Written Statement

Submitted to the

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Financial Services Subcommittee on Capital Markets

Examining the DOL Fiduciary Rule: Implications for Retirement Savings and Access

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Susan K. Neely
President and CEO

American Council of Life Insurers
101 Constitution Avenue, NW
Washington, DC 20001

Chairwoman Wagner, Ranking Member Sherman and members of the U.S. House Financial Services Subcommittee on Capital Markets, my name is Susan Neely and it is my privilege as Chief Executive Officer of the American Council of Life Insurers (ACLI) to submit this written statement outlining the U.S. Department of Labor's (DOL) damaging efforts to again dramatically expand the definition of an investment advice fiduciary under the Employee Retirement Income Security Act (ERISA), and in the process, create an unacceptable and impermissible barrier between low- and moderate- income savers and financial professionals. I truly appreciate this opportunity to discuss with you the vital role that life insurers play in our nation's retirement security and how this proposed fiduciary regulatory package needlessly undermines that role. In addition to my written statement today, I am also submitting ACLI's comments to the DOL on their proposed amendments to the Definition of "Fiduciary" at 29 CFR Part 2510.3-21(c), and proposed amendments to each of Prohibited Transaction Exemptions 84-24 and 2020-02.

ACLI advocates on behalf of 275 member companies dedicated to providing products and services that promote consumers' financial and retirement security. Financial security is our core business, and retirement security for all Americans is a critical mission. We protect 90 million American families with financial products that reduce risk and increase financial security, including life insurance, annuities, retirement plans, long-term care insurance, disability income insurance, dental and vision benefits, and other supplemental benefits. As society and work change, we are committed to providing financial security solutions that protect all Americans, regardless of where and how they work, their stage in life, or the economic status of their household. Americans are living longer, and financial security in retirement is a big challenge facing our country. Life insurers help people achieve their financial and retirement security goals, through products that are available, accessible, and affordable to all.

ACLI members represent 93 percent of industry assets in the United States. Through a well-crafted partnership of the private solutions ACLI members provide, and public solutions that are necessary, we believe the benefits of financial security can be made available to all Americans. Accordingly, ACLI member companies offer insurance contracts and investment products and services to employment-based retirement plans (including defined benefit pension plans, 401(k), SIMPLE, SEP, 403(b), and 457(b) plans) and to individuals (through IRAs and annuities). Three out of five small employers—those with 99 or fewer employees—rely on life insurers' products and services in their employment-based retirement plans. ACLI members are also sponsors of retirement plans for their own employees. And there are more than 15 million annuity-based IRAs held by individuals. As product and service providers, as well as plan sponsors, life insurers understand that by adequately and consistently saving for retirement, effectively managing assets throughout retirement and utilizing appropriate financial protection products, Americans can supplement Social Security and ensure retirement and financial security for life.

Americans face significant financial security challenges, and the insurance industry plays a critical role in helping them plan, save and guarantee a secure retirement. In 2022, American families received $422.9 billion in payments from annuities, $138.2 billion in payments from life insurance, $21.6 billion in disability income insurance benefits and $13.3 billion in long-term care insurance benefits.[1] No other industry provides Americans with the level of financial guarantees offered by life insurance companies.

[1] ACLI analysis of 2022 NAIC Annual Statement data.

THE RETIREMENT SYSTEM IN AMERICA

The retirement system for private sector workers in America builds upon the contributions made to Social Security and is enhanced by employment-based retirement plans, individual retirement accounts, annuities, and other investments. Private sector savings play a vital role in retirement security for millions of Americans. Current tax incentives for pensions and retirement savings encourage employers to provide and maintain work-based plans and have enabled millions of American families to accumulate savings, thereby improving their retirement security. According to the Bureau of Labor Statistics, 82 percent of full-time civilian workers have access to a retirement plan through their employer, and of these workers, 81 percent participate in a workplace plan.[2] Yet, there remain workers, mostly those who are working part-time and those at small businesses, without such access. More can and should be done to ensure that everyone who can afford to save for retirement is saving for retirement.

CHALLENGES FACING RETIREMENT SAVERS

While the current combination of Social Security and employment-based and individual retirement arrangements has successfully helped workers attain retirement security, Americans face significant challenges when it comes to saving for a secure retirement. In a 2021 study, the Employee Benefit Research Institute found "nearly half of employees are concerned with their household's financial well-being, citing saving for retirement and having emergency saving as top sources of financial stress."[3] In 2019, for example, almost 50 percent of all U.S. households had less than $5,300 in liquid savings that could be used for an emergency.[4] Among those aged 57-75, 49 percent could not cover three months' worth of expenses.[5]

