

A Roadmap to Litigation on the Department of Labor’s 2016 Conflict of Interest Rule

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(October 6, 2016)

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I. Scope of Outline

A. The Department of Labor (DOL) adopted a new Conflict of Interest Rule on April 10, 2016, that imposes new "ERISA-Like" fiduciary standards on broker-dealers, insurance agents, and other advisers providing recommendations about individual retirement account (IRA) rollovers from retirement plans. This outline highlights the substance and status of lawsuits challenging DOL's action, known as the "Fiduciary" Rule,¹ that DOL first [proposed](#)² in 2010, and [reproposed](#)³ in 2015. Collectively, six lawsuits assert at least 29 independent legal claims against DOL, the rule, and the rulemaking process, including challenges that, among other things, DOL:

1. Exceeded its authority under the Administrative Procedure Act by adopting an expanded definition of the word "fiduciary" that conflicts with existing law;
2. Unlawfully created a private right of action permitting individual lawsuits without appropriate authorization from Congress;
3. Failed to provide adequate notice of actions taken in the final rule, and disregarded commentators' views;
4. Inappropriately extended fiduciary obligations under ERISA to individual retirement accounts (IRA);
5. Contradicted the First Amendment of the Constitution by unduly restricting the speech of investment advisers;
6. Violated the due process clause of the Fifth Amendment to the Constitution by adopting unacceptably vague standards;
7. Failed to properly evaluate the rule's economic and competitive impact, particularly on small businesses;

¹ The fiduciary rule was adopted under the Employee Retirement Security Act of 1974 (ERISA) and the Internal Revenue Code (Code). See, <https://www.federalregister.gov/documents/2016/04/08/2016-07924/definition-of-the-term-fiduciary-conflict-of-interest-rule-retirement-investment-advice> (last viewed October 3, 2016).

² <http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=24328> (last viewed October 3, 2016).

³ <http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=28201> (last viewed October 3, 2016).

8. Violated the Dodd-Frank Act, the Regulatory Flexibility Act, and the Federal Arbitration Act; and,
 9. Unfairly discriminated against certain retirement products and distribution systems without reasonable justification.
- B. The Government Responded to five of the six complaints as of October 6, 2016.

II. Contextual Background: Brief Summary of the Final Rule

- A. Under the DOL's final conflict of interest rule (“fiduciary rule”), an adviser is deemed to provide investment advice for purposes of ERISA and the Internal Revenue Code when making an investment “recommendation” to a plan, plan fiduciary, plan participant or beneficiary, IRA or IRA owner for a fee or other direct or indirect compensation. See DOL [Fact Sheet](#)⁴ accompanying April 8, 2016 adoption of the final rule.
- B. The fiduciary rule applies to recommendations provided directly or through an affiliate by an adviser that:
1. Represents or acknowledges that it is acting as a fiduciary within the meaning of ERISA and/or the Code;
 2. Renders the advice under a written or verbal agreement, arrangement or understanding that the advice is based on the particular investment needs of the advice recipient; or
 3. Directs the advice to a specific advice recipient or recipients regarding the advisability of a particular investment or management decision with respect to securities or other investment property of the plan or IRA.
- C. The fiduciary rule defines “recommendation” to include “a communication that, based on its content, context and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action.”
1. Whether a recommendation has occurred under the fiduciary rule is an objective, rather than a subjective, test. More individually tailored communications recommending specific advice to individuals about financial strategies, such as acquiring a security, investment property or implementing suggested investment approaches could trigger the rule’s “recommendation” threshold
- D. The fiduciary rule covers “recommendations” about the:
1. Advisability of acquiring, holding, disposing of or exchanging securities or

⁴ <https://www.dol.gov/ProtectYourSavings/FactSheet.htm> (last viewed October 3, 2016).

other investment property, including how the proceeds from plan or IRA rollovers or distributions should be invested;

2. Management of securities or other investment property, including but not limited to recommendations on:

- a) Investment policies or strategies;
- b) Portfolio composition;
- c) Selection of other persons to provide investment advice or investment management services;
- d) Selection of investment account arrangements (e.g., brokerage versus advisory); and,
- e) Plan or IRA rollovers, transfers or distributions, including whether, in what amount, in what form and to what destination such a rollover, transfer or distribution should be made.

E. The fiduciary rule does not cover the following, if certain conditions are satisfied:

1. Platforms provided to ERISA plans (this exclusion does not apply to IRAs or 401(k) brokerage windows);

2. Selection and monitoring activities (including in response to an RFP or RFI and certain mapping alternatives);

3. General communications that a reasonable person would not view as investment advice (such as publicly broadcast talk shows, speeches given at widely attended conferences, newsletters and, importantly, general marketing data and prospectuses); and

4. Investment education, including:

- a) Plan information;
- b) General financial, investment or retirement information;
- c) Asset allocation modeling; and
- d) Interactive investment materials.

5. Under the fiduciary rule, several advisory functions are outside the fiduciary standard, including:

- a) Taking orders from clients strictly to buy or sell investment options, without providing any investment advice;
- b) Making sales pitches to plan fiduciaries who are themselves financial experts and underrate fiduciary duty to look out for the best interest of plan participants;
- c) Sales of swaps for security-based swaps to plan fiduciaries; providing a platform of investment alternatives for plan fiduciaries to offer to plan participants in self-directed plans;
- d) Identifying investment alternatives based on criteria selected by a plan fiduciary and giving objective financial data with independent yardsticks;

- e) Providing appraisals, fairness opinions, or valuation statements to ESOPs, CIFs, separate accounts, or for plan reporting purposes; and,
 - f) Providing general education on retirement savings.
6. Best Interest Contract Exemption
- a) The fiduciary rule contains a Best Interest Contract Exemption (“BIC exemption”) (Prohibited Transaction Exemption 2016-01) permitting qualified financial institutions, broker-dealers and investment advisers to give investment recommendations to “retail” investors, if the adviser meets certain “impartial conduct standards” and other significant standards. Under the BIC exemption, “retail” investors generally include plan participants and beneficiaries, IRA owners and “retail” fiduciaries.
 - b) The BIC exemption is limited to “financial institutions” and their employees, independent contractors, agents, representatives, affiliates and related entities. Under the BIC exemption, “financial institutions” includes only registered investment advisers, banks, insurance companies, broker/dealers and other entities.
 - c) To satisfy the BIC exemption, investment advisers must:
 - i.) Acknowledge fiduciary status under ERISA and/or the Code;
 - ii.) Adhere to “impartial conduct standards”;
 - iii.) Adopt policies and procedures to ensure related advisers adhere to the “impartial conduct standards”;
 - iv.) Clearly and prominently disclose any conflicts of interest, such as hidden fees, that might prevent the adviser from providing advice in the client’s best interest (commissions, 12b-1 fees, revenue sharing);
 - v.) Comply with other disclosure (including maintaining website disclosure), record retention and DOL notification requirements; and
 - vi.) Enter into written contracts with IRAs or other non-ERISA plans.
 - d) The BIC exemption’s impartial conduct standards demand that when rendering investment advice to a non-retail investor, the adviser act in the best interest of the investor, charge no more than reasonable compensation and, subject to certain exceptions, preclude bonuses, quotas and other differential compensation.
 - e) Proprietary Products. The BIC exemption contains provisions for entities that limit their recommendations to proprietary products. The BIC requires these entities to fully disclose that they are offering only a restricted menu of products and the associated conflicts of interest.

(1) Proprietary products firms must also adopt measures to protect investors from conflicts of interest and to insulate the adviser from conflicts of interest when making recommendations from the restricted menu.

(2) Advisers that recommend a limited set of products must consider what is in the retirement investor's best interest and document the reasons for recommending the particular proprietary product.

(3) If the adviser determines that the investor's best interest would be best served by another product that the adviser does not offer, the adviser cannot recommend a product from their limited menu.

7. Implementation Timetable

a) The final fiduciary rule has a grace period for advisers seeking to comply with the BIC exemption. Although the final fiduciary rule is generally effective on April 10, 2017, advisers are allowed to wait until January 1, 2018 to enter into required agreements with IRAs and other non-ERISA plans and comply with most other requirements of the BIC exemption. The fiduciary acknowledgment and impartial conduct standards of the BIC exemption, however, become effective as of April 10, 2017.

F. The DOL also amended a number of other existing prohibited transaction class exemptions ("PTEs"), including PTE 84-24, which previously provided prohibited transaction exemption relief for the sale of insurance and annuity products to retirement plans and IRAs. See, 80 Fed. Reg. 22,010 (Apr. 20, 2015)

1. In its action, DOL 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.

2. 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. 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.*

3. 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 DOL proposed several changes to PTE 84-24.

4. Among the 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.”

5. Rather than enjoying exemptive relief under PTE 84-24, participants in such transactions would be limited to seeking exemptive relief under the new BICE. DOL stated its belief that the BICE would better protect the interests of IRAs with respect to investment advice “regarding securities products.”

III. Lawsuits Challenging the Final Rule

A. The following six complaints challenging the rule were filed in four different jurisdictions:

1. U.S. District Court for the Northern District of Texas (Consolidated Cases)
 - a) [*Chamber of Commerce v. Perez*](#),⁵ N.D. Tex., Civil Action No. 3:16-cv-01476-G (June 1, 2016).
 - b) [*American Council of Life Insurers v. Perez*](#),⁶ N.D. Tex., Civil Action No. 3:16-cv-01530-C (June 8, 2016).
 - c) [*Index Annuity Leadership Council v. Perez*](#),⁷ N.D. Tex., Civil Action No. 3:16-cv-01537-N (June 8, 2016).
 - d) DOL filed an [*Unopposed Motion for Consolidation*](#),⁸ N.D. Tex., Civil Action No.3:16-cv-01476-M (June 16, 2016).
2. U.S. District Court for the District of Columbia
 - a) [*National Association for Fixed Annuities v. Perez*](#),⁹ DDC, Civil Action No. 1:16-cv-1035 (June 2, 2016).

⁵https://www.bloomberglaw.com/public/desktop/document/Chamber_of_Commerce_of_the_United_States_of_America_et_al_v_US_De?1466003736 (last viewed October 3, 2016).

⁶https://www.bloomberglaw.com/public/desktop/document/American_Council_of_Life_Insurers_et_al_v_United_States_Departmen?1466003546 (last viewed October 3, 2016).

⁷https://www.bloomberglaw.com/public/desktop/document/INDEXED_ANNUIITY_LEADERSHIP_COUNCIL_et_al_v_THOMAS_E_PEREZ_SECRETETA?1466003353 (last viewed October 3, 2016).

⁸https://www.bloomberglaw.com/public/desktop/document/Chamber_of_Commerce_of_the_United_States_of_America_et_al_v_US_De/1?1475358392 (last viewed October 3, 2016).

⁹https://www.bloomberglaw.com/public/desktop/document/NATIONAL_ASSOCIATION_FOR_FIXED_ANNUITIES_v_DEPARTMENT_OF_LABOR_et?1466003647 (last viewed October 3, 2016).

3. U.S. District Court for the District of Kansas
 - a) [Market Synergy Group, Inc. v. Perez](#),¹⁰ DKS, Civil Action No. 5:16-cv-04083 (June 6, 2016).
4. U.S. District Court for the District of Minnesota
 - a) [Thrivent Financial for Lutherans v. Perez](#),¹¹ DMN, Civil Action No. 0:16-cv-03289, (September 29, 2016).

B. **Note: In the discussion of the lawsuits and government responses below, every effort has been made to quote the precise wording in the noted legal documents to the greatest extent possible to accurately convey the positions of the parties without editorializing.**

IV. U.S. Chamber of Commerce Challenge to the Final Rule

A. Synopsis of Chamber of Commerce Position

1. DOL does not have “broad authority under [ERISA] to protect Americans’ retirement savings. Congress gave DOL regulatory and enforcement authority over employer-sponsored retirement plans and virtually no authority over retirement savings outside that context. *See, Chamber of Commerce Plaintiffs’ Reply in Support of their Motion for Summary Judgment and Opposition to Defendants’ Cross-Motion for Summary Judgment*, Civil Action No. 3:16-cv-1476-M (Sept. 9, 2016).
2. By using that authority to exact firms’ agreement to legal obligations that it is powerless to impose directly, DOL has seized the power over “retirement savings” that Congress never bestowed on it. DOL disregarded other regulators, both federal and state, and upended decades of state and federal regulation and law. *Id.*
3. The fiduciary rule impairs the ability of savers with modest means to plan for a secure retirement, and threatens to create a blueprint for pervasive regulatory excesses that erase the division of responsibility between coequal agencies and federal and state governments. *Id.*
4. IRAs are not ERISA plans and that are, therefore, beyond DOL’s jurisdiction apart from its limited authority under the Internal Revenue Code to interpret the statutory definition of “fiduciary” and grant prohibited transaction exemptions consistent with the statute. *Id.*
5. DOL’s arguments in support of its rulemaking is inconsistent with the text of the statutes, controlling precedents, and congressional determinations. DOL’s interpretation conflicts with ERISA, the Code, and the securities laws in other respects by conflating sales activity with fiduciary advice. *Id.*
6. The contractual enforcement mechanism created by the BIC exemption does not merely encapsulate existing state law, but provides new rights and remedies in an “end-run” around Congress’s purposefully limited design. *Id.*

7. The Court should reject DOL's impermissible regulatory overreach and hold the agency to its congressionally-prescribed limits, vacating the rulemaking in its entirety. *Id.*

B. Chamber Position in More Detail

1. DOL has adopted an unreasonable, arbitrary interpretation of "Fiduciary" that conflicts with the plain meaning of ERISA and the Internal Revenue Code. *See, Chamber of Commerce Plaintiffs' Reply in Support of their Motion for Summary Judgment and Opposition to Defendants' Cross-Motion for Summary Judgment*, Civil Action No. 3:16-cv-1476-M (Sept. 9, 2016).

a) When Congress used the term "fiduciary" in ERISA and the Code, it incorporated a central element of trust law: the presence of a relationship of "special intimacy or . . . trust and confidence" between the parties. Brokers and other salespersons have never been understood to have a fiduciary relationship and are not paid for providing advice. *Id.*

b) DOL's Rule conflicts with that historical understanding and the limitation it places on the statutes' reach; indeed, DOL makes no secret of the Rule's intent to sweep in relationships that are not marked by ongoing interactions involving heightened trust and confidence. *Id.*

c) Under the fiduciary rule any purchase recommendation by a broker-dealer or insurance agent makes her a fiduciary, even something as simple as "providing a selective list of securities" and indicating they are "appropriate for [that] investor" without making a "recommendation . . . with respect to any one security." *Id.*

d) DOL fails to show that the "other elements" of a fiduciary relationship, including a relationship of trust and confidence, characterized by "frequent and personal contact," [Lowe v. SEC, 472 U.S. 181, 195 (1985)] are incompatible with the text of ERISA or the Code. This one change Congress made in the common law understanding of fiduciary cannot justify treating as fiduciaries broker-dealers, sales agents, and others who at the time ERISA was enacted were distinguished from fiduciaries. *Id.*

e) The weight Congress placed on the "function" of a plan service provider—versus whether the provider is "named" in the trust document—made consideration of the historical function of a fiduciary still more important. *Id.*

f) DOL departs from the text of ERISA, the Code, and the established meaning of "fiduciary" when it suggests that fiduciary status should be determined by whether a person's activities "impact" "retirement security." *Id.*

g) Congress intended the defining characteristics of a “fiduciary” under trust law to carry over into the statutes, as the first and third prongs both describe relationships consistent with a traditional fiduciary relationship, involving important decision-making power for the plan. *Id.*

h) The House Report [on ERISA’s enactment], explained that a “fiduciary is one who occupies a position of confidence or trust” and that, for purposes of ERISA, this includes “a person who exercises any power of control, management, or disposition with respect to monies or other property of an employee benefit fund.” *Id.*

i) To qualify as a fiduciary under ERISA and the Code, a party must have an advisory relationship to a plan, not a sales-based relationship: fiduciary and sales relationships are fundamentally different and mutually exclusive, an understanding well established prior to ERISA’s enactment. *Id.*

2. DOL’s Interpretation Conflicts with the Statutory Requirement to “Render Investment Advice for a Fee or Other Compensation.” *See, Chamber of Commerce Plaintiffs’ Reply in Support of their Motion for Summary Judgment and Opposition to Defendants’ Cross-Motion for Summary Judgment*, Civil Action No. 3:16-cv-1476-M (Sept. 9, 2016).

a) In both word and in historical usage, the phrase “render investment advice for a fee or other compensation” refers to someone who provides advice in order to be compensated for it: the preposition “for” indicates that the purpose of the compensation is to pay for the advice. *Id.*

b) DOL’s counter-textual arguments do not withstand scrutiny. In ordinary sales interactions, the commission is not paid for recommendations that are made in the course of the transaction. *Id.*

c) A broker-dealer or insurance agent is not compensated for “advice.” A commission is paid if, and only if, there is a sale, no matter how meticulously the salesperson may have “advised” the consumer. Conversely, a broker will receive a full commission once a sale is made even if she makes only a fleeting “recommendation” or none at all. Someone compensated on this basis is plainly not “render[ing] investment advice for a fee.” *Id.*

d) Well before [ERISA and the code], a “distinction” had long existed between the “two general forms of compensation” that financial professionals receive in connection with offering investment assistance—commissions, which are earned “for each securities transaction completed,” and “a separate advice fee,” which is “often a certain percentage of the customer’s assets under advisement or supervision.” *Id.*

e) DOL argues that a salesperson who provides a “suggestion” is covered by the statutory language because the statute refers to “render[ing] investment advice for a fee or other compensation, direct or indirect.”

(1) The word “indirect” refers to whether the “fee or other compensation” is paid directly or indirectly, not to the advice’s role in generating the fee.

