

James R. Sopha
President

1 Corporate Way
Lansing, MI 48951
Phone: 517/702-2513
Fax: 517/702-2445
james.sopha@jackson.com

September 15, 2017

Office of Exemption Determinations
Employee Benefits Security Administration (Attention: D-11712, 11713, 11850)
U.S. Department of Labor
200 Constitution Avenue NW., Suite 400,
Washington, DC 20210

Re: RIN 1210-AB82

Subject: ZRIN 1210-ZA27 - Extension of Transition Period and Delay of Applicability Dates; Best Interest Contract Exemption (PTE 2016-01) (“BICE”); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (PTE 2016-02); Prohibited Transaction Exemption 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters (“PTE 84-24”)¹

To Whom It May Concern:

Thank you for the opportunity to respond to your proposed Extension of Transition Period and Delay of Applicability Dates (the “Proposed Delay”) for the prohibited transaction exemptions (“Proposed PTEs”) listed above. Jackson National Life Insurance Company (“Jackson”) strongly supports your proposed 18-month delay of the January 1, 2018, applicability date of the portions of Prohibited Transaction Exemptions 2016-01 and 84-24 (“PTEs”) that did not apply on June 9, 2017.² A fixed delay period will provide the U.S. Department of Labor (“DOL”), the Securities and Exchange Commission (“SEC”), and state insurance commissioners the requisite time to conduct a new and thorough cost-benefit analysis of the “fiduciary rules”³ and to determine how best to reform the fiduciary rules. At the same time, a fixed delay period will provide certainty and clarity regarding the regulatory environment that will, in turn, allow businesses providing investment advice and

¹ Extension of Transition Period and Delay of Applicability Dates, 82 Fed. Reg. 41365 (Aug. 31, 2017), (to be codified at 29 C.F.R. pt. 2500), <https://www.gpo.gov/fdsys/pkg/FR-2017-08-31/pdf/2017-18520.pdf>.

² Specifically, your proposal would, among other things, extend the special transition period under sections II and IX of the Best Interest Contract Exemption and delay the applicability of certain amendments to Prohibited Transaction Exemption 84-24 for the same period. 82 Fed. Reg. at 41365. Jackson supports the proposed PTEs.

³ The “fiduciary rules” consist of the Definition of the Term “Fiduciary”; Conflict of Interest Rule-Retirement Investment Advice, and subsequent amendments; Best Interest Contract Exemption (Prohibited Transaction Exemption (“PTE”) 2016-01); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (PTE 2016-02); and PTEs 75-1, 77-4, 80-83, 83-1, 84-24 and 86-128, 82 Fed. Reg. 16902 (Apr. 7, 2017), <https://www.gpo.gov/fdsys/pkg/FR-2017-04-07/pdf/2017-06914.pdf>.



products, and the retirement savers they serve, to reduce costs and risk. Throughout the delay, retirement savers will continue to benefit from the fiduciary rules' protections that have already begun to apply. They will also benefit from the avoidance of certain negative consequences that would result if the PTEs' requirements that did not begin to apply on June 9, 2017 were to apply on January 1, 2018. The critical importance of regulatory clarity and certainty leads Jackson to oppose the imposition of any conditions or contingencies on the proposed delay. Simply, all involved parties should know exactly when the remaining provisions of the PTEs will take effect.

I. Introduction

America is in the midst of a slow-rolling retirement crisis that risks the future of our middle class. A large percentage of U.S. working households have no retirement savings, including those households closest to retirement - between the ages of 55 and 64.⁴ A large majority of "baby boomers" do not believe their savings will last them through retirement, and most experts believe this "adequacy" crisis may be worse than these near-term retirees understand. The Center for Retirement Research at Boston College has concluded "that, as of 2013, more than half of today's households will not have enough retirement income to maintain their pre-retirement standard of living, even if they work to age 65 - which is above the current retirement age - and annuitize all their financial assets, including the receipts from a reverse mortgage on their homes."⁵

While the goal of the fiduciary rules may have been to alleviate one aspect of the retirement crisis --- fees from conflicted advice that reduce retirement savings --- these rules are a massive experiment affecting trillions of dollars in retirement assets, tens of millions of retirement savers, and hundreds of thousands of financial advisers and others providing retirement investment advice and products. The fiduciary rules have extended the ERISA fiduciary duty standard to approximately 70% of the retail advice market, according to Jackson's estimates. Even though the fiduciary rules are not yet fully implemented, there is initial evidence that their impact has not been all positive for retirement savers or the retirement savings crisis.

