IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MARKET SYNERGY GROUP, INC., Plaintiff, v. UNITED STATES DEPARTMENT OF LABOR, THOMAS E. PEREZ, in his official capacity as Secretary of the United States Department of Labor, and PHYLLIS C. BORZI, in her official capacity as Assistant Secretary of the United States Department of Labor, Defendants.	Civil Action No. 5:16-cv-04083

BRIEF *AMICI CURIAE* OF BETTER MARKETS, INC., CONSUMER FEDERATION OF AMERICA, AND AMERICANS FOR FINANCIAL REFORM IN SUPPORT OF DEFENDANTS

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IDENTITY AND INTEREST OF THE *AMICI*[1]

Better Markets, Inc. ("Better Markets") is a nonprofit, nonpartisan organization that promotes the public interest in the financial markets through comment letters, litigation, independent research, and public advocacy. It fights for reforms that create a stronger, safer financial system; promote the economic prosperity of all Americans; and protect individual investors from fraud, abuse, and conflicts of interest. Better Markets has submitted more than 175 comment letters to financial regulators, including the U.S. Department of Labor ("DOL"), advocating for strong implementation of reforms in the securities, commodities, and credit markets. It has also filed numerous amicus briefs in federal district and circuit courts defending agency rules on legal and policy grounds. *See generally* Better Markets, http://www.bettermarkets.com (including archive of comment letters and briefs).

Consumer Federation of America ("CFA") is a nonprofit association of more than 250 state, local, and national pro-consumer organizations, founded in 1968 to represent the consumer interest through research, advocacy, and education. More information about CFA's membership is available at http://consumerfed.org.membership/. For three decades, CFA has been a leading voice advocating strengthened protections for individual investors. CFA policy in this area is focused on ensuring that investors have a choice of appropriate investments and service providers, the information necessary to make informed choices, protection against fraud and abuse, and effective recourse when they are the victims of wrongdoing. CFA's advocacy for a heightened standard of care when financial professionals offer investment advice dates back to

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[1] *Amici* state that no party's counsel authored this brief in whole or in part, and further, that no party or party's counsel, and no person or entity other than *amici*, their members, or their counsel, contributed money that was intended to fund preparing or submitting this brief.

at least 2000. Key letters and documents advancing that policy goal are available at http://consumerfed.org/issues/investor-protection/investment-professionals/.

Americans for Financial Reform ("AFR") is a nonpartisan, nonprofit coalition of more than 200 consumer, investor, labor, civil rights, business, faith-based, and community groups. *See* AFR Membership List, *available at* http://ourfinancialsecurity.org/about/our-coalition/. AFR works to lay the foundation for a strong, stable, and ethical financial system—one that serves the economy and the nation as a whole. Through policy analysis, education, and outreach to our members and others, AFR seeks to build public will for substantial reform of the American financial system. AFR engages actively in policy issues relating to securities regulation and investor protections.

The *amici* have extensive expertise on the subjects of financial market regulation, investor protection, and administrative law, all topics central to this case. The *amici* are also intimately familiar with the provisions of the Rule and the exhaustive rulemaking process that DOL followed to craft it. For example, each of the *amici* filed extensive comment letters with DOL in support of the Rule. *See* DOL comment letter file on the Rule, https://www.dol.gov/ebsa/regs/cmt-1210-AB32-2.html (last visited July 29, 2016). Furthermore, each organization testified at DOL's public hearings in August of 2015. *See* DOL Conflict of Interest Proposed Rule Public Hr'g, https://www.dol.gov/ebsa/regs/1210-AB32-2-Hearing.html (last visited July 29, 2016). In addition, the *amici* are all co-founding and steering members of Save Our Retirement, a coalition of almost 100 public-interest, retirement, and labor organizations that fought for years to support the Rule. *See* Save Our Retirement, Membership List (Sept. 8, 2015), *available at* http://saveourretirement.com/2015/09/about-save-our-retirement/. This knowledge and expertise will enable the *amici* to assist this Court in resolving the legal and policy issues raised in this critically important case.

The *amici* share a strong interest in the outcome of this case for three reasons. First, they seek to defend the Rule and thereby ensure that Americans who try to save for a secure and dignified retirement are better protected from advisers' conflicts of interest that pervade much of the industry, siphoning away tens of billions of dollars every year in hard-earned savings. The Rule, even with its generous exemptions, enshrines the commonsense principle that all financial advisers who serve retirement savers must put their clients' best interest first, as Congress always intended in the Employee Retirement Income Security Act of 1974 ("ERISA") and the Internal Revenue Code ("Code"). A decision to enjoin implementation of the Rule would maintain a status quo that exacts a huge toll on retirement savers and intensifies an already serious retirement crisis in this country.

Second, the *amici* have an interest in ensuring that the plaintiff's profound misinterpretations of ERISA are firmly rejected. If those distorted readings of the law were to take hold, DOL's ability to implement and enforce ERISA's fiduciary duty would be impaired, not only as to the Rule but also as to future regulatory measures that DOL may deem necessary or appropriate to protect retirement savers.

Finally, the *amici* have an interest in defending the DOL's rulemaking process against the plaintiff's attacks predicated on the Administrative Procedure Act ("APA") and general principles of administrative law. DOL conducted one of the most thorough, thoughtful, and accommodating rulemakings in history, spanning five years, including a nearly six-month comment period and four days of public hearings. It culminated in a balanced Rule, a set of carefully crafted exemptions, a 395-page Regulatory Impact Analysis, and extensive commentary. The commentary shows that the DOL considered the appropriate factors, examined the relevant data, and offered rational explanations for the choices it made, all in accordance with applicable precedent. Moreover, contrary to the plaintiff's contention, DOL had no statutory duty to conduct yet more cost-benefit analysis, nor was DOL required to protect the incumbent distribution model for fixed-indexed annuities ("FIAs") from disruptions under the Rule and the exemptions. If the Court were to hold this extraordinary process inadequate, then future attempts by DOL and other agencies to adopt rules in the public interest will become easier targets for litigation, based fundamentally on nothing more than the regulated industry's self-serving, unfounded, and ultimately irrelevant claims of harm to their bottom line.

SUMMARY OF ARGUMENT[2]

The DOL's Regulatory Impact Analysis was exceptionally thorough. *See* Regulatory Impact Analysis for Final Rule and Exemptions ("RIA") (Apr. 2016), *available at* https://www.dol.gov/ebsa/pdf/conflict-of-interest-ria.pdf. After soliciting and receiving extensive input from industry and other stakeholders, DOL carefully considered the relevant attributes of FIAs, including the risks, conflicts of interest, and sales abuses associated with them, and it further considered the weaknesses in the state regulatory regimes to which they are already subject. In light of this analysis, DOL rationally concluded that FIAs warrant treatment under the more protective Best Interest Contract exemption ("BIC") rather than the less

[2] With respect to the statement of the nature of the matter before the Court, the statement of facts, and the statement of questions presented, *see* D. Kan. Rule 7.6(a)(1)–(3), the *amici* adopt the statements of the defendants' brief, *see* Defs.' Opp'n to Pl.'s Mot. for a Prelim. Inj. 3–31, ECF No. 25 (D. Kan. filed July 22, 2016).

protective Prohibited Transaction Exemption 84-24 ("PTE 84-24"). *See* 81 Fed. Reg. 21007, 21017 (Apr. 8, 2016). The Rule epitomizes reasoned decisionmaking.

