James Szostek
Vice President & Deputy, Retirement Security
(202) 624-2378
jimszostek@acli.com

Howard Bard
Vice President, Taxes & Retirement Security
(202) 624-2028
howardbard@acli.com

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U.S. Department of Labor
Employee Benefits Security Administration
Office of Regulations and Interpretations
200 Constitution Avenue N.W.
Room N-5655
Washington, DC 20210

**Subject: Notification of Proposed Class Exemption: Improving Investment Advice for Workers & Retirees ZRIN 1210-ZA29**

Greetings:

On behalf of the American Council of Life Insurers (ACLI), we appreciate the opportunity to provide comments in response to the Notification of Proposed Class Exemption (NPCE) issued by the Department of Labor (the Department) regarding the provision of investment advice by those acting as fiduciaries under the Employee Retirement Income Security Act of 1974 (ERISA). ACLI considers the Department's actions here to be a key part of the overall federal and state regulation of financial professionals, with the Department's focus on fiduciary advisers. In ACLI's view, it is critical that consumers retain access to both fiduciary and non-fiduciary services. We are concerned that the Department's commentary in the preamble to the NPCE (Preamble) could be understood to broadly impose fiduciary obligations in a manner similar to the Department's 2016 fiduciary regulation. Before it was vacated by the Fifth Circuit Court of Appeals, this fiduciary-only approach restricted access to professional guidance that retirement savers with low and moderate balances want and need. We have concerns that such consumer choice may be at risk again.

All financial professionals should act in the best interest of consumers whether they are serving in a fiduciary capacity or not. ACLI has long sought harmonized rules among various prudential regulators that are appropriately tailored to ensure that fiduciary investment advisers and non-fiduciary financial professionals act in the best interest of consumers. Moreover, these rules must ensure consumers continue to have access to both fiduciary and non-fiduciary financial services. To that end, ACLI supports the Securities and Exchange Commission's (SEC) Regulation Best Interest (Reg BI), as well as the National Association of Insurance Commissioners (NAIC) newly revised Suitability in Annuity Transactions Model Regulation (Model Regulation), both of which require that non-fiduciary financial professionals owe a meaningful and enforceable best interest standard of care to consumers. It is worth noting, too, the SEC's interpretive guidance on the Investment Advisers Act of 1940. Our comments here seek to advance this harmonization and maintain consumer choice.

The NPCE contains two distinct parts, a description of the proposed exemption and commentary on application of the Department's five-part test. According to the Department, the proposed exemption would allow investment advice fiduciaries under both ERISA and the Internal Revenue Code (Code) to receive compensation, including as a result of advice to roll over assets from a Plan to an IRA, and to engage in principal transactions, that would otherwise violate the prohibited transaction provisions of ERISA and the Code. ACLI generally supports that proposal, with recommended revisions and modifications, as explained further below. The Preamble to the proposed exemption, however, also sets forth "the Department's interpretation of the five part test of investment advice fiduciary status and provides the Department's views on when advice to roll over Plan assets to an IRA could be considered fiduciary investment advice under ERISA and the Code."[1] Because the Department seeks comments on "all aspects" of the part of its proposal relating to rollovers and fiduciary investment advice, the first part of our letter will address the Department's interpretation of the five-part test, and the second part of our letter will address the NPCE.

As noted above, ACLI seeks a harmonized federal and state best interest standard of care for financial professionals. We also seek the appropriate application of fiduciary requirements to those who are paid to provide impartial investment advice. ACLI undertook a review of the Department's latest actions with respect to ERISA's fiduciary advice provision with an eye toward how these actions conform with the Fifth Circuit ruling that vacated the 2016 Definition of Fiduciary, the SEC's Reg BI efforts, and the NAIC's revised Model Regulation.

As is detailed in Section I, we have serious concerns with the Department's commentary on the five-part test (*i.e.*, the definition of "renders investment advice"). We are deeply concerned that the Department's views of the five-part test transform that regulation into the now vacated and failed 2016 fiduciary-only approach—one that is at odds with the President's February 3, 2017 Memorandum to the Secretary of Labor.[2] The views expressed by the Department could be read to capture, as fiduciary advice, sales activities in which recommendations are solely incidental to traditional sales activities. The Department's comments conflate the receipt of compensation incident with the execution of a recommended transaction with a payment *for* such advice. That view does not align with the statutory text of ERISA § 3(21)(A)(ii), the Fifth Circuit ruling that vacated the Department's 2016 definition of "fiduciary," or the SEC's interpretations of the Investment Advisers Act of 1940 promulgated as a part of its Reg BI effort. Further, in its efforts to explain how recommendations regarding rollover transactions from ERISA plans lead to the rendering of investment advice, the Department obfuscates rather than clarifies the well-establish elements of the five-part test to both the detriment of consumers and financial professionals. The Department

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[1] 85 Fed. Reg. 40835 (July 7, 2020).

[2] Presidential Memorandum on Fiduciary Duty Rule, (Feb. 3, 2017).

should address the fact that the law rightly imposes fiduciary obligations on persons who are paid to provide investment advice, not those who are solely compensated for sales transactions. As the 2016 fiduciary rule went into partial effect, we learned firsthand how the inappropriate imposition of a fiduciary requirement limits and, for many, eliminates access to and information about annuities, harming low and moderate balance retirement savers.

As for the proposed prohibited transaction class exemption, as detailed in Section II, we have several comments on the required exemptive conditions. In general, we recommend that the Department revise and simplify the exemptive requirements to fully align with Reg BI. As fiduciaries are currently required to comply with care obligations/conduct standards under ERISA and common law, there is no need to impose a standard of care in the exemption. ACLI recommends the exemption require financial institutions to have policies and procedures in place to ensure compliance with the disclosure and other conditions of the exemption. In addition, the Department should align the exemption's conflict mitigation provisions with Reg BI, significantly simplify the proposed exemption's retrospective review and certification requirements, and significantly revise the exemption's compliance-related disclosure requirements.