The DOL does not yet have a full or adequate understanding of the effects of this massive regulatory experiment, or whether it is exacerbating the retirement crisis. There is substantial evidence that, along with some positive effects,⁶ the fiduciary rules are causing significant harm to retirement plan participants, beneficiaries, and individual retirement savers,⁷ as well as the people and businesses that

⁴ U.S. GOV'T ACCOUNTABILITY OFF., GEO-15-419, MOST HOUSEHOLDS APPROACHING RETIREMENT HAVE LOW SAVINGS, (May 2015), <http://www.gao.gov/assets/680/670153.pdf>. See also, Elyssa Kirkham, *1 in 3 Americans Have \$0 Saved for Retirement*, GOBANKINGRATES.COM, (Mar. 16, 2016), <https://www.gobankingrates.com/retirement/1-3-americans-0-saved-retirement/>.

⁵ Alicia H. Munnell, Wenliang Hou, & Anthony Webb, *NRRI Update Shows Half Still Falling Short*, 14-20 Center for Retirement Research at Boston College 1-9 (Dec. 2014), http://crr.bc.edu/wp-content/uploads/2014/12/IB_14-20-508.pdf.

⁶ For a discussion of a positive effect of the fiduciary rules, Jackson refers the DOL to pages 3 and 4 of Jackson's July 21, 2017 comment letter in response to its Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions. Letter No. 256 from James R. Sopha, President Jackson National Life Insurance Company, to Dep't. of Labor (July 21, 2017), <https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/public-comments/fiduciary-rule-examination>.

⁷ ERISA's section 408 requires that proposed PTEs must be (1) administratively feasible, (2) in the interests of the plan and of its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries of such plan. 29 U.S.C. § 1108(a)(1)-(3). Since the fiduciary rules apply to individual retirement accounts and other



serve them. For example, as the DOL noted in the Proposed Delay, quoting Jackson's earlier comment letter,

[w]ith respect to harm to retirement investors from not delaying the applicability date . . . one commenter stated that “the stampede to fee-based arrangements will leave many small and mid-sized investors without access to advice . . .” and that “retirement investors are losing access to some retirement products they need to ensure guaranteed lifetime incomes, including variable annuities, whose usage has plummeted. These market developments will cause more leakage and reduce already inadequate retirement resources for millions of retirement savers.”⁸

In addition, some significant market developments caused by the fiduciary rules must mature before the DOL can know if they are helpful or harmful. For example, annuity and mutual fund manufacturers and their distributors need a delay in the applicability date to bring innovative products like “clean shares,” “T shares,” and fee-based annuities to market, and market observers and policymakers will need additional time thereafter to assess the effects of these products on leakage and adequacy, as well as their consequences for the involved industries. Equally important, the DOL has not yet resolved a host of legal issues arising under the fiduciary rules. As the DOL again noted in the Proposed Delay with a quotation from Jackson's comment letter, “[i]t would be poor process for the DOL to allow the remaining requirements [of the PTEs] . . . to take effect on January 1, 2018, without providing detailed and clear guidance on critical open legal issues generated entirely by the DOL's own regulatory actions.”⁹

The DOL should therefore initiate an 18-month delay of the provisions of the PTEs that did not take effect on June 9, 2017 so that it may (1) conduct and publish the review mandated by President Trump's Memorandum of February 3, 2017,¹⁰ (2) develop and commence implementation of a plan with the SEC and the National Association of Insurance Commissioners (“NAIC”) to harmonize regulations and regulatory oversight affecting retirement investment advice and products, (3) propose or otherwise implement regulations and/or exemptions to give effect to that collaborative harmonization plan, and (4) resolve critically important legal issues affecting retirement advice and products, particularly those related to insurance and annuity products.

retirement plans in the individual market, many of the retirement savers whose interests are at play in the fiduciary rules are not “participants and beneficiaries” of retirement plans. Accordingly, this letter adds “individual retirement savers” to its discussion of effects on participants and beneficiaries. However, Jackson believes that there is some question as to the applicability of the section 408 standards to the proposed PTEs because they are modifications of PTEs rather than newly proposed PTEs. Nonetheless, in the interest of comprehensiveness, Jackson's comments address the interests of participants, beneficiaries, and individual retirement savers as part of its larger discussion. This discussion should not be taken as an endorsement of any particular interpretation of section 408.

⁸ 82 Fed. Reg. at 41370 n. 25.

⁹ *Id.* n. 28 (internal quotation marks omitted).

¹⁰ Presidential Documents Memorandum of February 3, 2017 for the Sec. of Labor, 82 Fed. Reg. 9675 (Feb. 7, 2017), <https://www.gpo.gov/fdsys/pkg/FR-2017-02-07/pdf/2017-02656.pdf>.



II. Jackson is well-positioned to offer knowledge, experience, and insight.

Jackson and its U.S. affiliates employ more than 5,000 workers, who manage more than \$199 billion in fixed and variable annuities for over 1.5 million investors, including approximately \$106 billion in annuities held in accounts that qualify as Section 408 Individual Retirement Annuities. In 2016, Jackson was the largest provider of annuities in the United States.¹¹

Jackson's insurance products are offered by more than 150,000 financial advisers affiliated with more than 600 independent broker-dealers, wirehouses, financial institutions and independent insurance agents. Thus, Jackson has a unique perspective as a leading manufacturer of annuity products.¹²

III. An 18-month delay will allow the DOL to assess the radical market transformation resulting from the already-applicable elements of the fiduciary rules while ensuring retirement plan participants and beneficiaries continue to be protected by the Impartial Conduct Standards.

