] *Suggestion,* Webster's New World Dictionary (2d College ed. 1986); *see also* Merriam Webster Online, available at http://www.merriam-webster.com/dictionary/suggestion ("a slight indication.")

[7] Hearing Transcript 718:4 – 719:21: 723:1 – 11; 851:16 – 852:9.

the Department to implement this intention by removing any reference to a "suggestion" and expressly requiring a "call to action" or "advocacy for a course of action." The Committee would welcome and fully support such a revision and is concerned that a failure to provide such clarification will result in too much uncertainty. Such uncertainty could harm retirement investors by eliminating access to valuable information because of concern that the provision of such information could be characterized as a "suggestion," and thus a recommendation, in the absence of a call to action.

We would point out, however, that it is not enough to modify the definition of "recommendation" in the proposal. As we detail in our letter, further changes are necessary to the definition to prevent non-fiduciary communications from being swept under the scope of the proposed rule:

- "Directing" a communication at an individual should not be part of the test.
- The Department should require a "reasonable expectation that the advice will be relied upon" in making decisions, or that the recommendation will be a "material part of the decision making."
- The Department should make clear that simply referencing facts, like age, expected retirement date, risk tolerance, safety of an annuity issuer, or longevity, that help individuals understand the pros and cons of an investment product, choice, or strategy, does not mean the communication has been "individualized."

B. Investment Education.

As we described in our previous comment letter, annuities are unique in that they provide guaranteed income and insurance protection against longevity risk by pooling risk among a large group of individuals, so that no single individual bears the burden of the entire risk alone. These unique features are not present in investment products like mutual funds. Because of their unique and beneficial features, annuities require greater investor education in order to assist retirement savers to make appropriate decisions.

In order to provide retirement investors with adequate education about annuities, the definition of investment education should be clarified to expressly include descriptions of an investment product itself, including a description of an annuity's distribution options. Throughout the hearing, comments from Department panelists gave the impression that the description of a particular investment, including descriptions made in a product's relevant disclosure materials, would qualify as investment education, rather than investment advice.[8] This is a much welcomed development and the Committee encourages the Department to expressly make this distinction by including "descriptions of investment products" under the enumerated categories of investment education found in the proposed rule. In the absence of an express carve out, we are concerned that the current definition of investment education is too ambiguous and could create unpredictable risks when simply describing a product's features. Such a result could significantly limit access to much-needed information currently available to

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[8] Hearing Transcript 718:4 – 719:21; 992:19 – 993:10.

retirement investors in a way that would discourage annuitization and harm retirement investors who could significantly benefit from the purchase of an annuity.

Beyond the simple "description of investment products," we also urge the Department to expressly clarify that the investment education carve out also includes communications generally discussing the advantages and disadvantages of annuitization or other distribution options (like living benefits) available under a contract.[9] Our previous comment letter explained how such conversations could possibly be understood as a "suggestion" that could inappropriately trigger an investment advice fiduciary relationship.[10]

Despite this request in our previous comment letter and similar requests from other witnesses and written comments, few questions or comments from Department panelists suggested that the Department is considering an expanded definition of investment education that would expressly cover communications discussing the general advantages and disadvantages of a particular investment product, so long as the communication does not advocate a particular course of action. The Committee believes that a failure to revise the rule in a way that covers such conversations could harm retirement investors because investors will not be able to obtain the information they need to make an informed decision about their ability to purchase or elect an annuity.

Finally, Committee members believe that there are circumstances when it is appropriate for service providers to reference specific investments in educational materials, especially when the investment has already been selected by the plan fiduciary. Throughout the hearing, the Department's panelists asked witnesses whether the rule would be improved if it allowed specific references to investments in the retirement plan context when all other investments of that type are also referenced.[11] The Committee appreciates the Department's recognition of areas where the investment education carve out can be improved and supports a rule that will allow service providers to connect investment education with plan-specific investments.

The foregoing comments can be illustrated with a few examples. First, suppose a plan purchases a group variable annuity that offers various mutual funds and fixed investment options among which participants may allocate their investment and a number of annuity distribution options. The plan fiduciary selects and monitors those investments and annuity distribution options. All of the following should be considered education:

- Explaining the features of the group annuity contract to the plan fiduciary and answering questions from the plan fiduciary, provided there is no advocacy or call to action.

