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

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Since their introduction to the marketplace in 1995, fixed indexed annuities have helped enable and protect the retirements of millions of Americans. These products are regulated by state insurance departments and are primarily sold through independent life insurance agents, who perform an essential role in educating clients about their choices in retirement savings vehicles and in evaluating whether a fixed indexed annuity might be a suitable choice given each client's unique financial circumstances. Independent insurance agents often have longstanding relationships with their clients and deep familiarity with the clients' retirement goals and resources. As a result, the agents are uniquely positioned to serve them.

Recent regulatory actions by the United States Department of Labor, however, threaten to obliterate these relationships and will, in large measure, irreparably damage the independent insurance agent business and service model itself. On April 8, 2016, the Department issued its final rule expansively redefining the types of activities it deems to be fiduciary "investment advice" under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1001 *et seq.*, and the Internal Revenue Code of 1986, as amended ("the Code"), 26 U.S.C. § 1 *et seq.* This substantial rule change will, in most instances, make insurance agents, securities brokers, and other sellers of retail financial products in the individual retirement market "fiduciaries" to the purchasers of those products in connection with each sales transaction. As such, financial product sellers will be subjected to a panoply of new regulatory standards and legal exposures – despite the fact that the vast majority of agents and other financial advisers already act in the best interests of their clients, and even though existing law, among other consumer protections, already requires that the agents establish the suitability of every recommended transaction for every purchaser.

In connection with this dramatic change in the "fiduciary" definition, the Department also amended and partially revoked Prohibited Transaction Exemption ("PTE") 84-24, which provides regulatory relief to insurance agents and others who, according to the Department's new regulatory definition, would become "fiduciaries" and who receive compensation from third parties in connection with transactions involving an ERISA plan or individual retirement account ("IRA"). Absent an exemption like PTE 84-24, ERISA and the Code prohibit fiduciaries from receiving third-party compensation. Yet, without notice, the Department revoked PTE 84-24 as it applies to ERISA plan and IRA purchases of annuity contracts that do not satisfy the Department's newly created definition of a "Fixed Rate Annuity Contract." In doing so, the Department specifically excluded fixed indexed annuities from the exemption's scope. It is this agency rulemaking action which lies at the crux of this lawsuit.

The Department's partial revocation of PTE 84-24 is unlawful under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, in three critical respects. ***First***, in its notice of proposed rulemaking, the Department did not so much as hint that it might exclude fixed indexed annuities from PTE 84-24. To the contrary, when the Department issued the notice of its proposed rulemaking on April 20, 2015 and during the entire comment period, which expired on September 24, 2015, the Department confirmed that such annuities would continue to enjoy their historical exemptive status. This conclusion by the Department was premised upon the Department's recognition of three important, distinguishing characteristics of all fixed annuities: (1) they are insurance products; (2) they are not distributed through the normal securities sales channels; and (3) they are not subject to a securities regulatory scheme for sales practice and disclosure requirements.[1]

[1] 80 Fed. Reg. 22,010, 22,014-015 (Apr. 20, 2015).

Second, When the Department's final action was announced on April 8, 2016, the industry was shocked to learn that fixed indexed annuities had been excluded from PTE 84-24. Although its new rules are supposedly intended to mitigate conflicts of interest in the sale of retirement products, the Department inexplicably removed fixed indexed annuities from PTE 84-24 while allowing all other types of fixed annuities to continue enjoying that exemption. The Department made no effort to distinguish fixed indexed annuities from other fixed annuities on the basis of the characteristics which had formed their original conclusions – because they could not do so. Nothing had changed in these respects since the Department's proposed rulemaking: (1) fixed indexed annuities are insurance products that are exempt from the securities laws; (2) they are overwhelmingly distributed through independent insurance agents, not the normal securities sales channels; and (3) they are subject to state insurance law regulation governing their sales practice and disclosure requirements.[2] Moreover, with respect to alleged conflicts of interest, fixed indexed annuities are no different than any other fixed annuity product. The Department is arbitrarily treating similar products differently.

Third, the exclusion of fixed indexed annuities from PTE 84-24 leaves those in the independent agent distribution channel without a workable exemption for the annuities' sale, a

[2] In general, this is true even for broker-dealers who sell fixed indexed annuities. The jurisdiction of the Financial Industry Regulatory Authority ("FINRA") is generally limited to securities activities governed by the Securities Exchange Act of 1934, as amended ("Exchange Act"), 15 U.S.C. § 78a *et seq.*, and FINRA rules. Thus, while certain FINRA rules apply equally to the broker-dealer and non-broker-dealer activities of member firms, FINRA generally lacks the authority to regulate insurance products or transactions or to inspect for or enforce compliance with the state insurance laws under which such products and transactions are primarily governed. *See* Report of the 2009 Special Review Committee on FINRA's Examination Program in Light of the Stanford and Madoff Schemes, September 2009, pp. 65-68 (available at: https://www.finra.org/sites/default/files/Corporate/p120078.pdf) (last visited June 14, 2016). *See also* Exchange Act, § 15A(6), 15 U.S.C. § 78o-3(b)(6) (noting that a national securities association such as FINRA cannot adopt rules designed "to regulate by virtue of any authority conferred by this [Act] matters not related to the purposes of this [Act]") (available at: https://www.sec.gov/about/laws/sea34.pdf) (last visited June 14, 2016).

problem the Department never acknowledged or considered. The Department fashioned a new exemption originally for federally regulated securities products – the Best Interest Contract Exemption – but that exemption is administratively infeasible for sales of fixed indexed annuities. Tens of thousands of individual agents and hundreds of small businesses are now threatened.

If PTE 84-24's partial revocation is not vacated, and if the April 2017 applicability date is not stayed immediately, the Department's actions, as they already have, will continue to severely and irreparably harm plaintiff Market Synergy Group, Inc. ("Market Synergy"), many others in the independent agent distribution channel, and consumers at large, disserving the public interest. For these reasons, set forth more fully below, Market Synergy respectfully requests that the Court grant its motion for preliminary injunction.

STATEMENT OF FACTS

I. Market Synergy and Its Independent Marketing Organization Members

Market Synergy is a Kansas corporation and a licensed insurance agency based in Topeka. See Declaration of Lance Sparks ("Sparks Decl.") (Exhibit 1), ¶ 3. Market Synergy works with insurance companies to develop specialized, proprietary fixed indexed annuities and other insurance products for exclusive distribution. *Id.* ¶ 14. It partners with select independent marketing organizations ("IMOs") in distributing those products. *Id.* Currently, approximately 3,000 agents and other financial professionals sell proprietary products developed through Market Synergy. *Id.* Market Synergy also conducts market research and provides training and product support for IMO network members and the independent insurance agents recruited by the IMOs. *Id.* Market Synergy's business derives from, and is dependent upon, the viability of

the IMO/independent insurance agent distribution channel for sales of fixed indexed annuities and other fixed insurance products. *Id.*

Currently, Market Synergy distributes fixed indexed annuities and other insurance products through eleven IMO network members, three of which are based in Kansas, and one each in Georgia, Iowa, Massachusetts, Michigan, Nebraska, North Carolina, Texas, and Virginia. *Id.* ¶ 15. These IMO network members are independently owned insurance wholesalers focused on helping agents and financial advisors increase their life insurance and annuity business. *Id.* There are approximately 20,000 individual agents among the eleven IMOs in the Market Synergy network. *Id.* In 2015, Market Synergy and its network members collectively were responsible for approximately $15 billion of fixed indexed annuity sales, measured by premium paid. *Id.* Nationwide, there are approximately 80,000 independent insurance agents engaged in the sale of fixed indexed annuities. Declaration of Sheryl Moore ("Moore Decl.") (Exhibit 2), ¶ 16(i).

II. Fixed Annuities vs. Mutual Funds and Variable Annuities

Annuities are retirement savings and income vehicles sold by life insurance companies. Sparks Decl. at ¶ 5. All annuities have one feature in common that distinguishes them from other financial products: with an annuity, the insurance company promises to pay income on a regular basis for a chosen period of time. *Id.* Because they can guarantee a stream of income in the future, including for the remainder of one's life, annuities can uniquely protect contract owners against the possibility of outliving their financial resources. *Id.*

In contrast to "immediate" annuities, deferred annuities characteristically have two phases of operation: (i) an "accumulation" or "deferral" phase in which the contract accrues value through payment of premiums and credited interest, and (ii) a "payout" phase in which the

purchaser receives a stream of payments according to a selected payment option. *Id.* ¶ 6. The most common types of deferred annuities are fixed annuities (which include so-called fixed declared rate annuities and fixed indexed annuities) and variable annuities. *Id.* ¶ 7.