DOL thoroughly considered the costs and benefits of the Rule and the exemptions. The plaintiff's attempts to superimpose on DOL yet further obligations to evaluate the costs and benefits of the Rule under the APA, ERISA, and *Michigan v. EPA*, 135 S. Ct. 2699 (2015), have no basis in law or logic. In addition, in designing exemptive relief for FIAs, DOL was under no obligation to ensure that its approach would be workable to the satisfaction of the FIA industry or that it would leave undisturbed the industry's preferred distribution model.

Finally, claims by the plaintiff, Market Synergy Group ("MSG"), that the Rule will have "devastating consequences" for the FIA industry are unsubstantiated and hyperbolic assertions that, even if true, could never justify the issuance of injunctive relief under the "balance of harms" or "public interest" prongs. If those predicted industry harms really were to unfold—and they will not—they would be far outweighed by the enormous benefits the Rule will confer on retirement savers and the public at large.

ARGUMENT

I. THE PLAINTIFF CANNOT SUCCEED ON THE MERITS BECAUSE DOL'S DECISION TO BRING FIAS UNDER THE BIC WAS THE PRODUCT OF REASONED DECISIONMAKING.

The central issue on the merits in this case is whether the decision to bring FIAs under the BIC "was the product of reasoned decisionmaking" under the APA, in accordance with the principles set forth in *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983). Clearly it was. As part of the rulemaking, the DOL assembled and published an extensive analysis of the annuity market, including an examination of the important distinguishing characteristics of fixed-rate annuities, FIAs, and variable annuities; the distribution of these annuity products; the conflicts of interest that exist in the annuity market; and the harms to retirement savers that can result from those conflicts. According to the RIA, "public comments and other evidence demonstrate that these products are particularly complex, beset by adviser conflicts, and vulnerable to abuse." RIA at 8. While data limitations impeded quantification of the losses that affect retirement savers, the DOL found nonetheless that there is "ample qualitative and in some cases empirical evidence that they occur and are large both in instance and on aggregate." *Id.* at 9. The RIA also examined the fragmented regulatory landscape governing FIAs, concluding that it does not provide sufficient protections for retirement savers.

In its analysis, the DOL compellingly showed that FIAs share critical features with variable annuities that make them susceptible to similar conflicts and abuses, features that are not shared by fixed-rate annuities. Furthermore, a wide range of commenters provided unequivocal feedback that, if variable annuities were subject to the more protective conditions under the BIC and FIAs were subject to the less protective conditions of PTE 84-24, there would be an incentive to shift sales to FIAs without regard to the best interests of the customer. Based on these considerations, the DOL properly determined that these products should be subject to similar treatment, and that treatment should be under the more protective conditions of the BIC. *See* RIA at 284.

The DOL's RIA and extensive accompanying commentary clearly satisfied and exceeded DOL's obligation to examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made. *See State Farm,* 463 U.S. at 43. The DOL's analysis demonstrates that it was not arbitrary and capricious for the DOL to change the treatment from the more relaxed and insufficiently protective conditions of PTE 84-24 to the more protective conditions of the BIC. In fact, FIAs are precisely the type of investment that should be subject to the more protective exemptive conditions of the BIC. Furthermore, the DOL's analysis and other available research refute the specious claims advanced throughout the plaintiff's filings that FIAs are benign financial products with a proud history of helping retirement savers achieve their goals, and that independent agents offer financial advice about these products at no expense.

Comparing and contrasting annuity products. In examining the annuity market, the DOL first analyzed the various annuity products that are marketed and sold to retirement savers, including variable, fixed-indexed, and fixed-rate annuities. The DOL compared and contrasted the different features of these annuities with regard to allocation of investment risk, fees, and guaranteed optional benefits. The DOL specifically drew parallels between variable annuities and FIAs. For example, it found that "similar to variable annuities, the returns of fixed-indexed annuities can vary widely, which results in a risk to investors." RIA at 123. It also found that insurers can transfer investment risks to FIA investors in ways that resemble the transfer of risk to variable annuity investors. *See id*. For example, variable annuities can offer hundreds of subaccounts that expose clients to market risk, typically through mutual fund performance. *See id*. Similarly, FIAs expose clients to investment risk by crediting investors' accounts based on changes in a market index, excluding dividends. They foist risk onto investors in other ways as well, through a combination of complex and obscure factors such as participation rates, interest-rate caps, and spread/margin asset fees. *See* RIA at 123–24. Worse, insurance companies generally reserve the power to unilaterally change terms and conditions to lower an FIA investor's effective return, leaving the investor with little or no recourse. These investment-oriented features differentiate FIAs from fixed-rate annuities, which provide guaranteed, specified rates of interest on premiums paid and whose terms and conditions regarding crediting criteria do not vary based on the self-interest of the insurance company.

Stakeholders' comments support the DOL's conclusion that variable annuities and FIAs share similar characteristics. For example, Allianz's comment detailed how the designs of these two products are converging. The comment described how FIAs can resemble variable annuities and how in fact Allianz Life Insurance Co. offers FIAs that blend features of variable annuities and vice versa, referring to one such product as "a variable annuity with index investment options." Comment of Allianz Life Ins. Co. of N.A. 22 (July 21, 2015), *available at* https://www.dol.gov/ebsa/pdf/1210-AB32-2-00718.pdf. Jackson National Life Insurance Co. echoed Allianz's comments describing how these product types have converged, stating, "Recent changes to the structures of fixed-indexed annuities (FIAs) and variable annuities . . . have resulted in these products becoming remarkably similar." Comment of Jackson Nat'l Life Ins. Co. 3 (Sept. 24, 2015), *available at* https://www.dol.gov/ebsa/pdf/1210-AB32-2-03083.pdf.

The shared complexity and opacity of these products fosters a dependence on professional advice, creating an environment in which conflicts of interest are more likely to thrive. The RIA cited to academic research contending that insurance "agents can inefficiently withhold information and distort consumer choices by providing misleading information or operating in their own self-interests." RIA at 155. Insurance agents may engage in this conduct without any consequences, according to these researchers, because it is exceedingly difficult for consumers to ascertain the value of insurance products even after purchase. *See id.* Based on these considerations, the DOL rightly determined that prudent and impartial advice, important to all investors, is even more crucial in safeguarding the best interests of investors in variable annuities and FIAs. *See id.* at 123, 140.

Distribution of annuity products. In further examining the annuity market, the DOL analyzed how various annuity products are distributed. It provided statistics on the recent share of annuity sales by distribution channel and product type, highlighting the range of intermediaries, including independent agents and independent marketing organizations ("IMOs"), in the annuity market and the products they typically sell. *See* RIA at 102–04. The statistics illustrate how the type of distribution channel largely dictates what products are sold, calling into question the extent to which investors' needs and circumstances determine those sales. For example, the main product sold by independent broker-dealers is the variable annuity (representing 23% of all annuity sales in the market), as compared to the fixed-rate annuity (representing 1% of all annuity sales) and the FIA (representing 3% of all annuity sales). *See id*. By contrast, the main product sold by independent agents is the FIA (representing 15% of all annuity sales), as compared to the variable annuity (representing a negligible amount of all annuity sales) and the fixed-rate annuity (representing 3% of all annuity sales). *See id*. The stark contrast between these figures makes it highly unlikely that they can be explained by differences among the consumers who seek services from these two types of advisers. The facts simply do not square with the plaintiff's claim that "independent insurance agents offer, at no expense, financial advice tailored to each customer's needs, goals, and financial resources." Pl.'s Br. 41.