A. Participants, beneficiaries, and individual retirement savers are benefitting from the Impartial Conduct Standards and will remain protected during any delay in the applicability date.

The PTEs each require any adviser to abide by the Impartial Conduct Standards if the adviser wants relief from the strict prohibitions in the fiduciary rule. When providing a recommendation to a retirement saver: (1) recommendations must be in the client's best interest, (2) compensation must be no more than reasonable, and (3) no material misleading statements may be made to the client.¹³ The Impartial Conduct Standards took effect on June 9, 2017, and would remain in effect throughout the 18-month delay.

Jackson's experience, even before June 9, 2017, has been that most of the businesses providing advice and products to retirement savers have changed their practices and products to comply with the Impartial Conduct Standards. Accordingly, the Impartial Conduct Standards are realizing the DOL's and Jackson's shared goal of reducing undue leakage from retirement savings to the benefit of participants, beneficiaries, and individual retirement savers. For example, there has been wide adoption of pay structures that provide financial representatives with level compensation for investment products within the same product category. Jackson is aware of more than 75 broker-dealers that have purposefully decided to require every annuity manufacturer with which they deal to offer the same commission options by product type to their representatives. This has resulted in over 145 commission schedule adjustments to Jackson's annuity products. This compensation reform is the direct result of the Impartial Conduct Standards' "best interest" and "reasonable compensation" requirements. Thus, these broker-dealers' representatives have no potential financial incentive to recommend one carrier's annuity product over another's product. The recommendation will be based

¹¹ LIMRA Secure Retirement Institute U.S. Individual Annuities Sales Survey (2017), http://www.limra.com/Posts/PR/Data_Bank/_PDF/2016-Q4-Annuity-Company-Rankings.aspx.

¹² Jackson National Life Distributors LLC ("JNLD") is an affiliate of Jackson. JNLD, the wholesale distributor of Jackson's variable annuity products, is registered as a broker-dealer with the SEC under the Securities Exchange Act of 1934, and is a member of the Financial Industry Regulatory Authority, Inc. ("FINRA").

¹³ Best Interest Contract Exemption; Correction 81 Fed. Reg. 44773, 44777 (July 11, 2016), <https://www.gpo.gov/fdsys/pkg/FR-2016-07-11/pdf/2016-16355.pdf>.



solely on the merits of the annuities. This development in market practices addresses the principal motivating factor behind the fiduciary rules: retirement advisers recommending one retirement product over another because the adviser perceives that he or she will derive an economic advantage.

It is important to note that business' compliance with the Impartial Conduct Standards has occurred absent any threat of enforcement by the DOL or the imposition of excise taxes by the Internal Revenue Service. Both organizations announced non-enforcement policies before the Impartial Conduct Standards took effect that removed these threats.¹⁴ In addition, financial institutions have not been subject to private litigation facilitated by the BICE's best interest contracts during the period when these extensive compliance efforts have taken place. Rather, the Impartial Conduct Standards have effected broad compliance without any need for the new and aggressive enforcement measures currently scheduled to take effect on January 1, 2018. There is every reason to believe that widespread compliance will continue during the 18-month delay period proposed by the DOL and that participants, beneficiaries, and individual retirement savers would benefit accordingly.

Compliance is directly relevant to the cost-benefit analysis of the DOL's proposed 18-month delay. The Regulatory Impact Analysis included in the proposed fiduciary rules¹⁵ was premised on financial advisers broadly providing conflicted advice for their own benefit thereby causing billions of dollars annually in leakage from retirement savers' accounts. While Jackson refutes the validity of the DOL's original Regulatory Impact Analysis and the resulting premise, Jackson's experience shows that the Impartial Conduct Standards have helped to assure that compensation for retirement investment advice is reasonable and does not create material conflicts.

The DOL's cost-benefit analysis of the proposed PTEs must consider these changes to the compensation landscape. An 18-month delay may impose no additional costs on participants, beneficiaries, and individual retirement savers because of compliance with the Impartial Conduct Standards. Instead, continued compliance with the Impartial Conduct Standards during the 18-month delay may produce benefits for participants, beneficiaries, and individual retirement savers. Moreover, the DOL's cost-benefit analysis must take into account the costs avoided by the providers of retirement advice and products that will result from delaying the applicability of the provisions of the Proposed PTEs that did not take effect on June 9, 2017. If the DOL conducts this new economic analysis, as required by President Trump's memorandum, then it will certainly find that the benefits of a delay exceed any costs, particularly for participants, beneficiaries, and individual retirement savers.

B. The fiduciary rules' negative effects, and the costs they will continue to impose on participants, beneficiaries, and individual retirement savers, must be studied, discussed, and remedied before additional regulatory burdens are imposed.

