

**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. 16-cv-4083

**MEMORANDUM OF LAW IN SUPPORT OF MOTION OF BETTER MARKETS, INC.,  
CONSUMER FEDERATION OF AMERICA, AND AMERICANS FOR FINANCIAL  
REFORM FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* IN SUPPORT OF THE  
DEFENDANTS**

Pursuant to Rule 7.1(a) of the Rules of Practice of United States District Court for the District of Kansas, Better Markets, Inc. (“Better Markets”), Consumer Federation of America (“CFA”), and Americans for Financial Reform (“AFR”) hereby submit this memorandum of law in support of the accompanying motion for leave to file the attached brief *amici curiae* in support of the defendants, the United States Department of Labor (“DOL”) and two of its officials, Secretary Thomas E. Perez and Assistant Secretary Phyllis C. Borzi.

The Rules of Practice of the United States District Court for the District of Kansas do not provide any special mechanism for the filing of *amicus* briefs, but the District of Kansas routinely grants motions for leave to file such briefs under Rule 15.1. “Whether to permit a

nonparty to submit a brief, as *amicus curiae*, is a matter within the sound discretion of the court.” *Hammond v. City of Junction City, Kan.*, No. 00-2146-JWL, 2001 WL 1665374, \*1 (D. Kan. Dec. 17, 2001). “Generally, courts permit participation as an *amicus* to brief and argue as a friend of the court upon a finding that the proffered information of *amicus* is useful or otherwise necessary to the administration of justice.” *Id.*; *see also id.* at \*2 (“Thus, to the extent [a prospective *amicus*] is able to provide *any useful information or a unique perspective* regarding the [relevant] issue, the court welcomes such assistance.” (emphasis added)); *In re Kan. Office Assocs., Ltd.*, No. 94-4216-SAC, 181 B.R. 537 (D. Kan. Mar. 31, 1995) (“The primary issue is whether [the prospective *amicus*] brief will potentially be of some benefit to the court in resolving the issues presented by this appeal.”).

In support of the motion for leave to file, counsel to *amici* states as follows:

(1) *Amici* have a strong interest in this case.

(2) *Amici* can assist this Court by providing helpful analysis on several important issues presented by the motion for a preliminary injunction.

(3) No party will be prejudiced by the filing of this brief *amici curiae*.

(4) The brief is timely and conforms to the pagination limit of Rule 7.1(e) of the United States District Court for the District of Kansas, as well as the requirements of Rule 29 of the Federal Rules of Appellate Procedure.

## **ARGUMENT**

### **I. *Amici* Have a Strong Interest in this Case**

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 regulatory reforms that lead to 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 the SEC, CFTC, DOL, and other financial regulators, advocating for strong implementation of reforms in the securities, commodities, and credit markets. *See* Comment Letters of Better Markets, *available at* <http://www.bettermarkets.com/rulemaking>. Better Markets has also filed numerous amicus briefs in federal district and circuit courts, defending agency actions on legal and policy grounds.<sup>1</sup>

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 that advocates for strengthened protections for individual investors. CFA policy in this area focuses 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 at least 2000. Key letters and documents that advance this policy goal are available at <http://consumerfed.org/issues/investor-protection/investment-professionals/>.

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<sup>1</sup> *See, e.g., Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359, 369–70 (D.C. Cir. 2014) (reflecting Better Markets' arguments in upholding the SEC's economic analysis of its disclosure rule on conflict minerals), *overruled on other grounds by Am. Meat Inst. v. USDA*, 760 F.3d 18 (D.C. Cir. 2014) (en banc); *Inv. Co. Inst. v. CFTC*, 720 F.3d 370, 377–80 (D.C. Cir. 2013) (reflecting Better Markets' arguments in upholding the CFTC's economic analysis of its registration rule for commodity-pool operators); *Sec. Indus. & Fin. Mkts. Ass'n v. CFTC*, 67 F. Supp. 3d 373, 387 (D.D.C. 2014) (citing Better Markets' description of the bailout funds channeled through AIG to its counterparties).