In reality, an investor who seeks advice from an independent agent will in all likelihood receive a recommendation to purchase an FIA regardless of whether that product is actually in his or her best interest, just as an investor who seeks advice from a broker-dealer would likely receive a recommendation to purchase a variable annuity regardless of the merits. The sales figures are especially confounding for fixed-rate annuities. Personal-finance writers, without a financial bias toward any particular product, generally view fixed-rate annuities as offering the best deal for investors. *See*, *e.g.*, Kimberly Lankford, *Deferred Income Annuities Offer Predictability*, KIPLINGER'S RETIREMENT REPORT (Aug. 2013), *available at* http://www.kiplinger.com/article/retirement/T003-C000-S004-deferred-income-annuities-offer-predictability.html; Karen Hube, *The Best Annuities*, BARRON'S (June 20, 2015), *available at* http://www.barrons.com/articles/the-best-annuities-1434769209. Yet fixed-rate annuities are the least likely to be sold regardless of sales channel, further suggesting that retirement savers are not being sold the products that are in their best interest.

The DOL also chronicled the relatively recent changes in annuity sales and assets held within the IRA market. Its statistics show a precipitous decline in sales and market share of fixed-rate annuities, which were once dominant. They also show a recent decline in variable annuity sales, while at the same time FIA sales have hit record levels, causing the DOL to infer that the recent gains in the sales of FIAs have come at the expense of variable annuities. *See* RIA at 41, 117–18. Again, it is difficult to explain these sales trends based on consumers' needs and preferences alone. Given the central role financial professionals play in recommending annuity products, these sales trends suggest that the incentives for financial professionals to recommend FIAs and variable annuities are considerably stronger than the incentives to recommend fixed-rate annuities. These factors necessitate stronger safeguards to ensure retirement savers who purchase FIAs and variable annuities are adequately protected and that any inappropriate sales of these products are eliminated.

The DOL's analysis of these annuity-market dynamics demonstrates a keen awareness and careful consideration of the range of entities that distribute various annuity products and the factors that affect annuity distribution. The DOL took this information into account when promulgating the final Rule, including in determining what exemptive treatment various annuity products and distributors should receive.

Conflicts of Interest. The RIA further described how commissions in the annuity market create a misaligned incentive system and result in conflicts of interest between financial professionals and consumers. The RIA highlighted that, because many financial professionals are compensated entirely or primarily by commissions resulting from annuity sales, this creates an incentive to aggressively maximize sales of the highest-commission products. *See id.* at 132, 134.

The RIA collected examples of such conflicts, including a financial professional who was rewarded for steering customers toward insurers approaching their production goals. *See id.* at 132. Moreover, when annuities are considered within the context of the broader range of investment products, a financial professional may have an incentive to recommend an annuity over other alternatives, such as mutual funds, because annuity commissions are often substantially higher than broker-dealers' mutual-fund or securities commissions. *See id.* at 131.[3] Conflicts of interest are thus likely more pronounced in the annuity market than in the mutual-fund market. Furthermore, commissions are typically higher for selling more complex and opaque FIAs and variable annuities than simpler, more consumer-friendly fixed-rate annuities, thus increasing the incentives to recommend FIAs and variable annuities. *See, e.g.*, *How Do Annuity Commissions Get Paid to the Agent?*, ANNUITY123 (May 16, 2013), *available at* http://blog.annuity123.com/how-do-annuity-commissions-get-paid-to-the-agent/; Hersh Stern,

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[3] Jim Poolman, executive director of the Indexed Annuity Leadership Council, testified at the DOL hearing that commissions on FIAs are "6 to 8 percent, give or take." DOL Hr'g Tr. 937 (Aug. 12, 2015), *available at* https://www.dol.gov/ebsa/pdf/1210-AB32-2-HearingTranscript3.pdf.

Annuity Commissions and Fees, IMMEDIATE ANNUITIES (July 8, 2016), *available at* https://www.immediateannuities.com/annuity-commissions/; Stan Haithcock, *Debunking Conventional Annuity Wisdom*, MARKETWATCH (Apr. 1, 2014), *available at* http://www.marketwatch.com/story/debunking-conventional-annuity-wisdom-2014-04-01.

In fact, plaintiff MSG's own members create perverse incentives for selling FIAs. For example, Insurance Agency Marketing Services advertises that it provides agents the "highest commission levels in the industry." IAMServices, Annuity, http://www.iamsinc.com/annuity/ (last visited July 29, 2016). It further advertises on its "Incentives" page that top producers receive trips to the Fairmont Empress Victoria, British Columbia, and the Four Seasons at Mandalay Bay. An agent qualifies for the Four Seasons trip, for example, by selling $1,250,000 of Athene Premium between November 1, 2015 and December 31, 2016. IAMServices, Incentives, http://www.iamsinc.com/incentives/ (last visited July 29, 2016). Another MSG member, InsurMark, advertises this enticement for agents: "COLD CASH, GREAT TRIPS, JUICY PERKS." InsurMark, Rewards, http://www.insurmark.net/agentrewards/ (last visited July 29, 2016). Yet another MSG member, Magellan Financial, has advertised trips to the Hard Rock Resort and Casino, Punta Cana, in the Dominican Republic, and free iPads for meeting certain production requirements. *See* Examples of Incentives for Annuity Brokers 3–4, Sen. Warren, *available at* http://www.warren.senate.gov/files/documents/AnnuityExamples.pdf.

Plaintiff MSG's members offer incentives that are typical in the IMO industry. *See, e.g.*, LifePro, Elite Hawaii Trip, https://www.lifepro.com/Rewards/Elite-Hawaii-Trip#57714-sales-quality--quantity-standards (last visited July 29, 2016); Capmar Ins. Servs., Reward Yourself with Our Capmar Incentive Program!, http://www.capmar.com/rewards/ (last visited July 29, 2016). These incentive programs that IMOs administer exacerbate conflicts of interest, encouraging and rewarding agents for recommending annuity products that are in the agents', IMOs', and insurance companies' financial interest—not retirement savers' best interest. Nothing indicates that, through their activities or structure, IMOs adequately ensure that retirement investors receive advice that is genuinely in their best interest or that conflicts are mitigated. Given these factors, it was entirely reasonable for the DOL to conclude that FIAs should be subject to the more protective exemptive conditions under the BIC and that IMOs should not be treated as financial institutions without first demonstrating they have an adequate supervisory mechanism in place to ensure compliance with the Rule.

<u>Detrimental features associated with conflicts of interest</u>. The RIA detailed how annuities sold on commission, and specifically FIAs, are associated with other product features that are detrimental to retirement savers, including substantial surrender charges that persist for years. Surrender charges effectively lock up a saver's money and make it costly to reverse the investment decision. An SEC Investor Alert, for example, explains:

> You can lose money buying an equity-indexed annuity, especially if you need to cancel your annuity early. Even with a guarantee, you can still lose money if your guarantee is based on an amount that's less than the full amount of your purchase payments. In many cases, it will take several years for an equity-indexed annuity's minimum guarantee to "break even."