The fiduciary rules have imposed significant costs on retirement savers in several ways that an 18-month delay may ameliorate. If not directly ameliorative, a delay would provide the DOL and other

¹⁴ Field Assistance Bulletin No. 2017-02, Temporary Enforcement Policy on Fiduciary Rule, (Dep't. of Labor May 22, 2017), <https://www.dol.gov/sites/default/files/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2017-02.pdf>; I.R.S. Announcement 2017-4 (2017), <https://www.irs.gov/pub/irs-drop/a-17-04.pdf>.

¹⁵ Regulatory Impact Analysis, Fiduciary Investment Advice, 130-134 (Dep't. of Labor Apr. 20, 2015), <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/proposed-regulations/1210-AB32-2/conflictsofinterestria.pdf>.



regulators the requisite time to analyze and seek ways to reduce or eliminate these added costs imposed on retirement savers.

1. *Higher Fees for Individual Retirement Savers*

Perhaps the most noteworthy market shift resulting from the fiduciary rules is the reaction to the BICE's section 2(h) and its creation of an exception for "level fee fiduciaries." Many of Jackson's distribution partners, and others in the industry, have aggressively expanded the availability and usage of fee-based advisory services. Jackson refers the DOL to pages 13 and 14 of Jackson's August 7, 2017 comment letter in response to your Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions provides further discussion of and evidence regarding this issue.¹⁶

In many instances, this shift to fee-based services has increased costs for individual retirement savers — in other words, it has exacerbated the leakage problem the fiduciary rules were supposed to help solve. A 2017 American Action Forum analysis concluded that the fiduciary rules will result in additional annual charges to retirement investors of approximately \$800 per account or over \$46 billion in aggregate as advisers try to cover the new costs and risks.¹⁷ By aggressively discouraging commission-based arrangements, the fiduciary rules are also, in some cases, increasing the costs of variable annuities and other products for many retirement savers. Jackson's August 7, 2017 comment letter discusses Jackson's experience with commissions and fees.¹⁸

The potential of added costs to individual retirement savers and the corresponding reduction in net investment returns must be factored into the DOL's cost-benefit analysis associated with the delay and the fiduciary rules more generally. To the extent an 18-month delay slows or reverses the large-scale shift from commission-based accounts to fee-based accounts, individual retirement savers will benefit from avoided costs. In addition, an 18-month delay will give the DOL an opportunity to assess whether it should repeal those portions of the BICE that are currently applicable and/or reform the provisions that are producing these negative consequences. All regulators, including the DOL, SEC, FINRA, and the states can use the 18-month delay in the proposed PTEs to work together on a solution that better balances the preservation of retirement savers' access to advice and any perceived risks to consumers from commission-based compensation arrangements.

2. *Poorer Investment Returns Resulting from the Unavailability of Expert Advice*

One consequence of new costs to distributors has been the loss of retirement investment advice for retirement savers with small and mid-sized accounts. Many savers with smaller accounts are unable to meet account minimums, which have risen and can be expected to rise further. The heightened costs for distributors will continue to rise as a result of the fiduciary rules' extensive paperwork, process, and disclosure requirements, plus the unquantified costs and risks of litigation, excise taxes, and other potential penalties. These costs make the small fees associated with low-balance accounts

¹⁶ Letter No. 574 from James R. Sopha, President Jackson National Life Insurance Company, to Dep't. of Labor, at 13-14 (Aug. 7, 2017), <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00574.pdf>.

¹⁷ Meghan Milloy, *The Consequences of the Fiduciary Rule for Consumers*, AMERICAN ACTION FORUM (Apr. 10, 2017), <https://www.americanactionforum.org/research/consequences-fiduciary-rule-consumers/>.

¹⁸ Letter No. 574 at 9-10.



uneconomical for retirement investment advisers. A 2016 study by A.T. Kearney found that, by 2020, broker-dealer firms will stop providing advice to retirement savers with low-balance accounts containing the majority of the \$400 billion currently in such accounts.¹⁹ Another recent study found that 71% of financial advisers plan to disengage from some retirement savers as a result of the fiduciary rule.²⁰ A 2017 survey by the National Association of Insurance and Financial Advisors found that nearly 90% of financial professionals believe consumers will pay more for professional advice services, and 75% have seen or expect to see increases in minimum account balances for the clients they serve.

Studies indicate that the experience and stewardship offered by a financial adviser can enhance investor returns between 1.8% and 3.0% annually.²¹ Six years ago, the DOL itself estimated that access to financial advice reduced the cost of retirement saver “mistakes” by \$15 billion per year, and that increasing access to financial advice would enable retirement savers to save billions more.²² These economic effects are relevant to the DOL’s cost-benefit analysis. Any investment gains that would flow from the continued availability of advice to some small and mid-sized retirement accounts, and any avoidance of investment losses made possible by expert advice, would be a benefit that accrues to individual retirement savers arising out of the delay of the PTEs’ applicability dates. Beyond the cost-benefit analysis, an 18-month delay would provide the DOL with time to determine how best to reform the PTEs to avoid the loss of high-quality advice to millions of American retirement savers while still ensuring they receive advice that is in retirement savers’ best interests.

