ACLI
Financial Security for Life

December 13, 2022

Amy DeBisschop
Division of Regulations, Legislation, and Interpretation, Wage and Hour Division (WHD),
U. S. Department of Labor
200 Constitution Avenue, NW, Room S-3502, Washington, DC 20210

RIN 1235-AA43
Re: 29 CFR Parts 780, 788, and 795
Employee or Independent Contractor Classification Under the Fair Labor Standards Act

Dear Ms. DeBisschop,

On behalf of the American Council of Life Insurers (ACLI), we offer these comments in response to the Department of Labor's (DOL or Department) proposed rulemaking (Proposed Rule) regarding employee or independent contractor classification under the Fair Labor Standards Act (FLSA).

Background & Interest of Life Insurance Companies

ACLI has extensively commented on the DOL's past regulatory actions related to independent contractor classification issues because independently contracted insurance agents are a vital component of the value proposition Life Insurers deliver to the nation's economy.[1] Their contributions to the communities they serve have helped our members pay out nearly the same amount of benefits to individuals per day as Social Security and invest $6.9 trillion in the U.S. economy. We incorporate by reference our past comments into the record.[2]

[1] There are an estimated 704,100 independent agents that sell life products in the United States. These independent agents are responsible for generating approximately 1,142,900 jobs indirectly. The 1.8 million combined agents and indirect jobs account for about 70% of the total 2.7 million direct and indirect life jobs in the United States; ; *See also*, Eisenach, Jeffrey et. al., The Role of Independent Contractors in the Finance and Insurance Sectors (2022), *available at* "https://www.nera.com/publications/archive/case-project-experience/the-role-of-independent-contractors-in-the-finance-and-insurance.htm

[2] *See, e.g.,* ACLI Comments on Proposed Rulemaking on Independent Contractor Status Under the Fair Labor Standards Act, https://www.regulations.gov/comment/WHD-2020-0007-1621 , *October 26, 2020*

The public, our members' policy holders, and the other stakeholders we serve have long benefited from our industry's diverse distribution models, including sales made through independent contractors. Most insurance companies in the United States have for decades used an independent contractor model that expands job opportunities, products, services and benefits to millions of Americans, while at the same time providing important opportunities to the independent contractor insurance agents. The agents that, overwhelmingly, choose to sell and service insurance products as independent contractors do so by contracting with our insurance company members or their affiliated general agents.[3] Other insurance companies, through a separate organization or channel, choose to sell and service products through common law employees and some through on-line and other direct means that do not require an insurance sales intermediary. Customers, policy holders and the general public benefit significantly from having this diversity, which ensures that independent insurance agents can sell the products of multiple insurance companies and make recommendations to clients based on their knowledge of the clients' unique needs and the products offered by these various companies, and not dictated by the real or perceived need to sell one company's products or services. In short, more Americans are financially secure because independent contractors exist and thrive within our industry.

Two other unique aspects of the insurance industry warrant mention here. First, insurance agents and independent financial advisors have historically (for nearly a century) been independent contractors and not employees for purposes of determining the applicability of federal and state wage and benefit laws. The Internal Revenue Code even contains a provision creating a special status for full-time, independent contractor life insurance and annuity salespersons, through which qualifying agents can participate in health and welfare and retirement plans typically reserved for employees, report income and deduct business expenses on a Schedule C and have the company with which they contract pay FICA taxes on their behalf. Relying on that special status afforded by Congress and the IRS to full-time *independent contractor* life insurance and annuity salespersons under I.R.C. § 3121(d)(3)(B), a number of firms primarily or solely engage these independent agents to distribute their life and annuity products. To the extent that the Department is concerned about ensuring that workers have access to health and welfare and retirement plans that are typically inaccessible to contractors, independent contractor agents in the insurance industry *already have that access* and have for decades. If insurance agents were no longer consistently held to be independent contractors for FLSA purposes, the resulting uncertainty may push firms to abandon independent contractor business models in favor of common law employee models, which would negatively impact agents by removing their eligibility for the tax and other benefits that Congress deliberately bestowed on these *independent contractors*. Moreover, study after study has shown that having insurance companies involved in the withholding and payment of FICA taxes for these independent contractors benefits the tax base.