SEC Investor Bulletin: Indexed Annuities (Apr. 2011), *available at* https://www.sec.gov/investor/alerts/secindexedannuities.pdf.

A survey of available FIAs shows products with surrender periods as long as 16 years and surrender charges as high as 20% of premiums. *See* American Equity Bonus Gold (July 14, 2016), *available at* https://www.aiponline.net/elink/carrier/Rates/AEIRates.pdf. The existence of a product with such disadvantageous features proves that the insurance company and the agents selling it are not reliably acting in customers' best interests. Examples of FIAs with surrender periods between 10 and 14 years and surrender charges between 10% and 15% include:

- Athene Performance Elite: 15-year surrender period, surrender charge up to 15%, *see* Athene Performance Elite 15 Prod. Details 1, *available at* http://www.annuity1.com/as_palette/docs/Athene/Athene_PE_15_ProductDetails.pdf;

- Fidelity and Guaranty AccumulatorPlus14: 14-year surrender period, surrender charge as high as 14.75%, *see* Fid. & Guar. AccumulatorPlus14 4, *available at* https://www.immediateannuities.com/annuity-brochures/fidelity-guaranty-accumulatorplus-14.pdf;

- Midland National Life MNL IncomeVantage 14: 14-year surrender period, 10% surrender charge for the first five years, *see* Midland Nat'l Life Ins. Co. Annuity Brochure 17, *available at* https://www.immediateannuities.com/annuity-brochures/midland-national-incomevantage-14.pdf;

- Phoenix Personal Retirement Choice: 12-year surrender period, 15% surrender charge for the first three years, *see* Phoenix Indexed Annuity Disclosure 8, *available at* https://www.phoenixwm.phl.com/shared/eforms/getdoc.jsp?DocId=OL4931.pdf.

Indeed, market research shows that surrender fees for the ten top-selling indexed annuities averaged 11.25% in the first year, as of 2015. *See* Fid., Indexed Annuities: Look Before You Leap (July 13, 2016), *available at* https://www.fidelity.com/viewpoints/retirement/considering-indexed-annuities.

Several commentators have connected FIAs' hefty surrender charges to the lofty commissions that these products pay to encourage and reward financial professionals for selling them. *See, e.g.*, Kimberly Lankford, *The Great Annuity Rip-Off*, KIPLINGER (Jan. 2007), *available at* http://www.kiplinger.com/article/retirement/T003-C000-S002-the-great-annuity-rip-off.html; Stan Haithcock, *Confessions of an Annuity Insider*, MARKETWATCH (Apr. 29, 2014), *available at* http://www.marketwatch.com/story/confessions-of-an-indexed-annuity-insider-2014-04-29. Commissions and surrender charges are intimately intertwined:

In fact, the whole purpose of surrender charges on annuities is simply to ensure

> that when an insurance agent is paid a commission upfront, the annuity funds will remain invested long enough with the ongoing interest rate spread extracted from the investor return to allow the insurance company to recover that commission cost from the investor (or else he/she pays a surrender charge to make up the difference!).

Michael Kitces, *The Myth Of "Free" No-Expense Fixed Or Equity Indexed Annuities*, KITCES.COM (Mar. 18, 2015), *available at* https://www.kitces.com/blog/the-myth-of-free-no-expense-fixed-or-equity-indexed-annuities-interest-rate-spread-is-still-a-cost/. This structure explains why annuities sold by an intermediary who receives a commission more often include surrender charges than annuities sold directly to customers. *See* RIA at 131. It also shows the connection between conflicted incentives and the resulting harm to retirement savers.

The plaintiff erroneously claims that "[t]he only significant difference between fixed indexed annuities and fixed declared rate annuities is the method for computing interest earnings credited to the policies," and further argues that this is "a distinction having no bearing on the Department's articulated concerns regarding 'conflicted' compensation." Pl.s' Br. 6, 29. These claims are false. In reality, an FIA's crediting mechanism creates a conflict of interest that can ultimately harm investors. Because insurance companies can manipulate how much is credited to an investor's account through the imposition of caps, participation rates, and spreads, and can unilaterally change terms and conditions to lower an investor's effective return, *see supra*, insurance companies can impose indirect and opaque costs that ultimately reduce investors' effective returns and transfer investment risk to the investor. But that ability to manipulate and vary effective returns and transfer investment risk to the investor is wholly absent with fixed-rate annuities, which provide guaranteed, specified rates of interest on premiums paid. The DOL thus adduced evidence that the conflicts associated with FIAs are more acute than with fixed-rate annuities and therefore require stronger protections for retirement savers.

Abuses. These intense conflicts of interest lead to high-pressure and abusive sales, as the RIA revealed. For example, a study by the Financial Planning Coalition on senior financial exploitation found that "over half of the [Certified Financial Planner] professional respondents . . . personally had worked with an older client who previously had been subject to unfair, deceptive or abusive practices. Of these, 76 percent reported financial exploitation that involved equity-indexed or variable annuities." RIA at 142.

There are more examples of the pervasive conflicts of interest surrounding FIAs than the DOL could possibly have chronicled. For example, in an undercover special, Dateline NBC highlighted advisers' scare tactics, such as making prospective clients think their money is unsafe in FDIC-insured accounts, downplaying huge surrender charges, and claiming that annuities never lose money. *See* Dateline NBC, Tricks of the Trade (Apr. 23, 2008), *viewable at* http://www.nbcnews.com/id/24095230/ns/dateline_nbc/t/tricks-trade/; *see also Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 138 F. Supp. 3d 1191, 1199–1215 (D. Colo. 2015) (finding Dateline broadcast to be substantially true in granting motion to dismiss defamation action).

In addition, several state regulators have expressed particular concern after observing an increase in aggressive and misleading advertising by producers and IMOs. Kansas's own Insurance Department has observed third-party marketing entities engaging in "misleading, deceptive, and/or incomplete information intended for the general public in what appear to be bait and switch sales tactics." Sandy Praeger, Kan. Comm'r of Ins., Bulletin No. 2014-1 at 1 (May 22, 2014), *available at* http://www.ksinsurance.org/department/legalissues/bulletins/2014-1.pdf. Iowa's Insurance Division observed some IMOs "aggressively promoting indexed annuities in potentially deceptive manners." Nick Gerhart, Iowa Ins. Comm'r, Bulletin No. 14-

02 at 1 (Sept. 15, 2014), *available at* http://www.iid.state.ia.us/sites/default/files/commissioners_bulletins/2014/09/15/insurance_marketing_organizations_pdf_14661.pdf. And statistics compiled by the North American Securities Administrators Association ("NASAA") indicate that annuities are involved in a third of all cases in which senior citizens were subjected to securities fraud or abuse. *See* Comment of NASAA (Sept. 10, 2008), *available at* http://www.nasaa.org/wp-content/uploads/2011/07/29-NASAA_Comment_Letter_on_SEC_Proposed_Rule_151A.pdf.