The SEC's Reg BI and the NAIC's Model Regulation have raised the bar on sales professionals while ensuring savers retain access to, and information about, annuities. The Department's focus should be on the appropriate application of fiduciary duties to persons who meet the definition of fiduciary at ERISA section 3(21)(A)(ii), *i.e.*, those paid to provide advice, not those solely compensated for sales transactions. As stated by the Fifth Circuit in its ruling vacating the 2016 rule, the phrase "investment advice for a fee" and similar phrases generally referenced a fiduciary relationship of trust and confidence between the adviser and client.[3] The Fifth Circuit directly addressed the distinction between sales transactions and fiduciary investment advice, finding that when enacting ERISA, "Congress was well aware of the distinction...between investment advisers who were considered fiduciaries, and stockbrokers and insurance agents, who generally assumed no such status in selling products to their clients."[4]

### The Department Should Ensure That Its Commentary In Connection With The Final Prohibited Class Exemption Aligns With The Well-Established Fiduciary Standard

Under ERISA §3(21)(A)(ii), a person is a fiduciary for purposes of ERISA if "he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so." In 1975, one year after ERISA's enactment, the Department adopted regulations delineating what it means to "render investment advice" for purposes of the fiduciary definition under ERISA and the Code.[5] Those regulations established a straightforward, five-part test that, prior to the 2016 Fiduciary Rule, had guided the industry for decades. As noted, the scope of the regulation is limited to the phrase "renders investment advice." Under the five-part test, a person "renders investment advice" under ERISA and the Code if the person (1) renders advice as to the value of securities or other property, or makes recommendations as to the advisability of investing in, purchasing, or selling securities or other property, (2) on a regular basis, (3) pursuant to a mutual agreement, arrangement, or understanding with the plan or a plan fiduciary that (4) the advice would serve as a primary basis

[3] *Chamber of Commerce of United States of Am. v. United States Dep't of Labor*, 885 F.3d 360 (Fifth Cir. 2018).
[4] *Id* at 372.
[5] *See* Final ERISA Rule, 40 Fed. Reg. 50,842 (1975); Final Tax Code Rule, 40 Fed. Reg. 50,840 (1975) (final rule under the Tax Code).

for investment decisions with respect to plan assets, and that (5) the advice was individualized based on the particular needs of the plan.[6]

In connection with the NPCE, the Department appropriately takes the ministerial step of re-codifying that test in the wake of the Fifth Circuit's vacatur of the 2016 Fiduciary Rule. ACLI supports that step. That said, certain aspects of the Preamble that discuss application of the Department's regulation which defines "renders investment advice" which includes the "five-part test" and its role in determining fiduciary status under ERISA § 3(21)(A)(ii) appear in tension with or contradiction of the regulation itself - as well as the statutory text, the Fifth Circuit's opinion vacating the 2016 Fiduciary Rule, and Regulation BI. As we discuss further below, the Department's commentary on when someone attains fiduciary status under ERISA is incorrect as it is both incomplete and inconsistent with current law. ACLI respectfully requests that, in promulgating a final exemption, the Department clarify this language to align with the law and the Fifth Circuit ruling. This will bring its views in symmetry with the SEC's views regarding when a financial professional is subject to the Investment Advisers Act of 1940 and its Regulation Best Interest rulemaking effort.

*"For a Fee"*

The Department's analysis of fiduciary status in the Preamble is incomplete and, therefore, incorrect. The "five-part test"[7] is limited to defining when someone "renders investment advice" under ERISA § 3(21). The Department's regulation defining "renders investment advice" does not address what it means to do so "for a fee or other compensation, direct or indirect." The Preamble might be read to mean that, at least in certain instances, it is the Department's view that when the five-part test is satisfied and a financial professional receives some form of compensation, the professional is necessarily an investment advice fiduciary. The Department offers the following example in the NPCE: "a broker-dealer who satisfies the five-part test with respect to a Retirement Investor, advises that Retirement Investor to move his or her assets from a Plan to an IRA, and receives any fees or compensation incident to distributing those assets, will be a fiduciary subject to ERISA … with respect to the advice regarding the rollover."[8] Read broadly, this example appears inconsistent with statutory text and the Fifth Circuit's decision vacating the 2016 Fiduciary Rule. As noted, relevant statutory text directs that a person is a fiduciary to the extent "he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so[.]"[9] The statute thus ties fiduciary status to circumstances in which a fee is paid "for" advice. The example above appears to elide any inquiry as to whether the compensation is paid for the advice. This repeats a significant error in the 2016 Fiduciary Rule. As the Fifth Circuit put it, "DOL's interpretation conjoins 'advice' with a 'fee or other compensation, direct or indirect,' but it ignores the preposition 'for,' which indicates that the purpose of the fee is not 'sales' but 'advice.'"[10]

Sales recommendations in which a commission is paid only when there is an investment transaction must not be viewed the same as investment advice under a relationship in which compensation is paid regardless of whether the advice leads to an investment transaction. This

[6] *See* 40 Fed. Reg. at 50,843.
[7] ERISA §2510.3-21(c).
[8] 85 Fed Reg. at 40,840.
[9] 29 U.S.C. § 1002(21)(A)(ii); 26 U.S.C. § 4975(e)(3)(B) (emphasis added).
[10] *Chamber of Commerce*, 885 F.3d at 373; *see id.* ("in law and the financial services industry, rendering 'investment advice for a fee' customarily distinguished salespeople from investment advisers during the period leading up to ERISA's 1974 passage").

clarification would also ensure that the Department remains aligned with the Investment Advisers Act of 1940 (the "Advisers Act) and its solely incidental exclusion.[11] [12] ERISA seeks to ensure that when plans, plan participants and beneficiaries hire an investment adviser and pay that adviser a fee to provide investment advice, the adviser has a duty of loyalty to the investor commensurate with that of a fiduciary under common law. It is inappropriate and beyond the scope of the law to apply a duty of loyalty to an insurance agent who is paid a commission by an insurance company only when their products are sold, not when recommendations are made.