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[9] We would distinguish conversations regarding an individual's specific circumstance, which involve advocacy of a particular one course of action, from general conversations in which the pro and cons, in general, of particular annuitization and other distribution options are discussed.

[10] CAI July Comment Letter 28.

[11] Hearing Transcript 38:7 – 41:10; 345:18 – 346:8.

- Offering participants asset allocation education which references the mutual funds or other investments available through the contract that fall into a particular asset class.
- Explaining the annuity distribution options available under the contract, including the advantages and disadvantages of one option over another, as long as there is no advocacy or individualized recommendation for a particular distribution option.

Second, suppose an IRA owner purchases a fixed annuity contract that offers a range of withdrawal and annuitization options, including a guaranteed living withdrawal benefit, various forms of life contingent annuities, and a term certain annuity. The issuer of the contract, or its agent or broker, should be able to explain these options, provide education regarding how they operate, and the pros and cons of each option, without triggering fiduciary status.

C. Annuity manufacturers.

As currently drafted, the proposed definition of an investment advice fiduciary is too ambiguous and could create unwarranted liability for life insurance companies that issue annuities (sometimes called the annuity "manufacturers" or "producers"). During the hearing, Department panelists seemed to suggest that such manufacturers need not worry about investment advice fiduciary liability unless they are actually providing a recommendation to an advice recipient in the FINRA sense.[12] This interpretation is not clear from the proposed rule and Committee members request the Department to expressly exclude manufacturers of annuities, so long as the insurance company does not render investment advice for a fee or other compensation related to such advice with respect to such insurance or investment products or represent or acknowledge that it is acting as a fiduciary.

This clarification is important for insurance companies in two ways. First, under state insurance laws, insurance products can only be sold by state licensed agents that are appointed (authorized) as agents by each insurance company whose product the agent sells. The appointment is the mechanism to tie the insurance company to the acts of the agent when selling that company's insurance products under state insurance law. This appointment process should not, by itself, turn the insurance company into a fiduciary.[13] Similarly, the appointment process should not, by itself turn an insurance company into a Financial Institution for the BICE, as discussed below.

Second, expressly excluding product manufacturers is important when insurance company employees are marketing their products to financial advisers and broker dealer firms in what is sometimes called "wholesaler" conversations. This is a clear sales context – both sides understand this – and the insurance company is not communicating to the end-user plan,

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[12] Hearing Transcript 722:14 – 725:25.

[13] Other commenters from the annuity industry have suggested specific language to address this point and we urge you to consider those suggestions.

participant, or IRA owner, but *may be* communicating with someone who serves as a fiduciary investment adviser. These wholesaler conversations should not be considered fiduciary advice.

III. Changes are necessary to provide appropriate and workable PTEs.

A. Retain variable annuities under PTE 84-24.

The Committee strongly encourages the Department to retain the current scope of PTE 84-24 by making it available to all annuity contracts. Despite significant written comments and live testimony from numerous commenters and witnesses who share this position, the Committee is concerned with how few of the questions and comments from Department officials at the hearing sought further clarification and input on this critically important issue. We are concerned that the absence of any meaningful discussion on this question during the hearing reflects a misunderstanding by the Department of how the exclusion of variable annuities from PTE 84-24 will harm retirement investors by limiting access to variable annuities. Accordingly, we would like to take this opportunity to reiterate our concerns.

The exclusion of variable annuities from PTE 84-24 will constrain variable annuities to the BICE, which entails significantly more conditions and more cost than PTE 84-24. We are concerned that the greater cost associated with the BICE could create a disincentive for one kind of annuity, variable, to be sold over another type of annuity, fixed, without regard to an individual retirement investor's needs. We strongly believe that retirement savers should have the opportunity to choose one product over another based on the actual economic benefit to the investor based on their needs; not which annuity is subject to one prohibited transaction exemption or another.