Poor performance. One way of understanding the true cost of FIAs is to compare the amount those products credit to an investor's account with the returns that an investor could have received elsewhere while taking comparable risks. Several studies have done just that. For example, an illustration by Fidelity shows that an investor would be considerably worse off purchasing an FIA as compared with a portfolio that is 90% invested in ten-year zero-coupon Treasuries and 10% percent invested in the S&P 500 index. *See* Fidelity, Indexed Annuities: Look Before You Leap. Starting with $100,000, the average ending balance of the Treasury/S&P 500 portfolio would be about $10,000 higher over 56 simulated rolling 10-year periods beginning with 1951-1960 and ending with 2006-2015. *See id.*

Another analysis examined the historical returns of four types of FIAs and 13 specific contracts for the period from 1957 (the beginning of the S&P 500 Index) to 2008. *See* William Reichenstein, *Financial Analysis of Equity-Indexed Annuities*, 18 FIN. SERVS. REV. 291 (2009) (FIAs underperformed the market on a risk-adjusted basis by at least 1.73% per year, with an average underperformance of about 2.9% per year), *available at* http://www.cfapubs.org/doi/full/10.2469/dig.v40.n4.21. The analysis concluded that, by virtue of contract design, FIAs will inevitably fail to match the returns available on competitive market-based assets of comparable risk.

Dr. Craig McCann of the Securities Litigation and Consulting Group has done extensive research on FIAs, which has led him to similar conclusions:

> [T]he equity-indexed annuities produce lower returns than US Treasury securities despite being illiquid and exposing investors to stock and bond market risk. This is a recurring theme in equity-indexed annuities. There is an enormous amount of complexity designed into the product but ultimately the complexity is a smoke screen designed and managed to provide investors with substantially the same miniscule returns regardless of which index option is chosen. The resulting investor returns equal the returns on a bond portfolio less a 2.5%-3.0% annual expense ratio.

Craig J. McCann, *An Economic Analysis of Equity-Indexed Annuities* (Sept. 10, 2008), *available at* http://slcg.com/pdf/workingpapers/EIA%20White%20Paper.pdf.

<u>Inadequate state insurance regulation</u>. The RIA also included a close examination of the regulatory landscape affecting the distribution of annuities. For example, it reviewed the lack of uniformity with regard to state insurance suitability regulations. *See* RIA at 39, 42, 111. Even in states that have adopted the Model Suitability Regulation of the National Association of Insurance Commissioners, the regulations do not adequately protect retirement investors against sales-driven conflicts of interest. State insurance suitability rules resemble FINRA's suitability rules, which apply to broker-dealers' securities sales. There is compelling evidence that such standards provide retirement investors with inadequate protections from sales-driven conflicts of interest in both contexts. *See id.* at 36–42, 111, 138, 140, 285. Suitability rules allow the sale of the least-suitable among a wide range of "suitable" investments and function more like a "do not defraud" standard than a best-interest standard. This helps to explain why products with highly disadvantageous features can be sold as "suitable" even though they clearly are not in the investor's best interest.

Given these inadequacies in the state regulatory framework and the problematic features, sales practices, and compensation incentives associated with FIAs described above, the DOL acted reasonably in concluding that FIAs should be subject to the BIC, incorporating the conditions it deemed necessary to protect investors from conflicts of interest arising from continued commission-based sales. Accordingly, the plaintiff has not and cannot demonstrate a likelihood of success on the merits, so its motion for preliminary injunction should be denied.

II. THE DOL GAVE FAIR NOTICE THAT IT WAS CONSIDERING INCLUDING FIAS UNDER THE BIC.

DOL's notice of proposed rulemaking ("NPRM"), the extensive comments, and the hearing testimony conclusively demonstrate that all stakeholders had ample notice that DOL was evaluating which PTE would be most appropriate for FIAs—the BIC or PTE 84-24. Stakeholders had ample opportunity to comment, and members of the adviser community, including many in the FIA industry, took full advantage of that opportunity. The DOL's notice expressly requested comment on different possible treatment of different types of annuities under the Rule, showing that the final Rule was the "logical outgrowth" of the proposed rule. *See U.S. Telecom Ass'n v. FCC*, No. 15-1063, 2016 WL 3251234, *10 (D.C. Cir. June 14, 2016) (holding that request for comment on an issue or other evidence that the agency is contemplating a change satisfies the logical outgrowth test); see also Defs.' Br. 32–33 (collecting authorities). That is all the law requires.

In its NPRM, the DOL expressly requested comment on which annuities, including FIAs (classified as non-securities), should be subject to the BIC as opposed to PTE 84-24. *See* 80 Fed. Reg. 21960, 21975 (Apr. 20, 2015). As one industry commenter clearly understood, "[t]he [p]roposal specifically request[ed] comment on *which exemption, the BIC Exemption or a revised PTE 84-24, should apply* to different types of annuity products." Comment of Allianz Life Ins. Co. 8 (emphasis added). DOL's express request for comment on the question at issue—standing alone—defeats any challenge to the adequacy of notice.

The comments received by DOL on the issue further demonstrate that this notice was sufficient to apprise stakeholders of contemplated changes to the proposal. Several industry commenters specifically, and repeatedly, supported the initial proposal to exempt FIAs under PTE 84-24, and they were equally explicit in opposing the application of the BIC to FIAs:

- The Indexed Annuity Leadership Council ("IALC") explicitly commented on the issue several times, stating that "we believe that the conditions of the Best Interest Contract Exemption (BICE) would be problematic for fixed annuities and would not offer any meaningful additional protections for sales of fixed annuities to IRA holders." Comment of IALC 7 (July 20, 2015), *available at* https://www.dol.gov/ebsa/pdf/1210-AB32-2-00774.pdf. The letter offered detailed objections against subjecting FIAs to the BIC, and IALC re-iterated its positions at the public hearing and in a subsequent comment letter dedicated entirely to the issue. *See* DOL Hr'g Tr. 904 (Aug. 12, 2015); Comment of IALC 4 (Sept. 24, 2015) ("For the reasons discussed below, the new proposed Best Interest Contract Exemption (BICE) would not work in the context of any fixed annuity product, including an FIA."), *available at* https://www.dol.gov/ebsa/pdf/1210-AB32-2-03124.pdf.

- The National Association for Fixed Annuities ("NAFA") submitted two comment letters, both arguing "that PTE 84-24 is the appropriate regulatory exemption for fixed annuities," including FIAs. Comment of NAFA 20 (July 21, 2015), *available at* https://www.dol.gov/ebsa/pdf/1210-AB32-2-00762.pdf; *see also* Comment of NAFA 1–6 (Sept. 24, 2015), *available at* https://www.dol.gov/ebsa/pdf/1210-AB32-2-03111.pdf.

Several commenters argued that the BIC should apply to no annuities, including FIAs:

- The National Association of Insurance and Financial Advisors ("NAIFA") argued repeatedly that "PTE 84-24 should apply to all annuity products sold to all types of investors." Comment of NAIFA 21–24 (July 21, 2015), *available at* https://www.dol.gov/ebsa/pdf/1210-AB32-2-00635.pdf; Comment of NAIFA 5 (Sept. 24, 2015) ("Then, among advisors and financial institutions who have to comply with a PTE, the playing field will be further divided between those who have to comply with the far more onerous BIC exemption and those who can rely on a less burdensome PTE (e.g., PTE 84-24)"), *available at* https://www.dol.gov/ebsa/pdf/1210-AB32-2-03065.pdf.

- The Committee of Annuity Insurers argued that "***PTE 84-24 should continue to be the exemption applicable to all annuities and other insurance products***." Comment of Comm. of Annuity Insurers 16 (July 21, 2015) (bold and italic emphasis in original), *available at* https://www.dol.gov/ebsa/pdf/1210-AB32-2-00650.pdf.

