TESTIMONY OF KIM O'BRIEN

FEDERATION OF AMERICANS FOR CONSUMER CHOICE

September 3, 2020

Thank you. The Federation of Americans for Consumer Choice, FACC, appreciates the opportunity to testify today. Let me say at the outset that we are encouraged to see many other industry trade associations speak to the very real concerns of independent agents and independent insurance distribution.

FACC was formed specifically to represent and address concerns of independent agents, marketing organizations and insurance agencies who provide customers with fixed products, especially fixed annuities. What differentiates independent agents is that they represent multiple carriers offering a wide choice of products, helping consumers navigate their options and choose products that effectively address their financial needs and goals.

I am Kim O'Brien and I have spent my career serving the independent insurance channel, first as head of product development and marketing for various insurance companies, and second as the leader of trade organizations that advocate for independent insurance professionals and marketing organizations. I am here today because I am deeply concerned that the Department of Labor is designing regulatory requirements that will not work for independent insurance agents and will ultimately harm the very consumers you are concerned about.

With all due respect, we believe the Department proposal is flawed. We think there are procedural flaws here especially as you rush to adopt this regulation. We think there are substantive flaws which include – but certainly are not limited to – the way this proposal would impact independent agents and their clients.

Procedurally, we cannot understand why parties are given only thirty days to comment on the rule proposal, two days to prepare for a hearing like this, and given only ten minutes to cover extremely serious issues. This rush to adoption – on a matter so profound – is simply unjustifiable.

Substantively, the Department has received dozens of comment letters, raising a raft of issues and concerns. We cannot begin to address all of them in a hearing like this. Certainly, the definition of fiduciary is now being blurred and rendered impossible even for lawyers to decipher let alone small business professionals. The rules of the road for rollover IRAs are being changed, raising the specter that ERISA will be applied to retail IRA sales, which cannot have been the intent of Congress. The new class exemption may work for the securities industry, but it does not work for the insurance industry.

These are real concerns – that we respectfully submit go to whether the rule would pass muster under arbitrary and capricious analysis. And it should not be lost on anyone that these new requirements are being created at the worst possible time when our country is in the middle of a pandemic, small businesses are hurting, consumers are reeling, and one must ask why would a federal agency right now introduce such complex requirements into the marketplace. It does not seem right.

I want to emphasize two related points. First, we know you have heard some of these issues before – some of these issues go back to your original proposals in 2010 and 2016 - but frankly we think the Department has always paid much more attention to the concerns of the securities industry than the insurance industry. That is why we along with many other trade groups are here once again to impress upon you how the Department proposal could completely upend the insurance industry, especially for independent agents. You need to understand this will affect people – agents and consumers.

Second, there are no quick fixes to this proposal, unless the Department decides to simply carve out or give a safe harbor to any insurance agents who satisfy state insurance laws. The issues raised by this rule proposal run deep into how agents do business, how agents interrelate with consumers, how they work with marketing organizations, and how they work with insurers. We have always been willing to sit down with DOL to discuss these matters but the Department has never truly engaged with us directly to understand our business and understand how DOL proposals will operate in the insurance environment – very different from the securities environment – which has always been your paradigm.

I appreciate some of what I have to say today will overlap with what you've heard from Mr. Campbell and seen in numerous industry comment letters. However, we cannot emphasize enough how jarring this rule will be to the insurance industry if it suddenly goes into effect.

The Department's misconceptions regarding the effect the Rule will have on independent distribution is apparent from its discussion in the preamble. In the preamble the Department suggests that insurance companies can simply copy Broker-Dealer supervisory models which is simply not true or even feasible. Broker-dealers have broad and exclusive authority over their registered representatives and dictate the select products they may sell, the terms under which they may sell them, and the compensation they are allowed to receive when a sale is made.

Typically, independent insurance agents represent a dozen or more insurance companies, so they can offer a wide selection of products to their clients. Individual insurance companies can and do supervise their appointed agents to ensure they follow compliance with all regulatory requirements but insurers can only do so for their own products, their own compensation arrangements for those products, and compliance with regulations as they apply to those products. FACC worked with the National Association of Insurance Commissions, the NAIC, to ensure its best interest model requirements were compatible with the independent agent distribution system, keeping in mind that an important goal of these regulations is to preserve consumer choice and different delivery models.

It is also telling the Department suggests in its preamble that agents could be fiduciaries merely because they receive trail, or ongoing, commission but that belies a misunderstanding of how annuity products work and agents get compensated. How does the fact that insurance companies may pay an insurance agent ongoing commission on a single sale of an annuity policy translate to a fiduciary relationship between the agent and the client? The annuity holdings, product performance, and obligations rest solely with the insurance company after the sale. This novel interpretation of the test for determining who is a fiduciary contradicts decades of precedence and guidance.