Because the Advisers Act predates the adoption of ERISA, it is appropriate to examine the SEC's views on when investment advice is "solely incidental." The SEC has explained that brokers whose rendering of investment advice is "solely incidental" to their business and free of any special charges shall not be deemed an "investment adviser" for purposes of the Advisers Act.[13] Statutory grounding for principle is found in § 202(a)(11)(C) of the Advisers Act itself—a passage commonly referred to as the "broker-dealer exclusion." In view of the SEC interpretation of the Act and the Fifth Circuit's interpretation of ERISA § 3(21)(A)(ii), it is untenable to suggest that a fiduciary relationship is formed during sales activities in which recommendations are solely incidental to the sales activities themselves in light of the "solely incidental" interpretation maintained by the SEC or, for that matter, the plain language of ERISA section 3(21)(A)(ii). In other words, with regards to this point, the Act and ERISA are in alignment – absent special compensation for the rendering of investment advice, no fiduciary relationship is formed.

In sum, it must be the case that a recommendation made in the course of an investment transaction is not treated the same as interactions in which advice is purchased regardless of whether an investment transaction ever takes place. The SEC has clearly carved out an exception for broker-dealers and reiterated its support of that exception. Such clarity regarding non-investment advisory brokers and insurance agents ultimately serves the consumer. The Department's view of ERISA § 3(21)(A)(ii) must also provide such clarity.

ACLI Recommendation. In promulgating a final prohibited class exemption, the Department should take the opportunity to make clear in the Preamble that the ultimate fiduciary inquiry turns first on whether the person is paid compensation "for" advice rather than "for" sales or other services—meaning that satisfaction of the five-part test plus the receipt of compensation are necessary, but not sufficient, conditions to impose fiduciary obligations.

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[11] *See* Interpretation, *Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer Exclusion from the Definition of Investment Adviser* (SEC Release No. IA-5249 July 12, 2019).

[12] The NPCE also contains language discussing the application of the new Impartial Conduct Standards in the IRA context. *E.g.*, 85 Fed. Reg. at 40838 (explaining that the exemption would cover, among other things, advice in connection with a rollover from "one IRA to another IRA"). In applying the proposed exemption to IRA plans, the Department should bear in mind the Fifth Circuit's conclusion that the 2016 Fiduciary Rule "impermissibly conflate[d] the basic division drawn by ERISA" under Titles I and II. 885 F.3d at 381. The Department should thus take care to ensure that, through the exemption, it does not impose Title I duties in the IRA context given that IRA fiduciaries are not bound by ERISA's general obligations of prudence and loyalty. *See generally* 26 U.S.C. § 4975.

[13] Interpretation, *Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer Exclusion from the Definition of Investment Adviser* (SEC Release No. IA-5249 July 12, 2019).

<u>The Regulation Defining "Renders Investment Advice"</u>

*Regular Basis.* As noted above, it is unclear whether the Department's view that the mere receipt of compensation when coupled with a recommendation causes one to meet the ERISA § 3(21)(A)(ii) definition of fiduciary. This lack of clarity leads to a heightened concern regarding the discussion of application of the five-part test to "advice relationships" elsewhere in the Preamble.

The Preamble contains capacious language regarding the "regular basis" prong of the five-part test. The Department claims, for example, that the "the regular basis prong … would be satisfied when an entity with a pre-existing advice relationship with the Retirement Investor advises the Retirement Investor to roll over assets from a Plan to an IRA."[14] The Department further claims that, "for an investment advice provider who establishes a new relationship with a Plan participant and advises a rollover of assets from the Plan to an IRA, the rollover recommendation may be seen as the first step in an ongoing advice relationship that could satisfy the regular basis prong of the five-part test depending on the facts and circumstances."[15] Taken together, this language could be read to suggest that, as a *per se* matter, the regular basis prong will be satisfied when an entity (i) has any type of pre-existing relationship with a retirement investor or (ii) in any case in which rollover advice is offered—on the theory that is a "first step" in establishing "an ongoing advice" relationship. This over-expansive understanding of the regular basis prong risks erasing the prong from the longstanding five-part test and will generate disruption and confusion in the rollover context and more generally as to when advice is offered on a regular basis. This is further compounded in footnote 41 of the Preamble, which both conflates sales commissions with a fee paid to secure investment advice and incorrectly denotes trail commissions as illustrative of an expectation of future advice.[16] In these ways, the Department risks repeating a central flaw the Fifth Circuit identified in the 2016 Fiduciary Rule.[17]

ACLI Recommendation: In promulgating a final class exemption, the Department should clarify that the regular basis prong of its "renders investment advice" regulation requires what it always has: [under the mutual agreement with the advice recipient,] the advice must be [is] offered on a regular basis and isolated past dealings or speculation about possible future advice relationships unmoored from the facts should not be sufficient to satisfy this requirement.