- Allianz Life Insurance argued that no annuities should be subject to the BIC, in part to ensure a level playing field. Comment of Allianz Life Ins. at 17–22.

Other commenters disagreed, arguing—ultimately successfully—for a broader application of the BIC, including its application to FIAs:

- Professor Ron Rhoades specifically "recommend[ed] that the BIC exemption apply to the sale of equity indexed annuities . . . ." Comment of Ron A. Rhoades 56 (July 20, 2015), *available at* https://www.dol.gov/ebsa/pdf/1210-AB32-2-00596.pdf.

- Professor Mercer Bullard argued that all annuities—whether fixed, indexed, or variable—should be regulated under the BIC because the products raise similar concerns with conflicted compensation and different standards would permit regulatory arbitrage. See Comment of Mercer Bullard 1–7 (Sept. 24, 2015), *available at* https://www.dol.gov/ebsa/pdf/1210-AB32-2-03090.pdf.

- A law school clinic argued that "compensation stemming from all annuities . . . should be permitted only through the Best Interest Contract Exemption." Comment of Univ. of Miami School of L. Inv'r Rights Clinic 4 (July 20, 2015), *available at* https://www.dol.gov/ebsa/pdf/1210-AB32-2-00577.pdf.

This robust debate on whether FIAs should be subject to the BIC further demonstrates that the final Rule was the "logical outgrowth" of the proposed rule and therefore that the DOL's notice was more than sufficient under the APA.

III. DOL FULFILLED ITS DUTY TO EVALUATE THE ECONOMIC IMPACT OF THE RULE, AND IT WAS NOT REQUIRED TO PROTECT THE INDUSTRY'S FAVORED DISTRIBUTION MODEL.

The plaintiff's case is premised largely on dire predictions that the Rule will cause major upheavals in the distribution network for FIAs, now dominated by IMOs and independent agents, supposedly putting thousands of insurance agents and small businesses out of work and depriving investors of the financial-planning advice they need. The plaintiff uses this grim scenario as the basis for its two-pronged legal argument that the DOL failed adequately to consider the impact of the Rule and that it failed to ensure that the BIC was "administratively feasible" for those IMOs and independent agents. See Pl.'s Br. at 32–37.

Neither argument has merit. First, as a threshold matter, the Rule will not have the ruinous impact that the plaintiff predicts, as shown in Section IV. The FIA industry will adapt, and IMOs and independent insurance agents will continue to do business. Nevertheless, DOL did thoroughly consider the economic impact of its Rule on the insurance industry, specifically IMOs and independent agents. Neither ERISA, nor the Code, nor *Michigan v. EPA*, nor any other source of law required the DOL to produce an analysis that was any more precise. Moreover, DOL had no obligation to ensure that the Rule was workable for the regulated industry or to guarantee that a particular business model—especially one fraught with conflicts of interest—would remain economically viable. DOL's Rule generously accommodates members of the FIA industry with an exemption from the rigorous fiduciary standard that Congress mandated in ERISA. But DOL was duty-bound to impose conditions on the exemption that it deemed necessary to protect retirement savers, as Congress also mandated in ERISA. In this case, adequate protection required applying the conditions of the BIC to FIAs, even if that were to entail significant changes in the FIA industry.

A. DOL thoroughly considered the costs and benefits of the Rule.

DOL more than satisfied its duty to consider the economic impact of the Rule. As reflected in the RIA, it thoroughly analyzed the costs and benefits of the Rule, both qualitatively, and where possible, quantitatively.[4] And it specifically evaluated the impact of the Rule and the BIC on IMOs and independent agents that recommend and sell FIAs. *See, e.g.*,

[4] The DOL was hampered by a lack of data in some areas, including, for example, data regarding independent agents. *See* RIA at 238 & n.519. The plaintiff acknowledges that "[i]ndependent and IMO sources did not seek to provide such data . . . ." Pl.'s Br. at 32 n.8.

RIA at 38, 101–05, 131, 144, 238 & n.519, 254, 310–11. This fully satisfied DOL's obligation to engage in reasoned decisionmaking and to consider the "relevant factors" and the "important aspect[s] of the problem." *Friends of the Bow v. Thompson*, 124 F.3d 1210, 1215 (10th Cir. 1997).[5]

The plaintiff's insistence that the DOL should have gone to even more extreme lengths in evaluating the costs and benefits of the Rule exemplifies the tactic that has become standard among industry opponents of financial regulation: inventing a duty to conduct cost-benefit analysis found nowhere in enforceable law and then attacking the agency's effort—no matter how thorough—as deficient. The plaintiff's effort here falls far short.

Its reliance on the APA for this proposition is unavailing, because the APA's arbitrary-and-capricious standard does not require an agency to engage in cost-benefit analysis. *See Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 670–71 (D.C. Cir. 2011). Furthermore, "[t]he APA imposes no general obligation on agencies to *produce* empirical evidence." *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009) (emphasis added). The

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[5] The RIA also amply fulfilled DOL's obligation to consider costs and benefits under applicable executive orders. This is plain from the thoroughness of the RIA itself, and it was confirmed in the executive branch internal review process. The proposed and final versions of the Rule were each thoroughly reviewed and approved for release by the Office of Information and Regulatory Affairs, the agency within the Office of Management and Budget responsible for ensuring that agencies comply with the principles set forth in executive orders, including cost-benefit provisions. *See, e.g.*, Conclusion of EO 12866 Regulatory Review, Office of Information and Regulatory Affairs, http://www.reginfo.gov/public/do/eoDetails?rrid=125915 (last visited July 15, 2016). But those executive orders are not enforceable in court, which explains the plaintiff's struggle to saddle the DOL with additional layers of obligation found nowhere in the law. *See* Executive Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993) (providing that "This Executive Order is intended only to improve the internal management of the Federal Government and *does not create any right or benefit, substantive or procedural, enforceable at law or in equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person*.") (emphasis added).

APA's core requirement is that an agency must "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' " *State Farm*, 463 U.S. at 43. The extraordinarily thorough and well-supported RIA removes any doubt that DOL satisfied its obligations under the APA.

Nor does ERISA support the plaintiff's argument. An agency's duty to conduct cost-benefit analysis is not to be inferred lightly or without a clear indication from Congress in an agency's organic statute. *See Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 510–12 & n.30 (1981) ("Congress uses specific language when intending that an agency engage in cost-benefit analysis."); *see also Inv. Co. Inst. v. CFTC*, 720 F.3d 370, 379 (D.C. Cir. 2013) ("Where Congress has required 'rigorous, quantitative economic analysis,' it has made that requirement clear in the agency's statute, but it imposed no such requirement here."). In ERISA,[6] Congress chose *not* to impose a cost-benefit analysis obligation on DOL.[7] DOL more than fulfilled any

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[6] ERISA's broad delegation does not require cost-benefit analysis. *See* 29 U.S.C. § 1135. To the extent that DOL is exercising the authority transferred from the Secretary of the Treasury to develop exemptions under § 4975 of the Code, Treasury is also under no statutory obligation to conduct cost-benefit analysis. *See* 26 U.S.C. § 7805(a).