Second, our members' operations are heavily regulated and primarily overseen by federal securities and state insurance regulators. Each state has its own set of company and agent licensing requirements, product filing rules, market conduct exams, and laws and regulations to ensure insurer solvency and protect consumers. Companies must meet risk-based capital standards, abide by investment guidelines and submit to regular on-site financial and market conduct examinations. Insurance professionals throughout the industry must be licensed by state insurance departments, appointed by the insurance companies for which they do business and, if engaged in transactions involving securities, must be a registered representative of a broker-dealer. While having to comply

[3] It is indisputable that both the agents and the Companies with which they affiliate mutually intend an independent contractor relationship. There should be some deference to the contractual intent of the parties, which is not addressed in the Proposed Rule.

with all of these externally created and imposed rules and regulations, these professionals simultaneously want to continue to own and operate their own small businesses and assume the risks and rewards of doing so. They often purchase and maintain their own offices, purchase their own insurance, hire staff and other employees, pay employment taxes, market and otherwise invest in their communities and purchase workers' compensation insurance for their employees.

Balancing these realities, despite the substantial, required external regulation, licensed insurance agents subject to this regulatory oversight have, for nearly a century, been uniformly held to be independent contractors and not employees for purposes of determining the applicability of federal (ERISA and EE01 reporting requirements) and state wage and benefit provisions. This treatment has significantly benefitted the consumer public. Specifically, many insurance agents are primarily engaged in sales activities, often selling products of multiple insurance companies, pursuant to separate contracts and appointments with those often-competing companies. They are not required to sell the products of only one company. Thus, these licensed producers are not subject to the direction and control characteristic of an employer/employee relationship and enjoy the opportunity for profit or loss based on their exercise of initiative and management of the investment they make in their own businesses. Having to comply with externally created government regulations should not be deemed to diminish that independence and should, at most, be a neutral factor in the evaluation of the status of any financial professional in the insurance and financial services industries.

We want to stress the importance of ensuring that a final regulation and any Department rulemaking continues to fully recognize the independent contractor status of insurance agents and certain financial services professionals. It would be enormously economically disruptive to the local businesses and preferred livelihoods of these individuals – not to mention the insurance industry and the customers it serves – if the Department's guidance were to suggest that (i) externally created, regulatorily-mandated compliance oversight is probative of whether the company exercises employer-type control, or (ii) that an agent's lack of involvement in price setting (which, as explained below, is *impermissible* in the insurance context) weighs in favor of employment status, or (iii) the fact that insurance agents affiliate with insurance companies (as they are required by law to do) undercuts their independent contractor status.

Accordingly, we submit these comments in the hope that the Department will take into account the unique framework within which insurance companies and insurance agents are required to operate and avoid issuing any guidance that would lump this unique industry in with others, or unnecessarily disrupt the independent contractor business models used for decades by insurers and agents throughout the industry.

General Comments Concerning the Proposed Rule

ACLI supports the Department's overarching goal of ensuring interested persons have the necessary clarity to make proper determinations of an individual's employment status. However, current law provides such clarity; whereas, the Proposed Rule would, at best, result in confusion and, at worst, result in a biased outcome toward employee status in the insurance and broader financial services industries.

Specifically, the Department's interpretation of certain of the economic realities factors in the Proposed Rule is likely to result in numerous unintended consequences for the insurance industry and is inconsistent with the bulk of existing case law. As detailed below, we strongly urge that the Department modify the Proposed Rule to better reflect the well-developed body of common law

addressing the employee/independent contractor question *in the insurance industry* and the unique regulatory and legal constraints and requirements imposed on insurers and insurance producers.

Recommendations

Factor 4 – Nature and Degree of Control

Compliance with Government Mandated Oversight: Compliance with Externally Imposed Legal or Regulatory Obligations Is Not and Should Not Be Determinative of Control or Economic Dependence

ACLI is very concerned with the formulation of the "control" analysis in the Proposed Rule. While we agree that the degree of control exercised by a putative employer may be a relevant factor, the interpretation in the Proposed Rule suggesting that "complying with legal obligations… may be indicative of control" ignores the practical realities of the insurance industry and the overwhelming weight of the applicable case law. It also would place at risk the careful balance that the courts and legislatures have fashioned in confirming the importance and viability of independent contractor models while ensuring regulatory compliance to protect the public.