(2) Thus, “indirect” means that a person paid for advice can be a fiduciary even if the payment flows from a source other than the plan or advisee. *Id.*

3. The fiduciary rule’s inconsistency with the Securities laws illustrates that DOL exceeded its authority. *See, Chamber of Commerce Plaintiffs’ Reply in Support of their Motion for Summary Judgment and Opposition to Defendants’ Cross-Motion for Summary Judgment*, Civil Action No. 3:16-cv-1476-M (Sept. 9, 2016).

a) The Investment Advisers Act of 1940 [15 U.S.C. § 80b-1 et seq.], particularly its definition of “investment adviser” and its exclusion of “incidental” advice from that definition, further inform ERISA’s definition of “fiduciary” and the “investment advice” prong. DOL asserts that this exclusion is irrelevant because Congress did not spell out a similar exclusion in ERISA and the Code. *Id.*

b) The Advisers Act iterates the clear and long-standing distinction between fiduciary investment advice and sales performed by broker-dealers. The strong parallels between ERISA’s fiduciary definition and the Advisers Act’s investment adviser definition (parallels DOL never addresses), as well as the explicit references to the Advisers Act in other parts of ERISA, confirm that Congress legislated against the background of the Act. *Id.*

c) Congress did not need to refer explicitly to the Advisers Act in the investment advice prong of ERISA and the Code to embed, in those new laws, the distinction that the well-known language carried with it from the Act. *Id.*

d) DOL also rejects the import of the Dodd-Frank Act for the interpretation of fiduciary it has adopted. In the Dodd-Frank Act, Congress directed the SEC to follow specific considerations in delineating any fiduciary standard that it adopted for broker-dealers, including that receipt of commissions should not be a fiduciary violation. *Id.*

e) DOL dismisses Congress’s clear direction on this point by contending that it is the prohibited transaction rules of ERISA and the Code that bar commissions, not the fiduciary rule. *Id.*

f) DOL's approach competes with Congress's explicit instruction that fiduciary status should not be used to outlaw broker-dealers' receipt of commissions. *Id.*

g) DOL emphasizes the unforeseen changes in employee retirement plans since ERISA was enacted. Even if DOL were correct that "today's marketplace realities" demand a radical change in the law, that would be a warrant for legislative action by Congress, not a license for an agency to contort an existing statute in a manner that conflicts with its text. *Id.*

h) The fiduciary rule attempts to regulate IRAs that has no basis in the statutory text and reflects instead DOL's view that today, "social change and legal change and financial change" are best achieved through "regulation" and secondarily through "litigation." *Id.*

i) DOL's interpretation is owed no deference. *Id.*

4. DOL arbitrarily and capriciously used its exemptive authority to impose new standards not authorized by Congress.

a) DOL claims that its exemptive authority under ERISA and the Code is "open-ended," restrained only by DOL's capacity to decide whether the conditions it elects to impose meet three broadly-worded statutory requirements. *See, Chamber of Commerce Plaintiffs' Reply in Support of their Motion for Summary Judgment and Opposition to Defendants' Cross-Motion for Summary Judgment*, Civil Action No. 3:16-cv-1476-M (Sept. 9, 2016).

b) DOL contends its imposition of new substantive standards for IRAs, which mirror those in ERISA but lack a basis in the text of the Code, cannot be arbitrary and capricious. The proposition that an agency has virtually unfettered authority to create new substantive obligations has no basis in ERISA, the Code, or in administrative law. *Id.*

c) DOL objects that plaintiffs would place "limits on DOL's exemption authority that are not in the statutory text" by precluding DOL from "impos[ing]"—through conditions to the BIC exemption "the duties of prudence and loyalty" that "Congress did not impose" itself. Plaintiffs do not dispute that DOL has authority to grant "conditional or unconditional" exemptions. *Id.*

d) DOL's "effectively incorporate[s]" into the Code the ERISA duties of loyalty and care and thereby establishes a regulatory scheme that is contrary to the Code is incompatible with the limited nature of an exemptive authority. *Id.*

e) The fiduciary rule goes further than the statute permits by attaching not merely new conditions through its exemptive authority, but new consequences. *Id.*

f) Under the fiduciary rule, when a financial institution enters a “Best Interest Contract,” and falls short of its requirements, the institution not only loses the exemption, but also becomes subject to suit for breach of the contract. The BIC exemption thereby imposes new non-statutory penalties, and produces arbitrary and capricious results. *Id.*

g) Significant record evidence shows that as a result of the fiduciary rule, service providers to IRAs often will have no choice but to use the BIC exemption because of the superiority of the transaction-based compensation model in many circumstances. *Id.*

h) DOL has adopted an overbroad, unadministrable definition of fiduciary precisely so it may channel service providers into the BIC exemption and subject them to burdens that Congress has not. *Id.*

5. The BIC Exemption Unlawfully Creates a Private Right Of Action And Is An Unreasonable, Arbitrary Exercise Of DOL’s Exemptive Authority

a) DOL acknowledged that “the contractual requirement” in the BIC exemption “creates a mechanism for investors to enforce their rights” under the exemption, even though “[u]nlike participants and beneficiaries in plans covered by Title I of ERISA, IRA owners and participants and beneficiaries in non-ERISA plans do not have an independent statutory right to bring suit against fiduciaries for violation of the prohibited transaction rules.” See, *Chamber of Commerce Plaintiffs’ Reply in Support of their Motion for Summary Judgment and Opposition to Defendants’ Cross-Motion for Summary Judgment*, Civil Action No. 3:16-cv-1476-M (Sept. 9, 2016).

b) The BIC exemption gives IRA owners legal recourse they indisputably lack under the Code: the ability to sue for breach of fiduciary duties and for breach of a prohibited transaction exemption. DOL’s regulations, not state law, create the compulsion to enter into the BIC; dictate the terms it must contain; and prescribe the remedies that must be available. Through these means, DOL has sought to regulate IRA markets and further its policy goals by writing federal regulatory requirements into privately-enforceable contracts. *Id.*

c) The Supreme Court unanimously rejected an attempt to use contract law to import a private right of action into a statutory framework where Congress had provided none. *Id.*

d) Even if DOL’s creation of private claims by prescribing contract terms distinguished this case from *Sandoval* the Rule would nonetheless be arbitrary and capricious under the APA and unreasonable under step two of *Chevron*. *Id.*

e) Congress has constructed a framework of requirements and penalties related to IRAs, and DOL's Rule fundamentally transforms that structure by inventing new standards of conduct and liabilities that depart from the Code. *Id.*

f) DOL cannot establish by direct regulation liabilities that Congress did not create in the Code; doing so through the backdoor with forcible contracts is no more lawful. *Id.*

6. DOL's Class Action Waiver Ban Violates the Federal Arbitration Act (FAA) and Is Arbitrary And Capricious

a) In "remedying" Congress's "failure" to extend ERISA's fiduciary standards and private rights of action to the Code, DOL also mandated that claimants must be allowed to bring their fiduciary breach claims as class actions in court; only individual claims may be freely arbitrated. See, *Chamber of Commerce Plaintiffs' Reply in Support of their Motion for Summary Judgment and Opposition to Defendants' Cross-Motion for Summary Judgment*, Civil Action No. 3:16-cv-1476-M (Sept. 9, 2016).

b) DOL's action extends farther than ERISA which permits arbitration agreements with class action waivers and imposing yet another requirement with no footing in the Code, DOL was arbitrary and capricious and violated the Federal Arbitration Act ("FAA"), which prohibits States, private parties, or agencies "from conditioning the enforceability of certain arbitration agreements" on the presence or absence of certain terms. *Id.*

c) Firms serving low-trading customers who do not need ongoing monitoring or assistance will be obligated to enter into contracts that allow class action litigation in court. *Id.*

d) The fiduciary rule impairs parties' ability to agree to arbitrate and to agree to the subject and terms of arbitration in a manner that "interferes with fundamental attributes of arbitration" [*AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344-45 (2011)] and impairs parties' ability to "structure their arbitration agreements as they see fit" [*Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989)]. *Id.*

7. Department's Cost-Benefit Analysis Does Not Justify Its Actions

a) DOL dismisses the Rule's negative effects on savers with limited means. See, *Chamber of Commerce Plaintiffs' Reply in Support of their Motion for Summary Judgment and Opposition to Defendants' Cross-Motion for Summary Judgment*, Civil Action No. 3:16-cv-1476-M (Sept. 9, 2016).

b) DOL continues to dismiss the daunting costs of exposure to class action lawsuits. DOL claims that firms are already subject to class action litigation but this ignores the fact that many firms including insurers agreements to arbitrate on an individual basis rather than litigate on a class basis. *Id.*

c) The “increased fiduciary liability insurance premiums” cited by DOL do not specifically address costs from class actions, as opposed to litigation generally. *Id.*

d) Costs of litigation include settling meritless cases because of the risk presented by even a low chance of a class wide damage award, and valuable services being withheld because of fear of liability. This fear was one of just three aspects of the “advice gap” that the UK examined in its recent report about an advice gap experienced by moderate retirement savers, yet DOL ignored this cost of class actions. *Id.*

8. DOL’s Regulation of Fixed-Indexed Annuities Is Arbitrary, Capricious, and Contrary to Congress’s Intent

a) The D.C. Circuit struck down an SEC rule attempting to regulate fixed-indexed annuities as securities (See, *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 167, 179 (D.C. Cir. 2009)), the “Harkin Amendment” to Dodd-Frank prohibited the SEC from regulating these annuities provided that they satisfy certain state regulatory requirements. See, *Chamber of Commerce Plaintiffs’ Reply in Support of their Motion for Summary Judgment and Opposition to Defendants’ Cross-Motion for Summary Judgment*, Civil Action No. 3:16-cv-1476-M (Sept. 9, 2016).

b) Despite this clear intent that fixed-indexed annuities be governed by appropriate state regulations, DOL nonetheless assumed, without any basis or meaningful analysis in the rulemaking that state regulation was inadequate. *Id.*

c) DOL fails to account in the rulemaking for the independent marketing organizations (“IMOs”) that play a central role in distributing FIAs, but which do not qualify for the BIC exemption and consequently have no plausible means for complying with the Rule. *Id.*

d) DOL suggests that IMOs could apply on an ad hoc, case-by-case basis for an exemption, despite the fact that there is no guarantee DOL would grant such an exemption; and DOL contends that an insurance company could simply delegate its oversight responsibilities to an IMO, even though the insurance company would remain liable and has no incentive to take on the risk of claims that it failed to properly oversee the IMO. *Id.*

9. The Appropriate Remedy is to Vacate All of the Rules

a) The APA provides that “reviewing court[s] shall . . . hold unlawful and set aside agency action” that is arbitrary, capricious, or contrary to law. See, Chamber of Commerce Plaintiffs’ Reply in Support of their Motion for Summary Judgment and Opposition to Defendants’ Cross-Motion for Summary Judgment, Civil Action No. 3:16-cv-1476-M (Sept. 9, 2016).

b) The entire rulemaking rests on an erroneous interpretation of “fiduciary” and a fundamental misconception of the extent of DOL’s authority, that are significant legal errors, not minor errors in reasoning that can be rectified on remand. *Id.*

c) The entire rulemaking here rests on an erroneous interpretation of “fiduciary” and a fundamental misconception of the extent of DOL’s authority that are significant legal errors, not minor errors in reasoning that can be rectified on remand. *Id.*

V. American Council of Life Insurers (ACLI) & National Association of Insurers and Financial Advisors (NAIFA) Challenge to the Final Rule

A. Synopsis of ACLI/NAIFA position

1. The regulation is a misguided and unprecedented intervention in the retirement savings marketplace. It will unnecessarily restrict consumers' access to annuity products and important information about those products. Yet the rulemaking failed to examine meaningfully the effects of the Rule on the annuity marketplace. See, *Reply of American Council of Life Insurers, National Association of Insurance and Financial Advisors, and North Texas Insurance and Financial Advisors’ Associations Plaintiff in Support to Their Motion for Summary Judgment and Response to Defendants’ Cross-Motion for Summary Judgment*, N.D. TX, Civil Action No. 3:16-cv-1476-M (Sept. 16, 2016).

2. The Rule will unnecessarily drive up the costs of guaranteed lifetime income products, distort the marketplace for retirement products generally, interfere with consumers' access to truthful information about those products, and worsen, not help resolve, the profound challenges facing retirement investors. *Id.*

3. The Rule is contrary to law, arbitrary and capricious, and unconstitutional as applied. *Id.*

4. Annuities are already subject to comprehensive regulation that effectively protects consumers without unreasonably impeding the annuity market. *Id.*

a) As insurance products, all annuities are subject to state insurance laws administered by state insurance regulators. In addition, the Securities and Exchange Commission (“SEC”) and the Financial Industry Regulatory Authority (“FINRA”) regulate the sale of variable annuities. *Id.*

- b) This regulatory oversight—strengthened in recent years—ensures that consumers receive truthful, valuable information about investment options and suitable retirement recommendations. *Id.*
5. Informing consumers about annuities requires considerable time and expertise. *Id.*
- a) Annuities have wide-ranging features designed to accommodate varying risk tolerances and consumer preferences. Effectively informing consumers about annuities thus often requires a more involved conversation than is required to sell other financial products. *Id.*
- b) Many retirement savers obtain that information the same way they learn about other important products: through conversations with a salesperson. For fixed annuities, including fixed-rate and fixed indexed annuities, that salesperson is most often an insurance agent; for variable annuities, it is a registered broker-dealer. *Id.*
- c) For these reasons, life insurers rely on IMOs and affiliated agents and broker-dealers to maintain a highly trained, professional sales force to market and sell their annuity products. *Id.*
- d) The alternative to commission-based compensation is a fee-for-advice model, in which consumers pay an adviser to manage their investments over time. *Id.*
- (1) This model may work well for consumers who can afford to pay for ongoing advice—typically measured by a percentage of assets under management. But it is more expensive and makes little sense for consumers making a one-time purchase of a “buy-and-hold” product like an annuity. *Id.*
- (2) Switching from a commission-based model to annual fees as required under the rule would increase costs for many annuity purchasers and threaten to deprive individuals with small balances of all access to personal financial assistance. *Id.*
6. The Court should vacate the Rule in its entirety. *Id.*

- B. ACLI/NAIFA Position in More Detail
1. The Fiduciary Rule Violates the First Amendment
 - a) The fiduciary rule regulates, burdens, and bans truthful commercial speech by Plaintiffs' members about annuity products, and it does so in a manner that discriminates based on speaker, listener, and the DOL's judgments regarding the value of the speech at issue. *See, Reply of American Council of Life Insurers, National Association of Insurance and Financial Advisors, and North Texas Insurance and Financial Advisors' Associations Plaintiff in Support to Their Motion for Summary Judgment and Response to Defendants' Cross-Motion for Summary Judgment*, N.D. TX, Civil Action No. 3:16-cv-1476-M (Sept. 16, 2016).
 - b) In addition to a challenge under the APA, Plaintiffs bring a pre-enforcement First Amendment claim under the Declaratory Judgment Act. *Id.* Multiple commenters, including ACLI, argued that the fiduciary rule would chill non-fiduciary sales speech and that less restrictive alternatives could achieve the DOL's claims, putting at issue the substance, if not the label, of the First Amendment claim. *Id.*
 - c) Plaintiffs seek relief "as applied" to the truthful commercial speech of Plaintiffs' members, not facial invalidation. *Id.*
 - d) Under the APA, the Court must set aside a rule "contrary to constitutional right," [5 U.S.C. § 706(2)(B)], and DOL's failure to tailor the rule to avoid creating First Amendment problems requires vacatur of the Rule as a whole. *Id.*
 2. The Rule Fails Strict Scrutiny.
 - a) The rule, with its web of distinctions among products and practices, imposes an array of content discrimination based on speaker, listener, and message. *Id.*
 - b) Regardless of the label given to the speech at issue—whether "professional" or "commercial"—the Rule's systematic content-based discrimination demands strict scrutiny. The rule is content-based under each of the tests recently clarified by the Supreme Court: it draws facial distinctions, and it ties the level of regulation to the DOL's views of the value of the underlying speech and speaker. *Id.*

c) Although regulation of truthful commercial speech is subject to at least intermediate scrutiny, a standard that may also apply to some content-based regulation of broad commercial speech categories if, for example, the regulation is aimed at fraud or illegality in a specific industry—strict scrutiny is proper where, as here, the government accomplishes “further content discrimination” within such broad categories. in the context of a restriction like the Rule that “burdens disfavored speech by disfavored speakers,” the Supreme Court has held that “[c]ommercial speech is no exception” to the First Amendment’s disapproval of content discrimination *Id.*

d) The Constitution’s prohibition on content discrimination is a “distinct ... limitation ... on government regulation of speech which applies to regulation of even otherwise “proscribable speech. Content discrimination” thus ordinarily requires strict scrutiny, because it is the “constitutionally impermissible manner” of regulation, not the type of speech at issue, that is dispositive. *Id.*

e) The fiduciary rule cannot survive strict scrutiny. There are many narrower alternative approaches Congress could have adopted to address perceived conflicts of interest, such as regulating compensation directly. argues that the Rule’s content, speaker, and listener-based distinctions depend only on the level of conflicts of interest and do not trigger strict scrutiny because guarding consumers from “commercial harms” is a content-neutral justification. *Id.*

f) The “commercial harms” that may permit content-based regulation of commercial speech are only those that arise from “false or misleading speech. the Rule is simply not an antifraud measure, and DOL’s conflation of conflicts of interest with fraud upends core First Amendment protections. *Id.*

g) DOL speculates that Plaintiffs’ position would require application of strict scrutiny to a host of regimes, such as securities laws, that regulate based on “subject matter.” The rule’s focus on “recommendations” regarding certain “content” is relevant to the First Amendment inquiry because it shows the Rule regulates expression. *Id.*

h) The Rule is subject to strict scrutiny because it draws myriad content-based lines among messages (imposing many more burdens on speech about some products than speech about others); listeners (imposing many more burdens on speech to listeners DOL deems less sophisticated than speech to listeners DOL deems more sophisticated); and speakers (imposing many more burdens on speech by human speakers than on speech by so-called robo-advisers). *Id.*

3. The Rule Fails Intermediate Scrutiny.

a) The professional conduct doctrine is inapposite. To avoid First Amendment review entirely on the grounds that the Rule regulates “professional conduct,” and that any effect on speech is “incidental.” Even if the “professional conduct” doctrine had ever commanded a majority of the Supreme Court (it has not) it is not implicated here by its terms. *Id.*

b) The central problem with the DOL’s argument is that the rule is not limited to regulating actual fiduciary relationships or expression, but instead purports to impose fiduciary obligations on non-fiduciary commercial speech by regulatory fiat. *Id.*

c) The Constitution does not permit the government to evade First Amendment scrutiny by burdening non-fiduciary speech through the artifice of classifying that speech as “fiduciary” or “professional.” The government “cannot foreclose the exercise of constitutional rights by mere labels.” *Id.*

d) DOL “declares” that all recommendations to retirement savers must be made in a fiduciary capacity, or not at all, whether or not those recommendations occur in relationships of “trust or confidence,” effectively banning typical commercial sales speech.

e) Under the Rule, an insurance agent may not make a sales presentation to a customer—however truthful the presentation or suitable the product—but may make sales “recommendations” only as a fiduciary. Even if the professional conduct doctrine were to insulate from First Amendment scrutiny regulation of fiduciary expression, it cannot permit insulation by ipse dixit. Otherwise, the government could vitiate First Amendment protections by sleight of hand, merely relabeling non-fiduciary speech as “fiduciary.” *Id.*

f) The rule does far more than force “fiduciar[ies] to act like ...fiduciar[ies]”: it first creates fiduciary duties by transforming garden-variety sales conversations involving retirement savers into fiduciary relationships and thereby requires non-fiduciaries to act under fiduciary obligations or remain silent. Plaintiffs’ First Amendment claim is aimed directly at that breathtaking expansion of the fiduciary “label” and burdens. *Id.*

g) The professional conduct doctrine is also inapposite because, unlike professional the rule is not targeted at “conduct,” with merely “incidental” effects on speech. The Rule regulates speech directly and intentionally: “advice” and “recommendations” trigger its regulatory burdens and prohibitions and the rule thus by its terms is squarely targeted at speech that “propose[s] a commercial transaction,” the very definition of commercial speech. *Id.*

h) An insurance agent describing products to a customer, even in a personalized fashion, and facilitating selection of a suitable product is engaged in protected commercial speech. “[P]ersonal solicitation,” no less than mass advertising, “is commercial expression to which the protections of the First Amendment apply.” the Supreme Court has held that such speech has “considerable value”—“allow[ing] a direct and spontaneous communication” in which the seller “has a strong financial incentive to educate the market and stimulate demand for his product,” and the buyer is given “an opportunity to explore [the product] in detail” and compare it to “alternatives.” *Id.*

4. The Rule is not an Antifraud Measure Because It Proscribes and Regulates Truthful Commercial Speech.

a) DOL must demonstrate it is “inherently likely to deceive” or “has in fact been deceptive,” and could not be presented in a non-deceptive way, which DOL has done. The Rule is aimed at “conflicts of interest” and “conflicted advice,” not fraudulent or deceptive speech. *Id.*

b) Existing federal securities laws, SEC regulations, and state laws already prohibit false and misleading statements, but DOL deems those laws and regulations insufficient because truthful speech, even suitable recommendations, may serve the economic interests of the speaker seeks. DOL would only permit speech that exclusively serves a listener’s interests. *Id.*

c) If speech by someone with an economic interest could be banned as “misleading” with no First Amendment scrutiny, no constitutional protection would remain for commercial speech. *Id.*

d) DOL’s concern with conflicted advice is not that it is “inherently likely to deceive, but that even well-informed consumers purportedly lack the “skills and knowledge” to act in their own interests on the basis of truthful information. This rationale for regulation of speech is categorically foreclosed by the First Amendment, which “assume[s] that [truthful] information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. *Id.*

5. The rule fails each step of intermediate scrutiny: it proceeds from multiple unconstitutional assumptions; it will harm retirement savers by raising the cost of access to information about retirement products; and more narrowly tailored alternatives were clearly available. Plaintiffs demonstrated that the rule’s sweeping imposition of fiduciary obligations and the substantial liability risk it created under the BICE will raise the cost of retirement products and impede consumers’ access to commercial information about those products. *Id.*

a) Agencies' conclusory claims to "expertise" alone cannot justify infringement of constitutional liberties. admits it did not directly "quantify those alleged costs." Without making such an attempt, DOL lacked a basis for its conclusions about the effects of the rule on the costs of access to information and products. Col cannot explain why banning truthful sales conversations, a low-cost means by which many consumers gain valuable information about retirement products, will not have the obvious effect of raising the costs of obtaining such information and thereby reducing consumers' access to it. *Id.*

b) DOL acted based on a counterintuitive assumption that truthful information provided by nonfiduciaries does not further retirement savers' interests and can "even [be] harmful. Because the Rule bans truthful commercial speech, regulates in a content-discriminatory manner, and cannot withstand intermediate—much less strict—scrutiny, it is unconstitutional. *Id.*

6. The Fiduciary Rule's Treatment of Annuities is Arbitrary and Capricious.

a) Under ERISA and the Code, DOL may create exemptions, such as the BICE, only if they are "administratively feasible." The BICE violates this requirement because it is unworkable for the insurers, agents, and broker-dealers that issue or sell annuities. The fiduciary rule regulates, burdens, and bans truthful commercial speech by Plaintiffs' members about annuity products, and it does so in a manner that discriminates based on speaker, listener, and the DOL's judgments regarding the value of the speech at issue. See, *Reply of American Council of Life Insurers, National Association of Insurance and Financial Advisors, and North Texas Insurance and Financial Advisors' Association Plaintiff in Support to Their Motion for Summary Judgment and Response to Defendants' Cross-Motion for Summary Judgment*, N.D. TX, Civil Action No. 3:16-cv-1476-M (Sept. 16, 2016).