3. Unavailability of Retirement Products Helping to Grow Retirement Savings While Providing Guaranteed Lifetime Incomes

Beyond the loss of advice, retirement savers are losing access to retirement products, including products retirement savers want and need. For example, variable annuities allow Americans to address their greatest risk and fear in retirement: outliving their assets.²³ Variable annuities protect savings against market and longevity risk through guaranteed lifetime income and death benefits. They also offer retirement savers the opportunity to grow savings on a tax-deferred basis through the construction of a diversified portfolio of investment strategies, including fixed account options with minimum guaranteed returns. Since a majority of variable annuities are held by investors with annual income under \$100,000, they need an opportunity to grow their assets.²⁴

¹⁹ A.T. Kearney, *The \$20 billion impact of the new fiduciary rule on the US. wealth management industry*, (Oct. 2016), <https://www.atkearney.com/financial-institutions/dol-fiduciary-rule>.

²⁰ *Fiduciary rule to leave US mass-market investors stranded, study shows*, VALUEWALK (Nov. 28, 2016), <https://www.valuwalk.com/2016/11/fiduciary-rule-bad/>.

²¹ SECTORS, LLC REPORT, FINANCIAL ADVISORS ADD VALUE 1.8% -3.3% ANNUALLY (2014), <http://isectors.com/wp-content/uploads/2015/03/2014.06.30-Financial-Advisor-Value-FINAL.pdf>. See also Ryan Rich, Colleen M. Jaconetti, Francis M. Kinniry Jr., Donald G. Bennyhoff, & Yan Zilbering, *Putting a value on your value: Quantifying Vanguard Advisor’s Alpha in Canada* (2015), <https://www.vanguardcanada.ca/documents/value-on-your-value-trlv.pdf>.

²² *Investment Advice —Participants and Beneficiaries*, 76 Fed. Reg. 66136, 66152 (Oct. 25, 2011) (to be codified at C.F.R. pt. 2550), <https://webapps.dol.gov/federalregister/PdfDisplay.aspx?DocId=25414>.

²³ *How to Not Run Out of Money in Retirement*, ALL THINGS CONSIDERED (Apr. 27, 2016), <http://www.npr.org/2016/04/26/475759586/how-to-not-run-out-of-money-in-retirement>.

²⁴ Press Release. Insured Retirement Institute, *IRI Issues Third-Quarter 2015 Annuity Sales Report* (Dec. 15, 2015) (on file with author).



Yet, the fiduciary rules have caused a steep decline in the sale of variable annuities. Despite a rising stock market, which has always led to increased sales of variable annuities in the past, sales declined by 21.6% from 2015 to 2016.²⁵ In the first quarter of 2017, variable annuity total sales declined an additional 4.6% from the prior quarter, and 10.2% when compared with the first quarter of 2016.²⁶ In the second quarter of 2017, variable annuity total sales declined 8% compared with the prior year's results. Sales from the first half of 2017 VA sales were \$49.1 billion --- 8% lower than the first six months of 2016 and the lowest level in sixteen years.²⁷

These declines in variable annuity sales are directly related to the DOL's decision to disfavor variable annuities by removing them from PTE 84-24 beginning on January 1, 2018, and subjecting them to the much more burdensome requirements of the BICE. Sales of fixed index annuities, which also would be removed from PTE 84-24 on January 1 if the DOL does not delay the applicability date as proposed, have also fallen in recent quarters.²⁸ By contrast, sales of fixed rate annuities, which will remain subject to PTE 84-24 after January 1, have grown. According to Todd Giesing, Director of Annuity Research for LIMRA Secure Retirement Institute, “[a] closer look at what’s driving the drop in VA sales reveals qualified [i.e., retirement account] VA sales have experienced a more significant decline than non-qualified VAs VA qualified sales were down 16 percent in the second quarter, while nonqualified sales were actually up 5 percent.”²⁹ Qualified variable annuity sales during the second quarter of 2017 accounted for 58% of retail variable annuity sales during that period, which represents a five-percentage- point decline from the same quarter last year.³⁰

Declining sales of variable annuities are not the product of consumer preferences. Variable annuities offer the opportunity to establish a regular “retirement paycheck” that helps control spending, protects financial resources from fraud and leakage, and ensures retirees have an income source other than Social Security that cannot be exhausted or outlived. A 2017 Insured Retirement Institute (“IRI”) survey found that more than 85% of consumers believe they need a source of guaranteed lifetime retirement income other than Social Security.³¹ In a recent survey conducted by IRI and Jackson, 80% of retirement savers said they would purchase an investment product providing

²⁵ Press Release, Insured Retirement Institute, IRI Issues Fourth-Quarter 2016 Sales Report (Mar. 30, 2017), <https://www.myirionline.org/newsroom/newsroom-detail-view/iri-issues-fourth-quarter-2016-annuity-salesreport> (variable annuity sales data provided by Morningstar, Inc.).