AFR is a nonpartisan 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 contested 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* Comment Letter of Better Markets (Sept. 24, 2015), *available at* <https://www.dol.gov/ebsa/pdf/1210-ZA25-00336.pdf>; Comment Letter of CFA (Sept. 24, 2015), *available at* <https://www.dol.gov/ebsa/pdf/1210-ZA25-00345.pdf>; Comment Letter of AFR (July 21, 2015), *available at* <https://www.dol.gov/ebsa/pdf/1210-ZA25-00213.pdf>. Furthermore, each organization testified during DOL's public hearings. *See* U.S. Dep't of Labor, Conflict of Interest Proposed Rule Public Hearing, <https://www.dol.gov/ebsa/regs/1210-AB32-2-Hearing.html> (last visited July 28, 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, one of the first in a series of

recently filed Rule challenges to reach a quasi-merits phase by considering the motion for a preliminary injunction.

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, dignified retirement are better protected from advisers' conflicts of interest that currently pervade much of the industry, siphoning away 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"). Even a decision to delay 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 misinterpretation of ERISA be firmly rejected. If this distorted reading were to take hold, DOL's ability to implement and enforce ERISA's fiduciary-duty standard 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 that are 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 ("RIA"), 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 Supreme Court and Eighth Circuit precedent. Moreover, contrary to the plaintiff's contention, DOL had no further statutory duty to conduct 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. The *amici* share an interest in the stability of the law of administrative rulemaking, a stability that would be upended if this Court were to adopt the plaintiff's novel contentions.

## II. The Brief *Amici Curiae* Will Prove Helpful to the Court

The attached brief contributes a number of arguments, on both legal and policy grounds, that supplement rather than repeat the arguments made by the defendants. For example, the *amici* provide a robust analysis of the RIA, detailing specifically why the DOL acted reasonably when it chose to condition exemptive relief for the sale of FIAs upon compliance with the protections set forth in the "Best Interest Contract" exemption. The *amici* further offer novel arguments that rebut the plaintiff's contentions that the APA, ERISA, and *Michigan v. EPA*, 135 S. Ct. 2699 (2015), required the DOL to conduct yet more cost-benefit analysis, beyond the exhaustive evaluation set forth in the RIA. And the *amici* provide additional grounds for discounting MSG's insistence that the DOL, while developing appropriate conditions for exemptive relief, had an obligation to protect and preserve the distribution model preferred by MSG and its members. Finally, the *amici* show that the public interest is best served by denying the requested injunction both because of the terrible toll exacted on savers from conflicted advice and because the industry's own public comments belie their hyperbolic claims of imminent harm. This material is not found elsewhere in the briefing.

III. No Party Will Face Prejudice from the Filing of Better Markets' Brief

The defendants have consented to this motion; the plaintiff has stated that it does not consent but has declined to state whether it will file responsive papers, which would be due on August 12, 2016. *See* D. Kan. Rule 6.1(d). The filing of a brief *amici curiae* seven days after the principal brief of the party supported by the *amici* is the timing prescribed by Rule 29 of the Federal Rules of Appellate Procedure. This schedule permits *amici* one week to evaluate the party's brief with an eye toward reducing redundancies and lightening the burden on the Court while preserving for the opposing party one week in which to address in reply any arguments that *amici* raise. This established timeline inflicts no prejudice.

IV. *Amici's* Brief Is Timely and Conforms with Applicable Requirements

The brief is timely, filed only seven days after the defendants' brief. The brief also conforms with the applicable requirements of this Court: Its body runs fewer than 30 pages of double-spaced, 12-point font, and it further complies with all of the requirements of Rule 29(c)(1)–(6) of the Federal Rules of Appellate Procedure.

DATED: July 29, 2016

Respectfully submitted,

/s/ Mark V. Dugan

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**CERTIFICATE OF SERVICE**

I certify that on July 29, 2016, I filed and served the foregoing memorandum 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