b) DOL suggests that ERISA only requires an exemption to be "feasible for DOL to administer, rather than workable for the industry." It is implausible that Congress would require an agency to consider its own convenience, but not that of regulated parties. *Id.*

c) The combination of the BICE's ill-defined standards with its novel and unpredictable enforcement-by-private-lawsuit regime that makes the BICE infeasible. the BICE's "best interest," "reasonable compensation," and proprietary-sales standards will not be enforced by a single agency capable of providing advance guidance and uniform interpretation, or by a single court able to refine those terms over time into consistently applied rules of conduct. Instead, DOL has elected to embed them in contracts to be enforced through state-law breach of contract class action litigation in state and federal court. *Id.*

d) A nationwide insurer attempting to comply with the BICE thus must contend with the possibility that the IRS and courts around the country will apply the BICE's open-ended requirements inconsistently. If the insurer guesses wrong about how even one such forum would rule, it will face potentially staggering liability—liability DOL did not even attempt to quantify. *Id.*

e) DOL's "reasonable compensation" standard does not make the Rule predictable here. For decades, DOL has refused to say whether particular arrangements are reasonable on the ground that the question is "inherently factual"—an unhelpful track record spanning more than 200 advisory opinions. *Id.*

f) Additional features of the BICE make it unworkable for the independent agents who currently sell more than two-thirds of all fixed indexed annuities. Additional features of the BICE make it unworkable for the independent agents who currently sell more than two-thirds of all fixed indexed annuities. But because independent agents sell products for multiple insurers, no one insurer possesses the information necessary to make good on that guarantee. *Id.*

g) An insurer logically cannot guarantee it has created no improper incentives without knowing what other products an agent sells or what commissions the agent receives from others. Complying with the BICE will require insurance companies "to overhaul their primary distribution model for fixed indexed annuities." *Id.*

h) The BICE is fundamentally unworkable for variable and fixed indexed annuities, and violates the statute's "administrative feasibility" requirement. *Id.*

7. DOL Ignored the Benefits of Annuities

a) Plaintiffs' brief explained that the Rule is arbitrary and capricious because DOL failed to account for the harm to American consumers from decreased access to variable and fixed indexed annuities as a result of the Rule. See, *Reply of American Council of Life Insurers, National Association of Insurance and Financial Advisors, and North Texas Insurance and Financial Advisors' Association Plaintiff in Support to Their Motion for Summary Judgment and Response to Defendants' Cross-Motion for Summary Judgment*, N.D. TX, Civil Action No. 3:16-cv-1476-M (Sept. 16, 2016).

b) Even if DOL did not intend to steer consumers away from variable annuities, the administrative record established that this would be the rule's inevitable effect, DOL was obligated to account for that "important aspect of the problem." *Id.*

c) Although the BICE and PTE 84-24 impose the same “reasonable compensation” and “best interest” standards on those recommending retirement products, only the BICE—applied to variable and fixed indexed products but not fixed rate annuities—exposes a seller to “class litigation, and liability and associated reputational risk. *Id.*

d) It is the different liability exposure created by the Rule, not the elimination of “unjustifiable” recommendations, that will drive sellers to recommend fixed rate annuities over variable and fixed indexed annuities. The damage done by that discrimination among products has nothing to do with whether a product is actually best for the customer, and everything to do with which recommendation would carry the most liability risk. *Id.*

e) The text and structure make clear that the rule, by design, will decrease consumer access to variable and fixed indexed annuities. In the RIA in particular, DOL laid bare its intention to engineer not only the availability of retirement products, but to change consumer decisions in the marketplace. According to the RIA, the rule is “expected to create benefits in the annuity market ... through better matches between consumers and the annuity product.” *Id.*

f) The structure of the rule also reflects DOL’s efforts to remake the market for retirement products. The rule subjects different annuities to two distinct regimes with markedly different burdens and liability risks. Agents and broker-dealers may sell variable and fixed indexed annuities for a commission only under the BICE, but may sell fixed rate annuities for a commission under PTE 84-24. *Id.*

g) DOL cannot deny that subjecting variable and fixed indexed annuities to the “more stringent” BICE, while leaving fixed rate annuities in the “streamlined” PTE 84-24, will depress the sale of the former and promote the sale of latter. *Id.*

h) Before driving consumers from annuity products, whether deliberately or merely knowingly, it was incumbent on DOL to study the benefits of the products at issue and consider the potential adverse effects of its actions. Its failure to do so was arbitrary and capricious.

8. DOL Failed to Consider the Existing Regulatory Framework Governing Annuities

a) DOL's analysis focused on nine quantitative studies that purportedly showed the ineffectiveness of those regulations. But those studies prove nothing about present-day regulation of annuities because they focused almost exclusively on one type of mutual fund, not annuities, and they relied on data predating significant reforms to the regulatory framework governing retirement products in general and annuities in particular that addressed precisely the concerns DOL seeks to remedy through the fiduciary rule. *See, Reply of American Council of Life Insurers, National Association of Insurance and Financial Advisors, and North Texas Insurance and Financial Advisors' Associations Plaintiff in Support to Their Motion for Summary Judgment and Response to Defendants' Cross-Motion for Summary Judgment*, N.D. TX, Civil Action No. 3:16-cv-1476-M (Sept. 16, 2016).

b) DOL determined to extend mutual-fund studies to the annuity marketplace because "conflicts exist in both the mutual fund and annuity markets." But DOL's principal evidence of harm to consumers from such conflicts, the nine quantitative studies, predates FINRA's adoption in 2012 of enhanced suitability requirements governing the sale of securities generally (FINRA Rule 2111), including mutual funds and variable annuities. FINRA Rule 2111 "strengthen[ed], streamline[d] and clarif[ied]" existing consumer protections by codifying and defining the three core suitability obligations: customer specific, reasonable-basis, and quantitative suitability. *Id.*

c) The rule also for the first time extended suitability consideration to investment strategies involving securities, such as recommendations to hold securities. The studies DOL relied upon say nothing about these later, strengthened rules and thus shed no light on the impact of present-day mutual fund regulation, let alone existing annuity rules. *Id.*

d) In asserting "there is no reason to expect that existing laws governing insurance would substantially lower the risk of harm to investors from conflicted compensation observed in the mutual fund context," DOL fails to acknowledge that annuities are governed by a distinct, customized, and comprehensive regulatory framework that was enhanced in 2010 to account for annuities' unique features. The dated mutual fund studies relied upon by DOL, which focus primarily on investment performance in the historical period 1991 to 2005, do not measure the efficacy of targeted and more rigorous annuity-specific rules. *Id.*

e) The FINRA rule applicable to deferred variable annuities (FINRA Rule 2330) requires broker-dealers to have a reasonable basis to believe that a recommended transaction comports with the general suitability standard, but it also provides specific mandates governing the sale of variable annuities.

- (1) Broker-dealers must have a reasonable basis to conclude a customer would benefit from the annuity's distinct characteristics, such as tax-deferred growth, annuitization, or a death or living benefit.
 - (2) Moreover, member firms must develop written supervisory policies and procedures and create compliance training programs to ensure that those who effect and review covered deferred variable annuity sales understand their material features.
 - (3) Finally, a registered principal must approve each deferred variable annuity sale—a heightened supervisory requirement that does not apply to mutual funds. *Id.*
- f) DOL's reliance on out-of-date mutual funds studies accounted for neither the heightened obligations governing the sale of securities in general nor the specific enhancements to FINRA and state suitability rules governing the sale of annuities and thus could not possibly have demonstrated that existing annuity regulation is insufficient. DOL's failure to consider "whether, under the existing regime, sufficient protections existed" renders the Rule arbitrary and capricious. *Id.*
9. The Fiduciary Rule Unlawfully Discriminates Among Financial Products.
- a) DOL's efforts to promote and discriminate against particular retirement products exceeded its statutory authority. Agencies are "limited in authority by legislative enactment and nothing in ERISA or the Code gives DOL authority to favor and disfavor products in that manner. See, *Reply of American Council of Life Insurers, National Association of Insurance and Financial Advisors, and North Texas Insurance and Financial Advisors' Associations Plaintiff in Support to Their Motion for Summary Judgment and Response to Defendants' Cross-Motion for Summary Judgment*, N.D. TX, Civil Action No. 3:16-cv-1476-M (Sept. 16, 2016).
 - b) The rule erects a hierarchy among different products, imposing markedly greater burdens on products DOL believes carry more "investment risk" (variable and fixed indexed annuities) and lesser burdens on products DOL wishes to "promote" because it considers them a "better match" for consumers (fixed rate annuities). *Id.*
 - c) In the rule, DOL created two different regulatory regimes: the BICE and PTE 84-24.

(1) The former imposes onerous conditions and the possibility of staggering liability for covered products, while the latter is “streamlined,” imposes no such litigation risk, and in these ways is meant to “promote” market share of covered products. placed disfavored products (variable and fixed indexed annuities) in the BICE, knowing that the burdens of the BICE would mean less information about them would reach consumers, while it placed favored products (fixed rate annuities) in PTE 84-24 with the expectation that consumers’ access to those products would be improved.

(2) That deliberate attempt to engineer the market for retirement products based on DOL’s judgment of which are best for consumers is unprecedented and pushes the Rule well beyond DOL’s statutory limits. *Id.*

d) DOL overstepped that limited statutory role by relying heavily on a factor—“investment risk”—unrelated to conflicts of interest. Explaining why it elected to regulate fixed rate annuities under PTE 84-24, DOL touted, among other things, the lower “investment risk” associated with those products. *Id.*

e) The risk of uncertain returns from a retirement product (that is, “investment risk”) bears no logical nexus to conflicted advice—a product with high “investment risk” could be sold with no commission, for example—and DOL was not free to bootstrap its statutory authority over conflicts of interest to disfavor retirement products it deemed to have too much uncertainty for consumers in expected return. *Id.*

f) DOL’s exemption authority requires the Secretary to certify that an exemption will be “in the interests of the plan” and “protective of the rights of participants and beneficiaries.” Those serve as a check on DOL’s authority; they do not give it boundless authority to craft exemptions based on its “independent judgment” about which products best match consumers’ needs. *Id.*

10. DOL Violated APA Notice Requirements

a) DOL violated the APA’s notice and comment requirements by excluding group and fixed indexed annuities from PTE 84-24 without sufficient notice. *See, Reply of American Council of Life Insurers, National Association of Insurance and Financial Advisors, and North Texas Insurance and Financial Advisors’ Association Plaintiff in Support to Their Motion for Summary Judgment and Response to Defendants’ Cross-Motion for Summary Judgment*, N.D. TX, Civil Action No. 3:16-cv-1476-M (Sept. 16, 2016).

b) DOL's errors were hardly harmless. That certain groups may have been made aware of these changes at the last minute does not cure the defect and ACLI and NAIFA would have submitted comments explaining why selling group annuities and fixed indexed annuities under the BICE is infeasible. *Id.*

c) DOL asserts it was aware of these issues, but it failed to address them in the record. *Id.*

11. Remedy Sought

a) The Court should vacate the rule or, in the alternative, declare the rule unconstitutional as applied to the truthful commercial speech of Plaintiffs' members. *Id.*

VI. Index Annuity Leadership Council (IALC) Challenge to the Final Rule

A. Synopsis of IALC Position

1. DOL's brief cannot paper over fatal defects at the Rule's core. The rule's radical expansion of the definition of "investment advice" indefensibly relabels as "fiduciary" routine sales conversations between, for example, insurance agents and customers that lack the critical characteristics of trust and confidence that underlie all traditional fiduciary relationships. *See, The Indexed Annuity Leadership Council Plaintiffs' Memorandum of Law in Support of Their Motion for Summary Judgement*, Civil Action No. 3:16-cv-1476-M (July 18, 2016).

2. The fiduciary rule improperly expands the definition of a "fiduciary" under the ERISA. Neither ERISA nor the Code authorizes DOL to treat advice incidental to one-time sales of fixed annuities as fiduciary investment advice. *See, The Indexed Annuity Leadership Council Plaintiffs' Memorandum of Law in Support of Their Motion for Summary Judgement*, Civil Action No. 3:16-cv-1476-M (July 18, 2016). *Id.*

3. The rule is arbitrary and capricious. *Id.*

4. DOL conceded that it can regulate such advice only if the parties to the sales are in relationships of trust and confidence, yet failed to identify substantial evidence that sales of these products actually take place in such relationships. *Id.*

5. DOL arbitrarily and capriciously decided to regulate fixed indexed annuities differently than other fixed annuities. failed to demonstrate the benefits—or justify the costs—of its rules. Most state insurance laws require those who sell fixed

indexed annuities to determine that the product is “suitable” for the purchaser. *Id.*

6. DOL failed to provide adequate notice of this new treatment for fixed indexed annuities. DOL initially proposed to treat all fixed annuities the same, but the final rule treats fixed indexed annuities like securities, based on reasoning that did not appear in DOL’s notice. *Id.*

7. The rule should be vacated *Id.*

B. IALC Position in More Detail

1. Fiduciary Definition is Invalid

a) Because “traditional tools of statutory construction,” *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842–43 & n.9 (1984), make clear that providing advice incidental to the sale of a retirement product is not fiduciary conduct, DOL’s contrary interpretation is “not in accordance with law.” 5 U.S.C. § 706. And even if the statutory definition of a “fiduciary” does not exclude those who provide incidental advice, the DOL’s decision to regulate such advice in connection with fixed annuities was arbitrary and capricious. *See, Indexed Leadership Annuity Leadership Council Plaintiffs’ Memorandum of Law in Support of their Motion for Summary Judgment*, Civil Action No. 3:16-cv-1476-M, D MN, Consolidated with: 3:16-cv-1530-C 3:16-cv-1537-N (July 18, 2016).

2. The New Definition of a “Fiduciary” Is Inconsistent with the Plain Meaning of ERISA and the Code.

a) Despite the fact that it was abandoning a more than 40-year old statutory interpretation, DOL was vague about the basis and limits of its new interpretation. At one point, it appeared to reject the premise that the statutory definition of a fiduciary requires any relationship of trust and confidence, stating that any person who provides “investment advice to a plan or IRA for a fee” falls within the “broad sweep of the statutory text.” *Id.* at 13.

b) DOL admitted that its new “broad test could sweep in some relationships that are not appropriately regarded as fiduciary in nature,” but it claimed that “carve-outs” save the new rule because they “avoi[d] burdening activities that do not implicate relationships of trust.” *Id.* at 13.

c) DOL concluded that, in the absence of exceptional circumstances, advice incidental to a single sale of a retirement product is always rendered in a relationship of trust. This alternative theory is also invalid. *Id.* at 13.

3. DOL Acted Arbitrarily and Capriciously in Treating Those Who Provide Advice Incidental to Sales of Fixed Annuities as Fiduciaries.

a) DOL failed to identify empirical evidence that parties to sales of fixed annuities are actually in relationships of trust. Even if the statutory definition of a fiduciary is ambiguous—and it is not—the DOL conceded that it can regulate only activities that “implicate relationships of trust.” *Id.*

b) DOL sought to justify its new definition of a fiduciary based on its views that: retirement products are complex; retirement savers are confused by the products and unable to distinguish good advice from bad; older savers are particularly vulnerable; retirement decisions are important; and, sellers of retirement products have superior expertise and knowledge. *Id.*

c) DOL lacks the authority to declare that sellers of annuities are fiduciaries simply because, in its view, “[t]he absence of adequate fiduciary ... safeguards” is “problematic in light of the growth of participant-directed plans and self-directed IRAs [and] the gap in expertise and information between advisers and ... customers.” *Id.* at 16.

d) DOL’s policy view that annuity purchasers would be better off if sellers were subject to fiduciary duties is not “evidence” that such transactions involve relationships of special trust and confidence. *Id.*

e) DOL cites suitability standards as evidence that agents are acting as trusted fiduciaries. But this reasoning is backwards. Suitability standards necessarily regulate non-fiduciary relationships; if the relationships were already fiduciary in nature, it would be nonsensical to impose less stringent suitability standards. And sales agents cannot become fiduciaries by complying with non-fiduciary regulatory standards. *Id.*

f) The fact that Congress has placed conditions on how fiduciaries can be compensated when they recommend certain investments does not demonstrate that everyone who makes investment recommendations is a fiduciary. *Id.* Congress imposed restrictions on advisers who actually occupy a position of trust and confidence. The question here is whether those who provide advice incidental to sales of fixed annuities occupy positions of trust.

g) Even if the fiduciary-through-advertising theory had any legal basis, the DOL still failed to offer evidence that the overwhelming majority of sellers of fixed annuities engaged in advertising that (by hypothesis) could create relationships of trust with purchasers of such products. Under settled law, national advertising cannot create fiduciary relationships. *Id.* at 18.

4. DOL failed to justify changing the regulatory treatment of those who provide advice incidental to sales of fixed annuities.

a) The Supreme Court recently explained, where DOL’s prior policy has engendered “decades of industry reliance,” the agency has a “duty to explain why it deemed it necessary to overrule its previous position. *Id.*

b) DOL knew that its new definition would capture sellers of fixed annuities, who for decades fell outside the definition of a fiduciary (or were covered by an exemption in the limited circumstances where they were fiduciaries), and who have structured their compensation arrangements and distribution channels accordingly. DOL not identify substantial evidence that sales of such annuities cause harm and thus failed to show why it was “necessary to overrule its previous position. *Id.* at 19.

c) DOL’s purported showing of harms—is based on analyses of mutual funds, not fixed annuity products. Even setting aside the defects in its analysis of mutual funds, DOL’s effort to extrapolate from mutual funds to fixed annuities is fatally flawed. *Id.*

d) DOL claimed that conflicted advice “inflict[s] ... losses ... by prompting IRA investors to trade more frequently, which will increase transaction costs and multiply opportunities for chasing returns and committing timing errors.” But commission-based sales cannot cause such losses for fixed annuities because they are “buy and hold” products. Similarly, DOL asserted that conflicts cause underperformance for actively managed mutual funds. But fixed annuities are not actively managed, because returns are fixed (as a specified rate or an indexed rate). *Id.*

e) DOL’s reliance on the alleged harms of conflicted advice in the mutual fund market does not demonstrate harms from commission-based sales of fixed annuities. *Id.*

f) FINRA alert and SEC bulletin about annuity sales cite in rule adoption provide no evidence of harmful sales practices; they just discuss features of fixed indexed annuities and cited media reports and allegations (not judgments) are unsubstantiated. *Id.*

g) DOL relied on studies so out-of-date and far afield, and on assertions so irrelevant or unsubstantiated, underscores the lack of evidence of real-world harms associated with commission-based sales of fixed annuity products. None of these materials provides the “good reasons” necessary to justify jettisoning the four decades-old recognition that sellers of these products do not act as fiduciaries. DOL’s expansion of the definition of a fiduciary to encompass such sellers is thus arbitrary and capricious. *Id.* at 21.

h) DOL’s decision to revoke the 84-24 exemption for fixed indexed annuities was also arbitrary, capricious, and not the product of the reasoned decision-making process the APA requires. The rule is therefore unlawful and must be vacated. *Id.*

i) DOL failed to offer substantial evidence that commission-based sales of fixed indexed annuities have caused harms that would justify imposing fiduciary regulation, let alone regulation under the BIC exemption. DOL failed to explain why the extensive consumer protections afforded by state law, together with the enhanced protections of the 84-24 exemption, are insufficient consumer safeguards. *Id.* at 21.

j) Despite the commentary and evidence in the record on the significant protections provided by state law, DOL never explained why existing state regulations are inadequate. Asserting that federal and state regulation can “work cohesively” does not explain why federal regulation is necessary in the first place. *Id.*

k) DOL’s disregard of state regulation is particularly troubling in light of Congress’s recent determination, in a closely related context, that additional federal regulation of fixed indexed annuities is unwarranted in light of state regulation, as evidenced in the Harkin Amendment to the Dodd-Frank Act, *Id.*

l) DOL failed to explain why the new protections it added to the PTE 84-24 exemption, together with state regulation, are insufficient to prevent any abusive sales practices associated with fixed indexed annuities. *Id.* Revised PTE 84-24 requires insurance agents to adhere to “Impartial Conduct Standards” that require them to “provid[e] prudent advice without regard to [their own] interests.” It also requires disclosure of any material conflicts of interest, including commissions the agent will receive, and prohibits the agent and the insurance company from accepting excessive compensation. *Id.*

5. DOL Failed to Conduct a Reasonable Cost-Benefit Analysis for Moving Fixed Indexed Annuities to the BIC Exemption.

a) Under the BIC exemption, insurance companies selling through most Independent marketing organizations (IMOs) must serve as the “Financial Institution” that enters into the best interest contract with the customer, supervises the agents, and warrants their compliance with fiduciary standards. This is wholly unworkable for an independent-agent distribution model. Among other things, the BIC exemption requires the insurance company to “insulate the [agent] from incentives to violate the Best Interest Standard, including incentives created by any other Financial Institution.” *Id.*

b) If forced to comply with the BIC exemption, therefore, insurance companies will have to overhaul their primary distribution model for fixed indexed annuities. This will impose massive costs on the insurance industry—costs DOL nowhere accounted for in its estimate of the cost of revoking the 84-24 exemption. *Id.* at 26.

c) DOL's cost estimate also failed to account for the substantial costs to retirement savers that will result from the DOL's revocation of the 84-24 exemption for fixed indexed annuities. The BIC exemption's increased costs will limit the availability and raise the cost of fixed indexed annuities, to the detriment of retirement savers who would otherwise. *Id.*

d) DOL never showed that traditional fixed annuities are better for retirement savers than fixed indexed annuities. And its cost estimate ignored the costs to retirement savers for whom a fixed indexed annuity would be "optimal" but who, because of DOL's rules, will not be able to obtain one, or will have to pay more. benefit from higher interest crediting rates. *Id.*

e) Because DOL cited no meaningful evidence that existing protections are insufficient to prevent abusive sales practices, it failed to show that revoking the 84-24 exemption for fixed indexed annuities will yield any marginal benefits, let alone benefits sufficient to outweigh the substantial costs and disruption of subjecting fixed indexed annuities to the BIC exemption. *Id.* at 27.