The Department also casually suggests insurance companies can transfer supervisory duties to independent marketing organizations, or IMOs, but that is anything but causal or easy. IMOs are not set up like broker dealers, they do not exercise control over agents, and of course IMOs are not currently even recognized as financial institutions by your own rule. Beyond all of that, it must be understood

that independent agents do not contract exclusively with any single IMO and it would take a sea change in our industry for independent agents to start operating exclusively for one IMO because then, of course, they would essentially no longer be independent. These are enormous obstacles – all left unaddressed by the Department – which must be addressed more seriously if this rule is to proceed.

And nobody should harbor any delusion that PTE 84-24 is a quick fix or panacea for insurance agents. First, to invoke PTE 84-24, an agent must essentially admit to being a fiduciary, which FACC maintains is unwarranted in most cases. Second, there is uncertainty whether PTE 84-24 is available to agents as an exemption for any compensation other than simple commission, leaving doubt whether it works for agents receiving other common forms of compensation including noncash compensation. Third, it is uncertain whether and how PTE 84-24 applies to up-line agents including IMOs receiving commissions on sale of annuity products. Fourth, with withdrawal of the *Deseret* advisory opinion, we believe there is uncertainty whether PTE 84-24 works for rollovers absent clarification that acknowledgement and approval is not needed from the employer plan fiduciary. And fifth, there is no assurance PTE 84-24 could not be limited or withdrawn in the future by the Department by more restrictive interpretations just as it has with the *Deseret* advisory opinion. PTE 84-24, just like the proposed rule itself, is a puzzle that creates as many questions as answers and FACC submits proper rulemaking demands more certainty than is afforded here to affected parties.

Allow me in my remaining minutes to talk about what this rule proposal would mean for real life insurance agents and agencies. I want to share a bit of what I will call "macro" information so you can get a sense of scale. Then I want to share stories about real insurance agents and agencies who are very worried about how this rule proposal could alter their livelihood and their ability to help clients.

First a few numbers. With help of a statistical analysis company, we have been able to estimate there are approximately 100,000 independent insurance professionals across the country whose primary focus is fixed annuity products. These are insurance only licensed agents most of whom have been in the business for years. Plus there are approximately 300 independent marketing organizations and insurance agencies, small to mediums sized businesses, who help individual agents find products to meet client needs and objectives. Based on publicly available statistics, total fixed annuity sales equaled $140 billion in 2019, and about 60% of those products are sold through independent agents. We believe over half of these products are IRAs and we estimate 40-50% of those are rollovers initiated by employees seeking the security of fixed annuities. These numbers are very large and DOL should not underestimate the impact its new rules will have on this industry.

We spoke with over a dozen agencies and agents over the short time provided to prepare for this testimony. We wanted to get a real human level sense of what this rule will mean. We can only tell you that agents who are aware of what is going on are deeply worried and mostly confused. We think those 12 plus agencies and agents are representative. They range from literally mom-and-pop shops to agencies with 60 or more employees. They are often located in smaller towns where access to financial services may be more limited. They are worried about whether this rule will force them to get new licenses, whether it will force them to work with or for securities brokers, whether it will take away their

independence, whether they will be able to afford additional legal costs to comply, whether they will see jumps in their E&O or Errors and Omissions premium, whether they will need to be more defensive just to avoid lawsuits. They all get that good compliance is important and has a cost but they wonder why do this now when they are already hurting with the pandemic and adjusting to new ways of working with clients. They told us their clients are everyday people who purchase policies averaging about $100,000. Their clients are people who want the safety of annuity products who are worried during these volatile economic times. These agents and agencies have mostly been in business for over twenty years with good records and highly satisfied clients.

One particular agent said COVID has placed his firm's clients in fear and frozen their ability to make important decisions regarding their retirement savings. Other agents and agencies have seen their own businesses suffer and have had to let employees go or move them from full to part time. One agent in Baltimore put it this way – he likened industry events to a tropical storm with the first phase being devastation by the strong winds of COVID and the economic crisis, only to be followed by the torrential rains of the DOL Rule just when things looked like they were starting to get back to normal.

Let me close by emphasizing the annuity IRA marketplace is already heavily regulated and the NAIC just recently adopted its model best interest requirements. Many ask why would DOL not first allow those to work – allow companies and agents get those requirements in place as required by their functional regulators – before creating yet another layer of regulation. When working with the NAIC on the development of the new best interest model, FACC met with regulator after regulator who uniformly told us their state doesn't have consumer complaint issues with the sale of fixed annuities. Rather, their decision to create a best interest standard was motivated by a desire to harmonize with other regulations, and we think now DOL should do the same in seeking to harmonize with the NAIC at least as to independent insurance agents.

We urge the Department to suspend this hasty adoption process and take the time necessary to study the many critical concerns that have been raised. Getting this right is important. Thank you for considering our testimony.