State insurance departments, FINRA and the SEC have long required insurers and their broker-dealer affiliates to maintain certain "supervisory" policies and practices and perform compliance oversight over their affiliated agents.[4] FINRA requires, expects, and regularly examines, whether companies develop and maintain adequate regulatory "supervision" programs, and imposes fines and other consequences where "supervision" is lacking. *See* FINRA Rule 3110 (requiring each member to establish and implement written supervisory procedures applicable to its affiliated representatives, including policies and procedures for reviewing advertisements, written correspondence and internal communications, and compliance with FINRA rules and securities laws).

But this "supervision" is not management of day-to-day activities as occurs in an employment setting. It has nothing to do with when or whether an individual chooses to work. It has nothing to do with the individuals or entities an agent chooses to engage as possible customers. Instead, in the insurance industry, the "supervision" relates solely to ensuring compliance with externally created and imposed government regulation of sales practices. As such, despite its existence this regulatory oversight it has long been the standard for insurance agents to operate as independent contractors, running their own insurance businesses and selling the products of the multiple insurers with which they are appointed and/or contracted. *See e.g.*, *Murray v. Principal Fin. Grp., Inc.*, 613 F.3d 943, 944-45 (9th Cir. 2010) ("We, along with virtually every other Circuit to consider similar issues, have held that insurance agents are independent contractors and not employees for purposes of various federal employment statutes [including the ADEA]."). Insurers and financial professionals have created and run their businesses in reliance on the independent contractor model, and the contractor

[4] These laws and regulations are developed by numerous regulators that are charged with protecting consumers of financial products and services. *See, e.g.,* FINRA, About FINRA, www.finra.org/about (last visited December 7, 2022) ("[T]o protect investors and ensure the market's integrity, FINRA is a government-authorized not-for-profit organization that oversees U.S. broker-dealers"); FINRA Rule 3110; NASD Rule 3010 (requiring mandatory supervision and review of transactions and correspondence); FINRA Rule 3270 (requiring disclosure of registered representative outside business activities to member firm and member firm to evaluate the propose activity to determine whether it should be treated as an outside securities activity); FINRA Rule 2210 (setting requirements for communications with the public).

status of the affiliated agents has been repeatedly and consistently upheld in various contexts by numerous courts across the nation.[5]

Insurers have navigated this highly regulated landscape and operated with independent contractor models for decades, all the while complying with legal and regulatory requirements, including maintaining the required supervisory policies and procedures. Issuing guidance suggesting that, regardless of the context or industry, a company's compliance with legal obligations to supervise its associated persons constitutes employer-type control would place insurers in the unenviable position of undermining their independent contractor business models or violating their legal and regulatory obligations.

In addition to the courts, legislatures and administrative agencies have also consistently recognized that insurance companies may operate within the regulatory environment they have been dealt – including by maintaining detailed "supervision" policies applicable to agents to protect the public and the insurer – while operating under an independent contractor business model. They recognize that maintaining such compliance policies for affiliated insurance agents is not evidence of employment status.

For example, at the federal level, Congress added language to the Internal Revenue Code via the 1997 Taxpayer Relief Act to clarify that "supervision for compliance with securities laws cannot be interpreted as control for the purpose of an employment relationship." Conference Report to Accompany H.R. 2014, Taxpayer Relief Act of 1997, Rpt, 105-220 at 457, 105th Congress (July 30, 1997) at: https://www.congress.gov/105/crpt/hrpt220/CRPT105hrpt220.pdf) (emphasis added). In doing so, Congress acknowledged the unique nature of insurance and financial services industries – where firms depend upon independent contractor business models while regulators simultaneously force them to exercise regulatory supervision of the agents with which they contract.

State legislatures and agencies have made similar acknowledgments. For example, in exempting insurance agents and insurance companies licensed by the state from its ABC Test, California acknowledged the highly-regulated nature of the industry and the fact that insurance agents are regularly engaged as independent contractors while subject to regulatorily-required supervision. *See* Cal. Labor Code §§2750.3(b)(1). Similarly, in the unemployment context, New York State