6. DOL Drew an Arbitrary and Unjustified Distinction Between Fixed Indexed Annuities and Other Fixed Annuities.

a) DOL originally proposed to retain the 84-24 exemption for all fixed annuities and to revoke the exemption only for variable annuities and other annuities that are regulated as securities. In the final rule, however, DOL retained the 84-24 exemption only for "Fixed Rate Annuity Contracts"—a defined term it first introduced in the final rule—and subjected fixed indexed annuities, along with variable annuities, to the BIC exemption. *Id.*

b) Because the "agency applie[d] different standards to similarly situated [products] and fail[ed] to support this disparate treatment with a reasoned explanation and substantial evidence in the record, its action is arbitrary and capricious and cannot be upheld." *Id.*

c) DOL claimed that placing fixed indexed annuities and variable annuities in the BIC exemption "avoids creating a regulatory incentive to preferentially recommend indexed annuities." But, of course, it does so only by creating a regulatory incentive to preferentially recommend fixed rate over fixed indexed annuities. *Id.*

d) In basing its disparate treatment of fixed indexed annuities largely on characteristics shared by all fixed annuities, DOL acted arbitrarily and capriciously. *Id.*

e) The rule must also be set aside because DOL failed to provide interested parties the required notice of, and opportunity to comment on, its revocation of the PTE 84- 24 exemption with regard to sales of fixed indexed annuities to plans and IRAs. *Id.* at 31. An agency must “make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible.”

f) The treatment of fixed indexed annuities in the final rule was not a “logical outgrowth” of the proposal. The NPRM had proposed to revoke the 84-24 exemption only for sales of variable annuities and other annuities that are securities, *See*, AR789, and had expressly proposed to retain the exemption for sales of annuities—including fixed indexed annuities—that are not treated as securities. *Id.* at 32.

g) DOL’s proposal sought comment simply on whether its proposed securities/nonsecurities distinction “strikes the appropriate balance and is protective of the interests of the IRAs.” This request provided no notice that the final rule would sever fixed indexed annuities from other fixed annuities and single them out for different treatment, or that the basis for that distinction would turn on DOL’s new assessment of their relative complexity. *Id.*

7. Relief Requested

a) The Court should vacate and enjoin enforcement of: the new fiduciary definition, or at least that portion that reaches advice incidental to one-time sales of fixed annuities; and the revisions to the 84-24 exemption insofar as they exclude fixed indexed annuities. Alternatively, the Court should vacate and enjoin implementation of the BIC exemption insofar as it creates an enforceable private right of action and prohibits arbitration.

VII. Government’s Response to Consolidated Cases in N.D. of Texas

A. Synopsis of Government’s Position

1. DOL determined that conflicts of interest in the retirement market are widespread and that underperformance associated with such conflicts in the mutual funds segment alone could cost IRA investors between \$95 billion and \$189 billion over the next 10 years and between \$202 billion and \$404 billion over the next 20 years. DOL also found that its previous regulation, which set forth a five-part test to qualify as a “fiduciary” under ERISA by virtue of “render[ing] investment advice,” had left loopholes, allowing those acting like fiduciaries to disclaim fiduciary status and its attendant responsibilities and restrictions. *See, Memorandum in Support of Defendants’ Combined Cross-Motions For Summary Judgment and Opposition to Plaintiffs’ Motions for Summary Judgment [Corrected]*, Civil Action No. 3:16-cv-1476-M Consolidated with: 3:16-cv-1530-C 3:16-cv-1537-N (Aug. 22, 2016).

2. Pursuant to its authority to define terms for purposes of ERISA, DOL refined its definition of a person who “renders investment advice” to better align with the text and purposes of ERISA in light of significant changes in retirement savings and the market for retirement investment advice since its prior rulemaking. Simultaneously, DOL employed its authority to grant exemptions to allow fiduciaries to engage in certain conflicted transactions that would otherwise be prohibited by law. DOL sought to mitigate the inherent conflicts of such transactions by conditioning the exemptions on safeguards so that they would nevertheless be in the interest, and protect the rights, of retirement investors, as statutorily required.

3. Plaintiff’s challenge the rulemaking relying on inapposite legal authority and mischaracterizations of the rulemaking. *Id.*

4. Plaintiffs urge the Court to rely on the distinctions and approach taken in securities laws, rather than looking to ERISA. But it is ERISA, not the common law of trusts or securities laws, that is the source of the rulemaking at issue. *Id.*

5. Rather than “reconfigur[ing]” “relationships among financial representatives and their customers,” or “eras[ing]” “distinctions between salespeople and fiduciary advisers,” the rulemaking recognizes the reality that a bright-line distinction does not exist, and, as a result, retirement investors are relying on investment advice from those who convey they have investors’ best interests in mind but nevertheless find ways to disclaim any obligation to act in investors’ best interests. *Id.*

6. The changes required under the rulemaking will impose costs on those providing investment advice. DOL determined, however, that those transitional costs will be significantly outweighed by enormous benefits to retirement investors. Where Congress delegated to DOL the authority to determine how best to protect Americans’ retirement security, and where DOL, consistent with that authority, conducted a thorough analysis and provided a reasoned explanation for its conclusions as to how best to do so, DOL’s determination is entitled to deference, and Defendants are entitled to summary judgment on all of Plaintiffs’ claims. *Id.*

B. The Government’s Position in More Detail

1. The rulemaking seeks to mitigate inherent conflicts of interest that arise when advisers’ compensation is linked to products, like mutual funds or annuities, they recommend to ensure that retirement investors get impartial investment advice. DOL acted well within its authority in promulgating these protections and provided a reasoned explanation for its decision to do so. *See, Memorandum in Support of Defendants’ Combined Cross-Motions for Summary Judgment and Opposition to Plaintiffs’ Motions for Summary Judgment [Corrected]*, Civil Action No. 3:16-cv-1476-M Consolidated with: 3:16-cv-1530-C 3:16-cv-1537-N (Aug. 22, 2016) at 29.

2. “[W]hen a district court reviews a summary judgment motion concerning an agency’s action, the court determines not whether the material facts are disputed, but whether the agency properly dealt with the facts. Under this standard, there is no legal basis for Plaintiffs’ requested relief, and Defendants are entitled to summary judgment on all of Plaintiffs’ claims. *Id.*”

3. DOL’s Interpretation of Fiduciary “Investment Advice” is Reasonable and Entitled to Deference

a) “Filling [statutory] gaps ... involves difficult policy choices that agencies are better equipped to make than courts.” *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.* (“Brand X”), 545 U.S. 967, 980 (2005) (citing *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984)). Accordingly, it is well-established that “ambiguities in statutes within an agency’s jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion.” *Id.*

b) In enacting ERISA, Congress gave DOL the authority to “prescribe such regulations as ... necessary or appropriate to carry out the [relevant] provisions,” including to “define accounting, technical and trade terms used in” the Act. 29 U.S.C. § 1135. Congress also adopted a broad definition of “fiduciary” to allow DOL to “consider varying interpretations and the wisdom of its policy on a continuing basis,” *Brand X*, 545 U.S. at 981, to serve ERISA’s “broadly protective purposes.” *Id.* at 29.

c) In exercise of that discretion, DOL promulgated a reasonable interpretation of fiduciary “investment advice” that comports with the text, history, and purposes of ERISA. That reasonable interpretation is entitled to deference. *Chevron*, 467 U.S. at 837. *Id.*

4. Congress Adopted a Broad “Fiduciary” Definition, Delegating to DOL the Discretion to Interpret “Investment Advice” to Serve ERISA’s Remedial Purposes.

a) ERISA’s statutory language demonstrates that Congress cast a wide net in assigning fiduciary status to persons involved in three separate functions—management, investment advice, and administration—related to retirement plans:

b) [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. 29 U.S.C. § 1002(21)(A) (emphasis added); 26 U.S.C. § 4975(e)(3) (largely same). *Id.*

c) Congress emphasized the intended breadth of the statutory definition by repeating the word “any” in each prong and by including the disjunctive “or.” *Id.* at 30.

d) Congress did not cabin DOL’s discretion by providing a precise definition of what it means to “render investment advice for a fee or other compensation, direct or indirect.” Instead, the plain language is susceptible to multiple reasonable interpretations, and Congress left to DOL the responsibility to further define it. *Id.*

e) The definition DOL adopted fits comfortably within an ordinary understanding of the text. A standard dictionary definition of advice is “an opinion or recommendation offered as a guide to action, conduct, etc.,” and of investment is “the investing of money or capital in order to gain profitable returns.” *Id.*

f) The rule further defines a “recommendation” as “a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advisee engage in or refrain from taking a particular course of action.” § 2510.3–21(b)(1). And consistent with the statutory language, the rule limits its application to advice resulting in “compensation” and concerning “property of [a] plan.” § 2510.3–21(a). A paid suggestion to an advisee to take a particular course of action with respect to his or her investment property readily comports within an ordinary understanding of what it means to “render investment advice for a fee or other compensation, direct or indirect.” *Id.* at 31.

5. None of Plaintiffs’ Arguments Demonstrates that the Statute Unambiguously Forecloses DOL’s Interpretation of “Investment Advice”

a) Plaintiffs make six primary arguments in contending that DOL’s interpretation fails at Chevron step one; however, none of them undermine, much less “unambiguously foreclose,” DOL’s interpretation, as required to meet the “demanding Chevron step one standard” to overcome an agency’s interpretation. *Id.*

b) Congress did not confine the fiduciary definition to the common law of trusts; instead, as the Supreme Court has recognized, Congress took an “express statutory departure” from the common law understanding of “fiduciary,” adopting a “functional” definition, rather than one based on formal trusteeship. Congress did not limit fiduciary status to the common law understanding of that term but sought to “expand the universe of persons subject to fiduciary duties,” to effectuate ERISA’s protective purposes. *Id.*

c) It is not unusual for Congress to adopt a common law term but define it differently for purposes of a statute, even where the statute elsewhere codifies common law concepts. Where Congress in ERISA explicitly adopted an “artificial definition of ‘fiduciary,’” Mertens, 508 U.S. at 255 n.5, that departed from the common law understanding of that term, the statutory definition prevails. *Id.* at 32.

d) DOL need not have confined its interpretation of fiduciary “investment advice” to those relationships recognized as fiduciary under the common law, and Plaintiffs’ proposed reading is contrary to Congress’s intent to extend fiduciary status to a broader class of relationships. *Id.* at 33.

e) DOL’s interpretation is not foreclosed by not recognizing the securities law distinction between investment advisers, who are fiduciaries, and brokers, who are not. The statutory text and legislative history demonstrate that this distinction has no place in ERISA. Tellingly, to create the distinction Plaintiffs identify, Congress in the Advisers Act “define[d] ‘investment adviser’ broadly and create[d] ... a precise exemption for broker-dealers.” *Id.* at 33.

f) Had Congress intended to adopt the same distinction in ERISA, presumably it would have done so expressly, as it did in the Advisers Act, by including a similar exemption.

(1) Because there is no such exemption in ERISA, one can presume that Congress did not mean to limit the investment advice prong of the fiduciary definition in such a way. In enacting ERISA, Congress specifically referred to the Advisers Act when it created an exception to the requirement that plan trustees have exclusive authority and control over plan assets.

(2) Congress did not refer to the Adviser’s Act when it defined a fiduciary as someone who renders investment advice for compensation.

(3) While Congress understood this legal backdrop, it chose not to limit fiduciaries in ERISA to those covered by the Advisers Act. *Id.* at 34.

g) Plaintiffs mischaracterize the rule by suggesting that it applies fiduciary status to those who merely sell a product. *Id.* It does not. The rule makes clear that where an individual merely sells a product, and does not render investment advice by way of specified recommendations, he is not a fiduciary under the rule. *Id.*

(1) Whether a recommendation occurs is an objective inquiry, determined by asking whether, based on its content, context, and presentation, it reasonably would be viewed as a suggestion to a retirement investor to take a particular course of action with regard to investment property.

(2) Once a person crosses that line, he is no longer “merely sell[ing] a product”; he is rendering investment advice.

h) Nothing in the broad statutory text—which includes a person who “renders investment advice for a fee or other compensation, direct or indirect” indicates that compensation must be paid principally for investment advice, as opposed to for advice rendered in the course of a broader sales transaction. DOL has thus long interpreted that language to include commissions for advice incidental to a sales transaction. *Id.* at 36.

i) The first and third prongs of the fiduciary definition, like the second, are broad, and deem a person a fiduciary if he has “any discretionary authority or discretionary control respecting management of [a] plan” or “any discretionary authority or discretionary responsibility in the administration of [a] plan.” *Id.* at 37.

j) DOL challenges Plaintiff’s view that section 913(g) of the Dodd-Frank Act, “Congress prohibited the SEC ... from creating a [fiduciary] standard ... that banned commissions.” Plaintiffs argue that it is “implausible” that Congress would have taken such action “while leaving DOL free to adopt an interpretation with that exact consequence.” DOL’s rulemaking does not “ban commissions”; instead, it is the long-standing prohibited transaction provisions in ERISA and the Code that prohibit fiduciaries from receiving conflicted commissions. The rulemaking specifically provides exemptions from those provisions to allow the industry to continue to receive customary forms of compensation, such as commissions. *Id.* at 38.

k) Plaintiffs incorrectly argue that Congress has implicitly “ratified” the 1975 regulation’s interpretation of an investment advice fiduciary where it has “amended ERISA many times” without amending the fiduciary definition. While courts “have recognized congressional acquiescence to administrative interpretations of a statute in some situations, [they] have done so with extreme care.” *Id.* at 38.

l) Plaintiffs attempt to impose non-textual limits on the fiduciary definition in contravention of Congress’s intent to apply fiduciary status broadly to effectuate ERISA’s protective purposes and fail to satisfy the demanding standard to overturn DOL’s interpretation. *Id.*

6. DOL's Interpretation of "Investment Advice" is a Reasonable Construction of the Statutory Language that Comports with the Text, History, and Purposes of ERISA.

a) Because Plaintiffs have failed to show that DOL's interpretation is unambiguously foreclosed by the statute, DOL's interpretation is entitled to deference so long as it is reasonable. *Id.*

b) In light of the text, history, and purposes of ERISA, the rule's interpretation of "investment advice" meets this standard.

c) The rule's definition of "investment advice" in terms of specified "recommendations" to a particular advisee regarding the use of "investment property" that results in compensation to the adviser readily comports with an ordinary understanding of what it means to "render investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan." *Id.* at 39.

d) Plaintiffs attempt to impose non-textual limits on the fiduciary definition in contravention of Congress's intent to apply fiduciary status broadly to effectuate ERISA's protective purposes and fail to satisfy the demanding standard to overturn DOL's interpretation.

7. DOL's Interpretation of "Investment Advice" is a Reasonable Construction of the Statutory Language that Comports with the Text, History, and Purposes of ERISA.

a) The rule's definition of "investment advice" in terms of specified "recommendations" to a particular advisee regarding the use of "investment property" that results in compensation to the adviser readily comports with an ordinary understanding of what it means to "render investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan." *Id.*

b) DOL's interpretation of "investment advice" serves ERISA's broad remedial purposes by protecting against activities that pose the precise harms Congress enacted the statute to avoid. *Id.* at 40.

(1) Most retirement investors today no longer participate in defined benefit plans, "where their employer has both the incentive and fiduciary duty to facilitate sound investment choices"; instead, most now have individual account-based plans for which they make their own choices and rely on advisers in a market where "both good and bad investment choices are myriad and [conflicted] advice ... is commonplace."

(2) The rule aligns the definition of investment advice with today's marketplace realities and ensures, consistent with ERISA's text and congressional intent, that fiduciary status applies to "persons whose actions affect the amount of benefits retirement plan participants will receive." *Id.*

c) Congress did not limit fiduciary status to those already in relationships of trust and confidence under the common law; instead, Congress identified those persons whose activities impact Americans' retirement security and artificially created a fiduciary relationship. Thus, far from limiting fiduciary status to relationships recognized as fiduciary under pre-existing law, Congress designed the functional definition of fiduciary to address deficiencies in the previous protections for Americans' retirement savings. *Id.* at 41.

d) Plaintiffs' position, which would appear to require a showing that a particular adviser-advisee relationship would constitute a fiduciary relationship under the common law of trusts, would lead to the anomalous result of reverting to pre-existing law from which Congress expressly departed. *Id.* at 42.

e) The statute applies industry-wide to those who "render investment advice," rather than requiring individual showings for different types of participants in the retirement advice market. DOL need not assess common law "factors" to "determin[e]" whether a person who renders investment advice would be a fiduciary under the common law, given Congress's express adoption of a standard that applies fiduciary status more broadly than the common law. *Id.* at 43.

f) There is no merit to Plaintiffs' contention that DOL has exceeded its authority by entrenching on the jurisdiction of the SEC. *Id.* at 44. The SEC has consistently recognized DOL's authority to define fiduciary investment advice for purposes of ERISA, noting "that advisers entering into performance fee arrangements with employee benefit plans covered by the [ERISA] are subject to the fiduciary responsibility and prohibited transaction provisions of ERISA." Nor is there merit to Plaintiffs' argument that DOL "failed to justify changing the regulatory treatment of those who provide advice incidental to sales of fixed annuities." The Supreme Court recently stated that "[a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change."

g) DOL provided a detailed explanation for revising its definition of "investment advice." DOL explained that the 1975 regulation's five-part test needed to be revised because it was allowing persons acting as fiduciaries to avoid fiduciary responsibilities. *Id.* at 45.

(1) Even if the annuity industry “structured their compensation arrangements and distributions channels” in reliance on the previous definition, DOL is entitled to change that definition where it concluded that it is necessary to protect retirement investors.

(2) DOL accounted for such reliance interests by specifically providing means for the industry to continue to collect their preferred forms of compensation and to fit into the new structure, so long as they could do so consistently with the interests of retirement investors. *Id.*

h) There is no merit to Plaintiffs’ argument that the rule “defie[s] congressional intent” by “reject[ing] ... the disclosure regime established by Congress under the securities laws.” *Id.* ERISA serves different purposes and, thus, sets up a very different regime than the securities laws.

(1) While Congress recognized the value of disclosures, one of the primary motivations for the passage of ERISA was Congress’s finding that existing requirements, which relied heavily on disclosures, were insufficient to adequately protect retirement investors from conflicts of interest and needed to be augmented by the imposition of fiduciary responsibilities and restrictions.

(2) ERISA reflected congressional judgment that retirement investments merit special protection given their importance to the “well-being and security of millions of employees and their dependents,” their “preferential Federal tax treatment,” and their importance to commerce and the “stability of employment.”

(3) ERISA includes disclosure requirements, and requires far more, including “standards of conduct, responsibility, and obligation for fiduciaries” and “provid[es] for appropriate remedies, sanctions, and ready access to the Federal courts.” *Id.* The rulemaking accords with Congress’s approach, with disclosures an important part of the rulemaking. DOL rejected a disclosure-only regime, explaining that “[d]isclosure alone has proven ineffective to mitigate conflicts in advice.”

i) Given DOL’s reasonable interpretation of fiduciary investment advice and Plaintiffs’ failure to undermine the reasonableness of that interpretation, DOL’s interpretation is entitled to deference, and Defendants are entitled to summary judgment on Plaintiffs’ first claim. *Id.* at 46.