With a fixed declared rate annuity, the owner is guaranteed at least a minimum crediting rate during the accumulation phase. *Id.* ¶ 8. In addition, the insurance company, normally on an annual basis, declares in advance a specific crediting rate, which may be above but may not be below the guaranteed minimum rate. *Id.* The insurance company also bears the investment risk associated with the declared rate, which is guaranteed for that upcoming year or other period as specified in the annuity contract. *Id.* When the annuity reaches the payout phase, the amount of the annuity income payments is determined based on payment rates guaranteed at the time the annuity was issued (or the insurer's current payment rates, if higher) and are guaranteed for the selected payout duration. *Id.*

The only significant difference between fixed indexed annuities and fixed declared rate annuities is the method for computing interest earnings credited to the policies. A fixed indexed annuity is a type of fixed annuity that earns credited interest based on positive changes in a market index, such as the S&P 500. *Id.* ¶ 9. However, annuity premiums are not invested in index funds. *Id.* The performance of the market index is simply used as a reference to determine the amount of credited interest in accordance with the specified index crediting method. *Id.* The crediting rate is guaranteed to never be less than zero, even if the market goes down and the index is net negative for the crediting period. *Id.* Thus, as with other fixed annuities, principal is always protected from market downturns. *Id.* ¶¶ 9-10. *See also* Declaration of Mark Heitz ("Heitz Decl.") (Exhibit 3), ¶¶ 4-5; Declaration of Bryon E. Rice ("Rice Decl.") (Exhibit 4), ¶ 10; Declaration of Michael Tripses ("Tripses Decl.") (Exhibit 5), ¶ 14. A typical fixed indexed

annuity policy also allows the contract owner to elect to switch the chosen reference index or computation method from year to year or, alternatively, to select a fixed rate for the year. Sparks Decl. ¶ 9. Like other fixed annuities, the insurance company bears the entire investment risk with fixed indexed annuities and must make good on the minimum guarantees and the amounts credited to the contract, regardless of the performance of the insurance company's own investment assets backing its obligations under the annuities. *Id.* ¶ 10. Moreover, fixed indexed annuities, like any other type of fixed annuity, must satisfy state standard nonforfeiture laws, another consumer protection feature. *See* Tripses Decl. ¶ 19. *See also* Kan. Stat. Ann. § 40-428 (2016) (Kansas standard nonforfeiture law).

Fixed indexed annuities were introduced to the insurance market in the mid-1990s and have been regulated solely by the states as fixed insurance products since that time. Sparks Decl. ¶ 11. A comprehensive range of state insurance and consumer protection laws and regulations apply to sales of both fixed indexed annuities and fixed declared rate annuities, as well as the conduct of licensed insurance producers generally. *Id.* *See also* Declaration of Francois Cousinet ("Cousinet Decl.") (Exhibit 6), ¶¶ 2, 7, 25; Heitz Decl. ¶ 5; Moore Decl. ¶ 19.

In contrast to the principal protection and guarantees associated with fixed annuities, mutual funds and variable annuities do not have guaranteed returns. They are securities whose investment returns to the customer do vary in accordance with the value of the assets in which their funds are invested. Variable annuities earn investment returns, and are exposed to losses, based on the performance of the investment portfolios – called "subaccounts" held within what are called the insurance company's "separate accounts" – where the contract owners choose to put their money. *Id.* ¶ 12. While variable annuities do have guarantees associated with future purchase rates of immediate annuities, the value of the separate account investments chosen

could go up or down. If they go up, the owner's variable annuity value increases. If the value of these accounts goes down, the owner's annuity value decreases and the owner could lose money and principal. *Id*. Also, income payments to the owner could be less than anticipated if the separate account investments do not perform as hoped or expected. *Id*.

Variable annuities differ from fixed annuities, including fixed indexed annuities, in other important ways. *Id*. ¶ 12. For example, variable annuities are not subject to state standard nonforfeiture laws and therefore are not required to guarantee a minimum contract value or a minimum rate of return. *Id*. Moreover, fixed annuities, including fixed indexed annuities, are subject to state guaranty fund laws that provide protections for purchasers if insurance companies become insolvent; in many jurisdictions, variable annuities are not. *Id*.

III. The Role of Market Synergy, IMOs, and Independent Agents in Distributing Fixed Indexed Annuities

Insurance companies generally do not recruit independent insurance agents to sell their products. Sparks Decl. ¶ 16. Rather, independent insurance agents are recruited by IMOs to offer, when appropriate, fixed indexed annuities and other types of insurance products to the independent agents' clients. *Id*. Although they take different forms, in general an IMO is a third-party intermediary between the agents and the insurance companies, providing economies of scale for product education, marketing, processing business, and licensing support. *Id*. IMOs permit the sale of insurance and annuity products from different insurance companies. This allows independent agents to identify the most suitable products for their clients, enabling the agents to offer choices across a spectrum of products and carriers. *Id*. ¶ 17. IMOs are generally compensated for their support services by the insurance companies with which they have relationships based on a percentage of agent sales volume. *Id*. ¶ 16. *See also* Rice Decl. ¶ 12.

IMOs and their networks of independent insurance agents constitute the largest overall distribution channel for fixed indexed annuities. Approximately 65% of fixed indexed annuities sold in 2015 were sold by independent insurance agents not affiliated with a broker-dealer, Moore Decl. ¶¶ 16-17, with the large majority of that percentage within Individual Retirement Accounts ("IRAs"). *Id*. *See also* Declaration of David Callanan ("Callanan Decl.") (Exhibit 7), ¶ 15. By contrast, during the fourth quarter of 2015, banks represented less than 17% of fixed indexed annuity sales and broker-dealers had a 13.5% share. Sparks Decl. ¶ 18.

Fixed indexed annuities represent a significant portion of the sales of a typical IMO's independent agents. *Id*. ¶ 19. For those in Market Synergy's network of IMOs, fixed indexed annuities represent more than 90% of total sales. Similarly, 100% of Market Synergy's 2015 revenue was attributable in some way to the development, marketing, or distribution of fixed indexed annuities. *Id*.

IV. The Department of Labor's Proposed Regulatory Actions

This lawsuit focuses on certain final rulemaking action of the United States Department of Labor (the "Department") – action about which the Department provided no prior notice or opportunity to comment to the public or other interested parties. However, we will begin with a description of the Department's proposed rulemaking which preceded that final action.

A. The "Fiduciary" Rule

In April 2015, the Department issued a voluminous and complex proposed regulatory package. First, the Department published a notice of proposed rulemaking to redefine who is a "fiduciary" of an employee benefit plan under ERISA as a result of giving "investment advice" to an ERISA-covered retirement plan or its participants or beneficiaries. *Definition of the Term ''Fiduciary''; Conflict of Interest Rule – Retirement Investment Advice*, 80 Fed. Reg. 21,928

(Apr. 20, 2015) (the "Rule"); Sparks Decl. ¶ 21. The proposal also applied to the definition of a fiduciary of a "plan" (including an IRA, which is not subject to ERISA's fiduciary responsibility provisions) under the Code.

Under ERISA and the Code, according to the proposal, a person is a fiduciary to a plan or IRA to the extent that he or she engages in specified activities, including rendering investment advice for a fee or other compensation, direct or indirect, with respect to any money or other property of a plan. Fiduciaries to plans and IRAs, it continued, are not permitted to receive compensation in "prohibited transactions." Sparks Decl. ¶ 21. Under the Rule, the Department proposed to treat persons who provide certain types of advice or recommendations to an employee benefit plan, plan fiduciary, plan participant or beneficiary, IRA, or IRA owner as fiduciaries under ERISA and the Code in a much wider array of "advice" or service relationships than the existing ERISA and Code regulations, which would be replaced. *Id.* ¶ 22.

B. The Best Interest Contract Exemption

As the second major piece of its regulatory package, the Department proposed a new prohibited transaction class exemption, the Best Interest Contract Exemption ("BICE"), that would provide conditional relief for common compensation, such as commissions and revenue sharing, that an Adviser (a defined term in the proposed BICE) and the Adviser's employing firm might receive in connection with investment advice to retail Retirement Investors (also a defined term in the proposed BICE). *Proposed Best Interest Contract Exemption*, 80 Fed. Reg. 21,960 (Apr. 20, 2015); Sparks Decl. ¶ 23. The proposal stated that the BICE would require a "Financial Institution," as defined in the proposed BICE, and the Adviser to contractually acknowledge fiduciary status, to commit to adhere to basic standards of impartial conduct (the "Impartial Conduct Standards"), including to act in the customer's "best interest" and receive no

more than "reasonable compensation," to adopt policies and procedures reasonably designed to minimize the impact of conflicts of interest, and to disclose basic information on their conflicts of interest and on the cost of their advice. *Id.*

C. Prohibited Transaction Exemption 84-24

1. The Nature of the Proposed Amendment and Revocation

As part of the April 2015 regulatory package, the Department also proposed to amend and partially revoke an existing prohibited transaction class exemption ("PTE 84-24") for certain sales transactions involving insurance agents and brokers, pension consultants, insurance companies, and investment company principal underwriters. *Proposed Amendment to and Proposed Partial Revocation of Prohibited Transaction Exemption (PTE) 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies and Investment Company Principal Underwriters*, 80 Fed. Reg. 22,010 (Apr. 20, 2015); Sparks Decl. ¶ 24. This element of the regulatory package is the focus of Market Synergy's lawsuit.