While workplace retirement plans with payroll-deducted contributions are very effective at helping people save, impediments still exist that prevent many Americans from maximizing this important savings tool. Certain segments of the population have greater barriers to savings. Despite 80 percent of full-time civilian workers having access to a retirement plan in the workplace, only 40 percent of part-time workers enjoy access to workplace savings, in particular, people who work for small employers and gig economy workers.[6] Additionally, Federal Reserve data show that Black and Hispanic savers have savings rates that lag significantly behind their white counterparts. These deficiencies are magnified with respect to women. It is important to note that financial insecurity, which includes a lack of retirement savings, is deeply rooted in other institutional inequities, including earnings, savings, housing and overall financial wealth. According to the Federal Reserve's 2019 Survey of Consumer Finances, Black and Hispanic families are far less likely to have a retirement account.[7] Among middle-aged families (who have the highest rates of account ownership), 65 percent of white families have at least one retirement account, compared to 44 percent of Black families, and just 28 percent of Hispanic families.[8] Contributing to this disparity is that Black and Hispanic families do not have access to a retirement plan in the workplace at the same rate that white families do.

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[2] Bureau of Labor Statistics, National Compensation Survey: Employee Benefits in the United States, March 2022, National Compensation Survey: Employee Benefits in the United States, March 2022 : U.S. Bureau of Labor Statistics (bls.gov)
[3] EBRI Insights, October 1, 2020.
[4] ACLI analysis of the Federal Reserve, Survey of Consumer Finances, 2019.
[5] Bankrate, July 2021 Emergency Savings Survey, https://www.bankrate.com/banking/savings/emergency-savings-survey-july-2021/
[6] Bureau of Labor Statistics, National Compensation Survey: Employee Benefits in the United States, March 2020, https://www.bls.gov/ncs/ebs/benefits/2020/employee-benefits-in-the-united-states-march-2020.pdf
[7] Federal Reserve, 2019 Survey of Consumer Finances, https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm
[8] Id

THE DEPARTMENT OF LABOR'S MISGUIDED PROPOSED RULEMAKING EXERCISE

Given Congress' recent bipartisan legislative successes to ensure lifetime income products are an option for Americans, it is troubling that the DOL continues to attempt to restrict access to vital retirement savings options, specifically with their proposed rulemaking on ERISA's definition of investment advice fiduciary.

Since 2010, the DOL has sought to fundamentally expand the definition of ERISA fiduciary investment advice that has been in place since 1975. The DOL's initial attempt, in 2010, was withdrawn in response to the more than 100 House and Senate Members of Congress from both parties who urged the DOL to coordinate rulemaking with the Securities and Exchange Commission (SEC) and provide a robust economic analysis, as well as workable ERISA prohibited transaction exemptions.

The DOL then proposed new regulations in 2015 and issued a final rule in April 2016 that reclassified nearly all financial professionals working with retirement savers as ERISA investment advice fiduciaries. Aspects of the final rule were delayed under the Trump Administration. Then, in June of 2018, the Fifth Circuit Court of Appeals vacated the fiduciary rule, holding that the DOL's interpretation was contrary to ERISA and unreasonable and that the DOL's implementation of the rule constitutes "an arbitrary and capricious exercise of administrative power."

Since that time, the SEC adopted Regulation Best Interest in June 2019, a rule that imposed enhanced obligations on broker-dealers that directly focused on addressing conflicts of interest. Then, the National Association of Insurance Commissioners (NAIC) in February 2020, adopted revisions to its annuity transactions model regulations that includes enhanced standards for the sale of annuities and closely aligns with the SEC's Regulation Best Interest.

These initiatives impose enhanced standards on broker-dealers and insurance producers that appropriately and effectively address potential financial conflicts of interest – the same potential conflicts the DOL said it was attempting to address in its flawed 2016 rulemaking. What's important to note is that unlike the 2016 DOL approach and the current DOL approach, the SEC and NAIC best interest models address potential financial conflicts without denying those with low and moderate savings access to and guidance and information about a variety of financial savings products. Protecting consumer access is of vital importance.

Both the NAIC model, which has already been adopted in 41 states, and the SEC's Regulation Best Interest, support the right of all consumers to access commission-based support or, when they can afford it, choose to pay for ongoing investment advice. The effect of these state initiatives is to provide strong consumer protections no matter which state a consumer calls home. In fact, 77.6 percent of U.S. consumers are now covered by enhanced consumer protections – without losing access to retirement options. By the end of next year, we expect coverage to be 100 percent. Together, the NAIC best interest model and SEC Regulation BI provide a robust consumer protection for Americans planning for retirement. Yet, despite the advancement of these significantly enhanced consumer protections, the DOL discounted this progress and again released a proposed fiduciary regulatory package that will seriously disrupt retirement savers' access to not only a lifetime income product, but potentially many other types of products.