*Rollovers.* As for rollovers generally, the Department makes no attempt to separate recommendations relating to a distribution of an accrued benefit from advice regarding investments held by the plan. As a matter of course, when distributing an accrued benefit, in the absence of a specific investment instruction from a participant (assuming the plan so permits), plans will raise cash necessary to pay the benefit by liquidating investments per the terms of the plan and its administrative policies. Absent specific advice regarding a particular investment, a recommendation to take a distribution for any purpose, rollover or otherwise, is not advice that relates to "any moneys or other property of [the ERISA] plan."[18] For example, as few qualified

[14] 85 Fed. Reg. at 40,840.

[15] *Id.*

[16] "Footnote 42 "Like other Investment Professionals, however, insurance agents may have or contemplate an ongoing advice relationship with a customer. For example, agents who receive trailing commissions on annuity transactions may continue to provide ongoing recommendations or service with respect to the annuity," 85 FR 40,840.

[17] *See Chamber of Commerce*, 885 F.3d at 366 (Fifth Cir. 2018) ("the new definition dispenses with the 'regular basis' and 'primary basis' criteria used in the regulation for the past forty years"; "[c]onsequently, it encompasses virtually all financial and insurance professionals who do business with ERISA plans and IRA holders").

[18] 29 U.S.C. § 1002(21)(A)(ii).

plans currently offer annuity options, many retirement savers must elect to rollover a portion of their accrued benefit to an individual retirement annuity to secure guaranteed lifetime income in retirement and preserve the favorable tax treatment afforded qualified savings. A recommendation regarding such annuity purchase is not investment advice relating to moneys or property of the plan.

The Department's expansive interpretation of the definition of "renders investment advice" and its views on rollovers casts sufficient doubt on whether insurance agents and the insurer for whom they work can act in a capacity other than a fiduciary capacity when engaging retirees about the benefits of an annuity in retirement. This lack of clarity has major implications from a retirement policy perspective. This broad interpretation inappropriately applies the fiduciary definition to those engaged in sales activities, namely, commercial speech that is protected by the First Amendment to the U.S. Constitution. We saw with the now-vacated 2016 rule how the inappropriate application of a fiduciary duty to sales activities frustrated access to financial products such as annuities, especially for small to moderate balanced savers. The Department should not repeat those unlawful mistakes here.

ACLI Recommendation: In promulgating a final exemption, the Department should clarify that a recommendation relating to a distribution of an accrued benefit does not, in and of itself, constitute the rendering of investment advice.

*Primary Basis.* The Department's commentary on the "primary basis" prong of the five-part test effectively removes this prong from the five-part test by reading "a primary basis" as if there can be multiple "primary bases." "Primary" is first before a variety of secondary bases. It is a singular item. As the Department noted in the preamble to the 2016 definition of fiduciary final rule, it justified the elimination of the "primary basis" prong as it required a prioritization of advice, *i.e.*, what is first before other advice.[19]

ACLI Recommendation: When promulgating a final prohibited class exemption, the Department should take the opportunity to clarify in the preamble that "primary basis" means the advice is "primary" under its common usage consistent with its prior views and that of the Fifth Circuit.

*Mutual Understanding.* The Preamble could also be read to water down the five-part test's "mutual understanding" prong. The Department states in the Preamble that "[w]ritten statements disclaiming a mutual understanding or forbidding reliance on the advice as a primary basis for investment decisions"—although appropriately considered in assessing this prong—"are not determinative."[20] Instead, the Department claims, the prong ultimately looks to the "reasonable understanding of each of the parties."[21] ACLI is concerned that this language could generate uncertainty regarding when a financial professional may rely on written, contractual language to define a relationship with a retirement investor. The language appears to invite the application of an ad-hoc, multi-factor contextual inquiry that could practically impair the ability of financial professionals and retirement investors to define carefully by contract the nature of their relationship.

ACLI Recommendation: In issuing a final class exemption, the Department should clarify in its Preamble that parties remain free to define the nature of their relationships through contracts and

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[19] The view that primary is singular is consistent with the Fifth Circuit's in which the Court emphasized "the" – not "a" - primary basis test.
[20] 85 Fed Reg. at 40,840.
[21] *Id.*

that, ordinarily, plainly disclosed written terms and conditions should be significant, if not dispositive, in assessing the “reasonable understanding” of the parties.

In light of the state of regulation already in place, there should be no ambiguity as to the services to be performed by a financial professional nor would it obfuscate their obligations to include a disclaimer regarding fiduciary advice services when the only services to be offered are that of an agent of an insurance company and not a fiduciary adviser. It should not be confusing to a consumer to be informed that the insurance agent represents an insurance company, that she is paid by the insurance company via a commission on any sales, and that she is not serving as the consumer’s fiduciary adviser, i.e., someone who is paid by fees charged directly to the advice recipient or indirectly deducted from the advice recipient’s assets.

For example, the SEC mandates that broker-dealers share versions of a client relationship summary form (Form CRS) with retail investors. Upon receipt of the Form CRS no reasonable person is likely to harbor any doubt about the parameters of the relationship between a customer and a broker-dealer. As such, financial professionals should be permitted to operate with the understanding that the clear, unequivocal, comprehensive written terms enumerated in a Form CRS are at the very least significant in assessing the “reasonable understanding” of parties. Any other interpretation of the significance of sharing a Form CRS frustrates the purpose of requiring such sharing in the first place.