²⁶ Press Release, Insured Retirement Institute, IRI Issues First-Quarter 2017 Annuity Sales Report (June 6, 2017), <https://www.myirionline.org/newsroom/newsroom-detail-view/iri-issues-first-quarter-2017-annuity-sales-report>.

²⁷ Press Release, LIMRA Secure Retirement Institute: First Half 2017 Annuity Sales Reach Lowest Level in 16 Years (Aug. 23 2017), http://www.limra.com/Posts/PR/News_Releases/LIMRA_Secure_Retirement_Institute__First_Half_2017_Annuity_Sales_Reach_Lowest_Level_in_16_Years.aspx.

²⁸ Press Release, LIMRA Secure Retirement Institute: First Quarter 2017 Annuity Sales Decline (May 18, 2017), http://www.limra.com/Posts/PR/News_Releases/LIMRA_Secure_Retirement_Institute_First_Quarter_2017_Annuity_Sales_Decline.aspx.

²⁹ Press Release, LIMRA Secure Retirement Institute: First Half 2017 Annuity Sales Reach Lowest Level in 16 Years (Aug. 23 2017), http://www.limra.com/Posts/PR/News_Releases/LIMRA_Secure_Retirement_Institute__First_Half_2017_Annuity_Sales_Reach_Lowest_Level_in_16_Years.aspx.

³⁰ *Id.*

³¹ Press Release, Baby Boomers’ Challenging Retirement Math, Insured Retirement Institute (Apr. 3, 2017), <http://irionline.org/newsroom/newsroom-detail-view/baby-boomers-challenging-retirement-math>.



guaranteed lifetime income, even if it cost more than an alternative.³² Eighty percent of advisers participating in the IRI/Jackson survey said that annuities' guaranteed lifetime income features have had a positive impact for their clients.³³ More than half of the advisers predicted that some of their clients will run out of money during retirement if they do not buy annuities.³⁴ Yet, 60% of advisers reported that legal and regulatory barriers are "very" or "somewhat" impactful in reducing annuity purchases by retirement savers.³⁵

When drafting the newest version of PTE 84-24, the DOL weighed the benefits to retirement savers from the various types of annuities offered (fixed rate, fixed index, and variable). In the end, the DOL concluded that fixed rate annuities would be favored as the only type of annuity that will continue to be eligible for relief under PTE 84-24, and that fixed index and variable annuities "should be sold under the more stringent conditions of the [BICE.]"³⁶ The DOL favored fixed rate annuities because their payments are "predictable"³⁷ and disfavored fixed index and variable annuities because they "typically require the customer to shoulder significant investment risk and do not offer the same predictability of payments as Fixed Rate Annuity Contracts."³⁸ This rationale is mistaken and contrary to sound investment and public policy. Retirement savers who purchase and hold variable annuities with lifetime income guarantees shoulder no investment risk that will adversely impact the dependability of their income payments. A decrease in the value of their investments will not decrease the value of their guaranteed lifetime income benefit, but an increase in the value of their investments may increase the amount of their guaranteed lifetime income benefit. Under saved retirement savers need to grow their assets and variable annuities are one of the best ways to grow retirement savings through exposure to the equity markets while minimizing the risk of market downturns. The DOL rules as currently written mistakenly discourage the use of variable annuities when they ought to be encouraging them.³⁹

If the DOL does not delay the current January 1, 2018, applicability date for PTE 84-24, then all "recommendations" relating to variable annuities and all commission-based sales of variable annuities will be subject to the BICE. The BICE's requirements are exceedingly complex, and virtually every aspect of a financial institution must be reviewed and altered to comply with the BICE, including training, forms, disclosures, technology, compensation, operations, marketing, legal, compliance, and governance. Many financial institutions have taken, or are in the process of taking, action to avoid the extensive burdens of the BICE. Some have banned the use of commission-based products altogether in retirement accounts so that they can avail themselves of the so-called "level fee" exemption to the use of the best interest contract. This marked shift away

³² Press Release, New Study Shows Consumers Desire Guaranteed Lifetime Income, But They Don't Know Where to Find It, Jackson National Life Insurance Company and Insured Retirement Institute (Sept. 14, 2017), on file with author.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Amendment to and Partial Revocation of Prohibited Transaction Exemption (PTE) 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies and Investment Company Principal Underwriters, 81 Fed. Reg. 21147, 21153 (Apr. 8, 2016), <https://webapps.dol.gov/federalregister/PdfDisplay.aspx?DocId=28810>.

³⁷ 81 Fed. Reg. at 21152.

³⁸ 81 Fed. Reg. at 21153.

