Executive Summary 2015 DOL Fiduciary Rule Proposal Comments

The Insured Retirement Institute (IRI) is the only national trade association that represents the entire supply chain for the insured retirement strategies. IRI has more than 500 member companies, including major insurance companies, broker-dealers, banks, asset management companies and consumers of annuity products that provide guaranteed lifetime income. Member companies account for more than 95% of annuity assets in the United States, include the top 10 distributors of annuities ranked by assets under management, and are represented by more than 150,000 financial professionals serving over 22.5 million households in communities around the country.

The following is an overview of the IRI's comments regarding the Department of Labor's Fiduciary Rule Proposal. We have respectfully offered these comments to assist the Department in determining how to formulate a final rule that will enhance consumer protection while preserving consumer choice and access to the products and services they need to attain a financially secure and dignified retirement.

Core Principles (See pages 7-10)

1. Financial professionals should be held to a best interest standard when recommending investments to retirement savers. (See page 8)
2. Consumers are entitled to freedom of access to retirement income guarantees. (See page 8)
3. In the post-defined benefit plan era, the availability of guaranteed retirement income through IRA rollovers meets a critical consumer need. (See page 8)
4. Rules for annuity products must be specifically crafted to account for their guaranteed lifetime income features. (See page 9)
5. Competitive annuity markets serve consumer interests. (See page 9)
6. Consumers have a right to choose their preferred source of retirement advice, including the option to work with advice providers who are experts on proprietary products, and how their advice provider is compensated. (See page 9)
7. The Administration's public policy position in favor of access to and utilization of guaranteed lifetime income products should be advanced. (See page 10)

America's Retirement Income Challenge and the Need for Retirement Income Products
(See pages 10-13)

1. Americans today are living longer than ever before, while access to traditional defined benefit pension plans continues to decline, creating a significant risk that many people will outlive their assets. It is critical that the regulatory environment allows consumers to access products that meet their need to protect against this increased longevity risk. (See pages 10-11)
2. Annuities are the only products available in the private market that can provide retirees and pre-retirees with a guaranteed source of income to ensure they can enjoy a financially secure and dignified retirement. (See pages 11-12)
3. Consumers who receive assistance from financial professionals save more throughout their working years, make better use of available retirement planning products and strategies, and commonly experience better returns on their investments, and therefore are better prepared for retirement than those who do not have access to retirement planning advice. (See pages 12-13)

Proposed Definition of the Term "Fiduciary" (See pages 13-28)

1. The definition of an investment advice "fiduciary" in the Proposed Regulation needs to focus more precisely on conduct that is appropriately regarded as fiduciary in nature rather than all manner of sales activities. The proposed definition would deprive retirement investors of access to information and would inappropriately limit advice sources. (See pages 15-20)

    a. The "specifically directed to" element of the Proposed Regulation will cause fiduciary status to arise as a result of ordinary advertising and marketing activities. This is unnecessary and harmful, and the phrase should therefore be removed from paragraph (a)(2)(ii) of the Proposed Regulation. (See pages 15-16)
    b. To provide predictability and certainty, both for consumers and financial professionals, the "individualized to the advice recipient" element of paragraph (a)(2)(ii) of the Proposed Regulation should be modified to read "sufficiently individualized as to form a reasonable basis for reliance by the advice recipient as a source of unbiased and impartial advice." (See pages 16-17)
    c. The "for consideration" element of paragraph (a)(2)(ii) of the Proposed Regulation is overly broad and should be changed to require that recommendations be made "for the purpose of" making investment decisions. (See pages 17-18)
    d. The definition of "recommendation" as a suggestion to engage in or refrain from taking a particular course of action, as set forth in paragraph (f)(1) of the Proposed Regulation, is too broad and should be redefined as "a communication that, based on its content, context, and presentation, would reasonably be viewed as a call to take action or to refrain from taking action." (See pages 18-19)
    e. To avoid inappropriately giving rise to fiduciary status, the phrase "either directly or indirectly (e.g., through or together with any affiliate)" should be moved from paragraph (a)(2) of the Proposed Regulation to paragraph (a)(2)(i) immediately following the word "acknowledges." (See pages 19-20)

2. To ensure consumers continue to have access to guaranteed lifetime income products and related advice, an additional, generalized carve-out is necessary to accommodate sellers of financial products and services, and modifications to the proposed carve-outs are needed to accommodate reasonable and necessary business practices. (See pages 20-25)

    a. The Department should add a new carve-out from fiduciary status for a person who: "provides advice or recommendations . . . under facts and circumstances where there can be no reasonable expectation on the part of the advice recipient that the advice provider is undertaking to provide unbiased and impartial advice." (See pages 20-21)
    b. The proposed counterparty carve-out safe harbor should be broadened to apply to 401(k) plans of any size as well as participants, beneficiaries and IRA holders. (See pages 21-23)
    c. The platform providers carve-out should be available to IRAs and should clarify that merely tailoring a sub-platform to a particular marketplace segment should not be regarded as individualization rendering the carve-out unavailable. (See pages 23-25)

3. The investment education carve-out should, consistent with the current language of I.B. 96-1, permit the identification of specific investment alternatives in connection with asset allocation education and the identification of specific distribution products in connection with the provision of distribution information when accompanied by a statement that other investment products with similar risk and return characteristics and other distribution products may be available under the plan and indicating where to obtain information about those other products. (See pages 25-28)

Proposed Amendment to PTE 84-24 (See pages 28-34)