If broker-dealers were to describe their role as an agent of an insurance company and disclaim service as a fiduciary with respect to the retirement investors along with a Form CRS, such written terms and conditions should be dispositive in determining the “reasonable understanding” of the relationship formed between the parties. As the SEC itself maintains, the Form CRS provides a host of information about the nature of the relationship between a retail investor and a financial professional, not least of which is the fact that it “underscores that broker-dealer investment advice can be consequential even when it is offered in connection with and reasonably related to the primary business of effecting securities transactions.”[22] In addition, the Form CRS states up front what sorts of services are to be provided by the broker-dealer. The SEC requires a Form CRS to communicate “information about services, fees and costs, conflicts of interest, legal standard of conduct, and whether or not the firm and its financial professionals have disciplinary history”[23] in a manner that is “easy-to-understand” so that retail investors may grasp “the nature of their relationship with their financial professional.”[24]

In January, the NAIC approved amendments to its Suitability in Annuity Transactions Model Regulation (#275). The amended Model requires that, prior to the recommendation or sale of an annuity, the producer shall prominently disclose to the consumer on a form substantially similar to Appendix A of the Model Regulation (*see attached*), a description of the scope and terms of the relationship with the consumer and the role of the producer in the transaction. Both Arizona and Iowa have adopted rules substantially similar to the revised NAIC model and more states are expected to consider adoption later this year.

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[22] Interpretation, Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer Exclusion from the Definition of Investment Adviser (SEC Release No. IA-5249 July 12, 2019) at 13.
[23] Securities and Exchange Commission, 2019. *SEC Adopts Rules And Interpretations To Enhance Protections And Preserve Choice For Retail Investors In Their Relationships With Financial Professionals*. [online] Available at: <https://www.sec.gov/news/press-release/2019-89> [Accessed 27 July 2020].
[24] *Id*.

The Department's new and expansive views as expressed in the Preamble regarding the "regular basis," "mutual understanding" and "primary basis" prongs of the five-part test leave these prongs without any reasonable or definite meaning. As noted, it is reasonable to conclude that the Department's view expressed in the Preamble is that a person is a fiduciary if he or she makes an individualized recommendation and receives compensation incident to the recommendation. Under state insurance rules, insurance agents must take steps to individualize their sales recommendations. Of course, insurance agents will get compensated for an annuity sale. Thus, under the views as expressed in the Preamble, these insurance agents could be viewed as fiduciaries merely for recommending annuities that meet the financial needs and expectations of consumers. The Department's views expressed in the Preamble are at odds with the law and the Fifth Circuit's opinion.

**ACLI Recommendation:** We request the Department address our points above and clarify and align its views of its definition of "rendering investment advice" with the entire definition of fiduciary set forth in ERISA § 3(21)(A)(ii) and the Fifth Circuit ruling. This would include addressing the fact that the intent behind the payment of a fee to a financial professional is a critical fact in determining whether a person meets the definition of a fiduciary.

## I. Comments on the Proposed Class Exemption

Our comments on the Proposed Class Exemption and its exemptive conditions and requirements are as follows.

### A. <u>Section II(a)1- Impartial Conduct Standards</u>

Section II(a) would require that fiduciary investment advice be provided consistent with the exemption's "impartial conduct standards." These include:

(1) a best interest standard of care;

(2) a reasonable compensation standard; and

(3) a requirement to make no materially misleading statements about recommended investment transactions and other relevant matters.

We are unclear as to the necessity of including section II(a)(1) as an exemptive condition. According to the Department, the proposed exemption would be available to registered investment advisers, broker-dealers, banks, and insurance companies and their individual employees, agents, and representatives **that provide fiduciary investment advice to Retirement Investors** (emphasis added). Thus, the exemption is only available to a person who is already a fiduciary, and as such, such person is already required to meet the ERISA's fiduciary requirements, including the "care, skill, prudence, and diligence" requirements contained in ERISA § 404(a)(1)(B) – which are nearly identical to those included in section II(a) of the exemption. Indeed, as the Department itself states in the preamble:

> Investment advice fiduciaries, like other fiduciaries to Plans and IRAs, are subject to duties and liabilities established in Title I of ERISA (ERISA) and Title II of ERISA (the Internal Revenue Code or the Code). Under Title I of ERISA, plan fiduciaries must act prudently and with undivided loyalty to employee benefit plans and their participants and beneficiaries. Although these statutory fiduciary duties are not in the Code, both ERISA and the Code

contain provisions forbidding fiduciaries from engaging in certain specified ''prohibited transactions,'' involving Plans and IRAs, including conflict of interest transactions.

Given this conduct requirement already exists, we question its necessity in the exemption. We are also perplexed by discussion in the Preamble in which the Department describes the standard of care as an objective standard that requires financial institutions and investment professionals to act *in the same way that knowledgeable and impartial professionals would* and that their advice would be measured against that of a *prudent investment professional*.[25] As the exemptive relief will be sought by financial institutions and investment professionals that have agreed to serve as fiduciaries, we do not understand why the Department views these persons as other than knowledgeable and impartial professionals who would not have considered meeting their fiduciary duty to act with care, skill, diligence and prudence but for the need to secure exemptive relief under the proposed class exemption. This discussion and its corresponding footnotes further the lack of clarity as to the Department's views on who is and who is not a fiduciary, suggesting that financial institutions and investment professionals seeking prohibited transaction relief are persons other than actual fiduciaries but whom the Department will treat as fiduciaries under an expansive interpretation of ERISA.

Further, with respect to the reasonable compensation requirement contained in Section II(a)(2), such a standard is already applicable to ERISA fiduciaries under § 408(b)(2). With respect to the standard prohibiting materially misleading statements, we believe the disclosure requirement addresses this.

Finally, we note that the Fifth Circuit ruling took issue with the imposition of the 2016 Best Interest Contract Exemption's Impartial Conduct Standards on non-ERISA transactions—and the Department's views are arguably inconsistent with its holding. Non-ERISA transactions are within the purview of other authorities. As noted, ACLI is supportive of the SEC and NAIC's efforts to impose a best interest standard of care on annuities and securities transactions. An approach consistent with the law is to condition exemptive relief for non-ERISA IRAs to when a transaction is made in keeping with the SEC's Reg BI conduct rules or the NAIC's Model Regulation conduct rules as applicable.

