February 15, 2019

The Honorable Doug Ommen
Commissioner
Iowa Insurance Division
Chair, NAIC Life Insurance and Annuities (A) Committee
Via e-mail to Ms. Jolie Matthews (jmatthews@naic.org)

Re: Comments on Proposed Revisions to the
<u>Suitability in Annuity Transactions Model Regulation</u>

Dear Commissioner Ommen:

The undersigned insurance carriers thank the National Association of Insurance Commissioners ("NAIC") for the opportunity to comment on the November 19, 2018, Suitability in Annuity Transactions Model Regulation Exposure Draft (the "Model Regulation"). A brief profile of each of the undersigned is attached as Exhibit A.

We support the enhancement of the standards that apply to recommendations of traditional annuities[1] by a broker, agent, or insurance producer whose recommendation is not subject to a fiduciary standard of care. We have joined to write and submit this letter, however, to urge the NAIC to amend the safe harbor in Section 6.J. of the Model Regulation to include recommendations of a "Fee-Based Annuity" by a "Regulated Fiduciary."

Adopting the proposed amendment to the safe harbor is sensible policy. It does not sacrifice consumer protection. Indeed, as described below, Regulated Fiduciaries are subject to standards of conduct, disclosure, and supervisory requirements that exceed those in the Model Regulation.

<u>Proposed Amendment</u>

We propose that the safe harbor in Section 6.J. of the Model Regulation be amended as follows:

> Sales (i) made in compliance with FINRA rules pertaining to suitability and supervision of annuity transactions; or (ii) of a Fee-Based Annuity by a Regulated Fiduciary in compliance with the laws and regulations applicable to such Regulated Fiduciary, shall satisfy the requirements under this regulation….

We also propose that the following definitions be added to Section 5:

---

[1] For purposes of this letter, "traditional annuities" are fixed, fixed index, or variable annuities that are characterized by either of the following:

- They include a sales charge or commission expense; and/or
- They include a surrender charge.

> "Fee-Based Annuity" means an Annuity that has no surrender period or surrender charge, does not include in the premium or any other term of the contract any sales charge, commission, or fee for any level of distribution, and the fiduciary or agent of the customer in the purchase of the annuity does not receive and retain any sales incentives in connection with the sale of the annuity.
>
> "Regulated Fiduciary" means an entity, and a person acting as an associated or affiliated person of an entity, registered, regulated, and acting (1) as an investment adviser under Section 203 of the Investment Advisers Act of 1940 ("Advisers Act") or a state securities commission (or agency or office performing like functions), and (2) a bank as that term is defined in Section 202(a)(2) of the Advisers Act.

Under our proposal, the safe harbor is available only when a recommendation of a Fee-Based Annuity is made by a Regulated Fiduciary, i.e., an individual registered, regulated, and acting as a representative of an investment adviser or bank that is subject to standards of conduct, supervisory requirements, and regulatory oversight (in addition to the oversight provided by state insurance departments) that meet or exceed those proposed in the Model Regulation. (*Please see Exhibit 2 for a description of some of the regulatory requirements for investment advisers and banks that apply in addition to the requirements in the Model Regulation.*) Thus, the safe harbor enables representatives of certain investment advisers and banks to utilize Fee-Based Annuities consistent with the well-developed policies and procedures that they use when recommending other investment solutions, without having to additionally comply with the Model Regulation.

By its operation, the safe harbor would <u>not</u> be available if the recommendation fails to comply with, or is not subject to, the requirements of the Advisers Act and federal banking laws. In such instances, all the requirements of the Model Regulation must be satisfied.

<u>Review of Rationale for the Proposed Amendment</u>

Separate and apart from the Model Regulation, recommendations of Fee-Based Annuities by Regulated Fiduciaries are subject to extensive state and federal licensing, regulation, and oversight. Regulated Fiduciaries must put their clients' interest first and act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent expert, acting in a like capacity and familiar with such matters, would use. In addition, if the safe harbor is amended, state insurance departments will retain their ability to investigate and enforce the consumer protection provisions within their insurance codes, which generally prohibit the use of any fraudulent, deceptive, or manipulative device in connection with the sale of insurance, as part of their oversight of fee-based annuity transactions. States will also retain the ability to investigate and enforce their securities anti-fraud statutes that govern the sale of variable annuities insofar as they regulate variable annuities as securities, as most states do. So, amending the safe harbor does <u>not</u> mean that recommendations of Fee-Based Annuities by Regulated

Fiduciaries will go unregulated. To the contrary, the fiduciaries will be subject to higher standards than those in the Model Regulation.