[5] *Murray v. Principal Fin. Grp., Inc., 613 F.3d 943, 944-45 (9th Cir. 2010)*; *Wortham v. Am. Fam. Ins. Grp.*, 385 F.3d 1139, 1140-41 (8th Cir. 2004); *Barnhart v. N.Y. Life Ins.,* 141 F.3d 1310 (9th Cir. 1998); *Deal v. State Farm Cty. Mut. Ins.*, 5 F.3d 117 (5th Cir. 1993*); Weary v. Cochran & Northwestern Mut. Life Ins.*, 377 F.3d 522 (6th Cir. 2004) ("this Court has repeatedly held that insurance agents are independent contractors, rather than employees, in a variety of contexts."); *Moore v. Am. Fam. Mut. Ins.*, 936 F.2d 575 (7th Cir. 1991); *Hennighan v. Insphere Ins. Solutions, Inc.*, 38 F. Supp. 3d 1083 (N.D. Cal. 2014); *EEOC v. Catholic Knights Ins.*, 915 F. Supp. 25 (N.D. Ill. 1996); *Dixon v. Burman*, 593 F. Supp. 6 (N.D. Ind. 1983); *Santangelo v. N.Y. Life Ins.*, 2014 WL 3896323 (D. Mass. Aug. 7, 2014), *aff'd on other grounds*, 785 F.3d 65 (1st Cir. 2015); *Walfish v. Northwestern Mut. Life Ins. Co.*, 2019 WL 1987013, *7-8 (D.N.J. May 6, 2019); *Anyan v. N.Y. Life Ins.*, 192 F. Supp. 2d 228 (S.D.N.Y. 2002), aff'd 68 F. App'x 260 (2d Cir. 2003); *Ruggiero v. Am. United Life Ins.*, 137 F.Supp.3d 104 (D. Mass. 2015); *Walker v. Bankers Life & Cas.*, 2008 WL 2883614 (N.D. Ill. Jul. 28, 2008); *Desimone v. Allstate Ins.,* 2000 WL 1811385 (N.D. Cal. Nov. 7, 2000); *Taylor v. Waddell & Reed Inc.*, 2013 WL 435907 (S.D. Cal. Feb. 1, 2013), *appeal dismissed*, No. 12-55339 (9th Cir. Apr. 11, 2013); *Mehtani v. N.Y. Life Ins.*, 145 A.D.2d 90 (1st Dep't 1989), app. den., 74 N.Y.2d 835 (1989); *Lockett v. Allstate Ins.*, 364 F. Supp. 2d 1368 (M.D. Ga. Apr. 8, 2005);; *Rose v. Northwestern Mut. Ins.*, 220 F.Supp.3d 363 (E.D.N.Y. 2016); *Holden v. Northwestern Mut. Fin. Network*, 2009 WL 440937 (E.D. Wis. Feb. 23, 2009); *Sofranko v. Northwestern Mut. Life Ins.*, 2008 WL 145509 (W.D. Pa. Jan. 14, 2008); *Nixon v. Northwestern Mut. Life In*s., 58 F. Supp. 2d 1269 (D. Kan. 1999); *Northwestern Mut. Life Ins. v. Tone*, 4 A.2d 640 (Conn. 1939).

Department of Labor Guidelines specify that requiring an agent to follow regulations is a "neutral factor" that neither points to an employment or independent contractor relationship.[6]

Courts around the country have made similar observations. As the District of New Jersey reasoned in *Walfish v. Northwestern Mutual*, 2019 WL 1987013 (D.N.J. May 6, 2019), if promulgating rules to ensure regulatory compliance were sufficient to constitute an exercise of control, "any business operating in a regulated industry would necessarily no longer be able to hire workers under an independent contractor relationship unless it was willing to risk regulatory non-compliance." *Id.*; *see also Chamberlain v. Securian Fin. Grp., Inc.*, 180 F.Supp.3d 381 (W.D.N.C. 2016) (imposing regulatory and professionalism requirements over insurance agent is not control over how they render services); *Santangelo*, 2014 WL 3896323, at *9 (company does not exercise employer-type control merely by imposing rules to comply with statutory and regulatory requirements), *aff'd*, 785 F.3d 65 (1st Cir. 2015); *Taylor,* 2013 WL 435907, at *6 & n. 27 (compliance with FINRA and SEC-mandated restrictions did not suggest control over financial advisors).