ACLI Recommendation: In lieu of the impartial conduct standards, ACLI recommends the exemption require that the financial institutions have policies and procedures in place reasonably designed to ensure compliance with the disclosure and other conditions of the exemption.

If the Department decides to retain a specific conduct standard, ACLI recommends inclusion of the SEC's Reg BI's standard of conduct for securities transactions and the NAIC's Model Regulation standard of conduct for annuity transaction. Neither of these standards include a fiduciary obligation of loyalty for the reasons explained above. In this way, those who do not consider themselves fiduciaries may elect to comply with the exemption's requirements, out of an abundance of caution - given the lack of clarity from the Department as to when one is an investment advice fiduciary under ERISA's definition.

*Related Commentary on Prudence*. In the Preamble, the Department seeks comments on its commentary that admonishes financial institutions to "carefully consider whether certain investments can be prudently recommended to the individual Retirement Investor in the first place

[25] 85 Fed. Reg. at 40,842

without ongoing monitoring of the investment." The Department notes that investments that possess "unusual complexity and risk … may require ongoing monitoring to protect the investor's interests." Finally, the Department questions whether an "Investment Professional may be able to satisfy the exemption's best interest standard with respect to such investments without a mechanism in place for monitoring."

Whether a fiduciary has acted prudently can only be determined by the facts and circumstances. We are perplexed that the Department, with no justification, presumes that, in certain ill-defined or undefinable circumstances, a fiduciary must agree to provide ongoing monitoring services to protect the investor's interests and that investors have no choice but to accept these services and pay for them. Further, this interpretation departs significantly from the SEC's Reg BI which appropriately maintains the distinction between a broker-dealer's transaction-based model and an adviser's fee-based business by declining to impose an ongoing monitoring requirement on brokers – and, as discussed above, issuing an interpretation of the solely incidental exception.

Finally, the Fifth Circuit, in vacating the 2016 rulemaking, admonished the Department for disadvantaging certain investment products in its prior investment advice rulemaking. The Preamble's discussion regarding the prudence of recommending "complex products" raises this same issue – the Department once again appears to be substituting its own judgement for those of retirement investors by choosing "winners" an "losers" among investment products. This approach is also inconsistent with President's February 3, 2017 Memorandum to the Secretary of Labor which states that one priority of this Administration is to "empower Americans to make their own financial decisions."[26]

ACLI Recommendation: We request the Department address our points above and clarify and align its views with the Fifth Circuit ruling and thus avoiding the imposition of its own judgement over that of fiduciary advisers and retirement investors.

B. Section II(b) – Disclosure

Section II(b) requires that, prior to engaging in a transaction pursuant to this exemption, the financial institution is required to provide the following disclosure to the retirement investor:

- A written acknowledgment that the financial institution and its investment professionals are fiduciaries under ERISA and the Code, as applicable, with respect to any fiduciary investment advice provided by the financial institution or investment professional to the retirement investor; and
- A written description of the services to be provided and the financial institution's and investment professional's material Conflicts of Interest that is accurate and not misleading in all material respects.

The language in the Preamble creates enough ambiguity to conclude that every sale in the qualified plan space could be seen as fiduciary investment advice. If fiduciary status cannot be discerned from the Department's view of its regulation and the law based upon the Preamble discussion, it is reasonable that financial professionals will seek to comply with the terms of the proposed class exemption given the uncertainty as to whether there are any prohibited transactions. Accordingly, we ask the Department to remove the requirement in the proposed

[26] Presidential Memorandum on Fiduciary Duty Rule, (Feb 3, 2017).

class exemption that persons seeking its relief acknowledge fiduciary status. In this way, sales professionals who do not consider themselves fiduciaries and who do not charge fees or get paid to provide investment advice may avail themselves of the protection afforded by the exemptive relief. In addition, because this exemption is only needed by investment advice fiduciaries, we do not see any reason to require a fiduciary acknowledgement. Retirement investors will benefit from a full and complete understanding of the scope of services to be provided. We note that a scope of services disclosure is consistent with Reg BI's disclosure requirements. The exemption's disclosure requirements should fully align with Reg BI's disclosure requirements. Finally, although the Department states in the Preamble that does not intend the fiduciary acknowledgment or any of the disclosure obligations to create a private right of action as between a financial institution or investment professional and a retirement investor, we are concerned that inclusion of such a disclosure creates unnecessary potential liability and may create a state-law cause of action.

ACLI Recommendation: We recommend that the Department delete the fiduciary acknowledgement and instead, consistent with Reg BI, include a requirement that, prior to or at the time of the recommendation, the investment advice fiduciary provide the retirement investor, in writing, full and fair disclosure of:

- All material facts relating to the scope and terms of the relationship with the retirement investor; and
- All material facts relating to conflicts of interest that are associated with the recommendation.

Furthermore, consistent with Reg BI, the Department should clarify that "material acts relating to the scope and terms of the relationship" includes:

- material fees and costs that apply to the retail customer's transactions, holdings, and accounts; and
- the type and scope of the services to be provided to the retail customer, including any material limitations on the securities or investment strategies that may be recommended to the retail customer.

With respect to conflicts, the Department should clarify, consistent with Reg BI, that such conflicts include, for example: conflicts associated with proprietary products, payments from third parties, and compensation arrangements.