8. DOL Has Authority to Grant Conditional Exemptions for Tax-Favored Accounts

a) Where “[t]he Secretary is expressly delegated the authority to grant [an] exemption and is required to make certain other determinations in order to do so

(1) ... [t]hat grant and those determinations have legislative effect, are thus entitled to great deference under the ‘arbitrary and capricious’ standard.” DOL’s determination to grant the BIC Exemption on the condition that fiduciaries who seek to rely on it act in the best interest of their retirement investors easily meets this standard. *Id.* at 47.

b) Congress in ERISA sought to protect Americans’ retirement savings by prohibiting fiduciaries to employee benefit plans and IRAs from engaging in specified transactions that Congress deemed so fraught with conflicts of interest that it prohibited them altogether. *Id.*

(a) Congress also delegated to the Secretary broad authority to grant “conditional or unconditional” administrative exemptions to the prohibited transaction restrictions, if the Secretary makes findings that any such exemption is “(1) administratively feasible, (2) in the interests of the plan and of its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries of such plan.” *Id.* DOL’s exemption authority applies to the prohibited transaction restrictions in both Title I of ERISA and the Code. See 5 U.S.C. App. 1, § 102. DOL granted the BIC Exemption after an extensive notice-and-comment period and after conducting a thorough regulatory impact analysis that concluded that conflicts of interest in the market for retirement investment advice are widespread and could cost retirement investors tens to hundreds of billions of dollars over the next ten years. *Id.* at 48.

c) The impartial conduct standards constitute “baseline standards of fundamental fair dealing that must be present when fiduciaries make conflicted investment recommendations to Retirement Investors” because the standards “are necessary to ensure that Advisers’ recommendations reflect the best interest of their Retirement Investor customers, rather than the conflicting financial interests of the Advisers and their Financial Institutions.” *Id.*

d) Given Congress’s broad delegation of authority to DOL to grant “conditional or unconditional” administrative exemptions based on its findings that an exemption serves the interests, and protects the rights, of retirement investors, DOL’s determination to condition utilization of the BIC Exemption on compliance with “baseline standards of fundamental fair dealing,” *Id.* , is entirely reasonable and “entitled to great deference. *Id.*

e) DOL is not, in fact, imposing new obligations on fiduciaries; instead, it is requiring them to adhere to conditions when they engage in transactions that would otherwise be prohibited altogether. *Id.* at 49.

f) In delegating to DOL the authority to grant “conditional or unconditional” administrative exemptions, See, 26 U.S.C. § 4975(c), Congress foresaw that DOL may need to require adherence to certain conditions in order to make the requisite statutory findings.

g) The rulemaking does not impose independent obligations on fiduciaries outside of the context of prohibited transactions. Instead, the rulemaking simply specifies the conditions for fiduciaries when they seek to engage in transactions otherwise prohibited by Congress, in accordance with Congress’s directive to grant such exemptions only if they can be crafted to protect retirement investors. *Id.* at 50.

h) Congress left to DOL the discretion to use its expertise and to weigh competing policy concerns over time to determine how best to protect IRA investors in the case of conflicted transactions. DOL’s solution—requiring fiduciaries to IRAs to act in the best interest of investors—is entirely consistent with the statutory prerequisites that the exemption serve the interests and protect the rights of retirement investors. There is nothing unreasonable or impliedly prohibited about DOL’s drawing on long-standing fiduciary duties that Congress used in related contexts in order to protect IRA investors in the case of conflicted transactions. *Id.* at 50.

9. DOL’s Provision for Contract Terms that could be Enforceable Under State Law Does not “Create a Private Right of Action.”

a) Under the terms of the exemptions, a fiduciary adviser cannot engage in an otherwise prohibited transaction unless the financial institution responsible for overseeing the adviser commits in writing to adhere to the impartial conduct standards, provides basic disclosures, and promises to implement procedures to ensure compliance with the impartial conduct standards and avoid financial incentives to violate those standards. A contract executed under the exemptions will expose the firm and adviser only to pre-existing causes of action. *Id.* at 51.

b) DOL has not expanded the scope of ERISA’s causes of action beyond those expressly provided for in 29 U.S.C. § 1132, created any new private causes of action under the Code, or created any other cause of action under any other law. *Id.* at 52.

c) There is a significant difference between conditioning an exemption on minimum contract terms, and creating or inferring a new cause of action that was not authorized by courts or legislatures. While DOL has imposed minimum contract terms, it does not have the authority to create a state law cause of action to enforce that contract. *Id.*

d) Parties are free to enter into a contract pursuant to the BIC or Principal Transactions Exemptions, and if they do so, they can avoid violation of the prohibited transaction rules and thereby reduce the advisers' exposure to liability under ERISA and the Code. To the extent, however, parties wish to enforce the contract terms, they will have to rely on existing causes of action under state contract or other laws, not new causes of action created by DOL. *Id.* at 53.

e) Precluding DOL from granting exemptions on conditions that could lead to liability under other regulatory schemes could dramatically reduce DOL's ability to craft sensible conditions and make it much more difficult for the agency to grant exemptions at all. *Id.* at 54.

f) It is not novel for federal regulations to specify terms for private contracts, and other ERISA exemptions have required written agreements with implications for private enforcement. *Id.* at 55.

g) DOL has exercised its broad delegated authority to craft administrative exemptions that serve the interests of retirement investors by specifying minimum contract terms for conflicted transactions that already involve contracts enforceable under state law. It did not "create" a cause of action but acted well within its statutory authority. Defendants are entitled to summary judgment on this claim. *Id.* at 56.

10. DOL's Cost-Benefit Analysis Supports Its Rulemaking

a) DOL properly stated the benefits and the costs associated with its rulemaking with thorough and reasonable analysis. This claim is reviewed under the APA's "highly deferential" arbitrary and capricious standard. *Id.* 57 Review under the arbitrary-and-capricious standard is "extremely limited.

b) DOL Relied on Sufficient Evidence that the Rulemaking Would Confer a Substantial Benefit on Retirement Investors by Mitigating Conflicts of Interest in Retirement Investment Advice

(1) DOL collected, examined, and relied on a wide body of evidence, both empirical and qualitative, to conclude that conflicted advice about mutual funds, annuities, and other retirement investments inflicts significant harm on retirement investors. *Id.* at 57. DOL relied on a group of nine studies to generate a quantitative estimate of the ongoing cost of conflicted advice in the mutual fund segment of the IRA market that were broadly consistent with the much larger body of empirical and qualitative evidence. *Id.* at 58.

(2) Given the breadth and robustness of the broader empirical and qualitative evidence, DOL's qualitative conclusions appropriately extend beyond such mutual funds to annuities and other investments that are subject to advisory conflicts. *Id.* All of the criticisms Plaintiffs level against this study were raised during the rulemaking and were addressed by DOL in its RIA. DOL's review of the available literature and public comments led it to conclude that the harm to retirement investors from conflicts of interest in the market for advice is not limited to the 1993-2009 period or any other period covered by particular studies. *Id.* at 59.

(3) DOL had adequate grounds to conclude that conflicts of interest are pervasive, and its quantification of the gains to investors in one market segment is both robust and illustrative of additional gains reasonably expected in other segments. *Id.* at 60.

11. DOL Did Not Underestimate the Rulemaking's Costs for the Industry or Retirement Investors.

a) DOL adopted the conservative position of using the affected industry's own estimates of its quantifiable compliance costs, even though these costs were likely overstated. *Id.* DOL specifically examined the "secondary market effects," including the impact of the rulemaking on small investors.

(1) DOL is not obligated to numerically quantify every cost. DOL did quantify at least a portion of this cost by accounting for increased fiduciary liability insurance premiums.

(2) DOL concluded, based on the evidence, that "quality, affordable advisory services will be amply available to small plans and investors under the final rule and exemptions." *Id.* at 61.

(3) DOL's cost-benefit analysis did not improperly exclude Plaintiffs' proffered harms to consumers because DOL reasonably concluded that these harms would not materialize.

b) DOL's Quantitative Analysis Supported its Reasonable Conclusion that the Benefits of the Rulemaking Would Justify its Costs. *Id.*

c) Applying conservative assumptions throughout the RIA likely to overstate costs and understate gains, DOL demonstrated that the rulemaking is consistent with the aims of ERISA. *Id.* at 63.

d) DOL relied on a wide body of evidence to conclude that conflicted advice imposes a substantial burden on retirement investors, and that mitigation of those conflicts would substantially benefit investors.

(1) DOL's analysis reasonably relied on both qualitative and quantitative evidence, with the weightiest evidence on the qualitative side due to the difficulty in empirically assessing the implications of conflicts of interest where compensation and incentives are opaque and the data was not produced by the industry. *Id.*

e) DOL quantified only a small fraction of the gains from the rulemaking due to data limitations. Second, the quantified costs and benefits are mismatched—the costs are derived from the industry's own market-wide estimates, while the gains are limited to the small fraction of IRA assets invested in front-end load mutual funds. *Id.* at 66.

f) Based on a holistic view of the evidence, a small overlap between the quantified costs and quantified benefits would not justify the conclusion that the rulemaking produced a net loss. DOL has demonstrated that the rulemaking will produce substantial gains for investors. *Id.*

12. DOL Weighed the Costs and Benefits of Excluding Variable Annuities and FIAs from PTE 84-24.

a) DOL considered the costs for fiduciaries rendering advice regarding variable annuities and FIAs, and quantified insurers compliance costs.

(1) DOL does not doubt that annuities, including variable annuities and FIAs, can be appropriate financial products for retirement investors.

(2) Nor is DOL's goal to decrease investors' selection of these types of annuities, per se.

(3) DOL seeks to ensure that these annuities—like other classes of financial products—are recommended to IRAs and plan participants only when they would be in retirement investors' best interests and where financial institutions will be held accountable if they violate that standard. *Id.* at 67.

b) DOL aims to ferret out mismatched recommendations of products that are not in the individual investors' best interests. Plaintiffs cannot show that industry compliance with the BIC Exemption or avoidance of conflicted compensation will meaningfully limit investors' options for annuity purchases. *Id.* at 67.

c) Plaintiffs have not shown that it will be necessary to dismantle the independent agent distribution model. DOL had no means to specifically quantify the investor gains in the FIA segment of the annuity market. DOL had asked the industry to provide relevant data, but industry sources indicated that this data “would be prohibitively expensive to compile or obtain.” *Id.* at 69. The industry should not be able to criticize a rulemaking for failure to analyze information unobtainable except from the industry itself.

13. The Inclusion of Annuities in the BIC is Reasonable

a) DOL designed the BIC Exemption to serve as a general purpose exemption for almost all prohibited transactions involving conflicted compensation in the “retail market.”

(1) DOL gave annuities significant consideration, in part due to the vulnerability of annuity purchasers, who “tend to be at or near retirement age, when individuals are older and have the most assets at stake.”

(2) DOL ultimately decided that conflicted transactions involving variable annuities and FIAs should be required to rely on the BIC Exemption—the same as most other prohibited transactions in the retail market—and that PTE 84-24 would remain available for only the simplest annuities.

(3) DOL ultimately decided that conflicted transactions involving variable annuities and FIAs should be required to rely on the BIC Exemption—the same as most other prohibited transactions in the retail market—and that PTE 84-24 would remain available for only the simplest annuities. *Id.* at 70.

(4) DOL’s action must be upheld where it “examined the pertinent evidence, considered the relevant factors, and articulated a reasonable explanation for how it reached its decision.”

14. DOL Sufficiently Explained its Reasons for Including Variable Annuities and FIAs in the BIC Exemption

a) Considerations of complexity, risk, conflicts of interest, and a level playing field justified including variable annuities and FIAs in the BIC Exemption

b) In light of the complexities, risks, and conflicts of interest associated with variable annuities and FIAs, DOL concluded that the best way to protect retirement investors in the case of conflicted transactions involving those annuities was to include them alongside mutual funds and other classes of products in the BIC Exemption. *Id.*

(1) Because variable annuities are regulated as securities and are sold by brokers and registered investment advisers, it is sensible for them to be treated the same as mutual funds and other similar products. Variable annuities often carry larger commissions than mutual funds, providing an incentive to sell more of them, and the costs associated with them are more opaque. Some advisers sell variable annuities that are proprietary products created by their employers, creating even more conflict issues.

(2) DOL was well justified in applying the same protective conditions of the BIC Exemption to variable annuities as it did to mutual funds and most other classes of products. *Id.*

c) DOL also demonstrated that its decision to treat FIAs the same as variable annuities and similar products was well supported by “significant concerns about [FIAs’] complexity, risk, and conflicts of interest,” along with a desire to ensure a level playing field among these annuities and mutual funds. *Id.* at 71.

(1) Like variable annuities, FIAs “are complex products requiring careful consideration of their terms and risks,” and DOL concluded that customers can easily misunderstand, overestimate, or underestimate the significance of many of the products’ terms and attributes. *Id.* at 71.

(2) Any index-linked gains are generally not fully credited to the investor, which instead depends on the particular features of the FIA, such as participation rates, interest rate caps, and the rules regarding interest compounding. *Id.*

(3) Given these and other complexities, retirement investors “are acutely dependent on sound advice that is untainted by the conflicts of interest posed by Advisers’ incentives to secure the annuity purchase, which can be quite substantial.” The D.C. Circuit has recognized, “[i]n FIAs, as in securities, there is a variability in the potential return that results in a risk to the purchaser.” *Id.*

(4) In addition to the complexity and risks involved in FIA purchases, there are inherent conflicts of interest. Compensation amounts are tied to the advice given, incentivizing agents to sell particular products.

(a) While the complexity of these products render investors particularly reliant on agents’ advice, opaque compensation arrangements often leave investors unaware that agents may be steering them toward higher commission products that may not be in their best interest.

(b) DOL reasonably concluded that the “stringent anti-conflict policies and procedures” of the BIC Exemption would be more appropriate for variable annuities and FIAs to protect retirement investors.

(c) DOL reasoned that treating variable annuities, FIAs, and mutual funds the same under the rulemaking would ensure a level playing field and “avoid creating a regulatory incentive to preferentially recommend indexed annuities” based on the reduced level of regulation, rather than the interests of retirement investors. *Id.*

(d) DOL’s rationale is supported by American Equity, in which the D.C. Circuit found it reasonable to treat variable annuities and FIAs the same for purposes of securities laws.

15. DOL’s distinction between declared-rate annuities and FIAs is well justified and entitled to deference.

a) In addition to the undisputable greater risk involved with FIAs, commissions are typically higher for FIAs than for declared rate annuities.

(1) FIAs, like variable annuities and unlike most declared-rate annuities, are generally sold with guaranteed living benefit riders, which come in several types, involve extra cost, and “because of their variability and complexity may not be fully understood by the consumer.”

(2) Taken together, DOL had ample grounds to distinguish between them in its exemptions. *Id.* at 74.

b) DOL’s rulemaking appropriately treats classes of products differently due to the varying degrees of risk they pose to investors

c) DOL has authority to craft exemptions for a “class” of products that are tailored to the attributes of specific investment products or transactions.

(1) Shortly before ERISA’s prohibited transaction provisions went into effect DOL granted a class exemption allowing plans to purchase insurance or annuity contracts or mutual funds from insurance agents or brokers who received a commission. *Id.* at 75.

(2) Since then, DOL has provided numerous exemptions for particular investment products or transactions.

d) It is difficult to imagine how DOL could make the requisite findings without assessing the conflicts associated with the particular types of products involved in the transactions that are the subject of the exemptions. In the rule, DOL has merely applied different standards to widely-recognized categories of annuities based on the different risks they pose to consumers. *Id.*

e) The fact that retirement products are also regulated under other legal regimes, such as securities law and state insurance law, does not curtail DOL's exemption authority, which reaches all investment products for which employee benefit plan and IRA moneys will be used. *Id.* at 76.

f) By granting authority to exempt transactions involving securities, insurance, or other investment products, Congress expressly contemplated that DOL's exemptions will encompass fiduciaries in these markets. *Id.*

(1) DOL coordinated with the SEC staff, state insurance regulators, and the NAIC to ensure that the rulemaking is harmonized to the fullest extent possible with securities and insurance regimes.

g) DOL does not seek to restrict access to any specific product, but instead seeks to serve Congress's goal to prohibit all conflicted transactions except to the extent the harms to retirement investors can be sufficiently mitigated. *Id.* at 77.

h) The rulemaking does not "pick and choose retirement products for American consumers or regulate the design or manufacture of investment products.

i) The rule requires only that in recommending any one product, investment advice fiduciaries adhere to professional standards of prudence and put the interests of the retirement investor in the driver's seat, rather than those of the adviser or other parties. *Id.*

16. DOL Appropriately Took Existing Annuity Regulation into Account in Determining How to Regulate Variable Annuities and FIAs

a) DOL did extensively consider both existing securities regulation relevant to variable annuities and the state insurance regulation relevant to all annuities, and concluded that its consumer protections were not sufficient.

(1) DOL concluded that "notwithstanding existing [regulatory] protections, there is convincing evidence that advice conflicts are inflicting losses on IRA investors." *Id.* at 78.

b) The CEM study on which DOL's quantitative benefits are based isolated how conflicts of interest embedded in front-end loads—i.e., commissions paid to brokers in the mutual fund market bias their advice in ways that are harmful to consumers.

(1) Because such conflicts exist in both the mutual fund and annuity markets, DOL reasonably extended its analysis to the annuity market where the commissions are larger and less transparent and products are more complex, leaving consumers more vulnerable to bad advice. *Id.* at 79.

17. DOL found additional support for concluding that the annuity market is influenced by substantial conflicts of interest in insurance-related studies that could be applied by analogy—such as one demonstrating that contingent commissions “align the insurance agent or broker’s incentive with the insurance company, not with the consumer.” *Id.* at 79.

18. The existing regulatory regimes for insurance products do not undermine the conclusions that both the sale of mutual funds by brokers and the sale of annuities by insurers are governed by regimes that primarily rely on disclosure and suitability requirements. *Id.* at 80.

19. There is no reason to expect that existing laws governing insurance would substantially lower the risk of harm to investors from conflicted compensation observed in the mutual fund context. Indeed, DOL specifically examined disclosure and suitability standards and concluded that they provided insufficient protections. *Id.* at 81.

20. Lack of uniformity among states “create[s] uneven protections and confusion for consumers” and “that differences in standards between the states provide opportunities for arbitrage, if not a race to the bottom.”

21. As valuable as the NAIC and FINRA improvements may be for consumers in some respects, they do not fundamentally change the limitations that come with a disclosure and suitability regime, and DOL reasonably concluded that they were not sufficient safeguards to address ERISA’s priorities for the protection of retirement investments. *Id.*

22. DOL has “made a reasonable effort to ensure that appropriate data was relied upon” in reaching its conclusions. *Id.*

C. The BIC Exemption is Sufficiently Workable for Annuities

1. The administrative feasibility requirement has long been construed to require consideration of whether an exemption is feasible for DOL to administer, rather than workable for the industry. Plaintiffs’ assumption to the contrary is completely unsupported and contrary to the plain language of the standard, which suggests that the term refers to feasibility for the administrative agency—not the regulated industry. *Id.* at 82.

2. DOL considered the issues Plaintiffs claim make the BIC Exemption unworkable—and even provided solutions to address many of them. *Id.* at 83.

3. DOL provided guidance regarding relevant factors to consider. *Id.* The best interest standard is not vague and incorporates the longstanding fiduciary duties of prudence and loyalty. *Id.* These duties are “deeply rooted in ERISA and the common law of agency and trusts.” *Id.*

4. DOL considered the availability of private litigation over violation of the impartial conduct standards giving rise to “unforeseeable” and “potentially staggering, liability,” and determined that the possibility of litigation incentivizes compliance, and that several features of the final exemption “should temper concerns about the risk of excessive litigation,” including provisions permitting arbitration of individual claims and contractual waiver of claims for rescission or punitive damages. *Id.* at 84.

5. Fiduciaries selling annuities to employee benefit plans have been subject to the duties of prudence and loyalty from ERISA’s inception. *Id.*

6. Where DOL has borrowed statutory standards in appropriately analogous contexts, it is unclear why some level of burden on the industry to qualify for an exemption would be unjustified when consistent with the burdens Congress directly imposed on the industry for other purposes. *Id.*

7. DOL did provide guidance regarding the sale of proprietary products, including a checklist in the exemption’s preamble. DOL made clear that the prudence standard “does not impose an unattainable obligation ... to somehow identify the single ‘best’ investment ... out of all the investments in the national or international marketplace, assuming such advice were even possible.” *Id.*

8. DOL explained that if the limited menu of proprietary products “does not offer an investment that meets the prudence and loyalty standards with respect to that particular customer,” then the adviser may not recommend a product from that menu. *Id.*

a) An insurer supervising an agent will not need to supervise the sale of other companies’ products, but will need to ensure only that recommendations and sales concerning its own products meet the standards.

b) It is not “impossible for the insurance company to comply” with the financial institution supervisory responsibilities for independent agents. *Id.* at 85.

c) An insurer supervising an agent will not need to supervise the sale of other companies’ products, but will need to ensure only that recommendations and sales concerning its own products meet the standards. *Id.*

9. DOL acknowledged and considered this distribution model throughout its analysis and identified several available options. *Id.* at 86.

a) Sixty percent of insurance agents are also registered to handle securities, and the broker or registered investment adviser with which they are affiliated could serve as the financial institution.

b) A third party, such as an IMO, could take on much or all of the insurance company’s oversight work even where the insurance company signs the contract.

c) Alternatively, IMOs or others may seek exemptions to become “financial institutions” separately charged with duties under the BIC Exemption—and several IMOs have already submitted applications. *Id.*

d) Even if some fraction of such agents choose to exit the market or take another role, DOL provided reasonable grounds to conclude that this will not cause a large reduction in available advisers or impair investors’ access to advice. *Id.* at 87.