It is unfortunate that the DOL continues to seek to impose an unnecessary standard that will be harmful to retirement savers. This "new" proposal incorporates many of the same inappropriately expansive and overly broad concepts as were included in the 2016 regulation that was vacated by the Fifth Circuit as arbitrary and inconsistent with the statutory text of ERISA. Like the 2016

regulation, the current fiduciary regulatory package proposal has several significant fatal flaws, is similarly inconsistent with the statutory text and, therefore, must be withdrawn. Specifically:

- It places a harmful and impermissible barrier between low- and moderate-income savers and financial professionals, denying them access to savings opportunities and retirement income solutions they want and need and ignoring recent changes in regulatory standards that already address the same purported problem.
- It is contrary to current law in several respects:
  - It is contrary to Congressional intent and violates the statutory limits Congress has placed on the DOL.
  - It improperly attempts to restructure the statute through the exemption process, imposing Title I Fiduciary Duties on Title II Fiduciaries.
  - It provides IRA investors the ability to bring a private right of action not authorized by Congress.
  - It violates the McCarran–Ferguson Act.
  - It attempts to expand the definition of "investment advice fiduciary" under ERISA beyond the scope of what Congress intended when it promulgated ERISA, thereby implicating the Major Questions Doctrine.
- The DOL's Regulatory Impact Analysis is flawed, incomplete, uses stale data, and fails to provide a credible basis for additional rulemaking.
- The DOL's abbreviated comment period and unprecedented holding of a hearing prior to the end of the comment period fail to provide stakeholders with a meaningful opportunity to participate in the rulemaking process, thereby violating the Administrative Procedure Act.

Moreover, given the Fifth Circuit's clear and compelling decision as to the appropriate scope of ERISA's statutory definition, there is no legitimate basis for the DOL to engage in further rulemaking initiatives under section 3(21)(A)(ii) of ERISA, the definition of an investment advice fiduciary. ACLI and our member companies have asked the department to withdraw the proposal and focus instead on partnering to implement retirement policy that helps – not hurts – Americans saving for a secure retirement.

REAL WORLD IMPLICATIONS: DOL'S PROPOSAL WOULD DENY ACCESS TO ANNUITIES

Many Americans turn to annuities to provide monthly pension-like income in retirement. Annuities are a product sought and used by middle-income Americans. The median household income among annuity owners in 2022 was $76,000 a year while median household income in the US is $63,000.[9] Annuities are the only financial product in the marketplace that guarantees income throughout retirement, distinguishing them from mutual funds and other investments. There are a wide variety of annuities available in the marketplace. Some provide immediate income and others provide income later in life. Some annuities offer market exposure and liquidity. Others provide protection against loss of principal.

Americans learn about the benefits and features of annuities from financial professionals who are typically compensated by commissions paid by insurers when an annuity is purchased. Life insurers have long sought to structure their compensation arrangements in a way that encourages

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[9] ACLI analysis of the Federal Reserve Survey of Consumer Finances, 2022.

insurance agents and broker-dealers to devote appropriate time and attention to consumers in the sale of annuities. For that reason, insurers typically pay a sales commission upon the completion of an annuity sale to compensate agents and broker-dealers for the significant effort involved in learning about and marketing and selling annuity products. Most annuities today are sold on a commission-based compensation structure.

The DOL's proposed fiduciary regulatory package would upend the marketplace for commission-based sales by broadly expanding the definition of fiduciary investment advice under ERISA to include virtually all financial service interactions in the retirements savings setting that could be construed to involve a "recommendation" of almost any investment product, strategy or service. Under this proposal, Americans would be forced to either forgo retirement guidance or engage a fiduciary investment adviser for any help with retirement finances, from taking the first steps to save for retirement to addressing their income needs in retirement.

Before the DOL's 2016 regulation was vacated by the Fifth Circuit, the response by the financial services industry to the imposition of the regulation's fiduciary-only approach on non-fiduciary transactional sales activity resulted in more than 10 million American workers' accounts, with $900 billion in savings, losing access to professional financial guidance, according to a 2018 Deloitte study. These results should not surprise. It was never appropriate to impose a fiduciary duty on persons engaged in traditional transactional sales activities.[10] Congress, the SEC and the NAIC have therefore specifically declined to do so. It should not be surprising that financial professionals and the firms for whom they worked moved away from the business of selling products and services following the release of the 2016 regulation that sought to de-incentivize sales and marketing activities.

Since 2018, a Quantria Strategies study found the 2016 fiduciary regulation would have:

- reduced the projected accumulated retirement savings of 2.7 million individuals, comprised of American workers with incomes below $100,000, by approximately $140 billion over 10 years; and
- leveled the most adverse effects on Blacks and Hispanics, reducing projected accumulated IRA savings by approximately 20 percent over 10 years and contributing to an approximately 20-percent increase in the wealth gap attributable to IRAs for these individuals.[11]

The DOL's current regulatory proposal is substantively the same and will inflict the same predictable harms on retirement savers.