C. Section II(c) - Policies and Procedures

Section II(c) requires that financial institutions establish, maintain and enforce written policies and procedures prudently designed to ensure that the financial institution and its investment professionals comply with the Impartial Conduct Standards in connection with covered fiduciary advice and transactions. Additionally, the financial institution's policies and procedures must mitigate conflicts of interest to the extent that the policies and procedures, and the financial institution's incentive practices, when viewed as a whole, are prudently designed to avoid misalignment of the interests of the financial institution and investment professionals with the interests of retirement Investors in connection with covered fiduciary advice and transactions.

ACLI agrees that, as a condition of exemptive relief, a financial institution should be required to establish, maintain and enforce written policies and procedures. As noted above, such policies and procedures should be designed to ensure the financial institution and its investment professionals comply with a best interest standard aligned with Reg BI's "care" obligation.

ACLI also agrees that a financial institution's policies and procedures must address conflict mitigation. However, we believe that as proposed, the exemption incorrectly fails to distinguish between advisor-level conflicts and firm-level conflicts. As currently drafted, the totality of the firm and advisor conflicts, when viewed as a whole must be mitigated sufficiently.

We note that the SEC, in Reg BI, recognizes the differences between advisor conflicts and firm conflicts, and treats them differently. The Department's exemption must do so as well.

ACLI Recommendation: The Department should align the exemption's conflict mitigation provisions with Reg BI. Specifically, the Department should clarify that advisor level conflicts and firm-level conflicts are viewed differently and consistent with Reg BI, firm level conflicts must be disclosed or eliminated - and advisor level conflicts must be disclosed and mitigated.

D. <u>Section II(d) Retrospective Review and Certification</u>

Section II(d) requires the financial institution to conduct a retrospective review, at least annually, that is reasonably designed to assist the financial institution in detecting and preventing violations of, and achieving compliance with, the Impartial Conduct Standards and the policies and procedures governing compliance with the exemption. The methodology and results of the retrospective review would be required to be reduced to a written report that is provided to the financial institution's chief executive officer (or equivalent officer) and chief compliance officer (or equivalent officer).

The financial institution's chief executive officer (or equivalent officer) would be required to annually certify that:

- The officer has reviewed the report of the retrospective review;
- The financial institution has in place policies and procedures prudently designed to achieve compliance with the conditions of the exemption; and
- The financial institution has in place a prudent process to modify such policies and procedures as business, regulatory and legislative changes and events dictate, and to test the effectiveness of such policies and procedures on a periodic basis, the timing and extent of which is reasonably designed to ensure continuing compliance with the conditions of the exemption.

We have several concerns with this overly proscriptive exemptive condition and question its necessity. First, the phrase "reasonably designed to assist the financial institution in detecting and preventing violations of, and achieving compliance with" is undefined and its meaning unclear. This subjective language would appear to allow the Department to retroactively determine that a financial institution's review did not meet this standard, in violation of the exemptive conditions, resulting in a prohibited transaction subject to financial penalties. Second, the requirement for annual CEO certification is unnecessary. We are not aware of any other prohibited transaction exemption requiring an annual CEO compliance certification and the Department has not demonstrated the necessity of such a certification in this proposed exemption.

ACLI Recommendation: We recommend that the Department significantly simplify this condition. The Exemption should require only that the financial institution conduct an annual review to ensure compliance with the exemption, and that such review be certified by the individual responsible for compliance oversight.

E. Section IV Compliance Records

Section IV(a) states that records demonstrating compliance with the FIA exemption shall be maintained for six years.[27] The Department explains in the preamble that such requirements are necessary so that parties relying on the exemption can demonstrate, and the Department can verify, compliance with the exemption. This recordkeeping requirement should be sufficient.

However, Section IV(a) further provides that the documents supporting compliance shall be made available to, in addition to the Department's employees, the following or their authorized representatives: plan fiduciaries, contributing employers, employee organizations, any participant or beneficiary or IRA owners.[28]

We question the need for these additional disclosure requirements. The Department's employees already have the statutory investigative authority to obtain documents necessary to demonstrate compliance with the exemption with respect to plan subject to ERISA. The Department of the Treasury ("Treasury") has investigative authority to obtain documents necessary to demonstrate compliance with the exemption with respect to both ERISA and non-ERISA plans in order to enforce the excise tax that applies to prohibited transactions of either type of plan. the Department does not provide any basis in the preamble or elsewhere for why parties other than the Department (or Treasury) should be afforded access to compliance-related documents. The Department and Treasury, not the delineated parties, have the authority to interpret, administer, and enforce the terms of the exemption. The Department provides no explanation as to how disclosure to such parties, many or all of whom may have no relationship with the fiduciary adviser or FIA, will enable the Department to "verify compliance with the exemption," nor does the Department explain how such disclosure to the listed parties will provide additional, meaningful protections to Retirement Investors.

The Department states in the preamble, that it "does not intend the exemption to expand Retirement Investors' ability, such as by requiring contracts and/or warranty provisions, to enforce their rights in court or create any new legal claims above and beyond those expressly authorized in ERISA," and that it does not believe that the exemption would "create any such expansion."[29] Contrary to these assertions, the Department, through these expanded and unsubstantiated disclosure requirements will do little more than promote litigation, thereby, increasing litigation risks and, ultimately, unintended consequences for Retirement Investors. Additionally, the application of these requirements to IRAs is reminiscent of the vacated Best Interest Contract Exemption's "private right of action" provision. As such, we note that the Fifth Circuit held that DOL impermissibly created vehicles for private lawsuits indirectly through the BICE contract provision where it could not do so directly.

**ACLI Recommendation:** ACLI recommends modifying Section IV(a) to remove the superfluous disclosure provisions and include only a six-year recordkeeping requirement.

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[27] 85 Fed. Reg. at 40864 (July 7, 2020).