10. Having examined the relevant evidence and factors regarding the ability of annuity providers to comply with the BIC Exemption, and articulating a reasoned explanation for its decision, DOL satisfied the APA requirements. *Id.* at 88.

D. DOL Provided Adequate Notice and Opportunity to Comment on the Scope of Annuities to be Covered by PTE 84-24.

1. DOL’s decision to require FIA transactions to rely on the BIC Exemption, rather than PTE 84-24, for exemptive relief, grew logically from its 2015 proposal. Importantly, as proposed, the BIC Exemption applied to all annuity transactions. And DOL’s notices raised questions about the line to be drawn between variable annuities and other types of annuities for purposes of distinguishing transactions that would be required to use the more protective BIC Exemption and those that could continue to use PTE 84-24 as amended. *Id.* at 88.

2. DOL both invited comment on whether its proposal had “drawn the correct lines between insurance and annuity products that are securities and those that are not,” and queried whether its decision to “leave in place relief for IRA transactions involving insurance and annuity contracts that are not securities strikes the appropriate balance and is protective of the interests of IRAs.” *Id.*

3. Circuit precedent demonstrates that these statements provided adequate notice for purposes of the APA. For example, the Fifth Circuit held that a final rule’s “comprehensive definition of ‘earnings’ was a logical outgrowth of DOL’s OSHA rulemaking proceedings,” rejecting appellees’ argument that, because the definition itself was not in the proposal, they lacked notice that “premium payments” would be included. *Id.*

4. DOL’s final determination that variable annuities and FIAs should be grouped together under only the BIC Exemption is plainly within the logical outgrowth standard. *Id.*

5. The DOL proposal explained its tentative reason for singling out IRAs, and then stated “[t]he Department requests comment on this approach.” the public had ample opportunity to comment on how plan and IRA sales should be treated under PTE 84-24 and the BIC Exemption, and *d/Id.* *Id.* at 91.

E. Plaintiffs’ Non-APA Claims Fail

1. The Contract Requirements in the BIC Exemption and Principal Transactions Exemption Do Not Violate the Federal Arbitration Act.

a) DOL allows the contracts under the BIC Exemption and the Principal Transactions Exemption to provide for binding arbitration of individual claims. *Id.* at 92. DOL also requires the contract between the financial institution and the investor to preserve the investor’s right to bring or participate in a class action.

b) The BIC exemptions are consistent with the statutory text and do not interfere with the FAA’s principal purpose—to ensure the enforcement of written arbitration agreements. Nor does the FAA restrict DOL’s authority to impose conditions on any exemptions it grants from the prohibited transaction restrictions. *Id.* at 92. Section 2 of the FAA provides that “[a] written provision in any ... contract ... to settle by arbitration a controversy thereafter arising out of such contract ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” The FAA was meant to reverse “widespread judicial hostility to arbitration agreements,” putting them on an equal footing with other contracts. *Id.*

c) The condition at issue does not interfere with the FAA’s “principal purpose.” *Id.* The preservation condition does not purport to render any “written provision” providing for arbitration invalid, revocable, or unenforceable. Nor does it prohibit class action waivers. Both institutions and advisers remain free to invoke and enforce arbitration provisions, including those that waive or qualify the right to bring a class action in court. Instead, such a contract simply does not meet the conditions for relief from the prohibited transaction restrictions in ERISA and the Code. As a result, the financial institution and adviser would remain fully obligated under Title I of ERISA and the Code to refrain from engaging in prohibited transactions. *Id.*

d) DOL has broad discretion to craft exemptions so long as they are administratively feasible, in the interests of retirement investors, and protective of their rights.

e) DOL concluded that the enforcement rights and protections associated with class action litigation are important to ensure adherence to the impartial conduct standards and other anti-conflict provisions of the exemptions. *Id.* at 93. If a financial institution enters into a contract requiring binding arbitration of class claims, the rulemaking does not invalidate the provision, but rather requires that the financial institution fully comply with statutory provisions prohibiting conflicted fiduciary transactions in its dealings with investors.

f) The FAA does not limit DOL's express discretionary authority over exemptions, nor entitle parties that enter into arbitration agreements to a pass from the prohibited transaction rules. The FAA does not limit DOL's express discretionary authority over exemptions, nor entitle parties that enter into arbitration agreements to a pass from the prohibited transaction rules.

g) DOL pointed to many ways that the industry can innovate to come into compliance with the rulemaking and avoid prohibited transactions. *Id.* at 93. Advisory firms may compensate advisers less by commission and more by salary or via rewards tied to customer acquisition or satisfaction.

h) As the class action preservation condition does not interfere with contract enforcement, it does not violate the FAA, and Defendants are entitled to summary judgment on this claim.

F. DOL's Rulemaking Is Consistent with the First Amendment.

1. The challenge is based on their mischaracterization of the rulemaking as a content-based restriction on commercial speech, even though the rulemaking is no such thing.

a) The rule refines the fiduciary definition for purposes of ERISA, such that those who fall within the definition must conduct themselves in accordance with fiduciary standards that have never been understood to run afoul of the First Amendment.

b) The exemptions accommodate these fiduciaries by allowing them to engage in transactions that would otherwise be prohibited by law. None of this constitutes a regulation of speech prohibited by the First Amendment. *Id.* at 95.

2. Given the Government's undisputed substantial interest in protecting retirement investors from being misled and harmed by conflicted investment advice, and the DOL's use of long-standing and commonsense means to combat such conflicts, the rulemaking easily meets that standard. *Id.*

G. The Rule regulates commercial conduct within a fiduciary relationship, and any incidental effect on speech does not violate the First Amendment.

1. The Supreme Court has long held that 'the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech. *Id.*

2. To determine whether the regulation of professional conduct has only a permissible, incidental effect on speech, courts look to whether "the speaker is providing personalized advice in a private setting to a paying client or instead engages in public discussion and commentary. *Id.* at 96.

3. Regulation of such conduct does not abridge free speech, so long as "any inhibition ... is merely the incidental effect of observing an otherwise legitimate regulation. *Id.*

4. The rule explicitly states that the definition of fiduciary investment advice does not include general communications to the public that could be viewed as commercial speech. *Id.* at 97.

5. The rule thus operates as a regulation of professional conduct, and the exemptions, which aim to mitigate conflicts in investment advice, have at most an incidental effect on speech. The rulemaking is subject to a very low level of scrutiny, if it falls within the ambit of the First Amendment at all. *Id.*

6. Plaintiffs attempt to recast the rulemaking as a prohibition on protected speech by repeatedly arguing that under the rule, “[s]alespersons now may speak as a fiduciary, or not at all,” but this Hobson’s choice does not even present a First Amendment question; that the rulemaking requires a fiduciary to act like a fiduciary is not a restriction on speech. *Id.* 98. Otherwise, the myriad long-standing state and federal laws pertaining to the conduct of numerous fiduciary relationships, such as those applying to doctors, lawyers, and psychologists, would be subject to strict scrutiny insofar as they involve the use of speech. Such an approach has been explicitly rejected.

7. Consistent with the professional speech doctrine, which recognizes that “[o]utside the fiduciary relationship between client and [fiduciary], speech is granted ordinary First Amendment protection,” the rulemaking regulates only commercial conduct that occurs within a fiduciary relationship. *Id.* at 99. Plaintiffs’ members can continue to have conversations about retirement products and market their services without becoming fiduciaries under the rule.

H. The rulemaking regulates transactions with the potential to mislead.

1. To the extent the rulemaking regulates commercial speech (as opposed to professional conduct) at all, it is subject at most to a very low level of scrutiny, as it regulates transactions that have inherent potential to mislead. *Id.* at 100. “Commercial speech is ... afforded lesser protection under the Constitution than other forms of speech.” “[F]or commercial speech to come within [the protection of the First Amendment], it at least must ... not be misleading.” *Id.*

2. The terms and conditions of the exemptions apply only when Plaintiffs’ members are engaged in transactions Congress deemed so fraught with conflicts of interest that it prohibited them altogether. *Id.* at 100. To the extent the exemptions regulate speech within those transactions at all, the only advice they limit would consist of suggestions that retirement investors take actions with respect to their investment property that are not in their best interest and misleading statements about investment transactions, compensation, and conflicts of interest. *Id.* at 101.

3. The rulemaking treats speakers, listeners, and subject matters differently, not because it “disfavor[s] ... particular messages about retirement products,” but because DOL determined that the potential for conflicts of interest and for consumers to be misled differed in degree such that differential treatment was justified. *Id.* “[P]rotecting consumers from ‘commercial harms’” is a “neutral justification” for any “content-based restrictions.”

4. Where bad advice and misleading statements are wholly proscribable because they are misleading, the rulemaking does not run afoul of the First Amendment where it makes content-based distinctions for the very same reason. Where the rulemaking aims at protecting consumers from misleading practices, it is subject to “less than strict review,” if it falls within the ambit of the First Amendment at all. *Id.* at 102.

5. Applying strict scrutiny to regulations of this sort would cripple the Government’s ability to address consumer needs and put into the hands of the courts, rather than the elected branches, the ability to determine the best means to do so. The First Amendment does not compel such a radical result. *Id.* 103.

I. The rulemaking directly advances the Government’s substantial interest in protecting retirement investors from conflicted investment advice.

1. Whether analyzed as a regulation of professional conduct or of transactions with inherent potential to mislead, Plaintiffs’ First Amendment claim should be subject to no more than rational basis review. *Id.* at 103. Even if the Court were to determine that the rulemaking regulates commercial speech that is not inherently misleading, the rulemaking would survive the higher level of review that applies to such regulations.

2. Under the Supreme Court’s test for commercial speech, if the communication is neither misleading nor related to unlawful activity, then the government must show: a “substantial” government interest; that the regulation “directly advances” the asserted interest; and that the regulation is “not more extensive than is necessary to serve that interest.” *Id.* That the Government has a substantial interest in protecting retirement investors from conflicted investment advice that threatens their retirement security is obvious and undisputed.

3. DOL revised the 1975 regulation’s definition of fiduciary investment advice to better align with ERISA’s statutory text, history, and purposes, and to ensure that fiduciary responsibilities and restrictions apply to those Congress intended to be fiduciaries in order to protect retirement investors from conflicted investment advice. *Id.* at 104. DOL crafted administrative exemptions that continue to protect retirement investors even in the case of conflicted transactions by, requiring investment advice fiduciaries to adhere to impartial conduct standards, to take certain steps to minimize the impact of conflicts of interest, and, in the case of the BIC and Principal Transactions Exemptions, to enter into enforceable agreements to ensure adherence to the exemptions’ conditions. *Id.* at 105.

4. DOL considered numerous alternatives to the approach it took in the rulemaking (including some of those proposed by Plaintiffs' members), but ultimately determined that none of the alternatives would protect retirement investors as efficiently and effectively as the rulemaking. *Id.*

5. DOL specifically considered the alternative of basing exemptive relief on disclosure alone, but, after thoroughly reviewing the academic research in this area, concluded that disclosure of adviser conflicts can backfire, and that relying solely on disclosures would be ineffective, and would yield little to no investor gains, and would fail to justify its compliance cost. *Id.*

6. The rule seeks to shield investors only from recommendations that are not in their best interest and other misleading information. These restrictions do not run afoul of the First Amendment. *Id.* at 106.

7. After completing a nearly six-year notice-and-comment process and conducting an extensive regulatory impact analysis, which includes thorough analysis of the position of small investors without the rulemaking, as well as the effect of the rulemaking on them, DOL concluded that small investors were not being well served by the financial industry and that the rulemaking will enhance the welfare of the small investors by “nudg[ing] the investment advice market’s evolution toward greater efficiency,” and by “reflecting better informed matches between customers and advisers.” *Id.*

J. Relief Requested.

1. Whether Plaintiffs’ First Amendment claim is about conduct and not speech at all, or is subject to rational basis review or intermediate scrutiny, DOL is entitled to summary judgment because the rulemaking serves the Government’s substantial interest in protecting retirement investors from conflicts of interest while being no more extensive than necessary to do so. *Id.* at 108. There is no merit to Plaintiffs’ First Amendment claim, and DOL is entitled to summary judgment on this claim

2. In the unlikely event that the Court concludes that some aspect of the rulemaking falls short as a procedural matter or otherwise, the Court should either remand to DOL without vacatur or provide an opportunity for the parties to briefly address appropriate remedies, including severability. *Id.* at 109. DOL intends that any invalidated provision of the rulemaking be severed, if feasible, to preserve its many other important benefits.

VIII. NAFA Challenge to the Final Rule

A. Synopsis of NAFA Position.

1. Insurance agents selling annuity products were never intended by Congress to be fiduciaries. See, Memorandum in Support of Plaintiff NAFA’s Application for Preliminary Injunction to Stay the April 10, 2017 Applicability Date of DOL of Labor Fiduciary, Civil Action No. 1:16-cv-1035, (June 2, 2016).

2. Fiduciary duties applicable to ERISA advisers were never intended apply to IRA advisers. *Id.*
 3. No federal agency on its own has authority to create a private cause of action. *Id.*
 4. Mandating compensation be “reasonable” with nothing more is a regulatory trap that is void for vagueness. *Id.*
 5. Placing fixed index annuities (FIAs) within the BICE is flawed because it is contrary to federal securities law and no consideration was given to the effect it would have on the fixed annuity industry. *Id.*
- NAFA requested that the fiduciary rule be vacated. To avoid the immediate and irreparable harm, NAFA requested that the Court issue a preliminary injunction during the pendency of the litigation. *Id.*

B. NAFA Position in More Detail.

1. In the DOL’s proposed fiduciary rule, both fixed declared rate annuities and FIAs were included in PTE 84-24 moved FIAs out of PTE 84-24 and into the BICE. All fixed annuities – including FIAs – have long been treated as fixed insurance products, exempt from federal securities laws, and regulated under state insurance laws. *See, Plaintiff NAFA’s Reply in Support of Its Application for A Preliminary Injunction and for Summary Judgment and Opposition to Defendants’ Cross-Motion for Summary Judgment*, Civil Action No. 1:16-cv-1035 (RDM), D DC (July 22, 2016).
2. The Rule Should Be Vacated Under The APA-DOL’s New Definitions of “Investment Advice” And “Fiduciary” Exceed Its Statutory Authority Under ERISA and the Code.
 - a) DOL exceeded its statutory authority by altering its definition of “investment advice for a fee or other compensation” and expanding the meaning of “fiduciary” far beyond what Congress intended when it enacted ERISA. Congress did not intend agents who sell insurance products for a commission – typically on a one-time basis – to be treated as ERISA fiduciaries merely for recommending that an IRA owner purchase a fixed annuity. *Id.* at 4.
 - b) According to DOL, the mere “suggestion” of an annuity product by a commissioned salesperson to an IRA owner is a fiduciary act under ERISA because it amounts to “render[ing] investment advice for a fee or other compensation.” That interpretation, however, flies in the face of the relevant statutory language under ERISA and the Code. *Id.*

c) DOL claims it is entitled to deference in redefining who is a fiduciary, because Congress granted it “broad administrative and interpretive power” to promulgate regulations that are “necessary or appropriate” to carry out ERISA and the Code. Because “Congress did not specifically define ‘investment advice,’” DOL reasons that it has “broad discretion to interpret that language.” *Id.*

d) DOL ignores the rule that if an agency has not “acted pursuant to delegated authority,” its action is “ultra vires,” and the agency is not entitled to deference. The “text, purpose, and legislative history” of ERISA make clear that Congress never intended to impose fiduciary duties on insurance salespersons merely for recommending the purchase of insurance policies. *Id.*

e) In ERISA, Congress determined that one might qualify as a “fiduciary with respect to a plan” if “he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or property of such plan, or has any authority or responsibility to do so.” 29 U.S.C. § 1002(21)(A)(ii). The meaning of “fiduciary” is therefore critical in assessing when Congress intended “investment advice” to amount to fiduciary conduct, as are the other portions of the definition requiring that investment advice be rendered “for a fee or other compensation,” or that an adviser have “authority or responsibility” over plan assets. *Id.* at 7.

f) In determining whether Congress has specifically addressed the question at issue [under Chevron Step One], a reviewing court should not confine itself to examining a particular statutory provision in isolation,” because “[t]he meaning – or ambiguity – of certain words or phrases may only become evident when placed in context. *Id.* the words in a statute should be considered “in their context and with a view to their place in the overall statutory scheme.

g) The most natural reading of the plain language “rendering investment advice for a fee or other compensation” is that compensation is being paid for the advice itself, not for the product being purchased. The distinction between paying for investment advice, as opposed to an insurance product, has long been recognized under the law. *Id.*

h) DOL’s attempt to impose fiduciary duties on insurance salespersons is further belied by the legislative history of ERISA. The conference report on the statute indicates that report makes clear that fiduciary status is to extend to individuals who are employed to render “investment advice” for a fee or who have “discretionary authority” or “control” over a plan or its assets (either directly or through delegation). *Id.* at 9.

i) The legislative history reinforces the plain language of ERISA and statutory context by showing that Congress intended to extend fiduciary status only to investment advisers “employed” by plans to render advice for a fee, or who otherwise exercise discretion or control over a plan’s investments. This is consistent with the notion that “[a] fiduciary is one who occupies a position of confidence or trust,” such as the “power of control, management, or disposition” of plan assets. *Id.*

j) Neither the plain meaning of the term “fiduciary” nor the common-law rules governing fiduciaries support extending fiduciary status to an insurance salesperson recommending the purchase of an insurance product for a commission. As a matter of common understanding, a fiduciary relationship is not a mere business relationship, but rather a special relationship of trust and confidence. *Id.* at 10.

k) An insurance salesperson has never been a fiduciary, under the common law or under ERISA. They do not have a special relationship of trust and confidence with their customers, they are not paid for investment advice, and they do not have power or control over plan assets. DOL cites no authority even suggesting that Congress intended ERISA fiduciary duties to apply to insurance salespersons receiving commissions in such circumstances. *Id.* at 12.

l) Fiduciary status flowing from the statutory language “rendering investment advice for a fee or other compensation” does not extend “to those who merely sell commission-generating products.” *Id.*

3. The Investment Advisers Act of 1940 provides further support for the conclusion that Congress did not intend for insurance salespersons to be classified as fiduciaries.

a) When Congress used the phrase “renders investment advice for a fee or other compensation” in ERISA, it did so against the backdrop of the Advisers Act, which defined an “[i]nvestment adviser” as one who “for compensation, engages in the business of advising others . . . as to the value of securities or as to the advisability of investing in, purchasing, or selling securities.” 15 U.S.C. § 80b-2(a)(11). *Id.* at 13.

b) The Advisers Act did not extend fiduciary status to “any broker or dealer” who provides advice that is “solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor.” 15 U.S.C. § 80b- 2(a)(11)(C). This exemption “reflected [a] distinction” between the “two general forms of compensation” financial professionals receive for rendering investment advice: “traditional commissions” and “a separate advice fee.” *Id.*

c) When DOL issued its previous five-part test, it crafted a regulation that was consistent with the plain meaning of “fiduciary,” common law fiduciary rules, and the fiduciary advice concepts incorporated in the Advisers Act. *Id.* Consistent with congressional intent, the five-part test extends fiduciary status only to advisers who render investment advice “on a regular basis” and pursuant to a “mutual” agreement or understanding that “the advice will serve as a primary basis for investment decisions” and is “individualized.”

d) Congress has repeatedly ratified the five-part test, both by reenacting the Code and by amending relevant provisions of ERISA. Congress reenacted the entire Code through the Tax Reform Act of, with amendments to Section 4975. *Id.* at 16. Numerous courts have relied on the DOL’s five-part test to conclude that insurance carriers and agents do not face fiduciary duties when recommending their products to ERISA plan. Congress also is presumed to have been aware of these judicial decisions as well when it reenacted the Code and the relevant portions of ERISA.

4. Congress ratified the five-part test when it affirmatively reenacted the entire Code in 1986 and amended relevant provisions of both ERISA and the Code through the 2006 it makes no sense to suggest that Congress intended ERISA fiduciary duties to extend to insurance salespersons, particularly when such an interpretation of the statute would have enormous adverse consequences on the fixed annuity industry. *Id.* at 19.