The supervision and control obligations imposed on insurers and broker-dealers by FINRA and state insurance regulators are wide-ranging. For example, there are obligations around record keeping of communications that are intended to protect customers, prevent fraud and detect suspicious activities. In our view, legally mandated controls such as these should not be considered a "degree of control" that would point to a finding of employee status. Those obligations have nothing to do with the day-to-day activities of agents who operate appropriately and never run afoul of any regulatory requirements. Moreover, it would be contrary to both public policy and to the dozens of cases finding regulatory oversight is not indicative of employee status to now provide that ensuring compliance with regulatory rules and regulations is suggestive of employee status. If the DOL adopts an interpretation that complying with legal obligations, including those created and imposed entirely by regulatory agencies, may be indicative of employer-type control, that would mean that insurers place their independent contractor business models and the independent status enjoyed by their agents potentially at-risk simply by satisfying their regulatorily-mandated obligations. Such a dramatic, unwarranted shift in the FLSA landscape would disincentivize firms from enacting measures that may better protect the public and make it so financial professionals are less willing to accept supervision over their business activities for fear of risking their independent contractor status.

To further the dual goals of maintaining regulatory compliance, protecting the public (who benefits from the regulations), and to provide guidance consistent with existing precedent, the Department should recognize that following legal and regulatory requirements is not indicative of employment status. This is entirely consistent with the numerous cases finding that regulatory supervision of insurance agents is not employer-type control, as well as the cases cited in the Proposed Rule on this point. The Proposed Rule primarily cites *Scantland v. Jeffry Knight, Inc.*, 721 F.3d 1308 (11th Cir. 2013) – a case involving cable installation technicians – in support of the proposition that the reason why the company exercised control is immaterial to the issue of whether employer-type control exists.[7] However, the alleged indicia of control at issue in *Scantland* – mandatory quality

[6] *See* NYSDOL Guidelines for Determining Worker Status: Insurance Sales Industry, at https://dol.ny.gov/system/files/documents/2021/02/ia318.18.pdf.

[7] *Scantland*'s continued relevance is questionable. As the DOL itself noted, "*Scantland*'s reasoning appears to be in the minority among courts of appeals" and numerous other courts have concluded that requiring such types of compliance is not probative of an employment relationship. *See*, 86 F.R. 1183, citing *Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369, 379 (5th Cir. 2019)); *Iontchev v. AAA Cab Serv., Inc*., 685 F. App'x 548, 550 (9th Cir. 2017) (noting that the potential employer's ''disciplinary policy primarily enforced the Airport's rules and [the city's] regulations governing the [drivers'] operations and conduct'' in finding that the potential employer ''had relatively little control over the manner in which the [d]rivers performed their work'').

control measures and regulation of schedules – were *not* required by law or regulation. Rather, the company argued that they stemmed from "the nature of the business." In other words, they were best practices driven by a desire to provide excellent customer service. That type of alleged "control," even if implemented for a laudable business purpose, is entirely different than an insurer performing legally-mandated oversight activities pursuant to FINRA and insurance department regulations.[8]

By contrast, the dozens of cases holding that insurance agents – all of whom were subject to regulatory oversight by the companies with which they contracted – are independent contractors recognize that regulatorily and legal-required supervision and oversight of insurance agents is not probative of whether an employment relationship exists. *See, e.g.*, Cases cited at footnote 7.

The Proposed Rule appears to acknowledge that not all circumstances are the same when it comes to this issue – noting that the assessment of control may, "*in some cases, include consideration of control that is due to the employer's compliance with legal, safety, or quality control obligations."* We submit that the proposed rule should specifically recognize and acknowledge that certain highly regulated industries – particularly those such as insurance that require licensing – are subject to various state regulations requiring supervision by firms of their agents to oversee transactions and protections for customers. In cases involving the insurance and financial services industries, supervision and oversight based on industry regulations or legal requirements should be considered at most a neutral factor as relates to employee or independent contractor classification.

Alternatively, we suggest that the following language be inserted to confirm more clearly that control exercised by a provider for the purpose of ensuring compliance with required laws, rules and regulations does not tip the scales against independent contractor status (i.e., requiring compliance with applicable laws, regulations and rules is not an element of control):

> In determining the level of control over a worker by a service recipient, no weight shall be given to instructions from or requirements imposed by the service recipient which are imposed in order to comply with applicable rules and regulations (including tax withholding and reporting requirements) set forth by the Federal Government, any State government, or a governing body pursuant to a delegation by a Federal or State agency, including self-regulatory organizations such as FINRA.