JURISDICTIONAL REGULATORY OVERREACH

The McCarran-Ferguson Act, passed by Congress and signed into law in 1945, entrusts states with the authority and responsibility for the regulation of the business of insurance. The sales and marketing of insurance products fits squarely within the boundaries of the "business of insurance" for a company to be in business and to market and sell goods and services. The preemptive authorities under ERISA do not extend to the business of insurance.

[10] In the Department of Labor's 2010 proposal to amend the definition of fiduciary (75 FR 65263), the Department recognized the dichotomy between advice for a fee and sales and marketing activities by providing a "sellers exception.""

[11] Hispanic Leadership Fund, Analysis of the Effects of the 2016 Department of Labor Fiduciary Regulation on Retirement Savings and Estimate of the Effects of Reinstatement, November 8, 2021.

Furthermore, DOL has no authority to regulate the conduct of agents compensated solely for the sale of insurance products. Under the McCarran-Ferguson Act, the "business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business" and "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance…."

To that end, the state regulatory oversight of insurance products and enforcement of insurance sales conduct is comprehensive. Oversight is achieved through the NAIC, whose members are chief insurance regulators from the 50 states, the District of Columbia, and the U.S. territories. Additionally, the states' enforcement regimes also extend to the entire insurance marketplace for products including disclosure requirements, professional standards for agents, and supervisory controls.

The NAIC's significant updates to the Suitability in Annuity Transactions Model Regulation (#275), in which they established a best interest standard of conduct that harmonized with the SEC's regulation best interest, was comprehensive and thorough. It was also a process that the DOL had direct interactions with; in contrast, the DOL's own proposed regulation process failed to engage or coordinate substantively with the NAIC and its members. The NAIC in their comment letter to the DOL specifically states: "The rationale and justification for DOL's work should stand on its own as complementary to robust state efforts and should not mischaracterize differences in regulatory philosophy as an absence of regulatory competence or efficacy in this space."[12]

CONGRESSIONAL INTENT AND PUBLIC POLICY TO ADDRESS RETIREMENT CHALLENGES

The Congress was specific and intentional in the passage of ERISA in 1974. Should there need to be statutory adjustments to key ERISA definitions, it is Congress, not DOL, who should consider whether to revise the law to impose a fiduciary status on commission-based sales activities. It is Congress that has the authority to determine whether the SEC's Regulation Best Interest and the states' best interest efforts implementing the NAIC model rule adequately protect consumers while preserving commissioned-based services. Forty-one state legislatures and state insurance departments under existing authorities have adopted the NAIC Model. The states did so with rules tailored to preserve the role of sales professionals selling commission-based products to consumers. It is Congress that has the role to examine whether federal laws should change and the costs and benefits of such change for investors and service providers.

Additionally, the passage of the *Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019*, and the SECURE 2.0 Act in 2022, were the most comprehensive retirement legislative packages passed since the Pension Protection Act in 2006 and are expected to prove instrumental in increasing access to retirement plans. Additionally, Congress took numerous steps to not only improve access to lifetime income, but to ease burdensome regulations that overcomplicated the use of these products. Still, there is more work to be done.

Both the House and Senate lawmakers are working to build upon this progress, and we ask policymakers to continue to look to public and private collaborators that can help implement the recently enacted public policy proposals that address savings challenges and help Americans ensure a secure retirement. We also ask policymakers to continue providing incentives to retirement savings and promoting guaranteed retirement income products. Focusing on ways to

[12] National Association of Insurance Commissioners, comments to the Department of Labor on their proposed amendments to the Definition of "Fiduciary" at 29 CFR Part 2510.3-21(c), and proposed amendments to each of Prohibited Transaction Exemptions 84-24 and 2020-02, 2023, [government-affairs-rin-1210-ac02-def-fiduciary.pdf (naic.org)](government-affairs-rin-1210-ac02-def-fiduciary.pdf)

help more people achieve a financially secure retirement — increasing savings rates, access to workplace-based retirement plans and lifetime income security for *all* Americans, are all key to financial security.

As Congress continues to look for opportunities to increase Americans' financial security, one critical element is the removal of barriers to lifetime income products. Removing barriers to annuities, as well as modernizing existing law, provides savers with the option to ensure they have income for life. Public policy changes to increase access to annuities through the workplace help to build a financial safety net that is critical in retirement.

CONCLUSION

The life insurance industry is proud to serve retirement savers and play a critical role in offering the only retirement product that provides guaranteed income for life. We take offense to the nefarious characterization that the DOL and Administration have attempted to make of these products and those that sell them. On behalf of the ACLI member companies, we appreciate the subcommittee's interest in this issue, and we hope that our input provides clarity and perspective as to why the DOL's proposal has significant legal and policy flaws and should be completely withdrawn.