The Model Regulation (and comparable FINRA regulations) were originally adopted to address potential conflicts of interest presented by the up-front commission structure associated with most traditional, commission-based annuities and to ensure the suitability of products that may have multi-year surrender charge periods. Those potential conflicts and product features do not exist when a Regulated Fiduciary offers a Fee-Based Annuity. The Regulated Fiduciary receives no sales compensation, and the consumer may surrender the Fee-Based Annuity at any time without penalty. A Regulated Fiduciary has no more incentive to recommend a fee-based annuity than any another investment product, including a mutual fund or ETF. Thus, the potential conflicts and features of traditional, commission-based annuities that the Model Regulation is intended to address are not present when a Regulated Fiduciary recommends a Fee-Based Annuity.

Finally, and most importantly, Fee-Based Annuities offer insured protection against market and longevity risk -- protections no other investment solution offers. At a time when more Americans are reaching retirement age than at any point in history[2], and nearly two-thirds of Americans between the ages of 20 and 70 fear running out of money in retirement more than they fear death[3], policymakers, including state insurance commissioners, should seek to preserve access to Fee-Based Annuities from Regulated Fiduciaries on a level regulatory playing field with other fee-based investments offered by fiduciaries. Imposing the requirements of the Model Regulation in the absence of a consumer protection or other reason to do so will serve to deter Regulated Fiduciaries from offering Fee-Based Annuities when they may be in consumers' best interest, thereby harming consumers.

Conclusion

The insurance and financial advisory industry is attempting to move in the direction long urged by consumers, consumer advocates, and policy makers by offering insurance solutions free of conflicts and liquidity restrictions and whose sale will be subject to the highest fiduciary standards of care and loyalty. It would be ironic, and extremely detrimental to the retirement savings marketplace in this country, if this attempted evolution is squelched by the continued imposition of unnecessary, prescriptive regulation that was designed for products with very

[2] Each day since the beginning of 2011, roughly 10,000 Americans have reached age sixty-five ... and as many or more will continue to do so each day until the end of 2029. Pew Research Center, *Baby Boomers Retire*, (Dec. 29, 2010), http://www.pewresearch.org/facttank/2010/12/29/baby-boomers-retire/.

[3] Allianz, *Finally Feeling Better About Retirement, Optimistic Baby Boomers Offer Lessons for Younger Generations*, (Sept. 25, 2017), https://www.allianzlife.com/about/news-and-events/news-releases/Generations-Ahead-Study-2017.

different characteristics, which discourage fiduciary advisors from offering protected lifetime income solutions.

The undersigned therefore urge the NAIC to amend the safe harbor in Section 6.J of the Model Regulation to include recommendations of a Fee-Based Annuity by a Regulated Fiduciary.

Thank you for the opportunity to share our views. We hope this letter is helpful to the NAIC and are happy to answer any questions you have or to provide additional information.

Very truly yours,

Jackson National Life Insurance Company

Andrew J. Bowden
Senior Vice President and General Counsel

AXA Equitable Life Insurance Company

Dave S. Hattem
Senior Executive Director,
Secretary and General Counsel

Brighthouse Financial

Conor Murphy
Chief Operating Officer

EXHIBIT A

Jackson National Life Insurance Company

Jackson National Life Insurance Company (Jackson) is the largest provider of individual annuities in the United States since 2012.[4] Jackson and its U.S. affiliates manage more than $200 billion in fixed and variable annuities for over 1.5 million investors. 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.

AXA Equitable Life Insurance Company

AXA is the brand name of AXA Equitable Financial Services, I,LC and its family of companies. AXA companies offer financial protection and wealth management and are premier providers of advice, retirement strategies, employee benefits, and life insurance. AXA's primary life insurance company, AXA Equitable Life Insurance Company was founded in 1859 and is among the largest life insurance and retirement savings companies in the United States, with nearly 2.5 million client households nationwide.

Brighthouse Financial, Inc.

Brighthouse Financial, Inc. (Brighthouse Financial) (Nasdaq: BHF) is on a mission to help people achieve financial security. As one of the largest providers of annuities and life insurance in the U.S., Brighthouse specializes in products designed to help people protect what they have earned and ensure it lasts. Learn more at brighthousefinancial.com.