The existing PTE 84-24, the proposal stated, provided an exemption for certain prohibited transactions that occur when, among other things, plans or IRAs purchase insurance and annuity contracts. Sparks Decl. ¶ 25. The then-current exemption had permitted insurance agents, insurance brokers, and pension consultants that are parties in interest or fiduciaries with respect to plans and IRAs to effect the purchase of an "insurance and annuity contract" for the plans or IRAs and receive a commission on the sale. *Id.* The exemption was also available when the insurance company selling the insurance or annuity contract is a party in interest or "disqualified person" with respect to the plan or IRA because the insurer is providing services to

the plan. The proposal noted that, under the existing PTE 84-24, the term "insurance and annuity contract" included variable annuities. *Id.*

The Department proposed several changes to PTE 84-24. *Id.* ¶ 26. Of core significance to the current action, among the proposed changes was the revocation of exemptive relief for insurance agents, insurance brokers, and pension consultants to receive a commission in connection with the purchase by IRAs "*of variable annuity contracts and other annuity contracts that are securities under federal securities laws*." 80 Fed. Reg. 22,010, 22,012 (Apr. 20, 2015) (emphasis added). Rather than enjoying exemptive relief under PTE 84-24, participants in such transactions would be limited to seeking exemptive relief under the new BICE. The Department stated its belief that the BICE would better protect the interests of IRAs with respect to investment advice "regarding securities products." *Id.*

In the proposal's own words:

> As the Best Interest Contract Exemption was designed for IRA owners and other investors that rely on fiduciary investment advisers in the retail marketplace, the Department believes that some of the transactions involving IRAs that are currently permitted under PTE 84-24 should instead occur under the conditions of the Best Interest Contract Exemption, *specifically, transactions involving variable annuity contracts and other annuity contracts that are securities under federal securities laws, and mutual fund shares*. Therefore, this proposal would revoke relief in PTE 84-24 for such transactions.

80 Fed. Reg. at 22,014-15 (emphasis added).

"On the other hand," the proposal continued,

> the Department has determined that transactions involving insurance and annuity contracts that are not securities can continue to occur under this exemption, with the added protections of the Impartial Conduct Standards. In this proposal, therefore, *the Department has distinguished between transactions that involve securities and those that involve insurance products that are not securities*. *The Department believes that annuity contracts that are*

> *securities and mutual fund shares are distributed through the same channels as many other investments covered by the Best Interest Contract Exemption, and such investment products all have similar disclosure requirements under existing regulations.*

Id. at 22,015 (emphasis added); Sparks Decl. ¶¶ 28-29. Thus, in contrast to products such as variable annuities and mutual funds regulated as securities under federal law, all fixed annuities (whether fixed declared rate annuities or fixed indexed annuities) – which are insurance products regulated exclusively under state law – would remain within the exemptive scope of PTE 84-24, as amended. Sparks Decl. ¶ 30.

The Department's proposal thus recognized differences between insurance products regulated under state law such as fixed declared rate and fixed indexed annuities, on the one hand, and investment products regulated under federal law such as variable annuities and mutual funds, on the other hand, with respect to three critical characteristics: (1) the product guarantees (or lack thereof, in the case of investments such as variable annuities and mutual funds); (2) the regulatory and disclosure regimes; and (3) the distribution channels associated with the respective products. *Id.* ¶ 31.

2. Market Synergy's and the Broader Industry's Reaction to the Department's Proposed Action

In reliance on the Department's determination to continue to include all forms of fixed annuities within the scope of amended PTE 84-24, Market Synergy determined that it had no need to submit a comment to the Department regarding its proposed regulatory package. *Id.* Because the proposed rule essentially drew a line between federally regulated securities products, such as variable annuities, and state-regulated insurance products, such as fixed annuities, Market Synergy and other interested parties had no reason to believe that the Department would ultimately switch any type of fixed annuity into the BICE in the final rulemaking. *Id.* Market Synergy's understanding of the limited nature of the Department's

proposed rulemaking was confirmed by the broader industry's reaction to the proposal. *Id.* ¶¶ 32-33.

During the comment period (which was extended into a supplemental period that ended on September 24, 2015 (*see* 81 Fed. Reg. at 21,147)), the Department received well over 3,000 comment letters on the proposed regulatory package. *Id.* ¶ 34. There were also over 300,000 submissions made as part of 30 separate petitions submitted on the proposal. *Id.* These comments and petitions came from consumer groups, plan sponsors, financial services companies, academics, elected government officials, trade and industry associations, and others, both in support of, and in opposition to, the proposed rule and proposed related exemptions. *Id.* Market Synergy is unaware of any comment or other submission that assumed that the Department would or intended to exclude fixed indexed annuities from PTE 84-24, as amended. *Id.* In fact, it was broadly reported throughout the trade and other press that fixed indexed annuities would be treated just like fixed declared rate annuities. *Id.* ¶¶ 34-35.

V. The Department of Labor's Final Regulatory Action Regarding PTE 84-24

A. The Change in the Scope of Products Covered Under the Exemption

In April 2016, less than seven months after the supplemental deadline to comment had expired, the Department issued its final amendment to, and partial revocation of, PTE 84-24. Sparks Decl. ¶ 36. While the underlying conditions and obligations of the final amended exemption did not change appreciably from the proposed rulemaking, the scope of the annuity products covered under the exemption changed dramatically for those marketing and selling fixed indexed annuities. *Id.*

In the final version of amended PTE 84-24, the Department created a new defined term that did not appear in the notice of proposed rulemaking. This new term – "Fixed Rate Annuity

Contract" – expressly *excludes* fixed indexed annuities from the exemptive scope of PTE 84-24. *See* 81 Fed. Reg. at 21,174 & 21,176-77 ("A Fixed Rate Annuity Contract does not include a variable annuity or *an indexed annuity* or similar annuity.") (emphasis added);[3] Sparks Decl. ¶ 37. Moreover, the Department did not support its final action with any new or differing analysis of the three characteristics that caused the original proposal to include all fixed annuities under PTE 84-24: namely, the (1) insurance guarantees, (2) the regulatory regimes, or (3) the distribution channels. Sparks Decl. ¶ 37.

The Department acknowledged commenters who pointed out that, for purposes of the proposed conflict of interest rule, there is no meaningful distinction between fixed indexed annuities and other types of fixed annuities:

> In this regard, some industry commenters focused on indexed annuities, in particular. These commenters asserted that fixed indexed annuities and fixed annuities are identical insurance products except for the method of calculating interest credited to the contract. They said that indexed annuities are treated the same as other fixed annuities under state insurance law and federal

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[3] Recited in full, PTE 84-24 defines a "Fixed Rate Annuity Contract" as

> a fixed annuity contract issued by an insurance company that is either an immediate annuity contract or a deferred annuity contract that: (i) satisfies applicable state standard nonforfeiture laws at the time of issue, or (ii) in the case of a group fixed annuity, guarantees return of principal net of reasonable compensation and provides a guaranteed declared minimum interest rate in accordance with the rates specified in the standard nonforfeiture laws in that state that are applicable to individual annuities; in either case, the benefits of which do not vary, in part or in whole, based on the investment experience of a separate account or accounts maintained by the insurer or the investment experience of an index or investment model. A Fixed Rate Annuity Contract does not include a variable annuity or an indexed annuity or similar annuity.

81 Fed. Reg. at 21,174 & 21,176-177.

> securities law, and stated that indexed annuities can offer the same income, insurance and contractual guarantees as fixed annuities. Moreover, some commenters noted that significant investment risk is borne by the insurer and there is no risk of principal loss, assuming that the investor does not incur surrender charges. According to some commenters, indexed annuities are no more complex than other fixed annuities, and there are no different conflicts of interest created with their sales, as compared to fixed annuities.

81 Fed. Reg. at 21,157.

The Department neither disputed nor critiqued these comments. Rather, in reversing the regulatory position it expressed with respect to the treatment of fixed indexed annuities in the proposed rulemaking, and announcing its new regulatory position for the first time in the final rulemaking, the Department simply stated: "Given the complexity, investment risks, and conflicted sales practices associated with" fixed indexed annuities and variable annuities, "the Department has determined that recommendations to purchase such annuities should be subject to the greater protections of the Best Interest Contract Exemption." *Id.* at 21,153.[4]

The Department included an appendix at the end of the final version of amended PTE 84-24, entitled "Comparing Different Types of Deferred Annuities." *Id.* at 21,178-180. Rather than identifying any greater or different conflicts of interest between "fixed indexed" annuities and "fixed-rate" annuities, the Department's appendix highlights the similarities between the two product types, with the exception that fixed indexed annuities use a different method for computing interest earnings credited to the contract. In addition, the appendix and the

[4] The Department cites no authority for the propositions that fixed indexed annuities contain heightened "conflicts of interest" or "investment risks," and completely fails to recognize the guarantees associated with these fixed annuities by merely lumping them in with variable annuities. With respect to "complexity," the Department cites only to one FINRA publication and scattered unnamed commenters. *See* 81 Fed. Reg. at 21,152-153, 21,155, 21,158. The Department's assertion that it "has not specified that any particular investment product is . . . per se imprudent" does not square with its arbitrary, unsupported (and unsupportable) conclusions regarding fixed indexed annuities. *See generally* 81 Fed. Reg. at 21,032.

definitional content of amended PTE 84-24 itself reflect the Department's effort to regulate products rather than the provision of fiduciary investment advice.

When issuing the final rulemaking package, the Department further acknowledged:

> The proposed amendment to PTE 84-24 stated that the proposed Best Interest Contract Exemption was designed for IRA owners and other investors that rely on fiduciary investment advisers in the retail marketplace, and expressed the view that some of the transactions involving IRAs that were permitted under PTE 84-24 should instead occur under the conditions of the Best Interest Contract Exemption, specifically, transactions involving variable annuity contracts and other annuity contracts *that are non-exempt securities under federal securities laws*, and investment company securities.