In any event, the exclusion of variable annuities from PTE 84-24 does not make analytical sense because such a distinction misunderstands the fact that variable annuities are not the same as mutual funds or other securities that fall outside the scope of PTE 84-24. For example, variable annuities, unlike mutual funds, provide insurance protection against longevity risk by pooling that risk among a large group of individuals, so that no single individual bears the burden of the entire risk alone. Additionally, variable annuities often include guaranteed death benefits and/or guaranteed living benefits, wherein the insurer guarantees specified minimum values or payments irrespective of market fluctuations.

For the reasons described above we strongly encourage the Department to retain the current scope of PTE 84-24 by making it available to all annuity contracts.

B. The BICE is unworkable under the current proposal.

As we expressed in our July comment letter, the Committee supports a principles-based exemption ensuring that anyone who provides investment advice acts in their client's best interest. The BICE, as currently proposed, falls short of this goal and is not workable in its current form. Accordingly, if the Department does not make PTE 84-24 the model principles-based PTE, as suggested in our previous comment letter, we urge the Department to vastly simplify the BICE.

The Department's comments and questions during the hearing appeared to reflect a willingness to simplify the BICE in order to make it a more feasible exemption.[14] We appreciate the Department's willingness to make changes in response to many of the administrative concerns raised by commenters and have outlined recommendations below to address the BICE's shortcomings.

i. <u>Administrative and mechanical changes to the BICE.</u>

Timing of the contract: Committee members appreciate the comments and questions from Department panelists seeking recommendations on the best approach to address the BICE's timing problem. As drafted, the BICE requires investment advisers and advice recipients to enter into a contract before any discussions begin. Our previous comment letter outlined our concerns with this timing issue and recommended that the Department, at the very least, adopt a rule that would only require a signed contract on or before the transaction that would otherwise trigger a prohibited transaction (such as the payment of compensation to the adviser or the purchase of a security or other property) occurs. Although we ultimately believe that the contract requirement should be removed altogether, a contract requirement closer to the point of sale would be a welcomed improvement to the BICE as currently proposed.

Current customers: As we stated in our previous comment letter and discuss further in section IV below, we urge the Department to expand the BICE's grandfathering provision to cover communications made after the rule's effective date with respect to an annuity that was purchased prior to the effective date. If the Department, nonetheless, decides to apply the proposal to annuities purchased prior to the effective date, a workable solution is absolutely required. For existing customers (which we believe should include owners of annuity contracts who make additional premium payments after the rule goes into effect), the Department suggested a willingness to adopt a "negative consent" approach to the BICE, whereby an adviser or financial institution would simply notify its current customers that it will undertake future advice under a best interest standard.[15] The Committee believes a negative consent approach is the only workable solution.

ii. <u>Significant changes required to make the BICE workable.</u>

Reasonable compensation: During the hearing, panelists from the Department also sought clarification on ways in which the Department could improve the BICE's requirement for total compensation not to exceed "reasonable compensation" in the context of variable annuities. Although the Committee opposes adoption of a rule that would constrain variable annuities to the BICE, we commend the Department for recognizing that the BICE's "reasonable compensation"

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[14] Hearing Transcript 87:13 – 88:72; 574:22 – 575: 25; 669:8 – 670:12.

[15] Hearing Transcript 295:15 – 296:4; 574:22 – 575:25.

requirement is uniquely flawed in the context of variable annuities.[16] As discussed in our July comment letter, the BICE's "reasonable compensation" requirement departs from the current regulatory framework by requiring service providers to determine whether or not compensation is reasonable.[17] To relieve this incongruity, we encourage the Department to create a rule that would define reasonable compensation as it is understood for the purposes of PTE 84-24. Under such a framework, the reasonableness of compensation would be determined by the independent plan fiduciary's (or IRA owner's) willingness to purchase an annuity after receiving the appropriate fee disclosures. Any other standard puts service providers and product manufacturers in the impossible position of having to benchmark themselves.

BICE disclosures: Among other concerns raised in our previous comment, the Committee would like to take this opportunity to comment on the hearing's coverage of the BICE's disclosure requirements. The Committee is concerned that the production and distribution of the BICE disclosures will result in significant costs for the annuity industry while providing essentially no additional utility for retirement investors beyond the disclosures already required by state and federal law.