---

[4] *See* LIMRA Secure Retirement Institute, US Individual Annuity Sales Survey, 2012, http://www.limra.com/uploadedFiles/limracom/Posts/PR/Data_Bank/_PDF/AnnuityCompanyRankings-Q4-2012.pdf; LIMRA Secure Retirement Institute, US Individual Annuity Sales Survey, 2013, http://www.limra.com/uploadedFiles/limra.com/LIMRA_Root/Posts/PR/Data_Bank/_PDF/Annuity-Company-Rankings-2013-Q4.pdf; LIMRA Secure Retirement Institute, US Individual Annuity Sales Survey, 2014, http://www.limra.com/uploadedFiles/limra.com/LIMRA_Root/Posts/PR/Data_Bank/_PDF/2014_year-end_AnnuityCompanyRankings.pdf; LIMRA Secure Retirement Institute, US Individual Annuity Sales Survey, 2015, http://www.limra.com/uploadedFiles/limra.com/LIMRA_Root/Posts/PR/_Media/PDFs/2015-Top-20-Rankings.pdf; LIMRA Secure Retirement Institute, US Individual Annuity Sales Survey, 2016, http://www.limra.com/Posts/PR/Data_Bank/_PDF/2016-Q4-Annuity-Company-Rankings.aspx.

EXHIBIT B - Description of Some of the Regulatory Requirements
<u>for Investment Advisers and Banks</u>

1. Regulated Fiduciaries are subject to enforceable fiduciary duties.

    a. *Investment Advisers.* Under Section 206(1) and (2) of the Advisers Act, which is applicable to an investment adviser regardless of SEC or state registration, an investment adviser is prohibited from engaging in fraudulent or deceptive practices, and is subject to fiduciary duties, when dealing with its clients.[5] The Supreme Court has interpreted Section 206(1) and (2) as establishing federal fiduciary duties for an investment adviser.[6] As a fiduciary, an investment adviser is subject to duties of loyalty and care, which generally require it to act in the best interest of its clients, not subordinate the clients' interest to its own without full and fair disclosure and informed consent, and provide suitable investment advice. The SEC and the states have supplemented the fiduciary duties by requiring an adviser to deliver brochures and brochure supplements (i.e., Form ADV Parts 2A and 2B) disclosing information about its business, fees and compensation, disciplinary history, and material conflicts of interest, as well as adopting other rules prohibiting certain acts and practices.

    b. *Banks.* Like investment advisers, national and state-chartered banks are subject to fiduciary obligations established by applicable law, which generally refers to applicable state or federal law governing a bank's fiduciary relationships (e.g., state trust law), the terms of any instrument governing a fiduciary relationship, or any court order pertaining to the relationship.[7] These obligations include duties of loyalty and care, pursuant to which banks must invest and manage client assets in the client's or applicable trust beneficiaries' best interests, deal fairly and disclose all material facts in connection with any transaction, and exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property.[8] In addition to the fiduciary obligations imposed by state law, the Office

---

[5] Section 206(1) and (2) of the Advisers Act makes it unlawful for an adviser "to employ any device, scheme, or artifice to defraud any client or prospective client" or to "engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client." Most state securities laws similarly prohibit an investment adviser from engaging in fraudulent or deceptive practices. In addition, investment advisers can face liability for violating other provisions of the federal securities laws (e.g., Section 17 of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder) or breaching state common law fiduciary duties.

[6] *See SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191–92 (1963).

[7] *See, e.g.*, 12 C.F.R. § 9.2(b) (defining "applicable law" to which a national bank is subject to mean the law of a state or other jurisdiction governing a national bank's fiduciary relationships, any applicable federal law governing those relationships, the terms of the instrument governing a fiduciary relationship, or any court order pertaining to the relationship).

[8] *See* RESTATEMENT (THIRD) OF TRUSTS § 77 (2005) ("(1) The trustee has a duty to administer the trust as a prudent person would, in light of the purposes, terms, and other circumstances of the trust. (2) The duty of prudence requires the exercise of reasonable care, skill, and caution. (3) If the trustee possesses, or procured appointment by purporting to possess, special facilities or greater skill than that of a person of ordinary prudence, the trustee has a duty to use such facilities or skill."); *id.* § 78 ("(1) Except as otherwise provided in the terms of the trust, a trustee has a duty to

of the Comptroller of the Currency ("OCC"), the Board of Governors of the Federal Reserve System ("Federal Reserve Board"), the Federal Deposit Insurance Corporation ("FDIC"), and state banking regulators have adopted regulations or issued supervisory guidance governing the fiduciary activities of the banks subject to their supervision.[9]

2. Regulated Fiduciaries are required to maintain an organizational supervisory structure designed to ensure compliance with legal obligations.

    a. *Investment Advisers*. The SEC and most states require investment advisers to adopt policies and procedures reasonably designed to ensure compliance with applicable law, including fiduciary obligations. Rule 206(4)-7 under the Advisers Act requires an SEC-registered investment adviser to adopt and implement written policies and procedures reasonably designed to prevent violation of the Advisers Act and rules adopted by the SEC, to review those policies and procedures no less frequently than annually, and to designate a chief compliance officer responsible for administering the policies and procedures. States have adopted rules, similar to Rule 206(4)-7, requiring investment advisers registered in the states to adopt and implement policies and procedures.