Factor 5 - Integral Part of the Business The Integral Part of the Business Factor Should Be A Neutral Factor Where Industry Regulations Require the Association of an Insurance Agent with an Insurer Or An Advisor with a Broker Dealer

ACLI similarly views the Department's interpretation of the fifth economic realities factor – the *extent to which the work performed is an integral part of the company's business* – as highly problematic as applied in the context of the insurance industry, where agents are required by law and regulation to associate with insurance companies. Insurance agents cannot sell securities or insurance products without being licensed and registering with and/or becoming appointed by a broker or

[8] Like *Scantland*, the other cases cited in the Proposed Rule on this point do not involve legal or regulatory requirements or the insurance industry. *See, e.g.*, *Amponsah* v. *DirecTV, LLC,* 278 F. Supp. 3d 1352, 1360 (N.D. Ga. 2017) (mandatory standards for how satellite technicians performed work orders, speak to customers, dress, and the vehicles they drove "were aimed at customer satisfaction," not regulatory requirements) *Molina v. S. Fl. Express Bankserv, Inc.,* 420 F.Supp.2d 1276 (M.D. Fla. 2016) (customer requirements applicable to courier drivers).

insurance company. *See, e.g.*, FINRA Rule 1210. Likewise, the regulations require registered representative agents to register with a FINRA-member firm and obtain approval to sell securities products. See FINRA Rule 1210 ("Each person engaged in the investment banking or securities business of a member shall be registered with FINRA as a representative . . . .") ; see also, e.g., MA G.L. ch. 175, §162S ("An insurance producer shall not act as an agent of an insurer unless the insurance producer becomes an appointed agent of that insurer….").

Further, an independent contractor who wants to sell any "variable" life insurance must also pass both a state insurance exam and securities exams. FINRA Rule 1220(b); FINRA Rule 1210. He or she must be licensed to sell insurance and be separately licensed to sell securities regulated products. FINRA Rule 1210; 15 U.S.C. §§ 80b-2(a)(11), 80b-3. He or she must be appointed by an insurance company and can sell regulated products only through a registered broker-dealer. FINRA Rule 1210.

Per these regulations, independent agents and registered representatives must be affiliated with insurance companies and/or broker dealers. They cannot operate entirely on their own without regulatory compliance oversight – a dynamic that could improperly lead to the claim that they are performing services that are "integral" to the firm's business.

ACLI submits that the Department should recognize that a company complying with industry regulations related to the formation and operation of the working relationship is not evidence of control or employee status. If insurance and/or securities industry laws and regulations compelling agents and registered representatives to affiliate with licensed insurers and broker dealers were sufficient to negate independent contractor status, this factor would perpetually weigh against independent contractor status for insurance industry relationships.

We request the DOL to categorically affirm that where laws or regulations dictate that an insurance worker must be affiliated with a company in the same business (as is the case with insurance agents and registered representatives), the integral part of the business factor be viewed as at most a neutral factor.

Factor 3 – Degree of Permanence of the Work Relationship

<u>The Degree of Permanence of the Work Relationship Should Be A Neutral Factor Where Industry Regulations Require the Association with an Insurer or a Broker Dealer</u>

As discussed above, an agent is required by regulation to maintain an ongoing affiliation with an insurer/broker dealer to operate in the industry. Accordingly, agents' relationships with companies cannot be definite in duration or "project-based." Encouraging a more transient relationship could result in agents more frequently switching affiliations, which would be highly disruptive to the industry, decrease compliance consistency and increase the chance of gaps in regulatory supervision, and adversely impact the consumer.

We recommend that the Proposed Rule be modified to recognize that, where laws or regulations dictate that a worker must be affiliated with a company in the industry, as is the case in the insurance industry, the degree of permanence of the work relationship be viewed as at best a neutral factor that is indicative of neither employee nor independent contractor status.

Factor 2 – Investments by the Worker and the Employer

The Relative Investments by the Worker and the Company Should Not Be Considered

Agents elect to incur a variety of business expenses in support of their sales businesses. Their investments are capital and entrepreneurial in nature: they often purchase and maintain their own offices, purchase their own insurance, hire and supervise employees, market and otherwise invest in their communities, pay employment taxes, and purchase workers' compensation insurance for their employees. These substantial investments are solely determined by the agents based on the needs of their respective businesses.