[7] *Michigan v. EPA*, invoked by the plaintiff, *see* Pl.'s Br. at 33, is inapplicable. In *Michigan*, the Supreme Court narrowly held that the EPA was required to consider costs when determining whether to regulate power plant emissions, by virtue of specific statutory provisions and studies focused on cost. The Court was also heavily swayed by the fact that the EPA was dealing with a specific mandate to determine whether to regulate at all: "Agencies have long treated cost as a centrally relevant factor when deciding *whether to regulate*." *Michigan*, 135 S. Ct. at 2707 (emphasis added). By contrast, here, Congress has already made the threshold decision that retirement assets must be protected against conflicts of interest under the strongest possible standards of loyalty and prudence because they are so critical to the "well-being and security of millions of employees and their dependents," 29 U.S.C. § 1001(a). Finally, even if *Michigan* were somehow read to require DOL to consider the costs and benefits of its Rule, DOL more than fulfilled that task in the RIA. The obligation to "consider" factors confers wide discretion upon an agency. *Cf. Sec'y of Agric. v. Cent. Roig Refining Co.*, 338 U.S. 604, 611 (1950). The Court in *Michigan* affirmed this principle. *See Michigan*, 135 S. Ct. at 2707 (it is for EPA to decide how to account for cost, and assigning monetary values is not required).

legal duty it had to consider the costs and benefits of the Rule and the BIC.

B. The DOL accommodated the FIA industry to the extent it could, but it was under no duty to safeguard the industry from changes—even significant ones—under the Rule.

The plaintiff's real grievance is not that DOL failed to consider the costs and benefits of the Rule—by any measure, it clearly did—but that DOL failed to guarantee the continued viability and profitability of the FIA distribution model, which relies so heavily on IMOs and independent insurance agents. This argument is wrong, and it upends DOL's fundamental role. In fact, DOL has no duty to ensure that a particular business model survives regulation if that business model violates ERISA and cannot meet the exemptive conditions that are necessary for the protection of retirement savers. On the contrary, DOL has an affirmative duty to implement Congress's statutory mandates by eliminating such business practices or conditioning them on compliance with requisite safeguards. In this case, as clearly set forth in ERISA, Congress has determined that the conflicts of interest driving the sale of FIAs by independent agents are impermissible, and it has furthermore determined that any exemptions from that prohibition must be conditioned on measures that protect plans, participants, and beneficiaries. *See* 26 U.S.C. § 4975(c)(2); 29 U.S.C. § 1108.

In reality, the DOL made very generous accommodations to the FIA industry, primarily by allowing commission-based compensation in the sale of FIAs to continue notwithstanding ERISA's prohibitions. But it went further and adjusted the BIC to minimize its impact on industry practices while still protecting retirement savers from the conflicts of interest that eat away at their savings. *See* RIA at 328 (concluding that "the final rule and exemptions will mitigate adviser conflicts . . . while avoiding greater than necessary disruption of existing business practices."). The DOL was not required to go to yet further extremes to protect the FIA industry.

The plaintiff's basis for demanding even more from the DOL is the statutory requirement that PTEs adopted by DOL be "administratively feasible." Pl.'s Br. at 32; 29 U.S.C. § 1108; 26 U.S.C. § 4975(c)(2). But this provision has nothing to do with whether a PTE is too burdensome, costly, or otherwise feasible for a regulated industry; instead, it refers to the agency's capacity to administer the PTE. *See, e.g.*, Bill Schmidheiser, *ERISA's Prohibited Transaction Restrictions: Policies and Problems*, 4 J. CORP. L. 377, 405 (1978) (" 'Administratively feasible' means feasible for the Departments to administer, given the Departments' resources and the nature of the transaction sought to be exempted."); *see also* Proposed Exemptions from Certain Prohibited Transaction Restrictions, 80 Fed. Reg. 44,702, 44,708 (proposed Jul. 27, 2015) ("The Applicant represents that the requested exemption is administratively feasible because the Sale is a one-time transaction for cash, which will not require continuous or future monitoring by the Department."). Unless DOL has the ability effectively to administer a PTE, it cannot ensure compliance with its terms and therefore cannot protect plans, participants, and beneficiaries as Congress intended.

Canons of statutory construction support this reading. Two of the three mandatory conditions that Congress placed on PTEs were designed to protect retirement plans and their participants and beneficiaries. It would be anomalous to read the third criterion, "administratively feasible," as a sudden expression of Congressional concern about the burdens an exemption might impose on the regulated industry. Such a reading would offend "[t]he commonsense canon of *noscitur a sociis*—which counsels that a word is given more precise content by the neighboring words with which it is associated." *United States v. Williams*, 553 U.S. 285, 294 (2008).

In reality, applying the conditions of the BIC to FIAs will prove to be eminently workable, as shown in Section IV. But even if the Rule means dramatic changes for conflict-ridden FIA business practices, such a decision was well within the scope of DOL's authority—indeed its mandate. *See* 26 U.S.C. § 4975(c)(2); 29 U.S.C. § 1108.

IV. INJUNCTIVE RELIEF CANNOT BE JUSTIFIED UNDER THE BALANCE-OF-EQUITIES OR PUBLIC-INTEREST PRONGS.

The RIA presents an overwhelming case against the issuance of injunctive relief. "Because a preliminary injunction is an extraordinary remedy, the right to relief must be clear and unequivocal." *Petrella v. Brownback*, 787 F.3d 1242, 1256 (10th Cir. 2015) (internal quotation marks omitted); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (four-pronged test). The plaintiff cannot meet that burden as to any of the four requirements for a preliminary injunction. Of greatest concern to the *amici*, the plaintiff cannot satisfy the balance-of-equities test. The harm to retirement savers resulting from an injunction against the Rule would far outweigh any harm to the plaintiff's constituents resulting from implementation of the Rule—even if the dire predictions were actually valid. In fact, however, those claims are grossly exaggerated, and under much more realistic scenarios, the balance of harms weighs even more heavily against injunctive relief. In either event, the public interest would suffer a terrible blow, since the Rule is necessary not only to protect savers but also to help mitigate the retirement crisis that is already unfolding in this country.

The plaintiff offers up a classic series of histrionic predictions, based on a handful of affidavits, warning that the Rule "poses an imminent and truly existential threat" to the plaintiff and the marketing channels it supports. Pl.'s Br. at 22; *see also id.* at 19 (certain IMOs will be "completely disenfranchised" and face "immediate peril"); *id.* at 20 ("many thousands of agents . . . will be at risk of losing their hard-earned careers"). These dire predictions from the plaintiff and its affiants are wholly unpersuasive. Their estimates of harm are not credible on their face, as they epitomize biased and unsubstantiated projections, lacking the authority of independent experts. In fact, the plaintiff's claims are precisely the type of sky-is-falling exaggerations that the financial-services industry has launched against new regulation for almost a century.