81 Fed. Reg. at 21,156 (emphasis added). The Department also understood "that like Fixed Rate Annuity Contracts, indexed annuities are generally not regulated as registered securities under federal securities laws" and that the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 989J, 124 Stat. 1376 (2010), "calls for certain annuity contracts to be considered exempt securities by the SEC if the conditions of that section are met." *Id.* Despite this, and notwithstanding the absence of any prior notice on the part of the Department, exemptive relief for fixed indexed annuity sellers was entirely revoked in the final amendment to PTE 84-24.

B. The Consequence of the Change in Regulatory Scope to Sellers of Fixed Indexed Annuities

The only recourse insurance-only agents and other sellers of fixed indexed annuities to IRA customers have under the new rulemaking to continue being compensated for their work as they traditionally have is to operate under the BICE. Sparks Decl. ¶ 40. In order to do that, they would need a sponsoring and qualifying "Financial Institution" as defined in the BICE. *Id*.

As a condition of receiving compensation that would otherwise be prohibited under ERISA and the Code, the BICE requires "Financial Institutions" to contractually acknowledge

their fiduciary status and the fiduciary status of their "Advisers," including independent insurance agents, in writing to each Retirement Investor. *Id.* ¶ 41. Among other things, the Financial Institution and Advisers must adhere to enforceable standards of fiduciary conduct and fair dealing with respect to their sales recommendations – such as acting solely in the customers' "best interest," avoiding misleading statements, and receiving no more than "reasonable compensation" – and provide full disclosure of conflicts of interest, compensation practices, and financial arrangements with third parties. *Id*. Under the final rulemaking, Financial Institutions, but not Advisers, must be parties to the "best interest" contract. *Id*.

VI. The Severe, Irreparable Harm Being Inflicted on Market Synergy, IMOs, and Independent Insurance Agents

As with most, if not all, businesses engaged in some capacity in the fixed indexed annuity industry and the broader financial services industry, Market Synergy was blindsided by the Department's reversal of its original position, which had included fixed indexed annuities within amended PTE 84-24's scope. Sparks Decl. ¶ 42; Moore Decl. ¶¶ 18-19. The Department's regulatory action, if allowed to stand, will be devastating to Market Synergy's business and to the entire IMO/independent insurance agent distribution channel, and it will be harmful to consumer interests. *Id*. ¶ 62. *See also* Moore Decl. ¶¶ 20-21; Cousinet Decl. ¶¶ 24-25; Declaration of Chris Shreves ("Shreves Decl.") (Exhibit 8), ¶¶ 24-25.

Because their businesses are so heavily dependent upon their ability to receive compensation from the marketing and sale of fixed indexed annuities, it is expected that Market Synergy, its member IMOs, and their independent agents will experience revenue decreases easily exceeding 50% if the Department's current exclusion of fixed indexed annuities from PTE 84-24 stays in place. Sparks Decl. ¶ 61. Market Synergy itself could experience a revenue drop approaching 80%. *Id.* This will necessarily result in employee layoffs for both Market Synergy

and its member IMOs, as well as potentially tens of thousands of independent insurance agents being forced to exit the marketplace. *Id.* ¶¶ 57-58. While these imminent effects are addressed in detail in the declarations supporting Market Synergy's motion (*see, e.g.,* Sparks Decl. ¶¶ 57-62; Tripses Decl. ¶¶ 22-29; Rice Decl. ¶¶ 22-29; Callanan Decl. ¶¶ 15-23; Shreves Decl. ¶¶ 22-27; Cousinet Decl. ¶¶ 20-23), we will summarize them briefly below.

IMOs are in direct jeopardy in part because they have no place in the structure of the BICE. IMOs do not qualify as Financial Institutions under the BICE. Sparks Decl. ¶¶ 45-52. Indeed, in promulgating the BICE, the Department specifically declined to expand the categories of Financial Institutions to IMOs. *Id.* ¶ 47. The Department instead limited the definition of Financial Institution to certain types of regulated entities "which are subject to well-established regulatory conditions and oversight": namely, registered securities broker-dealers, registered investment advisers, banks, and insurance companies (if certain conditions are met). 81 Fed. Reg. at 21,067. *See also* Sparks Decl. ¶ 47.

Unlike for broker-dealers and other securities industry channels already operating under the business and supervisory model that the Department contemplated when formulating its rulemaking package, the BICE is uniquely unworkable for independent insurance agent distribution of fixed indexed annuities. Sparks Decl. ¶ 45. Thus, while all IMOs will suffer severe dislocation, IMOs not affiliated with a Financial Institution or insurance company will be completely disenfranchised by the new regulatory regime, which, among other things, will likely prompt a shift in distribution to broker-dealers, registered investment advisers, and banks. *Id.* ¶ 52. The survival of such unaffiliated IMOs, encompassing several of Market Synergy's network members, will be in immediate peril if the Department's action regarding PTE 84-24 is not

promptly reversed or at least stayed while the court considers Market Synergy's claims. *Id.* ¶ 57. *See also* Rice Decl. ¶ 25.

Moreover, insurance-licensed-only agents do not and cannot legally work with securities broker-dealers and registered investment advisers. Shreves Decl. ¶ 22; Cousinet Decl. ¶ 20. A large percentage do not want to become securities-licensed because they are not interested in selling securities. Shreves Decl. ¶ 22; Cousinet Decl. ¶ 20. The customary relationships with securities brokerage and advisory firms are not compatible with the independent nature of these insurance professionals' businesses, which are nevertheless highly regulated by state insurance authorities. *Id.* The many thousands of these insurance-licensed-only agents, in particular, will be at risk of losing their hard-earned careers, professional autonomy, and financial livelihoods. Rice Decl. ¶ 24; Tripses Decl. ¶ 24. In addition, many of their lower and middle income clients will likely go unserved in the re-configured financial services community because the modest assets of these would-be retirement savers are not desirable to most large brokerage and investment advisory firms. Shreves Decl. ¶ 24; Cousinet Decl. ¶ 23.

While the Department allowed for the possibility that it might in the future consider applications for an individual exemption from other unenumerated entities to act as Financial Institutions, the Department cautioned that any such individual exemption would depend upon "the regulatory oversight of such entities, and their ability to effectively supervise individual Advisers' compliance with the terms of this exemption." Sparks Decl. ¶ 48. The Department has not offered any guidance on what this theoretical individual exemption process would even entail, and it is has been suggested that the Department itself believes that the process would likely take as long as two years. *Id.* Of course, even at the end of this undefined process, there would be no guarantee that the Department will grant an exemption. *Id.* It is inconceivable that

IMOs and associated agents selling primarily fixed indexed annuities could sustain their businesses during such an extended period of uncertainty. *Id.*

It is also highly uncertain, and doubtful, whether many, if any, insurance companies will agree to serve as the Financial Institution for purposes of supervising an independent insurance agent sales force under the BICE. *Id.* ¶ 50. Insurance companies must consider the risk and uncertainty for being held legally liable as the supervisory Financial Institution under the "best interest" contract for the acts and omissions of an independent agent, as well as having to establish the entirely new procedures, disclosure regime, and supervisory apparatus required under the BICE. *Id.* Rather than attempt to continue to market and sell fixed indexed annuities through an independent agent distribution channel in the face of the unique regulatory challenges that the channel and issuing carriers would face under the BICE, insurance companies will likely shift their distribution to, or through, career or "captive" agents, banks, registered investment advisers, and broker-dealers. *Id.* ¶ 52. Several large providers of fixed indexed annuities have already publicly signaled their intention to do just that. *Id.* ¶ 53. Again, neither IMOs nor independent insurance agents will have the ability to sustain their current livelihoods in such an environment. *Id.* ¶ 57.

Putting aside the likely possibility that many insurance companies will not agree to assume responsibility as Financial Institutions under the BICE, even insurance companies that might consider doing so have suggested that they will not be able to compensate IMOs under the Department's new regulatory regime. *Id.* ¶ 55; Tripses Decl. ¶ 21. Regardless of each company's particular decisions, the industry is moving and must move swiftly because of the fast-approaching April 10, 2017 "applicability date" of amended PTE 84-24 and the remainder of the final rulemaking package. *Id.* There are numerous, complex activities involved in adjusting

business strategies and preparing for compliance with the new rules in a sustainable way. *Id*. If insurance companies begin to develop and invest in business operations, infrastructure, strategies, and contractual arrangements designed to shift distribution of fixed indexed annuities away from IMOs and independent insurance agents to alternative channels, it will be difficult and highly unlikely for them to reverse those efforts even if the Department's actions are held unlawful or otherwise altered at a future point in time. *Id*.

Therefore, as further described and supported in the declarations filed with Market Synergy's motion, the Department's unannounced and unexpected action regarding the treatment of fixed indexed annuities in the final rulemaking poses an imminent and truly existential threat to Market Synergy and the independent insurance sales and marketing channels it supports. Sparks Decl. ¶¶ 57-62; Tripses Decl. ¶¶ 22-29; Rice Decl. ¶¶ 22-29; Callanan Decl. ¶¶ 15-23; Shreves Decl. ¶¶ 22-27; Cousinet Decl. ¶¶ 20-23; Moore Decl. ¶¶ 18-21; Heitz Decl. ¶¶ 9-11.