We believe that the disclosures in Part II(e) and Part III of the exemption should be deleted[18] and replaced with three disclosures:

- A requirement to disclose conflicts of interest that are material.[19]
- A requirement to provide, upon request in connection with the sale, the information regarding direct and indirect compensation based on the 408(b)(2) disclosure rules, as though the Retirement Investor were the "responsible plan fiduciary" and the plan or IRA is the "covered plan."[20]
- A requirement to provide a disclosure as would be required by the Department's 404a-5 regulation for any asset recommended for investment.

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[16] Hearing Transcript 160:24 – 161:10.

[17] The concept of "reasonable compensation" is well understood. What makes the BICE unworkable is that it requires that the Adviser and Financial Institution must affirmatively agree that no Asset will be recommended unless the total compensation to be received is reasonable and makes this agreement enforceable as a contractual matter. We have no doubt that such a requirement would lead to widespread and expensive litigation.

[18] For the reasons many commenters have raised, Section V(a) and (b) and all of Section IX of the BICE should also be deleted.

[19] As we point out in our comment letter, while the defined term in the BICE is "Material Conflict of Interest," the definition of the term does not actually contain a materiality element. This definition should be modified to focus on material financial interests, such as a commission or other material payment that will be received in connection with the purchase or sale of an insurance or annuity contract. See CAI July Comment Letter 22.

[20] In particular, it is critical that such disclosure be allowed to use ranges of compensation, which the Department has allowed in the context of 408(b)(2), provided any range of compensation or cost provides "sufficient information to permit evaluation of the reasonableness of the compensation or cost."

Best interest standard: Committee members are also concerned with how the BICE defines the best interest standard. As currently proposed, the best interest standard requires an investment advice fiduciary to act "without regard to the financial or other interest of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party." During the hearing, Committee members were pleased to hear Department panelists express a willingness to reconsider the "without regard to" requirement, including the removal of the problematic language altogether.[21] In response to these discussions, the Committee would like to reiterate our position that the enunciation of prudence in ERISA section 404, which looks to the actions of a prudent fiduciary in circumstances similar to those then prevailing, is a more straightforward test than the proposed best interest standard requiring advisers to act "without regard to" the adviser's financial or other interests. Accordingly, we encourage the Department to adopt a best interest standard that would remove the "without regard to" language in favor of a standard that expressly incorporates the best interest standard of ERISA section 404.

Compensation structures: The Department must eliminate the requirement to avoid compensation policies that might "tend to encourage individual Advisers to make recommendations that are not in the Best Interest of the Retirement Investor." The Committee does not believe the Department intends to discourage the use of investment products when they are otherwise the most appropriate option for individual retirement investors simply because of the relative commission amounts generated. Instead of the current proposed standard, the Department should look to FINRA's comment letter, which provides a straightforward and simplified approach to differential compensation, requiring a firm to adopt written policies and procedures that are reasonably designed to ensure advisers make recommendations that are in the best interest of the retirement investor.[22] In addition, the final BICE should have a *clear statement* in the rule or preamble that a higher commission for the sale of an annuity is not *per se* compensation that will "encourage advice that runs counter to the Best Interest of the Retirement Investor."

Tri-party agreement: The proposed rule requires the best interest contract to be agreed to by the Retirement Investor, the Adviser, and Financial Institution. The Committee is concerned that this requirement could have the unintended consequence of inappropriately requiring insurance companies whose products are sold through independent brokers to agree to the best interest contract when the insurance company has not provided any investment advice. We think the "tri-party" requirement should be removed. We are also concerned that a product manufacturer might become liable under the BICE as a "Financial Institution" simply because state law requires an insurance agent to be "appointed" by the life insurance company. As we discussed in our July comment letter, the product manufacturer should not be considered the Financial Institution unless there is no other investment advisory firm, broker-dealer, or insurance agency that employs or otherwise retains the individual as an independent contractor, agent, or registered representative.[23]

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[21] Hearing Transcript 524:19 – 525:22; 733:5 – 734:14; 984:13 – 19.

[22] See comment letter of Financial Industry Regulatory Authority (July 17, 2015) 9.

[23] CAI July Comment Letter 44.