³⁹ See Letter No. 574 at 4-5 for two real-world illustrations of these facts.



from commission-based products is dramatically and adversely affecting the recommendation of annuities, since 99% of annuities have historically been sold on a commission basis.

The DOL's proposed delay, if adopted, would temporarily address the problem of government choosing one annuity product over others and disfavoring products that will allow retirement savers to grow their retirement savings and guarantee their lifetime incomes.⁴⁰ During the proposed 18-month delay, all annuities would be treated equally under PTE 84-24, as they have been during the transition period, and had been for more than three decades before.

In the following table, Jackson assessed the consumer value differences of a fixed rate annuity, fixed index annuity, and variable annuity with a living benefit guarantee (i.e., a guaranteed lifetime income) over various time periods by comparing the withdrawal value available to the consumer.⁴¹

Year	Fixed Annuity	Fixed Index Annuity (7 yr term)	Variable Annuity w/ Living Benefit
	Withdrawal Value	Withdrawal Value	Withdrawal Value
1	\$97,713.00	\$95,248.00	\$95,890.00
5	\$110,052.39	\$108,396.00	\$160,694.00
10	\$123,682.87	\$123,827.00	\$259,742.00
15	\$136,221.52	\$139,492.00	\$319,395.00
20	\$150,031.30	\$152,614.00	\$247,734.00
25	\$165,241.08	\$173,432.00	\$412,539.00

Given persistently low interest rates, juxtaposed with record-setting growth in stock markets, variable annuities and fixed index annuities will produce a significantly higher net investment return than fixed rate annuities that becomes firmly established in Year 5 for variable annuities and Year 15 for fixed index annuities. The massive gap between the returns on variable annuities and the other two products further illustrates the critical role that variable annuities can play in helping to redress the inadequacy of some participants, beneficiaries, and individual retirement savers, if the DOL will not disadvantage it against other products. This gap, with changes in the sales of these products since the fiduciary rules and new PTE 84-24 began to influence the market, should be an important input into the DOL's cost-benefit analysis. It helps demonstrate that participants, beneficiaries, and individual retirement savers would benefit from the proposed 18-month delay. As part of its cost-benefit analysis, and in weighing the benefits of a delay to individual retirement savers, the DOL should

⁴⁰ See Letter No. 574 at 6-7 for a description of the recent treatment of various kinds of annuities under PTE 84-24.

⁴¹ All three of the analyses in the table assume that the annuity purchaser is a 65-year-old female paying a premium of \$100,000. The fixed rate annuity analysis assumes a guaranteed minimum interest rate of 1%, a first-year interest rate of 3.95%, and a base rate of 1.95%. The variable annuity analysis assumes that the funds are invested in a balanced fund (JNL/American Funds Growth & Income Fund). The fixed index annuity analysis also assumes that the fund is linked to the Standard & Poor's 500 index, but with a cap of 3.75% on annual growth, which is common for a fixed index annuity product. Jackson would be willing to provide the DOL with the more detailed analyses supporting this table. The results included in the table are net of all fees (i.e., contract fees, which are inclusive of commission, benefit fees, and fund fees, as applicable). The withdrawal value is also net of surrender charges that are assessed in the initial 7 years (for variable annuity and fixed index annuity) and 6 years (for the fixed rate annuity) for partial withdrawals and surrenders. The colors in the chart represent the highest (green) and lowest (red) account values during each period.



consider the difference between the growth in retirement savings available to purchasers of variable annuities and fixed index annuities during the 18-month delay period compared with the growth available to fixed rate annuity purchaser during that same period net of any differences in fees and commissions over the life of an average annuity.

C. New and innovative compliance-oriented products have been slowed by undue regulatory barriers, but also have unknown effects and consequences that must be studied during an 18-month delay with a full assessment of their costs and benefits.

The fiduciary rules have also encouraged some market changes that are too new for the DOL, the industry, and retirement savers to understand their meaning and effects. For example, in response to the fiduciary rules, retirement product manufacturers are in the process of innovating new products. As a leader in annuity sales in the United States, Jackson offers an excellent example.

Jackson introduced its first fee based variable annuity in 2016. This month, Jackson will introduce a next generation of its fee based variable annuity called Perspective Advisory II. The objective of Perspective Advisory II is increased transparency and better alignment with non-annuity fee based product offerings. Like other non-annuity fee based products, Perspective Advisory II includes no up-front or trailing sales charge, has no withdrawal charge fees or schedule, and utilizes Class I (Institutional) share funds that do not include 12b-1 fees.

The DOL's proposed 18-month delay would provide the DOL, the SEC, and the NAIC time to assess the regulatory barriers to innovation that are hindering the development and distribution of fee-based annuities and to develop and implement strategies for removing those barriers. For example, the Proposed Delay states that the DOL is considering proposing "in the near future a new and more streamlined class exemption built in large part on recent innovations in the financial services industry."⁴² Jackson strongly encourages the DOL to proceed with this new proposed PTE, and urges the DOL to consider the benefits of including innovative and compliance-focused annuity products, including fee-based annuities, in this new streamlined PTE along with the benefits of a more broadly inclusive PTE 84-24 that would provide equal treatment to all annuity products. Regardless of the approach the DOL, the SEC, and the NAIC adopt, the proposed 18-month delay is critical to allowing this collaborative regulatory effort to proceed.

