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September 15, 2017

Office of Exemption Determinations
EBSA, Attention: D– 11712, 11713, 11850
U.S. Department of Labor
200 Constitution Avenue NW., Suite 400
Washington, DC 20210

Re: Extension of Transition Period and Delay of Applicability Dates; Best Interest Contract Exemption (PTE 2016–01); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (PTE 2016–02); Prohibited Transaction Exemption 84– 24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters (PTE 84–24), 29 CFR Part 2550 [Application Number D–11712; D–11713; D–11850] ZRIN 1210–ZA27

Dear Sir/Madam:

The National Association of Mutual Insurance Companies ("NAMIC") appreciates the opportunity to provide comments regarding the Notice of proposed amendments to PTE 2016–01, PTE 2016–02, and PTE 84–24. (the "Notice").

NAMIC is the largest property/casualty insurance trade association in the country, serving regional and local mutual insurance companies on main streets across America as well as many of the country's largest national insurers. The 1,400 NAMIC member companies serve more than 135 million auto, home and business policyholders and write more than $ 196 billion in annual premiums, accounting for 50 percent of the automobile/homeowners' market and 31 percent of the business insurance market. Through our advocacy programs, we promote public policy solutions that benefit NAMIC companies and the consumers we serve.

Background

On April 14, 2015, the Department of Labor (the "Department") released a proposal to re-define who is rendered a "fiduciary" of an employee benefit plan under the Employee

Retirement Income Security Act (ERISA) by providing investment advice to a plan or its participants or beneficiaries.

The proposal by the Department was billed as a new level of protection for investors in their dealings with brokers and other financial professionals who give advice on retirement accounts and defined benefit pension plans. However, the proposal adopted a broad definition of fiduciary "investment advice" encompassing "sales" communications, certain educational materials, and other situations. In addition, the proposal broadly expanded the Department's current regulatory authority over employer-provided retirement plans to all Individual Retirement Accounts (IRAs) as well as to all private sectors, employer-provided retirement plans. The Department proposal would not apply to property casualty insurance contracts, but would affect traditional insurance products such as fixed index annuities in addition to variable annuities, which are regulated as a security.

In 2015, NAMIC submitted comments to the proposed rule and takes this opportunity to reiterate its opposition to the Fiduciary Rule as an inappropriate federal regulation of insurance, an action beyond the statutory authority of the Department, an inappropriate targeting of specific fee structures, and regulation more appropriately provided by securities regulators.

The Department Fiduciary Standard Rule is an Inappropriate Federal Regulation of Insurance

The primacy of the states in the regulation of insurance is well established. The McCarran Ferguson Act in 1945 clarified that states should continue to regulate the business of insurance and affirmed that the continued regulation of the insurance industry by the states was in the public's best interest. The Financial Services Modernization Act of 1999, also known as the Gramm-Leach-Bliley Act, once again affirmed that states should regulate the business of insurance by declaring that the McCarran-Ferguson Act remained in effect. The Wall Street Reform and Consumer Protection Act of 2010, better known as the Dodd-Frank Act, recognized that the primary of state insurance regulatory functions remain as they have been since the enactment of McCarran-Ferguson. Department

But while the proposed Fiduciary rule directly to insurance two dozen times, the Department nevertheless concluded that "[t]his proposed rule does not have federalism implications because it has no substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." To support this assertion, the Department noted that Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA. The breadth of this provision is clear in the definition of "state laws" which includes "all laws, decisions, rules, regulations, or other state actions having the effect of law, of any state." The ERISA preemption is widely viewed as one of the most comprehensive and inclusive preemptions in federal law; however, even ERISA includes a specific carve-out for the regulation of insurance. The ERISA savings clause under Section 514(b)(2)(A) provides that nothing in ERISA "shall be construed to exempt or relieve any person from any law of any state which regulates insurance, banking, or securities."

It is true that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" under ERISA 514(a), 29 U.S.C. 1144(a), but the "saving clause" then provides that some state laws are not preempted: "nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." ERISA 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A). In order for a state law to survive preemption by ERISA, the state law must be one that regulates insurance, as opposed to a state laws of general application that have some bearing on insurers. Kentucky Association of Health Plans, Inc. v. Miller, 538 U.S. 329, 123 S.Ct. 1471 (2003), citing ERISA, § 514(b)(2)(A), 29 U.S.C.A.§ 1144(b)(2)(A).