ARGUMENT

I. Applicable Legal Standards.

The standards for obtaining a preliminary injunction are well-settled. The moving party must demonstrate four factors: (i) a likelihood of success on the merits; (ii) a likelihood that the movant will suffer irreparable harm in the absence of preliminary relief; (iii) that the balance of equities tips in the movant's favor; and (iv) that the injunction is in the public interest. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1128 (10th Cir. 2013) (en banc) *aff'd sub nom Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). If the latter three requirements tip strongly in the movant's favor, the test is modified, and the movant may meet the requirement for showing success on the merits by showing that questions going to the merits are "so serious, substantial, difficult, and doubtful" as to make the issue ripe for litigation and deserving of more

deliberate investigation. *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1255-56 (10th Cir. 2003).

> The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary-injunction hearing.

Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981).

II. The Department's Actions Violate Applicable Law And Procedure.

Under the APA, a reviewing court must "hold unlawful and set aside agency action" determined to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," or "without observance of procedure required by law." 5 U.S.C. § 706(2). The court must set aside agency action unless it is supported by substantial evidence in the administrative record. *See* 5 U.S.C. § 706(2)(E). While an agency's decision is entitled to a "presumption of regularity," that presumption cannot shield the agency from a "thorough, probing, in-depth review." *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994).

By excluding fixed indexed annuities from the scope of PTE 84-24, as amended, and including them within the scope of the BICE, the Department has violated the APA in each of these respects. Specifically, the Department's legal violations are at least fourfold.

A. The Department gave no warning that it would remove fixed indexed annuities from the scope of PTE 84-24.

As a threshold matter, in its notice of proposed rulemaking, the Department did not forewarn that, in a final rulemaking, it might drastically alter the exemptive regulatory treatment

of fixed indexed annuities. The Department's surprise reversal of its original position deprived Market Synergy and the public of the opportunity to submit meaningful comments on that action.

Changes made in an agency's final rule "without opportunity for the public to comment on the viability or costs of such a requirement" are "particularly troubling." *Wyoming v. Dep't of Interior*, 136 F. Supp. 3d 1317, 1341 (D. Wyo. 2015). Under the APA, a notice of a proposed rulemaking must include, among other things, a statement of the time, place, and nature of public rulemaking proceedings, reference to legal authority under which the rule is proposed, and the terms or substance of the proposed rule or a description of the subjects and issues involved. *See* 5 U.S.C. § 553(b). While agencies are permitted "to make changes in the proposed rule after the comment period without a new round of commentary, the changes must be 'in character with the original scheme and be foreshadowed in proposals and comments advanced during the rulemaking.'" *Wyoming*, 136 F. Supp. 3d at 1341 (citing *Beirne v. Dep't of Agric*., 645 F.2d 862, 865 (10th Cir. 1981)). Agencies may thus promulgate rules that differ from proposed rules only if the final rule is a "logical outgrowth" of the proposal. *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1107 (D.C. Cir. 2014). A final rule is a logical outgrowth if affected parties should have anticipated that the relevant modification was possible. *Id.*

Here, no interested party could have anticipated the Department's extraordinary treatment of fixed indexed annuities. Neither the term "fixed indexed annuity" nor its alternative appellation, "equity indexed annuity," or their respective cognates appear anywhere in the Department's notices of proposed rulemaking regarding the Rule, PTE 84-24, or the BICE. The notices stated that the Department would revoke relief under PTE 84-24 for insurance agents, insurance brokers, and pension consultants *only* in connection with "transactions involving variable annuity contracts and other annuity contracts that are securities under federal securities

law, and mutual fund shares." *See* 80 Fed. Reg. at 22,014; *see also* 80 Fed. Reg. at 21,975. At the same time, the Department explicitly confirmed that "transactions involving insurance and annuity contracts that are not securities can continue to be covered" under PTE 84-24, just as they always had. *See* 80 Fed. Reg. at 22,015; *see also* 80 Fed. Reg. at 21,975.

Fixed indexed annuities are not variable annuities and are not regulated as securities under federal securities law. In fact, the Harkin Amendment to the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 989J, 124 Stat. 1376 (2010), directs that, provided certain basic criteria is met, fixed indexed annuities *must* be treated as exempt from federal securities law and thus regulated solely as insurance products under state law. Fixed indexed annuities are exempt if three criteria are met: (i) the value of the contract does not vary according to the performance of a separate account; (ii) the contract satisfies state nonforfeiture laws or their NAIC equivalent; and (iii) one of the following also is true: the contract is sold in a state that has adopted suitability standards that are modeled after those of the NAIC, the insurer is domiciled in a state that has adopted the NAIC Suitability Model, or the insurance company adopts and implements the NAIC Suitability Model's standards on a nationwide basis, subjecting it to examination. To date, most states and the District of Columbia have adopted the NAIC Suitability Model or its equivalent, and insurance companies that operate on a nationwide basis have adopted suitability standards that meet or exceed that Model.[5] As the

[5] "45 states and the District of Columbia have adopted either the current version of the Suitability Model (which was adopted by the NAIC in 2010) or one of the previous versions." Insured Retirement Institute, "State Regulation of Annuities" (available at: http://irionline.org/government-affairs/annuities-regulation-industry-information/state-regulation-of-annuities) (last visited June 15, 2016). *See also, e.g.,* NAIC "Suitability In Annuity Transactions Model Regulation" (listing states) (available at: http://www.naic.org/store/free/MDL-275.pdf) (last visited June 15, 2016); Kan. Admin. Regs. 40-2-14a ("The Kansas insurance department's 'policy and procedure regarding suitability in annuity transactions,' dated November 29, 2012, is hereby adopted by reference."); Kan. Ins.

Department itself acknowledged, virtually all of the fixed indexed annuities in the marketplace today are not registered with the SEC. *See* 81 Fed. Reg. at 21,157. Such fixed indexed annuities are therefore universally understood and treated as exempt from federal securities laws and the persons selling them need not be registered as brokers under federal securities laws. *See* Heitz Decl. ¶ 4; Rice Decl. ¶¶ 10-11; Tripses Decl. ¶¶ 9-10; Sparks Decl. ¶¶ 11, 30.

On this understanding, Market Synergy did not submit its own individual comment to the Department regarding any aspect of the Rule, PTE 84-24, or the BICE, but instead relied on comments submitted by others which did not address the possibility that fixed indexed annuities might be excluded from PTE 84-24. Sparks Decl. ¶ 23. Indeed, Market Synergy is unaware of any comment or other submission that assumed that the Department would exclude fixed indexed annuities from PTE 84-24. *Id.* ¶ 24. Multiple commenters even "commend[ed]" and "appreciate[d]" the Department for continuing to include fixed indexed annuities within that exemption. Consequently, as was reported in the trade and national press, when the Department announced its decision to exclude fixed indexed annuities from amended PTE 84-24, the industry and its analysts were shocked by the Department's unexpected flip-flop. Moore Decl. ¶ 18; Rice Decl. ¶ 18.

"Deficient notice is a 'fundamental flaw' that almost always requires vacatur." *Allina Health*, 746 F.3d at 1110 (vacating rule under APA for inadequate notice); *see also Prometheus Radio Project v. FCC*, 652 F.3d 431, 450 (3d Cir. 2011) (same); *Natural Resources Def. Council v. EPA*, 279 F.3d 1180, 1188 (9th Cir. 2002) (same); *Wyoming*, 136 F. Supp. 3d at 1340-41 (same). This case presents no exception to that rule – some form of vacatur with direction to the

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Dept., "Policy and Procedure Regarding Suitability in Annuity Transactions" (available at: http://www.ksinsurance.org/documents/department/regulations-adopted/article-2/40-2-14a-attachment2.pdf) (last visited June 15, 2016).

Department is the only equitable outcome here. After all, "agencies may not impose undue hardship by suddenly changing direction, to the detriment of those who have relied on past policy." *Grace Petroleum Corp. v. Fed. Energy Regulatory Comm'n*, 815 F.2d 589, 591 n.4 (10th Cir. 1987).

B. The Department arbitrarily treats fixed indexed annuities differently from all other fixed annuities.

The Department also failed to offer a reasoned basis for excluding fixed indexed annuities from PTE 84-24, as amended, and instead including them in the BICE. Although it pointedly excluded fixed indexed annuities in the final rulemaking, the Department nonetheless permitted all other types of fixed annuities to continue enjoying their historical exemption under PTE 84-24. This distinction arbitrarily treats similar products differently.