However, the Proposed Rule vaguely states that, when assessing this factor, "the worker's investments should be considered on a relative basis with the employer's investments in its overall business." There are multiple problems with that interpretation. ACLI submits that the proportionality between the agent's individual business self-investment and the Company's overall investment in its business is not at all probative of independent contractor status. *See, e.g., Hopkins v. Cornerstone America*, 545 F.3d 338, 344 (5th Cir. 2008) (finding independent contractor status, while noting that the insurance company's investment, "including maintaining corporate offices, printing brochures and contracts, providing accounting services, and developing and underwriting insurance products—outweighs the personal investment of any one Sales Leader." Moreover, such a standard ignores that agents' investments are often substantial considering their individual financial circumstances.

Comparing the individual worker's investment to the company's investment only serves to prevent larger companies from prevailing on this factor, even though courts have recognized that the size of the company should not impact its ability to engage independent contractors. *See Karlson v. Action Process*, 860 F.3d 1089, 1096 (8th Cir. 2017) (holding that comparing the worker's investment with the potential employer's total operating expenses had little relevance because "[l]arge corporations can hire independent contractors, and small businesses can hire employees."). The investment factor should be limited to analyzing the extent to which the individual worker invests in their business – hiring staff, renting office space, purchasing insurance, spending on marketing, etc. Those facts are probative of the worker's economic dependence or independence, not the comparative investment of the company in its own separate business.

If the DOL were to give any consideration to the relative investment of the company, it would need to specify how those investments are measured. Nothing in the Proposed Rule explains whether the analysis is focused on investments that the company made in the specific worker's business (i.e., paying for the worker's staff, rent, tools or equipment) or whether the analysis focuses on the overall investment of the company in the entirety of its separate business operations (i.e., advertisements, branding, overhead for headquarters, etc.). To the extent that the DOL does not mean to consider only the company's investment in the work performed by the individual worker (rather than its broader investment in unrelated company business activities), it would help to clarify how the relative investments of the worker and the employer would be measured. Absent such guidance, this factor could be seen as perpetually weighing against independent contractor status in the context of large companies.

Finally, the Department's interpretation of the Relative Investment factor conflicts with its interpretation of the Ability to Profit or Loss Based On Managerial Skill factor. The DOL is simultaneously, and inconsistently, saying that a worker's effectiveness in managing their overhead and expenses to maximize profit suggests independent contractor status, but that a worker's failure

to invest sizeable sums to offset the company's investment suggests employment status. The profit and loss factor, focused on entrepreneurial acumen, should be given greater weight than the relative investment factor so that workers who are skilled in managing their own overhead expenses are not penalized and deemed employees simply because they are better businesspeople and need to invest less and less over time as their businesses mature.

Factor 1 – Opportunity for Profit or Loss Depending on Managerial Skill

The Ability To Control Pricing Should Not Be Considered In The Insurance Context.

This factor considers whether the worker exercises managerial skill that affects the worker's economic success or failure in performing the work. Insurance agents exercise managerial skill that directly affects their economic success or failure. They operate their independent insurance businesses, choosing which customers to solicit, what to invest in their solicitation efforts, what products to focus on and recommend and how to structure their individual business (including whether to hire staff, maintain office space, etc.). Without question, their profit or loss depends upon their own managerial skill, their ability to manage business expenses, and their effectiveness attracting clients, retaining clients, and selling insurance products. Given that**,** this factor should weigh heavily in favor of an independent contractor classification.

That said, the Proposed Rule suggests that "whether the worker determines or can meaningfully negotiate the charge or pay for the work provided" is a relevant fact in assessing this factor. However, insurance regulations, including New York Insurance Law § 4228, set strict limits on the commissions that insurers can pay to agents. Commission plans must be submitted and approved by insurance regulators, and agents are, by law, unable to negotiate or change their commission structure. In fact, the life insurance industry could not operate if each individual agent had independent discretion to set pricing for the policies or financial products that he or she sells. Taking a step back, insurance agents sell financial commitments backed by the insurer, which the insurer must honor and pay. Prices for life insurance and financial products are determined by firms based on a wide array of actuarial and financial assumptions and projections and in accordance with regulatory considerations (reserving, loss ratios, etc.).[9] This ensures that funds exist to pay the claims of insureds and that all of the premiums that are paid are not simply turned over to the agents in the form of commissions. For that reason, neither insurers nor insurance agents have unlimited discretion to adjust prices however they see fit.[10]

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[9] Insurance pricing is also subject to state anti-discrimination laws while numerous states directly regulate insurance rates for property & casualty products such as homeowners' and auto insurance.