In reserving the authority to regulate the business of insurance to the states, McCarran-Ferguson provides that "[n]o Act of Congress shall be construed to ... supersede any law enacted by any State for the purpose of regulating the business of insurance ... unless such Act specifically relates to the business of insurance." 15 U.S.C. 1012(b). In Unum Life Ins. Co. of America v. Ward 526 U.S. 358 (1999), the Court noted that in interpreting the "business of insurance"

> the courts first ask whether, from a "common-sense view of the matter," the contested prescription regulates insurance. Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 740 (1985); see Pilot Life, 481 U.S., at 48. Second, we consider three factors employed to determine whether the regulation fits within the "business of insurance" as that phrase is used in the McCarran-Ferguson Act, 59 Stat. 33, as amended, 15 U.S.C. 1011 et seq.: "first, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry." Metropolitan Life, 471 U. S., at 743 (emphasis, citations, and internal quotation marks omitted); see also Pilot Life, 481 U.S., at 48—49.

Section 514(b)(2)(A) provides that "nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." ERISA preemption analysis is no different than any other preemption analysis. John Hancock Mutual Life Ins. Co. v. Harris Trust and Savings Bank, 510 U.S. 86, 99 (1993) ("we discern no solid basis for believing that Congress, when it designed ERISA, intended fundamentally to alter traditional preemption analysis").

The clear language of Section 514(b)(2)(A) makes it clear that the DEPARTMENT application of Section 514 to preempt state insurance regulation warrants at least an explanation, rather than a blanket dismissal. The application of the Fiduciary rule directly affects the policy relationship between the insurer and the insured in the case of state regulated products, including retirement annuities; and directly affect state regulated insurance companies and state licensed and regulated producers. The Department has provided no explanation of why the Department believed that the 24 insurance references in the proposed rule did not have any "substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." The Fiduciary rule provides no reasonable grounds for its broad preemption and fails to provide any proper consideration of Section 514(b) or any attendant circumstances. It is imperative that Department demonstrate that the application of the rule to the sale of insurance products by licensed insurance producers does not "invalidate, impair or supersede" applicable state laws.

The states directly regulate the sale of annuity products. Almost all states have adopted standards to ensure that the agent — or insurer if no agent is involved — have reasonable grounds to believe that the product is suitable for the consumer. In complying with suitability standards, insurers and insurance producers focus on their client's specific financial situations and investment needs, and inform the client of features of the product, including market risk, returns, and fees. The existing standards for insurance products serve and protect Americans well. There is no statutory authority — or economic necessity — to attempt to displace well-functioning, state based insurance regulatory authority over the sale of annuity or other insurance products.

Statutory Authority

The Fiduciary rules are inconsistent with, and more expansive than, the underlying statutory authority provided by ERISA. The Department has failed to present evidence that it possesses the requisite authority to issue interpretative regulations. In enacting ERISA, Congress made a conscious choice to exclude IRAs from Title I. Instead, Congress applied the prohibited transactions rules of the Internal Revenue Code to IRAs. Congress has never extended Title 1 's fiduciary duty rules to IRAs.

Despite clear congressional intent with respect to IRAs, the Fiduciary rule's expanded definition of investment advice coupled with the requirements of the "Best Interest Contract Exemption" to adhere to the substantive fiduciary responsibility would expand the application of ERISA beyond Congressional intent. Such action would have the effect of amending, not just interpreting the statute — authority well beyond the administrative powers of the Department.

The Department has argued that it is appropriate to expand the definition of investment advice in light of the expanded use of 401(k) plans, IRAs and rollovers from ERISA employee plans. However, Congress has amended ERISA regularly, including recent revisions as part of the Pension Protection Act of 2006. The Department cannot with any credibility argue that Congress was unaware of the widespread use of 401(k) plans and IRAs or the rollover of assets from ERISA plans. If the Department believed changes were necessary the Administration should have sought a legislative change to the statute. Simply because Congress does not act to expand or amend a statute does not confer upon a department or agency the authority to unilaterally expand the breath and scope of its authority through regulatory edict.