"An agency's action is arbitrary and capricious if the agency has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Qwest Commc'ns Int'l, Inc. v. FCC*, 398 F.3d 1222, 1229 (10th Cir. 2005) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983)). "In addition to requiring a reasoned basis for agency action, the 'arbitrary or capricious' standard requires an agency's action to be supported by the facts in the record." *Olenhouse*, 42 F.3d at 1575. "Review under the arbitrary and capricious standard is narrow in scope, but is still a 'probing, in-depth review.'" *Sorenson Commc'ns, Inc. v. FCC*, 567 F.3d 1215, 1221 (10th Cir. 2009) (quoting *Qwest Commc'ns*, 398 F.3d at 1229). "The court must rely upon the reasoning set forth in the administrative record and disregard *post hoc* rationalizations of counsel." *Id.*

In amended PTE 84-24, the Department created a new defined term – "Fixed Rate Annuity Contract" – which, contrary to the original proposal, expressly *excludes* fixed indexed annuities from the exemptive scope of PTE 84-24. *See* 81 Fed. Reg. at 21,174 & 21,176-177 ("A Fixed Rate Annuity Contract does not include a variable annuity or *an indexed annuity* or similar annuity.") (emphasis added). PTE 84-24 defines a "Fixed Rate Annuity Contract" as

> a fixed annuity contract issued by an insurance company that is either an immediate annuity contract or a deferred annuity contract that: (i) satisfies applicable state standard nonforfeiture laws at the time of issue, or (ii) in the case of a group fixed annuity, guarantees return of principal net of reasonable compensation and provides a guaranteed declared minimum interest rate in accordance with the rates specified in the standard nonforfeiture laws in that state that are applicable to individual annuities; in either case, the benefits of which do not vary, in part or in whole, based on the investment experience of a separate account or accounts maintained by the insurer or the investment experience of an index or investment model. A Fixed Rate Annuity Contract does not include a variable annuity or an indexed annuity or similar annuity.

Id. The arbitrary nature of the Department's action can be illustrated by noting that fixed indexed annuities, in fact, satisfy the definition of Fixed Rate Annuity Contract described above – only the last, and purely arbitrary, exclusionary sentence in the definition removes fixed indexed annuities from the definition. Heitz Decl. ¶ 5; Tripses Decl. ¶ 19. Stated simply, the Department's position is that "a fixed indexed annuity is a Fixed Rate Annuity Contract by definition, except we say it is not."[6] Thus, after defining the characteristics which would justify a product as being a "Fixed Rate Annuity Contract" – characteristics which are met by *both* declared rate *and* fixed indexed annuities – the Department, without analysis, justification, sound basis, or prior notice excluded fixed indexed annuities from the very definition that they meet.

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[6] Fixed indexed annuities, like any other type of fixed annuity, must satisfy state standard nonforfeiture laws. *See* Tripses Decl. ¶ 19. *See also, e.g.,* Kan. Stat. Ann. § 40-428 (2016) (Kansas standard nonforfeiture law).

Also, as noted above, the Department made no effort to explain how it could reverse itself as to the characteristics which it originally cited to *support* applying PTE 84-24 to *all* fixed annuities, including fixed indexed annuities. It bears repeating that fixed indexed annuities meet all three of the tests set forth in the original proposal for continuing applicability of PTE 84-24: they are not securities (rather, they are insurance products with guarantees and other insurance features); they are not primarily distributed by securities brokers; and they are not subject to federal securities regulation, but to state regulation.[7]

It gets worse. The Department's stated purpose in acting at all was to create a regulatory regime that protects plans, participants, beneficiaries, and IRA owners from potential conflicts of interest and divided loyalties. *See, e.g.*, *id.* at 21,148; 81 Fed. Reg. 21,002. As compared to "Fixed Rate Annuity Contracts," however, there are no different or greater potential conflicts of interest associated with the commissioned sale of fixed indexed annuities. Except for the method of calculating interest credited to the contract – a distinction having no bearing on the Department's articulated concerns regarding "conflicted" compensation – fixed declared rate annuities and fixed indexed annuities are materially identical insurance products, are regulated in the same manner under state insurance law, and are similarly exempt from federal securities

[7] The Department's attempt through its Regulatory Impact Analysis to justify its change in treatment is both incorrect and inadequate. First, the Department suggests that since some states have not adopted the NAIC Model Suitability Regulation, there is not a "uniform state standard" governing the conduct of the sales of fixed indexed annuities. However, all issuers of fixed indexed annuities have adopted, as they must to qualify for exemption under the Harkin Amendment, policies and practices that meet or exceed these uniform state standards. The Department does not dispute this in the Regulatory Impact Analysis or anywhere else in its rulemaking package. Second, the Department notes that some newer fixed indexed annuities have features that could cause an investor to lose money, but in a footnote acknowledges that these annuities are unique and are in fact registered as securities under the federal securities laws. Regulating Advice Markets, Definition of the Term "Fiduciary" Conflicts of Interest – Retirement Investment Advice, Regulatory Impact Analysis for Final Rule and Exemptions (April 2016) ("Regulatory Impact Analysis") at 42 n.110.

regulation. The Department cited no studies, reports, or supporting data tending to suggest that sales of fixed indexed annuities produce any more, or different, conflicts of interest than sales of other types of fixed annuities, yet it irrationally excluded only the former from amended PTE 84-24.

Tellingly, in PTE 84-24, the Department included an appendix "Comparing Different Types of Deferred Annuities." 81 Fed. Reg. at 21,178-90. Rather than highlighting any greater or different conflicts of interest in sales transactions between fixed indexed annuities and "Fixed Rate Annuity Contracts," the Department's appendix only highlights the similarities between the two product types, with the immaterial exception that fixed indexed annuities use a different method for computing interest earnings credited to the contract. For example, the appendix does not describe any difference between commissions or other compensation paid or received for selling either type of fixed annuity product.

Compounding its error, the Department acknowledged, but then casually ignored, commenters who pointed out that, for purposes of a rule intended to mitigate conflicts of interest, there is no meaningful distinction between fixed indexed annuities and other types of fixed annuities, "and there are no different conflicts of interest created with their sales, as compared to fixed annuities." *Id.* at 21,157. The Department neither disputed nor critiqued these comments. Rather, the Department conclusorily stated: "Given the complexity, investment risks, and conflicted sales practices associated with" fixed indexed annuities (and variable annuities), "the Department has determined that recommendations to purchase such annuities should be subject to the greater protections of the Best Interest Contract Exemption." *Id.* at 21,153.

In a "regulatory initiative" intended "to mitigate the effects of harmful conflicts of interest associated with fiduciary investment advice," *id.* at 21,148, the Department's response to

the commenters is a *non sequitur*. Even accepting at face value the Department's assumption that fixed indexed annuities exhibit greater complexities, risks, or conflicted sales practices – a dubious and unsupported assumption – the Department never demonstrated that fixed indexed annuities engender any different or greater conflicts of interest, or suffer from greater sales practice maladies, than do the remaining universe of fixed annuities, which continue to enjoy exemptive relief under PTE 84-24. Product complexity or relative risk do not produce *sales*-related conflicts of interest and it is telling that the Department did not bother explaining how or why it believes that might be so. Perhaps the reason the Department did not attempt to support its assertions on sales practice maladies is that the actual record on sales of fixed indexed annuities does not support such an assertion. *See* Moore Decl. ¶ 19 (citing August 2015 NAIC report, noting that of the 68,592 complaints lodged with state insurance departments regarding insurance products, only 52 were tied to fixed indexed annuities).

"The disparate treatment of functionally indistinguishable products is the essence of the meaning of arbitrary and capricious." *Wyoming*, 136 F. Supp. 3d at 1344 (internal quotation marks omitted). The Department offered no coherent explanation for why, in a rule supposedly concerning alleged conflicts of interest and divided loyalties, it singled out for adverse treatment fixed indexed annuities but not other fixed annuity products. The Department's stated justification is wholly disconnected from the Rule's underlying purpose, violating the APA. *See, e.g.*, *Sorenson Commc'ns*, 567 F.3d at 1222 (in issuing a rule prohibiting telecommunications relay service providers from using revenues received from a "TRS Fund" to lobby customers, the agency "made no attempt to explain why lobbying expenditures were deserving of prohibition while all other uses of Fund revenues were not," notwithstanding agency's explanation "that lobbying end users was not an activity the TRS Fund was intended to compensate"); *Olenhouse*,

42 F.3d at 1582 (agency acted arbitrarily and capriciously by treating rain-induced late planting as "beyond the Farmers' control" for purpose of assigning a disaster credit but late planting as "within their control" for purpose of calculating yield reductions).

C. The Department failed to consider the detrimental, perhaps debilitating, effect of its actions on independent insurance agent distribution channels.

The Department also failed to consider and analyze whether relegating fixed indexed annuity transactions to the BICE is administratively feasible for independent agents, IMOs, and other businesses like Market Synergy that support or comprise the independent agent distribution channel. Relatedly, the Department failed to consider the marketplace consequences, especially the disproportionate, disruptive economic impact it will have on that channel, and especially the small businesses that dominate that channel.[8]

Under ERISA and the Code, exemptions to prohibited transactions adopted by the Department must be "administratively feasible." 29 U.S.C. § 1108(a)(1); 26 U.S.C. § 4975(c)(2). Likewise, under the APA's "arbitrary and capricious" standard, an agency acts unlawfully if it "entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs.*, 463 U.S. at 43. "Agencies have long treated cost as a centrally relevant factor when deciding whether to regulate. Consideration of cost reflects the understanding that reasonable

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[8] The Department's Regulatory Impact Analysis contains only passing reference to the cost impact on independent insurance agents. After purporting to detail costs to broker-dealers, insurers, and banks in complying with the Rule, the Department states: "*Independent insurance agents could also be affected. . . . Reliable data are not available to estimate how many are not registered as BDs [broker-dealers].*" Regulatory Impact Analysis at 238. Then, by footnote, the Department further acknowledges that "[*d]ue to this data limitation, costs for these independent insurance agents may not be accounted for in the total costs.*" *Id.* at 238 n.519. There are no other references in the Department's Regulatory Impact Analysis to the impact on independent insurance agents. Independent agent and IMO sources did not seek to provide such data during the proposed rulemaking phase in reliance on the reasonable assumption that PTE 84-24 would continue to be applicable to their sales of fixed indexed annuities under the final rulemaking, as it was under the proposed rulemaking.

regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions." *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). Similarly, under the Regulatory Flexibility Act, an agency must prepare a "final regulatory flexibility analysis" describing "the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected." 5 U.S.C. § 604(a)(6).