Other warranties: The Committee would like to reiterate its request to remove other unnecessary warranties and promises in Section II(c) and (d) of the BICE not otherwise addressed. For example, the BICE's requirement for Advisers and Financial Institutions to affirmatively warrant that they "will comply with all applicable federal and state laws regarding the rendering of investment advice, the purchase, sale and holding of the Asset, and the payment of compensation related to the purchase, sale and holding of the Asset." While the Committee supports a standard that requires investment advisers to act in their clients' best interest, we do not support a rule that would create a private breach of contract claim under any federal or state law (all of which will have their own enforcement regimes). The litigation costs resulting from such a rule will be far too burdensome and inevitably increase costs for both participants and providers.

IV. Substantial changes are necessary to establish appropriate grandfathering rules.

Panelists indicated that the Department is looking very hard at how to reconfigure the proposal's grandfathering provisions based on the number of issues identified by commenters but did not provide any indication as to how the Department intends to craft such provisions. Committee members appreciate the Department's willingness to revisit the grandfathering question because the BICE's current grandfathering provision is too narrow and the proposed rule contains little guidance on possible grandfathering treatment for PTEs beyond the BICE.

As discussed in our July comment letter, we believe that the BICE's current grandfathering provision does not go far enough to ensure that retirement investors have access to much needed information regarding annuities purchased prior to the rule's effective date.[24] Although the BICE currently provides relief for communications made prior to the rule's effective date, the proposed grandfathering provision does not extend to *future communications* made with respect to annuities purchased prior to the effective date. In other words, the grandfather provision is, essentially no grandfather for existing products, which were never priced with these new rules in mind.

The Committee is concerned that this narrow application of the BICE's grandfathering provision will prevent customers from obtaining information about annuities purchased prior to the effective date if the communication could be considered a recommendation. This result is unfair for annuity purchasers who may not be able to receive the same level of support available when they purchased the annuity contract and unfair for annuity issuers who did not have pricing models at the time of sale contemplating the increased regulatory cost. Accordingly, we urge the Department to expand the BICE's grandfathering provision to include communications made after the rule's effective date for annuities purchased prior to the effective date. Finally, if the Department does not expand the BICE's grandfathering provision in accordance with this recommendation, the Department must permit a "negative consent" approach for existing customers, as discussed above in section III.B.i.

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[24] CAI July Comment Letter 42 – 43.

V. The Regulatory Impact Analysis is flawed.

A significant portion of the hearing was devoted to the Department's Regulatory Impact Analysis. Although our previous comment only briefly referenced this economic analysis, we would like to take this opportunity to express a very specific concern about the analysis.

In particular, the economic impact analysis fails to account for the cost to consumers created by the reduced access to and education for annuities that will result if the rule is adopted as proposed. As discussed in our July comment and above, we believe that the proposed rule, as currently drafted, will effectively discourage many retirement investors from annuitizing or purchasing an annuity in the first instance. Such a result would prevent retirement investors from accessing the guarantees provided by annuities in a way that is not contemplated by the Regulatory Impact Analysis.

To put it bluntly, unless the proposal is significantly changed, fewer Americans will have access to the guaranteed income that annuities provide. That creates significant risks in retirement that the Regulatory Impact Analysis simply fails to take into account.

VI. Re-proposal is necessary to provide clarification and resolve ambiguity.

Based on the proposed rule's significant ambiguity, as demonstrated by the number and variety of interpretations offered by the Department and commenters, the Committee requests the Department to re-propose the definition of an investment advice fiduciary and the accompanying PTEs to allow for additional comments prior to issuance of a final rule. Until there is an opportunity to consider the significant changes the Department needs to make, it is virtually impossible as a practical matter for interested parties to reasonably determine the scope and impact of the proposed rule and to respond with comments. This fact should be apparent from the multiple contradictory interpretations of the proposed regulation offered by the Department, written commenters, and witnesses at the hearing. During the hearing, Department panelists repeatedly expressed an interest in reducing confusion about the rule and providing clarification where necessary. A re-proposal of the rule would provide the Department with a meaningful opportunity to accomplish these objectives.

We appreciate this opportunity to offer input on this proposal. If you have any questions, or if we can be of any assistance in your consideration of the issues summarized above, please do not hesitate to contact either of the undersigned at 202-347-2230.

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