1. All fixed and variable annuities, whether registered as securities or not, are insurance and provide guaranteed lifetime income, and therefore should be treated the same under PTE 84-24. Given the need for a level playing field for all annuities, exemptive relief should be available for all sales of both variable annuities and fixed annuities under both the Proposed Amendment to PTE 84-24 and the Proposed BIC Exemption. (See pages 28-30)
2. The definition of the term "Insurance Commission" in the Proposed Amendment to PTE 84-24 is overly narrow and should be broadened to ensure that advisers are not inadvertently prohibited from receiving customary employee benefits, such as health insurance coverage and access to an employer-sponsored retirement plan. (See page 30)
3. The Definition of the term "Best Interest" in the Proposed Amendment to PTE 84-24 is overly prescriptive and should be revised to make clear that advisers and financial institutions must always put their clients' interests first, but would not be required to completely disregard their own legitimate business interests. (See pages 31-32)
4. The Department should clarify that a recommendation to rollover a plan account balance or an existing IRA to an annuity is covered by PTE 84-24. (See pages 32-33)
5. The Department should clarify that the exemptive relief provided by PTE 84-24 is available for both the purchase of the annuity and the selection of investments under the annuity contract. (See page 33)
6. To level the playing field for annuities and mutual funds under PTE 84-24, the Department should extend to annuities the same independent fiduciary approval presumption provision that applies to mutual fund transactions. (See page 34)

Proposed Best Interest Contract ("BIC") Exemption (See pages 35-51)

1. To avoid disruptions in the availability of annuity products and their guaranteed lifetime income features to millions of retirement savers, and advice about whether these products fit their needs, the requirements in the Proposed BIC Exemption must be revised in a workable manner. (See pages 35-43)
   a. The terms of the BIC exemption should be clarified to indicate that a counter-signature on the part of the advice recipient is not needed to satisfy the condition. Advisers and financial institutions should be permitted to comply with this requirement through a unilateral agreement furnished to the advice recipient. (See page 35-38)
   b. The contract timing requirement under the Proposed BIC Exemption should require the contract to be executed prior to the transaction, not prior to the recommendation. (See page 38)
   c. The definition of the term "Best Interest" in the Proposed BIC Exemption is overly prescriptive and should be revised to make clear that advisers and financial institutions must always put their clients' interests first, but would not be required to completely disregard their own legitimate business interests. (See pages 39-41)
   d. Given that the duty to act in a client's best interest is contained in the required contract under the Proposed BIC Exemption, the warranties required under the Exemption serve no useful consumer purpose, but expose Advisers and Financial Institutions to risks of frivolous and costly litigation, adding to the expense associated with serving retirement investors. (See page 41)
   e. The "reasonable compensation" conditions of the Proposed BIC Exemption are focused on the value of services and fail to take into account the costs of annuity products' guaranteed features. Moreover, the conditions unfairly disadvantage proprietary products. For purposes of annuity product recommendations, the definition of "reasonable compensation" contained in the Proposed BIC Exemption should be conformed to the corresponding provision in the Proposed Amendment to PTE 84-24. (See pages 41-42)

f. The Adviser's and Financial Institution's agreement to comply with the Impartial Conduct Standards by delivering a Best Interest Contract should be sufficient to satisfy the conditions of section II(c) of the Proposed BIC Exemption. Violations of the Impartial Conduct Standards should not result in loss of the exemption. (See pages 42-43)

2. The Department should take steps to preserve proprietary annuity distribution models, which provide consumers with invaluable and irreplaceable sources of knowledge about annuity products and how annuities can be used to provide guaranteed lifetime income to retirees. To that end, the "Limited Range of Investment Options" requirements included in section IV of the Proposed BIC Exemption should not apply to Advisers and Financial Institutions that offer proprietary annuity products. (See pages 43-45)

3. The proposed point of sale, website, annual and ongoing information maintenance requirements impose exceedingly burdensome and expensive disclosure requirements on annuity product providers and distributors. In addition, many of these disclosure requirements are duplicative of, and in many cases conflict with, existing SEC prospectus disclosure rules. For these reasons, the disclosure provisions should be removed from the Proposed BIC Exemption. (See page 45)

   a. The point of sale disclosures required under the Proposed BIC Exemption should be made through the provision of a prospectus for registered annuity products and should be replaced by a reference to the statutory prospectus disclosure requirement. (See pages 45-47)
   b. The website disclosure requirements for annuity products should be eliminated in favor of the settled disclosure regimes under applicable federal securities laws and state insurance laws. (See pages 47-48)
   c. The annual disclosure requirement under paragraph III(b) of the Proposed BIC Exemption is overly burdensome, would be exceedingly costly to develop and does not advance investor interests, and should therefore be removed. (See page 49)
   d. The Proposed BIC Exemption's provision authorizing public disclosure of Adviser return information will provide no meaningful benefit to consumers but will be extremely expensive to implement, and should therefore be deleted. (See pages 49-50)

4. The condition to the exemption for pre-existing transactions prohibiting additional advice following the applicability date of the regulation creates inappropriate incentives and would render the exemption worthless in practice, and should therefore be removed. (See pages 50-51)

Timing of Implementation for Proposal

1. The Department should extend the proposed implementation period to ensure the industry has adequate time to develop the necessary compliance processes. The proposed eight-month timeline would result in significant and harmful market disruptions. (See pages 51-52)

A copy of the Insured Retirement Institute's full comment letter can be found at http://www.dol.gov/ebsa/pdf/1210-AB32-2-00626.pdf.

A copy of the Insured Retirement Institute's supplemental comment letter can be found at http://www.dol.gov/ebsa/pdf/1210-AB32-2-03062.pdf.