An "important aspect of the problem" here is that, unlike PTE 84-24, the BICE is uniquely unworkable for independent agent sales of fixed indexed annuities. The great majority of fixed indexed annuities are marketed and sold through independent insurance agents, especially agents recruited to IMOs; only a minority of fixed indexed annuities are marketed and sold through broker-dealers, banks, and other channels. Market Synergy and its IMO network members alone sold more than a quarter of the $54.5 billion in fixed indexed annuities sold in 2015, as measured by premium dollars. Unless the Department's action is preliminarily enjoined and ultimately set aside, that will quickly change, with the likely effect being reduced consumer access to traditional retirement planning sources and reduced choice and availability of guaranteed retirement income products.

To sell fixed indexed annuities and continue to receive transaction-based compensation such as commissions, independent insurance agents can no longer rely on PTE 84-24. According to the Department, they must now rely on the BICE. The BICE requires that a "Financial Institution" execute a "best interest" contract with the financial product purchaser, supervise each individual "Adviser," and in that way assume direct legal liability for the Adviser's

conduct. The Financial Institution exercising supervisory authority must adhere to the conditions of the BICE, including the policies and procedures requirements and the obligation to insulate the Adviser from incentives to violate the Impartial Conduct Standards, even if those incentives are created by third-party product providers whose products the Adviser may offer. *See* 81 Fed. Reg. at 21,007.

Entities that qualify as Financial Institutions are registered investment advisers, banks, broker-dealers and, if they meet certain conditions, insurance companies. *See* 81 Fed. Reg. at 21,083. IMOs do not categorically qualify as Financial Institutions. Indeed, in promulgating the BICE, the Department specifically declined to expand the categories of Financial Institutions to "marketing or distribution affiliates and intermediaries." *Id.* at 21,067. The Department instead limited the definition of Financial Institution to certain types of entities "which are subject to well-established regulatory conditions and oversight." *Id.* The Department allowed for the possibility that it might in the future consider applications for an individual exemption from "marketing intermediaries or other entities" but cautioned that any individual exemption would depend upon "the regulatory oversight of such entities, and their ability to effectively supervise individual Advisers' compliance with the terms of this exemption." *Id.* The uncertainty surrounding the ability of IMOs to receive an exemption will only cause more insurance companies to shift fixed indexed annuity distribution to other channels and abandon the independent agent distribution channel for fixed indexed annuity sales, causing irreparable harm to both independent agents and IMOs. Moreover, any individual exemption is available only on a case-by-case basis, as opposed to a class basis, unfairly and arbitrarily discriminating against smaller IMOs that may not fit the profile necessary to qualify for an exemption, or even possess the resources available to pursue an individual exemption.

Because they serve *independent* insurance agents, IMOs and Market Synergy are not configured to effectively supervise an Adviser's compliance with the BICE. Independent insurance agents are free to be appointed by different insurance companies, some of which the IMO or Market Synergy may have no relationship with. Neither an IMO nor Market Synergy can effectively supervise agents who sell products that the IMO or Market Synergy cannot offer. IMOs do not control the type or degree of interaction independent agents have with their clients. Nor do IMOs direct independent insurance agents' day-to-day activities or business. Sparks Decl. ¶ 49.

For similar reasons, it is doubtful whether insurance companies will agree to serve as the Financial Institution for purposes of supervising an independent agent sales force under the BICE. Insurance companies must assume the risk and uncertainty for being held legally liable as the supervisory Financial Institution under the "best interest" contract for the agent's acts and omissions. *Id.* ¶ 50. If an agent is authorized to sell the products of more than one insurance company, it will be problematic for any one company to be in a position to meet its supervisory obligations under the BICE and still allow the agent to maintain his independent status. Insurance companies do not control the type or degree of interaction independent agents have with their clients. Nor do insurance companies direct independent insurance agents' day-to-day activities or business. *Id.* ¶ 51.

In any event, even if an insurance company were willing to function as the Financial Institution, the net effect may likely be to transform the independent agents into a captive sales force because the insurance company may conclude that compliance with BICE is not even possible unless the Financial Institution has control over all sales of competing products by the independent agent. *Id.* ¶ 52. So, for example, a Financial Institution could not effectively guard

against adverse sales incentives, a key concern in the Department's adoption of BICE, unless the Financial Institution were in a position to know of and control those incentives, including incentives provided by other product manufacturers.

In addition, the BICE is expressly designed to provide a private right of action allowing contract owners to sue the Financial Institution if they believe the Adviser violated the Impartial Conduct Standards, exposing the Financial Institution to unquantifiable legal risk. This is not speculation – it is the insurance companies' outlook. For example, in an open letter to its sales force dated May 2, 2016, American Equity Investment Life Insurance Company (one of the largest fixed indexed annuity providers) observed "that there are numerous obstacles to complying with BICE for the independent agent distribution channel and that BICE was not drafted to be workable for independent agent distribution of FIAs." The letter elaborated:

> BICE requires that a Financial Institution sign a Best Interest Contract with the policyholder. Organizations that qualify as a Financial Institution are banks, broker-dealers, registered investment advisors and insurance companies. National marketing organizations (NMOs) do not qualify as a Financial Institution although BICE permits them to apply to the DOL for an individual exemption. The DOL limited Financial Institutions to "regulated entities … which are subject to well-established regulatory conditions and oversight." This means that the insurance carrier must function as the Financial Institution for sales of FIAs by independent agents to qualified accounts.
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> If an independent agent represents more than one insurance carrier, neither carrier can meet its supervisory obligation under BICE and still allow the insurance agent to maintain his "independent" status. Additionally, BICE includes a private right of action that allows policyholders, individually and as part of a class action, to sue the Financial Institution if they believe the independent agent violated the Best Interest Standard. The DOL has not created any safe harbors that if met, would prohibit policyholders from bringing suit. This exposes the Financial Institution to potentially unlimited and unquantifiable legal risk.

The "bottom line," the letter concluded, was that there "are significant challenges to the sale of FIAs to qualified accounts under BICE by companies like American Equity Life that utilize the

independent agent channel. The potential legal exposure to the insurance company cannot be reasonably assessed or quantified." *Id.* ¶ 53.

Market Synergy, IMOs, independent insurance agents, and others not affiliated with a Financial Institution are completely disenfranchised by the new regulatory regime. In its zeal to police fixed indexed annuities, the Department considered none of this, making no determination as to whether the BICE is administratively feasible for independent agent distribution of fixed indexed annuities. When an agency fails to provide a reasoned explanation for its action, it is appropriate to remand to the agency for further proceedings. *Qwest Corp. v. FCC*, 258 F.3d 1191, 1201 (10th Cir. 2001).

D. The Department has exceeded its statutory authority in seeking to manipulate the financial product market rather than regulate fiduciary conduct.

The Department's final rulemaking is also unlawful and in excess of statutory authority because the Department effectively seeks to manipulate the financial product market by granting preferential exemptive treatment to some products (*i.e.,* "Fixed Rate Annuity Contracts") over others (*i.e.* fixed indexed annuities) based on the Department's own unsupported product biases. Neither ERISA nor the Code authorizes the Department to be the arbiter of which financial products succeed and which fail. But that is precisely the purpose and likely effect of the Department's arbitrary and unannounced reversal regarding the exemptive treatment of fixed indexed annuities in the final rulemaking.

The Department claims that it "has not specified that any particular investment product is . . . per se imprudent." 81 Fed. Reg. at 21,032. That assertion is proven hollow when one examines the Department's final regulatory action. The Department uses its ostensible exemptive authority – through the creation of the BICE and the amendment and partial revocation of PTE 84-24 – to promote the sale of certain types of fixed annuities, while

suppressing the sale of another type of fixed annuity. Sellers of the favored products get the benefit of the more "streamlined" PTE 84-24, while sellers of the disliked products are relegated to the substantially "more stringent" BICE. 81 Fed. Reg. at 21,152-153, 21,155, 21,158. The Department tacitly acknowledges the significance of its ability to funnel products into or away from the BICE, citing the undesirable legal and financial risks, "including class litigation, and liability and associated reputational risk" under the BICE. 81 Fed. Reg. at 20,947.