5. DOL has no statutory authority to impose ERISA fiduciary duties on IRA transactions, as it seeks to do through the combination of the rule, PTE 84-24, and the BICE. *Id.* at 20.

6. DOL ignores that ERISA was enacted, in part, to regulate the individuals who manage employer-sponsored employee benefit plans in order to protect the beneficiaries of such plans, who lacked control over plan investments. In contrast, IRAs are individual plans for which such protections are unnecessary, because IRA owners have the freedom to shop for the most appropriate financial product. *Id.*

7. When Congress enacted Title I of ERISA, it elected to impose fiduciary duties on ERISA plan fiduciaries through ERISA Section 404. 29 U.S.C. § 1104. At the same time, Congress created traditional IRAs and amended the tax code to establish prohibited transaction rules applicable to IRAs, but Congress deliberately chose not to impose key ERISA duties in IRA transactions through Sections 408(e) and 4975 of the Code. *Id.*

8. Legislative history demonstrates that Congress drew clear distinctions between Title I of ERISA, which imposes fiduciary duties on ERISA plan fiduciaries, and Title II, which imposes no fiduciary duties in IRA transactions. *Id.*

9. DOL claims that its limited authority to issue “conditional” exemptions to the prohibited transaction rules in Section 4975 of the Code gives it the authority to condition such exemptions on adherence to the very same fiduciary standards that Congress deliberately chose not to apply to IRA transactions. According to DOL, “all that can be inferred” from Congress’s decision not to impose fiduciary duties in IRA transactions “is that Congress did not intend to mandate such obligations.” *Id.* at 24.

10. Title I of ERISA imposes a “prudent man standard of care” requiring that “a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries” (i.e., a duty of loyalty) and “with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.” Title II of ERISA (i.e., the Code provisions) imposes no such duties in IRA transactions. *Id.*

11. DOL exceeded its statutory authority by subjecting all insurance agents to ERISA fiduciary duties when selling annuities to IRAs. NAFA challenges “whether the agency has stayed within the bounds of its statutory authority.” *Id.* at 26.

12. DOL believes that it is “in the interest of retirement investors” that “fiduciaries to IRAs agree in writing to adhere to fiduciary obligations that put investors’ interest first,” but it has no authority to make that judgment when Congress has not done so. “[T]hat is a decision for Congress and the President to make if they wish by enacting new legislation.” *Id.*

13. DOL has created a private right of action against IRA “fiduciaries” for breach of fiduciary duty, where Congress authorized no such action; DOL has no statutory authority to do that. *Id.* at 29.

14. The rule and the BICE create additional remedial litigation rights to enforce federal law, for the first time subjecting IRA “fiduciaries” to a risk of liability for breach of ERISA fiduciary duties that Congress never imposed on them. *Id.* Because all agents and IMOs in the annuity marketplace are compensated by commission, insurance carriers that sell FIAs purchased with qualified IRA funds will have no choice but to enter into BICs that subject them to a new risk of liability for breach of fiduciary duties imposed by ERISA. *Id.* at 30.

15. Even if the DOL’s rulemaking were not completely foreclosed by the language of the statute, it fails at Chevron Step Two in any event. Congress never intended the relevant provisions of ERISA and the Code to be used to impose fiduciary status on insurance salespersons who earn commissions for selling annuities to IRAs. *Id.* at 35. Under Chevron Step Two, it is not enough for DOL to simply state that “much has changed during the last 40 years.”

16. The rule also fails at Chevron Step Two, because the DOL has adopted an unreasonable and “counterintuitive” new definition to achieve a regulatory purpose not intended by Congress. An insurance salesperson has never been deemed an ERISA fiduciary for recommending an insurance product for which he receives commissions, and DOL has no authority to apply ERISA fiduciary duties to IRA transactions. Thus, DOL’s decision to abandon the five-part test and adopt a new Rule and exemptions that impose ERISA fiduciary duties on insurance salespersons falls “outside the bounds of reasonableness.” *Id.* at 37.

17. DOL’s decision to shift FIAs from PTE 84-24 to the BICE violated the APA for at least four reasons: DOL failed to provide a rational explanation for its decision when it ignored distribution issues identified in the NOPR; the decision is contrary to federal law; the decision is irrational and unworkable; and, DOL failed to weigh the costs and benefits. *Id.* at 38.

18. DOL recognized in the NOPR that those annuities that are securities (i.e., variable annuities) were an appropriate “fit” with other securities investments covered by the BICE (e.g., mutual funds, stocks, and bonds), because variable annuities are largely sold through the same distribution channels (e.g., broker-dealer representatives), subject to similar disclosure requirements (e.g., securities prospectuses), and subject to the same compliance rules and regulations (e.g., supervisory oversight mandated by FINRA). *Id.* at 39.

19. DOL recognized that other types of annuities that are “not securities” – including fixed declared rate annuities and FIAs – would be a poor fit for the BICE, because they fall outside the scope of securities laws, are sold through a different distribution system, and are subject to different disclosure requirements, compliance rules, and regulations. Numerous comments confirmed that the BICE was a poor fit for insurance products because of distribution issues. *Id.*

20. DOL’s post hoc analysis is unreasoned, because the exact same analysis applies to fixed rate annuities that it left in PTE 84-24 and FIAs that it moved to the BICE (with variable annuities). It is well-settled that “[i]f the agency makes an exception in one case, then it must either make an exception in a similar case or point to a relevant distinction between the two cases.” *Id.* at 42.

21. BICE itself offers no indication that insurance agents can meet the standards of prudence by satisfying some kind of lesser analysis if agents fail to: investigate the full financial circumstances of the client; evaluate the client’s investment objectives; investigate and evaluate investments; and, perform all of these required activities in a manner that meets professional standards as compared to other investment advisers. *Id.* at 48.

22. DOL made no attempt to explain its utter failure to consider the unique aspects of the FIA industry or to address how its last-minute decision to “group” FIAs together with securities products will affect the FIA industry. *Id.* at 50.

23. DOL did not attempt to describe the costs and benefits associated with its eleventh-hour decision to shift FIAs from PTE 84-24 to the BICE. Thus, Court must vacate the decision to switch FIAs from PTE 84-24 to the BICE. *Id.* at 53.

24. The regulations that control “reasonable compensation” for these purposes also apply the nebulous and vague use of “facts and circumstances.” Crafting these tax concepts into the BICE leaves the fiduciary in the untenable position of translating a vague tax concept into precise monetary compensation in a contract. In short, Section 4975 is of no help in solving the riddle of “reasonable compensation.” *Id.* at 56.

25. If a fiduciary, acting in good faith, charges compensation later determined to be unreasonable, the proverbial sky will fall in on that fiduciary. The consequence is that there will be no exemption from the prohibited transaction rule against self-dealing. Using an insurance company as the hypothetical fiduciary, each policy that it has had approved under state law in order to comply with the rule will contain unreasonable compensation features, notwithstanding the insurance company’s well-intentioned effort to obtain only “reasonable compensation.” *Id.* at 62.

26. The impact is so substantial that the vague notion of “reasonable compensation” leaves the insurance company (and other providers) unable to avoid unyielding litigation, excise tax, and cost-of-correction exposure. As a result, the “reasonable compensation” aspect of the BIC violates the Due Process clause and is void for vagueness. *Id.* at 62.

27. DOL failed to offer “a statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments[.]” *Id.* at 64.

28. The RFA requires agencies to specifically consider the effects of regulations on small entities, whereas the APA itself codifies basic precepts of reasoned rulemaking. RFA Section 604(a)(5) mandates that the agency consider and provide “an estimate of the classes of small entities” impacted by the rule, while section 604(a)(6) requires the agency to describe “the steps the agency has taken to minimize the significant economic impact on small entities[.]” *Id.*

29. NAFA asked the Court to stay the applicability date of the rule not because of what might happen on some future date, but because of what is happening to NAFA’s members right now. In stating that “the rule does not apply until April 2017” (Opp. at 85), the DOL refuses to recognize the reality of the situation set out in the affidavits. The Rule requires the fixed annuity industry to change its very business model and completely overhaul its distribution system. *Id.* at 65.

30. Without injunctive relief, the harm the rule causes is immediate and cannot be reversed, because carriers, IMOs, and agents are already devoting unrecoverable resources to comply with dramatic new compliance requirements that alter the very essence of their businesses. *Id.* 66.

31. For purposes of a remedy under the APA, a court sits in equity, not at law. A court may “issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.” *Id.* 71.

32. Even if the deadline for compliance is months away, the rule and exemptions are on the books, and NAFA’s members face the imminent need to restructure their business models and distributions channels in order to comply with a regulation that likely will not survive the mounting legal challenges against it. Indeed, DOL states in its brief that participants in the fixed annuity industry should not labor under the “false impression that they may not need to reform their practices to come into compliance with the rule and BIC Exemption by the applicability dates.” *Id.* at 73.

IX. Government’s Response to NAFA Complaint

A. Synopsis of Government’s Position.

1. NAFA contests both the fiduciary rule, which seeks to ensure that those who provide investment advice act in the best interest of their customers, and its related exemptions, which DOL crafted to allow advisers, including NAFA’s members, to collect compensation through transactions that would otherwise be prohibited by law. Given DOL’s broad statutory authority, as well as its thorough analysis and reasoned explanation for the regulations, NAFA’s six claims and request for a preliminary injunction should be denied. *See, Corrected Memorandum in Support of Defendants’ Opposition to Plaintiff’s Motion for a Preliminary Injunction and for Summary Judgment and Defendants’ Cross-Motion for Summary Judgment*, Civil Action No. 1:16-1035 (RDM) (July 11, 2016).

2. Pursuant to its broad authority under ERISA to protect employees’ retirement savings, DOL engaged in an open rulemaking process spanning almost six years that focused on conflicts of interest in the market for retirement investment advice. *Id.*

3. Based on the extensive public comments and evidence garnered during that process, DOL determined that such conflicts of interest are widespread and could cost investors in individual retirement accounts (in one segment of the market alone) between \$95 billion and \$189 billion over the next 10 years. *Id.*

4. To address this threat to employees’ retirement security, the DOL promulgated The fiduciary rule and related exemptions, which broaden the category of individuals who must adhere to fiduciary responsibilities. The fiduciary rule is necessary to safeguard the retirement savings of millions of American consumers. *Id.*

- B. Government's Position in Greater Detail
1. NAFA Cannot Prevail on the Merits of its Six Claims
 - a) DOL acted well within its authority in putting the rule and exemptions to ensure that retirement investors receive impartial investment advice and to mitigate the inherent conflicts in the forms of compensation regularly received by advisers who sell products, such as FIAs, and provided a reasoned explanation for its decision to do so. There is no legal basis for NAFA's requested relief, and Defendants are entitled to summary judgment on all of NAFA's claims. *See, Corrected Memorandum in Support of Defendants' Opposition to Plaintiff's Motion for a Preliminary Injunction and for Summary Judgment and Defendants' Cross-Motion for Summary Judgment*, Civil Action No. 1:16-1035 (RDM) (July 11, 2016) at 32.
 - b) When a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal. The 'entire case' on review is a question of law. The function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did. *Id.*
 2. DOL's Reasonable Interpretation of "Investment Advice" Is Entitled to Chevron Deference
 - a) In enacting ERISA, Congress gave DOL broad administrative and interpretive power to "prescribe such regulations as ... necessary or appropriate to carry out the [relevant] provisions," including to "define accounting, technical and trade terms used in" the Act. *Id.* at 33. DOL promulgated a reasonable interpretation of "investment advice" in light of the text, legislative history, and purposes of ERISA. Congress did not specifically define "investment advice," but entrusted DOL with broad discretion to interpret that language in light of its expertise and competing policy concerns.
 - b) NAFA's interpretation that runs afoul of the statutory text and case law regarding ERISA fiduciaries, and NAFA's alternative sources of authority do not compel its narrow interpretation. The text, legislative history, and purposes of ERISA support the agency's reasonable interpretation of "investment advice," and that interpretation is entitled to deference. *Id.*
 - c) Congress did not provide a precise definition of "investment advice," but instead adopted broad language, the ordinary understanding of which is susceptible to multiple reasonable interpretations. *Id.* at 34.

d) While an ordinary understanding does not dictate one precise definition, the context of the statutory phrase makes clear that “investment advice” must have a meaning distinct from the other prongs of ERISA’s definition of fiduciary. *Id.* While all three prongs speak of functions as they relate to a plan, the first speaks in terms of “management,” the second of “investment advice,” and the third of “administration.” *Id.* at 35.

e) The enumeration of three independent functions—linked by the disjunctive “or”—suggests that Congress meant for each prong of the definition to have independent meaning. *Id.*

f) A suggestion to an advisee to take a particular course of action with respect to his or her investment property (all of which actions would presumably affect the property’s income or profit) comports both with an ordinary understanding of what it means to render “investment advice” and with the statutory context’s requirement that the term not be coextensive with “management” or “administration.” As discussed more fully below, DOL’s reasonable interpretation is entitled to deference and should be upheld. *Id.* at 36.

g) None of NAFA’s arguments compels its interpretation of “investment advice” as “ongoing management” NAFA’s insistence that fiduciary status is limited to persons involved in “plan management and administration,” See Pl.’s Br. 31, would essentially read the second prong out of the statute altogether and give it no significance at all, independent or otherwise. It is well-settled that courts “should disfavor interpretations of statutes that render language superfluous,” as NAFA’s interpretation would. *Id.* at 37.

h) The courts have roundly rejected the argument that fiduciary status is limited to that under the common law of trusts. Indeed, “[t]he D.C. Circuit has addressed the precise question of whether the common law of trusts or ERISA governs in determining whether a party acts as a fiduciary,” and “look[s] only [to the statute] to” make that determination. *Id.* at 38. Congress purposefully departed from the common law of trusts and adopted a broad, functional definition that “expand[ed] the universe of persons subject to fiduciary duties.” ERISA explicitly expands the scope to include those who “render investment advice for a fee or other compensation.” *Id.* at 38.

i) Congress in the Adviser’s Act “define[d] ‘investment adviser’ broadly and create[d] ... a precise exemption for broker-dealers.” Had Congress intended to adopt the same distinction in ERISA, presumably it would have done so expressly, as it did in the Advisers Act, by including a similar exemption. *Id.*

j) In enacting ERISA, Congress specifically referred to the Adviser's Act when it created an exception to the requirement that plan trustees have exclusive authority and control over plan assets. *Id.* at 39. While Congress understood the securities law backdrop, it chose not to limit fiduciaries in ERISA to those covered by the Adviser's Act. *Id.* at 40.

3. DOL's interpretation of "investment advice" comports with the text, legislative history and purposes of ERISA.

a) Where NAFA fails to demonstrate that its interpretation is compelled by the statute, and because the relevant statutory text is ambiguous, the agency's interpretation is entitled to deference so long as it is reasonable. *Chevron*, 467 U.S. at 843. In light of the text, legislative history, and purposes of ERISA, the rule's interpretation of "investment advice" easily meets this standard. *Id.* at 42.

b) Congress purposefully departed from the common law of trusts, applying fiduciary status more broadly to those involved in various functions, including those who render "investment advice." Congress did not, however, provide a precise definition of "investment advice"; rather, it adopted a term susceptible to multiple interpretations but, consistent with the remedial purposes of ERISA, broad enough to cover a range of adviser-advisee relationships. *Id.*

c) DOL adopted a reasonable interpretation of "investment advice" consistent with an ordinary understanding of that phrase, the statutory context, and the legislative history. In addition, DOL's interpretation of "investment advice" in the rule serves the broad remedial purposes of ERISA by protecting against activities that pose the precise harms Congress enacted the statute to avoid. *Id.*

d) The rule aligns the definition of investment advice with today's marketplace realities and ensures, consistent with congressional intent, that fiduciary status applies to "persons whose actions affect the amount of benefits retirement plan participants will receive." *Id.* at 43.

e) In the preamble to the rule DOL explains in detail how the "regular basis" requirement in the 1975 regulation, in particular, no longer aligns with congressional intent in light of today's market realities. *Id.*

f) While the provision of advice on a regular basis could be evidence of a relationship of trust between an adviser and an advisee, it is far from the only basis for such a relationship, and nothing in the statutory text makes advice on a “regular basis” a prerequisite of fiduciary status. DOL has provided more than sufficient justification that omission of such a requirement better effects legislative intent in today’s financial environment. *Id.* at 44. In arguing to the contrary, NAFA relies on two cases that are easily distinguishable, *Goldstein v. SEC* 451 F.3d 873 (D.C. Cir. 2006), and *Hearth, Patio & Barbecue Ass’n v. U.S. Dep’t of Energy*, 706 F.3d 499 (D.C. Cir. 2013). *Id.*

4. DOL Has Express Authority to Grant Conditional Exemptions, and Its Finding That the BIC Exemption Meets Statutory Requirements for Exemptions is Entitled to Deference.

a) “Where Congress delegates, explicitly or implicitly, to an administrative agency the authority to give meaning to a statutory term or to promulgate standards or classifications, the regulations adopted in the exercise of that authority enjoy ‘legislative effect,’ [and] are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.” *Id.* at 47.

b) Where an agency “is expressly delegated the authority to grant [an] exemption and is required to make certain other determinations in order to do so ... [t]hat grant and those determinations ... are ... entitled to great deference under the ‘arbitrary and capricious standard.’” *Id.* By virtue of the Reorganization Plan, DOL was expressly given broad authority to grant “conditional or unconditional” administrative exemptions to the prohibited transaction provisions in the Code. *Id.*

c) Congress expressly delegated to DOL the authority to grant exemptions only on its determination, in accordance with DOL’s expertise and competing policy concerns, that an exemption would be administratively feasible and in the interests of retirement investors and protective of their rights. *Id.*

(1) As DOL explained in the preamble to the BIC Exemption, the impartial conduct standards constitute “baseline standards of fundamental fair dealing that must be present when fiduciaries make conflicted investment recommendations to Retirement Investors” because the standards “are necessary to ensure that Advisers’ recommendations reflect the best interest of their Retirement Investor customers, rather than the conflicting financial interests of the Advisers and their Financial Institutions.” *Id.* at 48.

d) Given Congress’s broad delegation of authority to DOL, as well as the requirement that any exemptions serve the interests, and protect the rights, of retirement investors, DOL’s determination to condition use of the BIC Exemption on compliance with “baseline standards of fundamental fair dealing,” *Id.*, is entirely reasonable and “entitled to great deference.” *Id.*

e) Those who qualify as fiduciaries with respect to employer-based plans are required under ERISA to adhere to fiduciary duties and to refrain from specified prohibited transactions, absent an applicable exemption; those who qualify as fiduciaries with respect to IRAs are not subject to fiduciary duties under ERISA but are subject only to the parallel prohibited transaction provisions in the Code. *Id.* at 49.

f) Under the prohibited transaction provisions, the default is that transactions must be free from conflicted advice, or else the transaction cannot proceed at all.

(1) Congress deemed such transactions so fraught with conflict and the potential for abuse that it prohibited them altogether in both ERISA and the Code. *Id.*

(2) By giving DOL discretion to craft exemptions as needed to protect participants and beneficiaries, Congress intended to delegate to DOL the authority to determine what obligations should apply to fiduciaries to IRAs. *Id.* at 50.

g) DOL relied, in part, on fiduciary standards that have existed for hundreds of years and already apply in *Id.* the ERISA context to similar transactions. Nothing in the rule or related exemptions requires fiduciaries to IRAs to use exemptions, including the BIC Exemption.³² Exemptions simply provide a means to engage in IRA transactions otherwise prohibited by § 4975 of the Code. *Id.* at 51.

5. DOL’s Provision in a Conditional Administrative Exemption for Contract Terms that Could Be Enforceable Under State Law Does Not “Create a Private Right of Action”

a) The exemption simply provides that a fiduciary who wishes to engage in a transaction otherwise prohibited by ERISA and the Code can do so only if it makes a written commitment to the customer to adhere to the impartial conduct standards, provide basic disclosures, and be subject to oversight by a financial institution that does not incentivize the adviser to violate these standards. *Id.* at 52.

6. No right of action has been “created” as the available actions are preexisting ones under state contract law.

a) Although the courts have recognized limits under which a private right of action may be inferred by the judicial or executive branches, those limits have nothing to do with this case. *Id.* These principles are

b) irrelevant here, however, because DOL has neither “created” a private right nor required an “action to enforce federal law.” *Id.*

(1) DOL has expressly disclaimed any new cause of action. DOL has simply specified contract terms for a financial institution to qualify for the BIC Exemption for IRA transactions. *Id.* at 53.

(2) None of these terms has independent operation or enforceability by IRA holders through the Rule or the BIC Exemption.

(3) The terms become enforceable only pursuant to the contract that the financial institution may choose to enter into with the IRA holder.