The Fiduciary Rule is based Upon on Flawed Assumptions

The Department relied on its Regulatory Impact Analysis to justify the Fiduciary rule, but as the Investment Company Institute (ICI) explained at the Hearing on "Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees" before the House Subcommittee on Health, Employment, Labor, and Pensions, of the Committee on Education and the Workforce on June 17, 2015, the Regulatory Impact Analysis did not support Department's assertion that there is a "substantial failure of the market for retirement advice." The Regulatory Impact Analysis did not consider how the proposal actually could limit retirement savers' access to guidance, products, and services, or how such limits could affect savers— particularly lower- and middle-income savers with smaller account balances.

As the ICI made clear the Department argument in its Regulatory Impact Analysis that broker-sold funds "underperform" provided no benchmark for returns against which it measures this claim of "underperformance." The factual data provided by the ICI seriously challenged, if not disproved, the academic research that Department cited as the foundation of its conclusions.

The proposed rule's cost-benefit analysis is equally flawed. The Department grossly underestimates the time and expense that would be required to comply with the new requirements on a transitional - and ongoing - basis. The man-hours needed to make the substantial system changes necessary to provide individualized disclosures and restructure compensation systems alone are tremendous. The Department should have consulted with all affected segments of industry to ascertain more realistic projections of the projected burdens.

In assessing the economic benefits of the proposed rule, Department also over-emphasized the benefits of so-called robo-advice. Insurers often service the needs of middle-market consumers and nonaffluent investors. These customers and policyholders value the ability to receive and discuss advice and recommendations from trusted professionals, persons with whom they often have a long-standing relationship and who understand their personal situation well. The imposition of new fiduciary requirements has more had the effect of reducing the supply of advice available to these consumers. Insurers provide well-tailored products and services to a broad cross-section of Americans. Inappropriate expansion of ERISA and encroachment into state-regulatory authority in relation to insurance products appears to have had the unintended effect of significantly reducing the availability and variety of high quality products for many consumers.

Proprietary Products

A bedrock principal for NAMIC is fair competition in which all market participants compete on a level-playing field. The Fiduciary is not neutral in terms of choice of business model, nor does it place products on an equal footing. Many insurers offer products through exclusive independent contractor arrangements. In addition, many offer proprietary products. These structures often allow for low minimum investment amounts and provide investment options for consumers will small account balances. The use of these products serves a unique and necessary role within the retirement and savings planning system. Proprietary products are just as appropriate for large segments of the market as non-proprietary products and any public policy should not discriminate against a particular product or business structure.

The Fiduciary rule has also inappropriately targeted specific fee structures. The Department should not through rule be allowed to restructure well-functioning fee arrangements that have and continue to serve consumers well. A variety of fee structures are appropriate in the retirement space to account for costs, complexity, benefits, and risk of various products. Just as one size does not fit all in shoes it does fit in retirement planning needs and accordingly in associated fee structures.

NAMIC believes that the Fiduciary rule has inappropriately discriminated against many insurer business models, insurance products and compensation structures. This decreases both the number of available investment products, as well as market participants — ultimately reducing competition and consumer choice.

There are More Appropriate Alternatives to the Fiduciary Rule

It is by no means clear that federal jurisdiction is appropriate for the application of a fiduciary standard for securities that are insurance products, but it is certain that the appropriate federal regulator for securities is and should be the Securities and Exchange Commission (SEC). Under section 913(g) of The Dodd—Frank Wall Street Reform and Consumer Protection Act (Dodd Frank), the SEC was ordered to study whether to impose a uniform fiduciary duty on both investment advisers and broker-dealers and was given the authority to craft such a proposal. Presently, broker-dealers are held to a standard that requires the products they sell investors to be suitable, whereas investment advisers must put their clients' interests ahead of their own.

The SEC has the clear authority regarding the standard of care under the securities laws for broker-dealers and investment advisers that provide personalized investment advice about securities to retail customers. On January 21, 2011, the SEC issued a study on broker-dealers and investment advisers and in 2013 released a request for information on whether it should pursue a uniform rule for advisers and brokers. At the very least, the Department should work with the SEC rather than the Department of Labor promulgating investment regulations. The SEC has continually evidenced an appreciation and respect for the appropriate role of the states in the regulation of insurance products and services. We urge the Department to defer to the expertise of the SEC in this area, or at the very least to afford the public sufficient opportunity to consider the SEC's regulatory efforts.