The pattern has been repeated with each new effort to strengthen financial regulation, including the federal securities laws, deposit insurance, the Glass-Steagall Act, mutual-fund reform, and others. *See, e.g.*, Marcus Baram, *The Bankers Who Cried Wolf: Wall Street's History of Hyperbole About Regulation*, THE HUFFINGTON POST (June 21, 2011, 6:56 PM), http://www.huffingtonpost.com/2011/06/21/wall-street-history-hyperbole-regulation_n_881775.html; Paul G. Mahoney, *The Origins of the Blue-Sky Laws: A Test of Competing Hypotheses*, 46 J.L. & ECON. 229, 249 (2003) ("In the 5 years following adoption of [the most stringent type of blue sky law statute], bank profits increased on average by nearly 5 percentage points . . ."); *see also* John Heltman, *Mortgage Rules Not Chilling Market as Feared, Data Shows*, AMERICAN BANKER (Sept. 24, 2015), *available at* http://www.americanbanker.com/news/law-regulation/mortgage-rules-not-chilling-market-as-feared-data-shows-1076899-1.html (belying claims that new mortgage underwriting standards would "cripple credit availability" and spur banks to "quit the business entirely"); Comment of Fin. Planning Coal., (July 5, 2013) (application of fiduciary standard to fee-based accounts did not cause predicted "parade of horribles"), *available at* https://www.sec.gov/comments/4-606/4606-3126.pdf. In each case, the imagined harm from regulation failed to materialize. The plaintiff's claims must be similarly discounted.

Its grim predictions already ring hollow. Mounting evidence indicates that the FIA industry will readily adapt to the Rule. Insurance companies and IMOs are fashioning solutions to the challenges of operating under the BIC, including the development of new distribution networks. This evidence comes from multiple sources, including plaintiff MSG's own members, other IMOs, and experts who follow trends in the FIA markets.[8]

Published reports show that MSG's members have begun preparing to comply with the rule, with confidence that they will be able to "navigate through any changes":

- MSG member Advisors Excel stated that it has "worked with consultants and law firms to begin preparing the necessary systems to ensure complete compliance with the rule, including evaluation of mechanisms to establish Advisors Excel as a financial institution. Rest assured, AE will be prepared for implementation well in advance of critical dates and will ensure the financial professionals who work with us are provided with all the tools necessary to comply with the rule." Advisors Excel, DOL Fiduciary Rule (July 2016), *available at* http://aeleadstheway.com/wp-content/uploads/2016/07/DOL-Fiduciary-STANCE-2.pdf.

- MSG member CreativeOne has "formed an internal, 10-person task force of actuaries, attorneys, compliance, executives, sales and marketing representatives ready to navigate [advisors] through any changes." Chris Conroy, *CreativeOne: Your Resource for Proposed DOL Fiduciary Changes*, CREATIVEEDGE MAG (Apr. 5, 2016), *available at* http://www.creativeedgemag.com/creativeone-resource-proposed-dol-fiduciary-changes/.

- MSG member Fig Marketing "has established a DOL steering committee and is advancing technology and sales and compliance processes to create efficiencies to assist our institutional and retail advisor clients to be successful in any industry environment." Nick Voelker, *The Fiduciary Rule Battle Moves to the Courts!*, FIG

[8] The plaintiff also goes through the perfunctory formality of claiming that retirement savers will suffer if FIAs become more difficult to purchase or if independent agents can no longer dispense financial planning advice to their clients. *See, e.g.*, Pl.'s Br. at 33. This deserves no weight. First, the plaintiff does not establish that FIAs and independent agents are actually beneficial for investors, and in fact, the record in this case points in just the opposite direction. The RIA convincingly establishes that FIAs have many problematic features, and that conflicts of interest—which are especially powerful among independent agents selling FIAs—result in bad financial advice and bad outcomes for investors. Moreover, the plaintiff's sky-is-falling predictions have little bearing on investors. MSG's concern is that the Rule will force independent agents out of business and encourage the evolution of alternative distribution channels that *can* meet investor needs—such as they are—for FIAs.

CORPORATE BLOG (June 3, 2016), *available at* http://www.figblueprint.com/tag/fiduciary-rule/.

Broader surveys yield similar results. An April 2016 article canvassed responses from top executives at a number of IMOs who were asked to share their thoughts on the impact that the Rule would have on their businesses:

- Michael Kalen, CLU, ChFC, is President and CEO of the Futurity First Financial Corporation, a distribution organization with a producer network of over 2,500 independent agents, 15 agencies, and 14 broker-dealer firms. Kalen reported that "there is enough interest in a fiduciary standard in a more macro sense that it makes sense to prepare our producers for this. We believe that some of the tenants of the revised rule like "ensure objectivity at the point of sale" and "transparency" are good for the consumer and will be good for business in the long run. We are educating our producers and beginning to develop platform tools they will need to meet these standards if and when they are implemented."

- W. Andrew (Andy) Unkefer is the President of Unkefer & Associates, which is a national annuity and life insurance marketing organization involved in product design and national sales distribution, largely serving independent agents. Unkefer reported that while his company is "contributing to the fight and rallying our agents to participate on two fronts," at the same time they are "preparing to create a fiduciary structure capable of serving our agents, agencies and other marketing firms so they can fully comply with the rule if it prevails."

Brian Anderson, *2016 FMO Executive Outlook, Part I: The M&A Climate, Planning for the DOL Fiduciary Rule, Other Key Challenges*, INSURANCEFORUMS.COM (Apr. 6, 2016), *available at* http://ifn.insurance-forums.net/annuities/twenty-sixteen-fmo-executive-outlook-part-one/. Still others have expressed the same confidence that the FIA industry will adapt and even improve:

- Annexus, an independent insurance-product design and distribution company, which comprises a network of 17 IMOs and accounts for more than $4 billion in FIA sales, plans to establish an affiliated broker-dealer through which to sell FIAs. David Rauch, COO and General Counsel at Annexus, stated that it is "full speed ahead" for the firm and that he expects "there are more independent industry players like us who are contemplating the same thing." Greg Iacurci, *Indexed Annuity Distributors Weigh Launching B-Ds Due to DOL Fiduciary Rule*, INVETSMENT NEWS (June 23, 2016), *available at* http://www.investmentnews.com/article/20160623/FREE/160629957/indexed-annuity-distributors-weigh-launching-b-ds-due-to-dol.

- Other commentators predict that the Rule will actually strengthen the market for annuities by incentivizing the industry to make them better for investors. Michael Kitces, *Why The DoL Fiduciary Rule Won't Kill Annuities, It Will Make Them Stronger!*, KITCES.COM (Apr. 21, 2016), *available at* https://www.kitces.com/blog/why-dol-fiduciary-wont-kill-annuities-it-will-make-them-stronger/.

All of these examples belie the plaintiff's ardent insistence that the Rule will inflict catastrophic costs and burdens on IMOs, independent agents, and the FIA marketplace as a whole. They further weaken an already tenuous claim for injunctive relief.

An even larger public interest is at stake in this case. The dispute over the Rule is unfolding in the context of an acute retirement crisis in America, as millions of Americans have far too little saved for retirement. *See* U.S. Gov't Accountability Office, *GAO-15-419*, *Retirement Security: Most Households Approaching Retirement Have Low Retirement Savings* 9 (2015). The Rule is therefore all the more critical: Retirement savers must at least be able to protect and preserve what savings they have managed to set aside. But if financial advisers are allowed to continue siphoning off their clients' retirement savings, then the prospects for a secure and independent retirement will continue to fade for millions of Americans.

CONCLUSION

For the foregoing reasons, the Court should deny the injunctive and other relief requested by the plaintiff.

DATED: July 29, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 29, 2016, I filed and served the foregoing brief using the CM/ECF system, which sent notification to all counsel who have consented to electronic service, as all counsel have in this case.

Dated: July 29, 2016

/s/ *Mark V. Dugan*