[28] *Id.*

[29] *Id.* at 40842, n. 49.

The Department's efforts here could go a long way to ensuring savers and retirees continue to have access to and information about annuities. Conversely, missteps by the Department here that generate confusion as to when fiduciary status does and does not apply would have detrimental effects on investors access to information about annuities as well as annuity products themselves—replicating the significant negative effects that the 2016 Fiduciary Rule caused. Annuities play a significant part in today's retirement savings marketplace, particularly with respect to the retail IRA market. Indeed, the Department itself has found that thirty-one percent of IRAs include investments in annuities.[30] The widespread use of annuities reflects the significant value that retirement investors attach to annuity products as a means to help save for retirement while also managing and balancing different retirement risks.

First and foremost, an annuity is the only form of longevity protection in the market. It allows investors to convert retirement savings into a stream of monthly guaranteed income for life—a process known as "annuitization." With the shift away from defined-benefit plans, without an annuity, a retiree now bears the risk of outliving his or her retirement savings. That risk is becoming only more significant as Americans live longer. An annuity enables the retirement saver to transfer that longevity risk—the risk they will live longer than expected—to the insurer.

The peace of mind that annuities provide in the face of that longevity risk demonstrably improves retirees' overall well-being and mental health. A study commissioned by the Department itself "found that beneficiaries of lifelong-guaranteed income—such as from a privately-purchased annuity…were more satisfied in retirement and suffered from fewer depression symptoms than those without such income."[31] The "boost in well-being became stronger" the longer the person was retired—a finding "consistent with the notion that retirees who rely on finite savings and [defined- contribution] plan assets grow increasingly worried about funding retirement expenses as they grow older and deplete their assets, whereas recipients of lifelong-guaranteed income, other than from Social Security, are less concerned with outliving their resources."[32]

The Department should make every effort to ensure that the final exemption and accompanying commentary safeguard, not impair, investors' access to these and other valuable retirement products. On behalf of the ACLI member companies, thank you for your consideration of these comments. We welcome the opportunity to discuss these comments and engage in a productive dialogue with the Department.

Respectfully,

James H. Szostek

Howard M. Bard

[30] *See, e.g., Fiduciary Investment Advice, Regulatory Impact Analysis 54 (Apr. 2015) ("Proposed RIA").*

[31] *Michael J. Brien & Constantijn W.A. Panis, Annuities in the Context of Defined Contribution Plans: A Study for the U.S. Department of Labor,* Employee Benefits Security Administration *(Nov. 2011).*

[32] *Id*.

## APPENDIX A

## INSURANCE AGENT (PRODUCER) DISCLOSURE FOR ANNUITIES

**Do Not Sign Unless You Have Read and Understand the Information in this Form**

Date: ________________________

**INSURANCE AGENT (PRODUCER) INFORMATION ("Me", "I", "My")**

First Name: ________________________________________ Last Name: ____________________________________

Business\Agency Name: __________________________________ Website: __________________________________

Business Mailing Address: ____________________________________________________________________________

Business Telephone Number: ________________________________________________________________________

Email Address: ____________________________________________________________________________________

National Producer Number in [state]: ____________________________________________________________________

**CUSTOMER INFORMATION ("You", "Your")**

First Name: ______________________________________ Last Name: ________________________________________

**What Types of Products Can I Sell You?**

I am licensed to sell annuities to you in accordance with state law. If I recommend that You buy an annuity, it means I believe that it effectively meets Your financial situation, insurance needs, and financial objectives. Other financial products, such as life insurance or stocks, bonds and mutual funds, also may meet Your needs.

I offer the following products:

____ Fixed or Fixed Indexed Annuities

____ Variable Annuities

____ Life Insurance

I need a separate license to provide advice about or to sell non-insurance financial products. I have checked below any non-insurance financial products that I am licensed and authorized to provide advice about or to sell.

____ Mutual Funds

____ Stocks/Bonds

____ Certificates of Deposits

**Whose Annuities Can I Sell to You?**

I am authorized to sell:

| | |
|---|---|
| ____ Annuities from Only One (1) Insurer | ____ Annuities from Two or More Insurers |
| ____ Annuities from Two or More Insurers although I primarily sell annuities from: | |

## How I'm Paid for My Work:

It's important for You to understand how I'm paid for my work. Depending on the particular annuity You purchase, I may be paid a commission or a fee. Commissions are generally paid to Me by the insurance company while fees are generally paid to Me by the consumer. If You have questions about how I'm paid, please ask Me.

Depending on the particular annuity You buy, I will or may be paid cash compensation as follows:

___ Commission, which is usually paid by the insurance company or other sources. If other sources, describe: ____________________ .

___ Fees (such as a fixed amount, an hourly rate, or a percentage of your payment), which are usually paid directly by the customer.

___ Other (Describe): ________________________________________ .

***If you have questions about the above compensation I will be paid for this transaction, please ask me.***

I may also receive other indirect compensation resulting from this transaction (sometimes called "non-cash" compensation), such as health or retirement benefits, office rent and support, or other incentives from the insurance company or other sources.

***Drafting Note****: This disclosure may be adapted to fit the particular business model of the producer. As an example, if the producer only receives commission or only receives a fee from the consumer, the disclosure may be refined to fit that particular situation. This form is intended to provide an example of how to communicate producer compensation, but compliance with the regulation may also be achieved with more precise disclosure, including a written consulting, advising or financial planning agreement.*

***Drafting Note:*** *The acknowledgement and signature should be in immediate proximity to the disclosure language.*

By signing below, you acknowledge that you have read and understand the information provided to you in this document.

______________________________________

Customer Signature

______________________________________

Date

______________________________________

Agent (Producer) Signature

______________________________________

Date