Beyond the problem of regulatory harmonization, there is a timing problem associated with the distribution of innovative compliance-focused products. Even if innovative products can be manufactured by January 1, 2018, they are new to distributors, advisers, and retirement savers. An education period will be necessary to explain how these products operate, whether they will succeed in helping retirement savers to secure guaranteed lifetime incomes, which types of retirement savers might find them to be suitable products that serve their best interests, how they might fit in a diversified retirement investment portfolio, and how compensation associated with the products will be structured, among other issues. More time, made possible by an 18-month delay in the January 1 applicability date, will increase the likelihood of success of these products. Further, the DOL and the industry do not and, at this stage, cannot know what effect these products will have on consumer choice, leakage, and retirement savings adequacy. These innovations need time to mature and their effects to develop. As with any responsible experiment, the proper approach is for the DOL to pause until it fully understands and has responded to the fiduciary rules' deeply disruptive interventions in retirement advice and products markets.

⁴² 82 Fed. Reg. at 41371.



IV. Retirement Investment Advice and Products Have Multiple Regulators Who Need An Extended Delay of the Applicability Date to Properly Collaborate and Harmonize Regulatory and Enforcement Approaches.

As the Proposed PTEs state, on June 1, 2017, the SEC re-commenced its review of the federal securities laws' fiduciary standard with publication of Chairman Jay Clayton's "Public Comments from Retail Investors and Other Interested Parties on Standards of Conduct for Investment Advisers and Broker-Dealers."⁴³ Jackson believes that the SEC and the DOL should work cooperatively to develop a functional and efficient best interests standard that applies to both qualified and non-qualified investments. Adoption of the proposed delay will allow the SEC an opportunity to gather input and evidence and to develop and commence a regulatory strategy that is consonant with the DOL's efforts.

Jackson also strongly encourages the DOL to cooperate with the NAIC during the period of any delay of the applicability date. The Proposed PTEs made no mention of the NAIC or the state insurance commissioners despite the immense role state insurance laws play in the regulation of annuity products and their distribution. For this reason, the NAIC is a mandatory partner for the DOL as it reconsiders and reshapes fiduciary rules that govern annuity products and their distribution to retirement savers.

Like the SEC, it is apparent that the NAIC is willing to engage fully in this project. In February 2017, the NAIC's Life Insurance and Annuities Committee established a new Annuity Suitability Working Group to determine whether the NAIC's Suitability in Annuity Transactions Model Regulation should be updated in response to the fiduciary rules and associated developments in the insurance industry. The DOL should use the opportunity presented by any delay it may adopt to cooperate fully with this Working Group and the NAIC more generally. Senior leaders of the DOL's Employee Benefits Security Administration already have communicated with the Working Group.

At a minimum, comity among federal agencies and respect for our federalist system requires the DOL to give the SEC and the NAIC an opportunity to develop and promulgate new regulatory and enforcement strategies working closely with the DOL. Further, harmony between the fiduciary standards under ERISA, the federal securities laws, and state insurance laws will reduce the confusion and costs across the industry to the benefit of participants, beneficiaries, and individual retirement savers. Enforcement of consistent fiduciary standards by the SEC, FINRA, the DOL, and the states' insurance commissioners will promote compliance across the industry that will, in turn, benefit participants, beneficiaries, and individual retirement savers. For these reasons, the DOL should delay the January 1 applicability for 18 months to give the SEC and the NAIC additional time, but a firm deadline, to advance their examinations of their regulatory roles with respect to investment advice.

With respect to the closely related issue of the need for an 18-month delay to allow the DOL to produce and finalize guidance regarding a host of legal issues arising under the fiduciary rules, and the importance of the DOL demonstrating an understanding and proposing strategies to remedy the

⁴³ Jay Clayton, Chairman, Sec. and Exch. Comm'n, Public Statement: Public Comments from Retail Investors and Other Interested Parties on Standards of Conduct for Investment Advisers and Broker-Dealers (June 1, 2017), <https://www.sec.gov/news/public-statement/statement-chairman-clayton-2017-05-31>.



fiduciary rules' consequences, Jackson refers the DOL to Jackson's July 21, 2017, comment letter in response to your Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions.⁴⁴

V. Conclusion

For these reasons, a delay of the January 1, 2018, applicability date for 18 months will benefit participants, beneficiaries, and individual retirement savers, as well as the providers of retirement advice and retirement products, other regulators, and the DOL. Jackson urges the DOL to finalize an unqualified 18-month delay for the PTEs.

Sincerely,

James R. Sopha
President

⁴⁴ Letter No. 256 at 8-9.