The Department's attempt to engineer the mix of products in the retirement savings marketplace is both contrary to law and a bit startling. The Department lacks statutory authority to regulate financial products, or to pick winners and losers among them based on unfounded and erroneous notions of their relative value to retirement savers – notions which are not premised on the type of advice, nor the type of conflict of interest. The Exchange Act authorizes the SEC, not the Department, to regulate the securities product marketplace. *See generally* 15 U.S.C. § 78a *et seq*. The states – not the federal government – are entrusted with regulatory oversight of insurance products. *See* McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015. ERISA and the Code grant the Department limited authority to regulate, as pertains here, fiduciary "investment advice" with respect to the assets of ERISA plans and IRAs. 29 U.S.C. § 1002(21)(A)(ii); 26 U.S.C. § 4975(e)(3)(B). Thus, the Department's prescribed authority only extends to regulating certain *conduct* of persons deemed to assume fiduciary responsibility under the statutes. Neither statute reflects congressional authorization to transform this carefully delineated authority into a prerogative to directly regulate and manipulate access to particular financial *products*, which are already heavily regulated at the federal or state levels, or both, depending on the type of product. For this reason as well, the Department's last-minute exclusion of fixed indexed annuities from

the scope of the final amended PTE 84-24 is unlawful and far beyond the Department's delegated authority under ERISA or the Code.

III. The Department's Actions Are Causing Immediate And Irreparable Harm.

If, as is now the case, those who sell or are involved in the independent distribution of fixed indexed annuities cannot receive commissions or other third-party compensation under PTE 84-24 (because that exemption has been revoked) or the BICE (because that exemption is unworkable), the consequences will be profound. The coming shift in how fixed indexed annuities are sold, and *who* will sell them, will radically alter the annuity industry, to the overwhelming detriment of independent agents, IMOs, and Market Synergy.

Although "purely speculative" harm does not amount to irreparable injury, "an injury is not speculative simply because it is not certain to occur." *Greater Yellowstone*, 321 F.3d at 1258. An irreparable harm requirement is met if the movant demonstrates a "significant risk" that it will experience harm that cannot be compensated after the fact by monetary damages. *Id.*; *see also Winter v. Natural Resources Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (movant must show irreparable injury is *likely* absent an injunction). The movant may establish irreparable harm by such factors as the difficulty in calculating damages, loss of customers, loss of goodwill or competitive market position, or threats to a business's viability. *Advisors Excel, LLC v. Zagula Kaye Consulting, LLC*, No.15-4010-DDC-KGS, 2015 WL 736344, at *3 (D. Kan. Feb. 20, 2015) (Crabtree, J.) (citations omitted).

These standards are readily satisfied here. In 2015 alone, fixed indexed annuity sales reached $54.5 billion in premium, an increase of 13% from 2014. *See* Moore Decl. ¶ 16(a). Historically, IMOs and the independent insurance agents with whom they have relationships have been the dominant distribution channel for this product. There are approximately 80,000

independent insurance agents who sell fixed indexed annuities. Moore Decl. ¶ 16(i). Around six in ten fixed indexed annuities sold in the fourth quarter of 2015 were via independent agents, with the majority of that percentage within qualified retirement accounts. *Id.* ¶¶ 16-17. By contrast, during the same period, banks represented less than 17% of sales and broker-dealers had a 13.5% share. *See* Sparks Decl. ¶ 18; *see also* Moore Decl. ¶¶ 16-17.

Unsurprisingly, fixed indexed annuities represent a significant portion – often exceeding 80% – of a typical IMO's sales. For those in Market Synergy's network of IMOs, for example, fixed indexed annuities represent more than 90% of total sales. Sparks Decl. ¶ 19; Tripses Decl. ¶ 14; Rice Decl. ¶ 15; Callanan Decl. ¶ 15. The vast majority of independent agents are recruited by IMOs, and most are licensed to sell insurance only – meaning that they are neither licensed to sell securities such as stocks, mutual funds, or variable annuities, nor affiliated with a broker-dealer or registered investment adviser. *See* Rice Decl. ¶ 9; Tripses Decl. ¶ 20. Nearly all independent agents, and many IMOs, are small business entities. *See* Rice Decl. ¶ 28; Tripses Decl. ¶ 11; Heitz Decl. ¶ 10. *See also* Moore Decl. ¶¶ 20-21.

Rather than attempt to continue to market and sell fixed indexed annuities through an independent agent distribution channel in light of the unique regulatory challenges caused by the BICE, insurance companies will shift their distribution to career agents, banks, registered investment advisers, and broker-dealers. As noted, several large providers of fixed indexed annuities have publicly signaled their intention to do just that. Indeed, insurance companies have indicated that they intend to finalize plans to comply with the new regulatory regime as soon as practicable. If insurance companies begin developing and investing in business operations, strategies, and contractual arrangements designed to shift distribution of fixed indexed annuities away from IMOs and independent insurance agents to alternative channels, it will be difficult for

them to reverse or rescind those operations, strategies, and arrangements even if the Department's actions are vacated or otherwise altered at a future point in time. *See generally* Sparks Decl. ¶¶ 50-56. *See also* Tripses Decl. ¶ 21.

All this will cost Market Synergy, IMOs, and independent agents their customers, market share, goodwill, and competitive position relative to broker-dealers, banks, registered investment advisers, and captive agent sales forces. Because their business model so heavily depends on their ability to receive compensation generated from fixed indexed annuity sales, independent agents and IMOs expect to experience a drop in revenue exceeding 50%. Market Synergy anticipates experiencing a revenue drop approaching 80%. For the same reasons, it is expected that upwards of 20,000 independent insurance agents will exit the marketplace. In this hostile environment, it will become exceedingly difficult to attract and recruit new independent agents – the lifeblood of any IMO. *See generally* Sparks Decl. ¶¶ 57-62; Callanan Decl. ¶¶ 15-23. *See also* Tripses Decl. ¶¶ 23-29; Rice Decl. ¶ 28.

Consumers too will be adversely impacted because independent insurance agents offer, at no expense, financial advice tailored to each customer's needs, goals, and financial resources. For example, independent agents are required both by law and good business practice to ascertain whether a fixed indexed or other annuity is a suitable choice for the customer. By eliminating third-party compensation for independent agents, independent agents will be unable to offer financial advice to less affluent consumers. *See generally* Cousinet Decl. (Exhibit 6); Shreves Decl. (Exhibit 8). *See also* Moore Decl. ¶ 21; Heitz Decl. ¶ 10; Callanan Decl. ¶¶ 17-18.

IV. The Equities And Public Interest Favor Issuance Of A Preliminary Injunction.

"The third preliminary injunction factor requires the Court to determine whether the threatened injury to the movants outweighs the injury to the opposing party under the

injunction." *Wyoming*, 136 F. Supp. 3d at 1349. "When the government is the opposing party, it is appropriate for the Court to consider jointly the balance of harms and public interest." *Id.*

No governmental or public interest would be harmed by a preliminary injunction. The Department has no legitimate interest in issuing or enforcing an invalid regulation. Moreover, the Department's amendment to and partial revocation of PTE 84-24 is only applicable to transactions occurring on or after April 10, 2017. *See* 81 Fed. Reg. at 21,147. Whereas Market Synergy and others are suffering immediate, ongoing harm *now* because of industry developments occurring under the specter of the impending regulations, the Department and the public will not be prejudiced by a temporary stay until the Court can decide this matter on the merits. Delayed agency efforts, without more, do not constitute harm. *See Wyoming*, 136 F. Supp. 3d at 1351; *Comanche Nation v. United States*, 393 F. Supp. 2d 1196, 1211 (W.D. Okla. 2005). Where enjoining an agency action will not appreciably thwart a government or public interest, but private parties will suffer disproportionate harm in the interim, the balance of equities weighs in favor of the injunction. *See Hobby Lobby*, 723 F.3d at 1146; *Wyoming*, 136 F. Supp. 3d at 1351-52.

V. The Court Should Waive Any Security Requirement.

The Court may determine that a bond or surety is unnecessary to secure a preliminary injunction if there is an absence of proof showing a likelihood of harm. *See* Fed. R. Civ. P. 65(c); *Coquina Oil Corp. v. Transwestern Pipeline Co.*, 825 F.2d 1461, 1462 (10th Cir. 1987); *Wyoming*, 136 F. Supp. 3d at 1354 n.53. As the Department will suffer no harm, Market Synergy requests that the Court exercise its discretion to not require security for an injunction.

CONCLUSION

For all of the foregoing reasons, Market Synergy respectfully requests that the Court grant its motion and preliminarily enjoin the Department, its officers, employees, and agents from effectuating, implementing, applying, or taking any action whatsoever to adopt or enforce the final amended version of PTE 84-24, insofar as it relates to fixed indexed annuity sales, during the pendency of this litigation. This will allow fixed indexed annuity sellers to continue to avail themselves of exemptive relief under PTE 84-24, as it existed prior to the Department's April 8, 2016 amendment and partial revocation, during the pendency of the litigation. If Market Synergy prevails on the merits, all of the harms that amended PTE-84-24 imposes (as addressed in this motion) will have been avoided.

In the event that the Department prevails on the merits, then Market Synergy would conditionally request that the Court order the Department to set a new applicability date that provides Market Synergy, its IMO members, independent insurance agents, and the rest of the fixed indexed annuity industry a reasonable and adequate period of time after the disposition of the case to come into compliance with the Department's new Rule and related exemptions. The exact duration of this period will depend on the timing of the Court's merits decision in relation to the current applicability date.

Dated: June 17, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 17th day of June, 2016, I electronically filed the above and foregoing document with the Clerk of the Court using the Court's ECF system, which will send notification of said filing to all counsel of record, if any. The undersigned further certifies that the above and foregoing document will be served via Federal Express-Overnight Delivery to the following:

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