[10] In the early 1900s, in a largely unregulated environment, a number of insurance companies unwisely sought to compete for agents and market share by paying exceedingly high commissions to agents. When one company was nearly bankrupted by these practices, a commission (known as the "Armstrong Commission") was convened to review the insurance industry and make recommendations as to how it could be regulated to protect the public from insurance company failures. Mayerson New York Allen Mayerson, A New Look at the New York Expense Limitation Law, 8 Transactions of Society of Actuaries 258-59 (1956). One result of the work of the Armstrong Commission was the enactment of a New York Insurance Law (now N.Y. Ins. Law § 4228) which imposes substantial limits on the expenses insurance companies can incur in connection with the sale of life insurance products and annuities, both on an aggregate company-wide basis and with respect to the compensation of individual agents. Id. at 259. As a result, § 4228, which protects tens of millions of insurance policy holders, regulates all insurance companies "doing business in this [New York] state." Ins. Law N.Y. Ins. Law §§ 4228(a) and (h).

Consistent with the requirement of financial solvency, insurance agents and advisors have no say or influence over the price of the products that they sell on behalf of firms, and they are prohibited by law from "rebating" any of the commissions earned from those sales. That effectively bars them from getting involved in, or setting, pricing. Given these central features for distributing insurance products, using an agent's capacity, or lack thereof, in setting prices would be contrary both to public policy, applicable law (*see, e.g.,* NYS Ins. Law Section 4228) and to the factors, history, and longstanding understanding of the independent contractor analysis in the insurance industry.[11] Accordingly, the Department should eliminate whether the worker can meaningfully negotiate the charge or pay for the work provided from the list of potentially relevant facts under the economic realities test.[12]

Factor 6 - Skill and Initiative

The DOL Should Provide Examples of Specialized Skills

Although the proposed regulations provide that "[t]his factor considers whether the worker uses specialized skills to perform the work and whether those skills contribute to business-like initiative," the regulations neither define the phrase "specialized skills" nor provide examples of the types of skills that could be considered to be specialized. Because the insurance industry is a highly-regulated industry that requires that agents: (1) pass specialized exams in order to become licensed; (2) must be licensed by the states and appointed by insurance companies to market and sell insurance products; and (3) must attend ongoing training and continuing education to ensure the highest standards of honesty and integrity, insurance agents should be included in the final regulations as an example of the type of worker who possesses such "specialized skills" as to suggest an independent contractor relationship.

Conclusion

Insurance agents and independent financial advisors are vital to ensuring that millions of Americans have access to important financial protection benefits. These independent professionals are deeply rooted in their communities and are best positioned to understand the needs of consumers. To issue guidance that could potentially force them into an employment relationship drastically limits not only their chosen livelihoods, but the availability of diverse products from multiple companies that the agents can provide their clients.

We have serious concerns with the formulation of the six-factor test presented in the Proposed Rule, as described above. This formulation is detrimental to agents, insurers, and consumers alike and ignores years of well-understood business practices and regulation of the business of insurance, and, in some instances, a substantial body of case law. We request that the DOL reconsider the test with a view toward understanding the benefits of current law that already provides meaningful guidance for courts, employers, and other stakeholders in the insurance and financial services industries.

[11] Lest the Department think that N.Y. Ins. Law § 4228 applies only in New York, that is not the case. It applies in every state in which an insurance company operates if that insurance company also operates in New York without doing so through a separate, stand-alone entity.

[12] To the extent that the Proposed Rule suggests control over pricing should also be considered as part of the control factor, ACLI has the same concerns.

On behalf of the ACLI member companies, thank you for your consideration of these comments. We hope our suggested changes will be fully considered, and we would be happy to answer any questions you may have.

Sincerely,

David M. Leifer
Vice President & Sr. Associate General Counsel
(202) 624-2128 t
davidleifer@acli.com

Ian Trepanier
Senior Policy Analyst
(202) 624-2118 t
iantrepanier@acli.com