Enforcement Policy on Arbitration Limitation in the Best Interest Contract Exemption and Principal Transactions Exemption

In Field Assistance Bulletin No. 2017-03 on August 30, 2017 from John J. Canary, Director of Regulations and Interpretations, the Department announced that it will not pursue a claim against any fiduciary based on failure to satisfy the BIC Exemption or the Principal Transactions Exemption, or treat any fiduciary as being in violation of either of these exemptions, if the sole failure of the fiduciary to comply with either the BIC Exemption or the Principal Transactions Exemption, is a failure to comply with the Arbitration Limitation in Section II(f)(2) and/or Section II(g)(5) of the exemptions. The Bulletin provided that this policy will continue to apply as long as the exemptions include the Arbitration Limitation now found in Section II(f)(2) and/or Section II(g)(5).

NAMIC commends the Department for this decision. Arbitration avoids civil jury trials so policyholders that require arbitration agreements will be less likely to be subject to class action litigation. Arbitration clauses also protect against a company having to defend claims brought in different state courts and jurisdictions, and can provide a more standard resolution process.

As a rule, arbitration is less expensive and more efficient than traditional litigation for all parties. Arbitration can result in disputes being resolved faster and in a less burdensome manner for both parties, is favored by the courts, and provides all parties with advantages. In response to frivolous lawsuits, higher liability insurance costs, and the potential for runaway verdicts with large awards for punitive damages, many companies now include arbitration clauses in their agreements. Arbitration agreements often include confidentiality provisions which can limit threats of baseless litigation, predicated only on threats of publicizing groundless allegations of horrible acts or failures.

The Federal Arbitration Act (the Act) provides for judicial facilitation of private dispute resolution through arbitration. It applies in both state and federal courts, was held constitutional in Southland Corp. v. Keating, 465 U.S. I (1984), and applies where the transaction contemplated by the parties "involves" interstate commerce and is predicated on an exercise of the Commerce Clause powers granted to Congress in the U.S. Constitution. The Act provides for contractually-based compulsory and binding arbitration, resulting in an arbitration award entered by an arbitrator or arbitration panel as opposed to a judgment entered by a court of law.

The Supreme Court of the United States in Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201 (2012), ruled that state and federal courts must enforce the Act, with respect to all arbitration agreements covered by that statute. The Act provides that a "written provision in . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The Court opined that the Act "reflects an emphatic federal policy in favor of arbitral dispute resolution." KPMG LLP v. Cocchi, 565 U.S. (2011) (per curiam) (slip op., at 3) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U. S. 614, 631 (1985). The Court found that West Virginia's prohibition against pre-dispute agreements to arbitrate personal-injury or wrongful-death claims is a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the Act.

Not all signed arbitration agreements are enforceable, nor do courts automatically accept deficient agreements. A claimant/plaintiff may ask a court to find that an arbitration agreement is invalid because either the language of the agreement is unconscionable or no longer valid. In addition, arbitration may not be permitted if the party who signed the agreement did not have authority to do so, or the dispute is beyond the scope of the agreement. When determining whether an arbitration agreement is unconscionable, courts will scrutinize whether the contractual terms unreasonably favor the drafter of the agreement and whether there is no meaningful choice on the pan of the other party regarding the acceptance of the provision.

Conclusion

Accordingly, NAMIC believes that the Fiduciary rule is an improper preemption of state insurance regulation, is not supported by a factual basis and addresses regulatory questions that are outside the expertise and purview of the Department. We respectfully request that the Department consider and adopt: (1) reasonable and proper consideration of its preemption of established and recognized state insurance jurisdiction; (2) a revised Regulatory Impact Analysis based on more objective and verifiable data and analysis; (3) a recognition of the appropriateness of proprietary products, alternate fee structures and business models; and, (4) deference to the SEC to conclude its work in this area. If you have questions or comments, please feel free to contact me at 202-628-1558, tkarol@namic.org.

Respectfully submitted,

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