    b. *Banks*. The OCC has published extensive supervisory guidance to national banks engaged in fiduciary activities through a series of booklets in the Comptroller's Handbook that are intended to guide bank activities.[10] This guidance includes, among other requirements, that a national bank must adopt policies and procedures adequate to maintain its fiduciary activities in compliance with applicable law, comply with consumer protection regulations for the sale of

---

administer the trust solely in the interest of the beneficiaries, or solely in furtherance of its charitable purpose. (2) Except in discrete circumstances, the trustee is strictly prohibited from engaging in transactions that involve self-dealing or that otherwise involve or create a conflict between the trustee's fiduciary duties and personal interests. (3) Whether acting in a fiduciary or personal capacity, a trustee has a duty in dealing with a beneficiary to deal fairly and to communicate to the beneficiary all material facts the trustee knows or should know in connection with the matter.").

[9] *See, e.g.*, 12 C.F.R. § 9.5 (requiring national banks to "adopt and follow written policies and procedures adequate to maintain its fiduciary activities in compliance with applicable law"); 12 C.F.R. § 9.11 (requiring national banks to "invest funds of a fiduciary account in a manner consistent with applicable law"); OCC INVESTMENT MANAGEMENT SERVICES HANDBOOK, 137; Examination of Fiduciary Activities, SR 01-5 (SUP), Division of Banking Supervision and Regulation, Board of Governors of the Federal Reserve System (Feb. 27, 2001); Trust Examination Manual, FDIC.

[10] *See, e.g.*, OCC RETAIL NONDEPOSIT INVESTMENT PRODUCTS HANDBOOK; OCC INSURANCE ACTIVITIES HANDBOOK; OCC PERSONAL FIDUCIARY ACTIVITIES HANDBOOK; OCC INVESTMENT MANAGEMENT SERVICES HANDBOOK; OCC ASSET MANAGEMENT HANDBOOK.

insurance, and adhere to various sales practice-related considerations.[11] The Federal Reserve Board and FDIC have similarly issued extensive supervisory guidance for banks engaged in fiduciary activities. Similarly, state laws substantively regulate fiduciary activities of state-charted institutions and substantively require such institutions to abide by high fiduciary standards of care and loyalty.[12]

3. <u>Regulated Fiduciaries are subject to ongoing oversight by state and/or federal regulators.</u>

   a. *Investment Advisers*. An investment adviser's fiduciary duties are enforceable by both the SEC and the states, regardless of registration. While registration of investment advisers is bifurcated between the SEC and states, both the SEC and the states have authority to investigate and bring enforcement actions against investment advisers for fraud or deceit regardless of registration.[13] For example, the SEC has brought enforcement actions against investment advisers that were registered with one or more states,[14] or that were not registered at all.[15]

   b. *Banks*. As referenced above, each type of bank is further subject to regulatory oversight and examination by federal regulators and state attorneys general, including in connection with the bank's general authority to recommend and sell Fee-Based Annuities. For example, federally chartered national banks are subject to supervision by the OCC; state-chartered banks that are members of the Federal Reserve System are supervised by both state banking authorities and the Federal Reserve Board; and state-chartered banks that are not Federal Reserve System members are supervised by both state banking authorities and the FDIC. Banks are also subject to routine examinations to assess the adequacy of their conflicts management practices and internal control systems (including, among other things, the control environment, risk assessment systems, control activities,

---

[11] *See generally* 12 C.F.R. § 9.5; 12 C.F.R. pt. 14; OCC RETAIL NONDEPOSIT INVESTMENT PRODUCTS HANDBOOK, at 64-67.

[12] *See, e.g.*, CAL. FIN. CODE § 1560 (2012) (stating the legislature's intent that the regulation of fiduciary activities in California conform to OCC Part 9); IOWA CODE, CHAPTER 633A – IOWA TRUST CODE (2014).

[13] *See* Investment Advisers Act of 1940 § 203A(b)(2) ("Nothing in this subsection shall prohibit the securities commission (or any agency or office performing like functions) of any State from investigating and bringing enforcement actions with respect to fraud or deceit against an investment adviser or person associated with an investment adviser.").

[14] *See In re James William Fuller*, Investment Advisers Act Release No. 1842 (Oct. 4, 1999); *In re Robert Radano*, Investment Advisers Act Release No. 2750 (June 30, 2008); *SEC v. Aaron Donald Vallett and A.D. Vallett & Co., LLC*, Litigation Release No. 21557 (June 16, 2010).

[15] *See In re Six Financial Information USA Inc.*, Investment Advisers Act Release No. 4780 (Sept. 28, 2017).

accounting and information processes, communication processes, and self-assessment and monitoring systems).