(4) Federal agencies regularly specify terms for the private contracts of regulated entities. *Id.*

(5) The exemption does not fundamentally alter the existing legal regime or the availability of a state law private right of action. *Id.* at 54.

c) Contracting parties are entitled to bring breach of contract claims under applicable state law, independent of the federal regulatory regime under which the contracts were created—at least unless preempted by federal law. *Id.* DOL’s specification of minimum contractual terms to meet the statutory criteria for an exemption does not subject financial institutions to a new cause of action, let alone a federal one.

7. The contract provision is a reasonable exercise of DOL’s statutory authority to create administrative exemptions.

a) DOL is well within its authority to dictate the terms of a “conditional” exemption to the prohibited transaction provisions. *Id.* Other exemptions under ERISA and the Code require written agreements. *Id.* at 55. It is not uncommon for federal agencies to provide for private contracts in the process of implementing federal statutes, even where those contracts are not specifically contemplated by the statute. *Id.*

8. The Term “Reasonable Compensation” in the BIC Exemption is Not Unconstitutionally Vague.

a) The term “reasonable compensation” in the BIC Exemption does not violate the Fifth Amendment’s Due Process Clause as void for vagueness.

(1) This provision addresses the evidence of widespread financial incentives that have led financial institutions and advisers, in many instances, to collect higher commissions and other fees than are justified by the benefits provided to retirement investors and to steer such investors to investment products that do not perform as well. *Id.* at 56.

(2) In light of the statutory basis for the term, the guidance provided by the agency, and the pervasive use of reasonableness in legal standards, it defies common sense that sophisticated outfits such as insurance companies “will be incapacitated” and “at an absolute loss on how to administer” a reasonableness requirement. *Id.*

b) Courts have ruled that variations of the term “reasonable” are not impermissibly vague in a wide variety of statutes or regulations. *Id.* The roots of the term “reasonable compensation” go back to the common law. The term has been widely used by Congress, including in connection with insurance. *Id.* at 57.

c) The BIC Exemption’s use of “reasonable compensation” is sufficiently clear for three reasons: 1) it incorporates the longstanding statutory meaning, 2) the exemption’s preamble provides relevant factors to consider, and 3) the richness of general usage of the term, described above, confirms its meaningful scope. *Id.*

(1) The term is expressly borrowed from longstanding ERISA and Code provisions that have been applied to financial institutions. DOL provided relevant factors to consider in applying the term. DOL clarified that the standard does not depend on the ultimate success or failure of the investment, but instead the “on the particular facts and circumstances at the time of the recommendation.” *Id.*

d) There is no contradiction in making clear that while reasonableness will be determined with general reference to the market, not all existing compensation schemes will get a free pass.

(1) Although one would generally look to the market to get a sense of what people pay for a particular service, there are other ways in which the fee can be “unreasonable.

(2) While this may not be the “precise guidance” NAFA wishes for, there is no lack of “fair warning” sufficient to prevail on a vagueness challenge. the vagueness doctrine does not require perfect clarity and precise guidance. *Id.* at 60.

9. DOL Provided a Reasoned Basis to Require Conflicted FIA Transactions to Satisfy the Conditions of the BIC Exemption.

a) DOL’s decision that conflicted FIA transactions must meet the more protective conditions of the BIC Exemption if they are to proceed is based on careful reasoning, reflected in the final rulemaking documents. *Id.* at 61.

b) DOL’s determination that conflicted FIA transactions must satisfy the conditions of the BIC Exemption does not impermissibly treat FIAs as securities *Id.* at 62.

c) DOL did not treat FIAs as securities and violated no federal law in providing for FIA transactions in the BIC Exemption and excluding them from PTE 84-24. Whether or not FIAs are securities is irrelevant because neither the fiduciary definition in ERISA and the Code, nor the prohibited transaction provisions, turn on whether the investment at issue is a security. Inclusion of FIAs in the BIC Exemption does not “effectively classif[y them] ... as securities.” *Id.*

d) The BIC Exemption, as proposed and as finalized, is available for use with a wide variety of products, including those that are not securities. DOL observed that FIAs are not generally regulated as securities and did not purport to regulate them as such. DOL reached its decision regarding FIAs based on “significant concerns about [their] complexity, risk, and conflicts of interest associated with recommendations,” which made FIAs similar to variable annuities and securities in relevant ways. *Id.* at 63.

e) FIAs “involve considerations of investment not present in the conventional contract of insurance.” DOL concluded that PTE 84-24 was not sufficiently protective of retirement investors in the case of FIA transactions and that the BIC Exemption could be adapted to better accommodate FIAs. *Id.* Congressional action regarding securities laws does not impact DOL’s authority under ERISA and the Code to regulate retirement investment advice by fiduciaries to tax-favored retirement vehicles. Congress decided that investment advice to IRA and plan investors regarding both securities and non-securities should be subject to the prohibited transaction rules under both statutes. *Id.*

f) The provision of the Dodd-Frank Act directing the SEC to treat FIAs meeting certain criteria as exempt from federal securities laws has no bearing on DOL’s authority to determine under what conditions transactions involving FIAs should be exempt from the prohibited transaction provisions of Title I of ERISA and the Code. *Id.* at 63.

g) That a given financial product may be grouped with one set of products under one regulatory regime, and grouped with another set of products under another regulatory regime means no more than that one entity can have two legal obligations at once and does not rise to the level of an APA violation. *Id.* at 64.

10. The BIC Exemption does not provide unworkable conditions for insurers involved in FIA transactions.

a) NAFA proposes three hurdles that allegedly make “unworkable” the sale of FIAs under the BIC Exemption: 1) that insurers cannot meet the supervisory obligations, 2) that insurers did not receive sufficient notice and may be at a competitive disadvantage if other institutions are permitted to use

b) arbitration clauses or punitive damage waivers, and 3) that insurance agents will have to become registered investment advisers under securities law. DOL “examined the relevant data and has articulated a satisfactory explanation for its action” in regard to all three issues. *Id.*

c) Several paths are available to meet financial institution supervisory obligations. Nothing in the best interest standard requires the insurance company to scour the market to find the best possible investment option for each customer. What this standard does require is what is required of even common law fiduciaries: that they act prudently, by making recommendations that a knowledgeable investment professional would make and that are in the best interests of the plan participants and IRA holders, and loyally, by not prioritizing their own competing financial interests. *Id.* at 65.

d) The supervision that is required is far from unworkable or irrational. *Id.* Nothing would prevent the insurer from contracting with a third party, such as an IMO, to take on much or all of the oversight work. *Id.* at 66. IMOs may seek exemptions to become “financial institutions” separately charged with duties under the exemption. *Id.*

e) DOL concluded based on the evidence that DOL concluded that some disruption of current practices was not only anticipated but necessary given DOL’s conclusions, reached after an extended and open rulemaking process, that plan participants and IRA holders are being harmed each and every day by conflicted advice. Most advisers will remain. *Id.* Some additional contraction in the independent distribution channel would not harm investors, especially if offset by better rates and less conflicted advice. *Id.* at 67.

11. DOL provided sufficient notice of the optional contract provisions regarding arbitration clauses and punitive damage waivers and those provisions are not arbitrary.

a) Under the APA an agency must publish a notice of proposed rulemaking that “provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully.” With regard to arbitration, the final exemption is, in relevant part, unchanged from the proposal, which had specifically noted that it “would not affect the ability of a Financial Institution or Adviser, and a Retirement Investor, to enter into a pre-dispute binding arbitration agreement with respect to individual contract claims.” *Id.* at 68.

b) The optional punitive damages or rescission waiver comes within the logical outgrowth of the proposed exemption, which generally prohibited waivers of liability. Public comments requested clarification that these clauses were permitted, and NAFA was aware of those comments. *Id.* at 69. The final exemption reduced the scope of that prohibition by providing that such waivers were prohibited only to the extent that other laws prohibited them, thus ensuring that DOL's exemptions worked with and complemented other consumer protection laws. *Id.*

12. The prudent advice requirement does not conflict with the circumscribed role of an insurance agent.

a) DOL made clear that the fiduciary role under ERISA and the Code is distinct from fiduciary status under federal or state securities law. For insurance agents to hold themselves out as fiduciaries under the ERISA and Code provisions should not, of itself, subject them to additional regulation under state law. Nor does the rule or exemptions "preempt or supersede state insurance law and enforcement." *Id.* at 70.

b) The rule does not require the agent to "somehow identify the single 'best' investment for the investments in the national or international marketplace. *Id.* "The advice fiduciary's obligation under the Best Interest standard is to give advice that adheres to professional standards of prudence, and to put the Retirement Investor's financial interests in the driver's seat, rather than the competing interests of the Adviser or other parties." *Id.* at 71.

c) DOL has even provided for an agent to recommend exclusively "proprietary products," so long as certain additional conditions are met. An insurance-only agent would need to be clear with the consumer about the restricted scope of the recommendation and make a prudent recommendation regarding an insurance product in the context of the consumer's overall portfolio, investment needs and objectives. Such obligations can clearly be satisfied within the contours of the "permitted activities for an insurance-only person" described in the [DOL] bulletin. *Id.*

13. DOL provided sufficient notice for its action and a reasoned basis for requiring conflicted FIA transactions to adhere to the conditions of the BIC Exemption.

a) DOL sought comment on the balance to strike in applying PTE 84-24 and the BIC Exemption respectively and explained the basis for its ultimate decision. *Id.* at 72. DOL provided adequate notice. DOL's 2015 proposal, which tentatively drew the line for products that could continue to use PTE 84-24 between variable and fixed annuities, expressly invited comment regarding whether the BIC Exemption was feasible for "insurance and annuity contracts that are not securities" and whether shifting variable annuities out of PTE 84-24 "strikes the appropriate balance." *Id.* at 73. This is far from the situation where "the final rule was surprisingly distant from the proposed rule" such that "interested parties would have had to divine the agency's unspoken thoughts."

b) DOL also concluded that the conflicts of interest in FIA sales are greater than those for the comparatively simpler fixed annuities. *Id.* at 74. DOL determined that a level playing field for variable annuities, indexed annuities, and mutual funds was important to "avoid creating a regulatory incentive to preferentially recommend indexed annuities." *Id.*

c) DOL explained in detail the ways in which FIAs "are complex products requiring careful consideration of their terms and risks," listing the host of relevant considerations, and concluding that customers can easily misunderstand, overestimate, or underestimate many of these issues. *Id.*

d) DOL was concerned about inconsistent regulation of FIAs. By raising FIA sales in connection with plans and IRAs to a uniform standard, DOL leveled the playing field for variable annuities, FIAs, and mutual funds. *ID.*

e) DOL considered and acknowledged that "[a]dvisory firms' responses to the final rule and exemptions (and to related changes in consumer demand and competition) ... may involve frictional costs and have distributional effects." *ID.* at 77. DOL determined, however, that "any frictional cost ... will be justified by the rule's intended long-term effects of greater market efficiency and a distributional outcome that favors retirement investors over the financial industry."

14. DOL Complied with the Regulatory Flexibility Act.

a) RFA requires that, when a rule is promulgated after a mandatory notice of proposed rulemaking, "the agency shall prepare a final regulatory flexibility analysis" with descriptions of specific aspects of the rule, the compliance requirements, and the steps the agency has taken to minimize the impact on small entities. *Id.* at 78. By addressing each aspect of the RFA criteria, DOL performed a complete analysis and thus met the RFA's requirements.

- b) The discussion of alternatives and the explanation for the changes made to the proposed rule, along with the discussion throughout the RIA of how this rule and these exemptions meet the “stated objectives of the applicable statutes,” amply satisfy the RFA standards. *Id.* at 82.
15. NAFA Is Not Entitled to a Preliminary Injunction.
- a) To obtain injunctive relief, the moving party must establish: (1) a substantial likelihood of success on the merits; (2) that it would suffer irreparable injury if the injunction were not granted; (3) that an injunction would not substantially injure other interested parties; and (4) that the public interest would be furthered by the injunction *Id.* at 83.
16. NAFA Has Not Demonstrated a Likelihood of Success of Any of its Claims.
- a) NAFA cannot prevail on the merits of the six claims asserted in its complaint, and DOL is entitled to summary judgment. *Id.* at 83.
17. NAFA Has Not Demonstrated Irreparable Harm from DOL’s Carefully Calibrated Rule that Requires Investment Advice to Be in the Best Interest of Retirement Investors.
- a) NAFA’s allegations consist solely of economic harm, a type of harm rarely sufficient for preliminary injunctive relief, that is also speculative and remote, NAFA has failed to carry its burden of establishing irreparable harm. *Id.* at 85.
18. NAFA has not established that the rule and exemptions pose a certain and imminent threat to the survival of any of its members.
- a) The possibility that a subset of fixed annuity providers will need to restructure their distribution systems and re-design their products to be able to provide impartial advice to consumers looking for financial advisers to safely protect the tax-favored assets they have saved for retirement is flatly insufficient to warrant enjoining a rule that regulates investment advice. *Id.* at 86.
- b) The possibility that independent agents will decide to sell other products or “become affiliated with a broker-dealer, advisory firm, or captive agency,” does not equate to the “loss of businesses,” and agents’ self-interested economic decisions cannot be attributed to the rule. *Id.* at 86.
- c) The BIC Exemption specifically provides for related entities, such as IMOs, to receive compensation so long as the requirements of the exemption are fulfilled by the financial institution and adviser. IMOs can continue to serve independent agents, and receive compensation for doing so, by contracting with an insurance carrier, which would serve as the financial institution. *Id.* at 87.

d) Even if the alleged harms to IMOs were not speculative, they certainly are not imminent. One year from the rule's publication, financial institutions and agents need only be in a position to acknowledge fiduciary status, make fairly minimal disclosures, and give advice that is prudent, loyal, not unreasonably priced, and not subject to misrepresentations. *Id.* at 89.

e) While firms currently operating with acute advisory conflicts will need to revise their distribution practices to comply with the rule, that insurance carriers may opt to no longer work with IMOs or independent agents to do so is an independent decision of those carriers. *Id.* at 90.

f) NAFA has not shown that its alleged harms to businesses are "actual." *Id.* at 91.

19. NAFA has not established that the alleged costs of compliance with the rule and exemptions constitute irreparable harm.

a) NAFA's theory of irreparable harm fails to take account of the well-established principle that the cost of compliance with a regulatory scheme does not constitute irreparable injury. *Id.* at 91. The unrecoverable economic losses alleged by NAFA are compliance costs.

b) Given the many alternatives available to carriers, IMOs, and agents to come into compliance with the rule, as well as an applicability date that provided the industry a year in which to do so (and an additional eight months in the case of certain conditions of the BIC Exemption), NAFA has wholly failed to show that the losses it alleges are certain and imminent. *Id.* at 93.

c) The alleged harm to NAFA's members due to increased insurance premiums and exposure to liability is not sufficiently great or certain to qualify as irreparable harm. *Id.*

20. NAFA has not established that any alleged competitive harm constitutes irreparable harm.

a) The D.C. Circuit has been skeptical that competitive disadvantage can constitute irreparable harm, where one of the agency's stated purposes is to create a level playing field so that competing products posing similar dangers (variable annuities, indexed annuities, mutual funds) are subject to the same standards. *Id.* at 94.

b) The rule does not treat identical things differently; instead, it holds all investment advisers, including insurance agents and registered investment advisers, to the same fiduciary standard. The rule does not inflict “discriminatory competitive harm.” *Id.* at 95. The rule does not require insurance agents to become registered advisers; it requires only that investment advisers, of whatever stripe, adhere to fiduciary standards. While insurance agents may decide to undertake the time and costs associated with becoming licensed and registered, those costs cannot be directly attributed to the rule. *Id.* at 96.

21. The Balance of Equities and the Public Interest Weigh Against Any Injunction in this Case.

a) In determining whether the balance of equities favors granting a preliminary injunction, courts consider whether an injunction would “substantially injure other interested parties.” *Id.* at 96.

b) A preliminary injunction would lead to the very outcome the carefully considered deadlines were meant to avoid: confusion about the legal status of the rule for an entire industry seeking to come into compliance with it, *See* 81 Fed. Reg. 20993, and the potential delay of safeguards against conflicted investment advice that cumulatively costs retirement investors billions of dollars in lost retirement income, *Id.*

c) Investment advisers have been able to operate under financial conflicts and retirement investors have been paying the price of their tainted advice. This is the problem the rule and exemptions seek to ameliorate, and NAFA has not shown that it is entitled to enjoin the solution DOL crafted to do so. Instead, NAFA asks for relief that would prolong and sustain the ongoing harm to retirement investors. *Id.* at 98.

X. Market Synergy Challenge to the Final Rule

A. Synopsis of Market Synergy Position.

1. The fiduciary 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.

a) Financial product sellers will be subject 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. *See, Plaintiff’s Memorandum of Law in Support of Motion for Preliminary Injunction*, Civil Action No. 5:16-cv-04083, D KS, (June 17, 2016).

2. DOL also amended and partially revoked Prohibited Transaction Exemption (“PTE”) 84-24, which provides regulatory relief to insurance agents and others who, according to DOL’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”). *Id.*

a) Absent an exemption like PTE 84-24, ERISA and the Code prohibit fiduciaries from receiving third-party compensation. Yet, without notice, DOL revoked PTE 84-24 as it applies to ERISA plan and IRA purchases of annuity contracts that do not satisfy DOL’s newly created definition of a “Fixed Rate Annuity Contract.”

b) DOL specifically excluded fixed indexed annuities from the exemption’s scope. It is this agency rulemaking action which lies at the crux of market Synergy’s lawsuit. *Id.*

3. DOL’s partial revocation of PTE 84-24 is unlawful under the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 et seq. In its notice of proposed rulemaking, DOL did not so much as hint that it might exclude fixed indexed annuities from PTE 84-24. *Id.*

a) When the DOL issued the notice of its proposed rulemaking on April 20, 2015 and during the entire comment period, which expired on September 24, 2015, DOL confirmed that such annuities would continue to enjoy their historical exemptive status.

b) DOL’s conclusion was premised upon DOL’s recognition of three important, distinguishing characteristics of all fixed annuities: they are insurance products; they are not distributed through the normal securities sales channels; and they are not subject to a securities regulatory scheme for sales practice and disclosure requirements.

4. Although its new rules were intended to mitigate conflicts of interest in the sale of retirement products, DOL inexplicably removed fixed indexed annuities from PTE 84-24 while allowing all other types of fixed annuities to continue enjoying that exemption. DOL made no effort to distinguish fixed indexed annuities from other fixed annuities on the basis of the characteristics which had formed DOL’s original conclusions in the proposed rule and in the PTE. *Id.*

5. With respect to alleged conflicts of interest, fixed indexed annuities are no different from any other fixed annuity product. DOL arbitrarily treated similar products differently. *Id.*

6. 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 problem DOL never acknowledged or considered. DOL 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. *Id.*

7. If PTE 84-24's partial revocation is not vacated, and if the April 2017 applicability date is not stayed immediately, DOL's actions, will continue to severely and irreparably harm plaintiff Market Synergy Group many others in the independent agent distribution channel, and consumers at large, disserving the public interest. *Id.*

B. Market Synergy Position in More Detail.

1. DOL 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: the product guarantees (or lack thereof, in the case of investments such as variable annuities and mutual funds); the regulatory and disclosure regimes; and, the distribution channels associated with the respective products. *Id.* at 13.

2. In reliance on DOL'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 DOL regarding its proposed regulatory package. 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 DOL would ultimately switch any type of fixed annuity into the BICE in the final rulemaking. *Id.* at 14.

3. 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, DOL 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. *Id.*

4. DOL 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 insurance guarantees, the regulatory regimes, or the distribution channels. *Id.* at 15.

5. DOL 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 Act, “calls for certain annuity contracts to be considered exempt securities by the SEC if the conditions of that section are met.” *Id.*

6. 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. In order to do that, they would need a sponsoring and qualifying “Financial Institution” as defined in the BICE. *Id.* at 17.

7. 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.*

8. 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. Under the final rulemaking, Financial Institutions, but not Advisers, must be parties to the “best interest” contract. *Id.* at 18.

C. The Severe, Irreparable Harm Being Inflicted on Market Synergy, IMO, and Independent Insurance Agents.

1. 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 DOL’s reversal of its original position, which had included fixed indexed annuities within amended PTE 84-24’s scope. DOL’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.*

2. 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 DOL’s current exclusion of fixed indexed annuities from PTE 84-24 stays in place. *Id.*

3. Market Synergy itself could experience a revenue drop approaching 80%. 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.*

4. 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. *Id.* at 19.

5. In promulgating the BICE, DOL specifically declined to expand the categories of Financial Institutions to IMOs. DOL 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).
6. Unlike for broker-dealers and other securities industry channels already operating under the business and supervisory model that DOL contemplated when formulating its rulemaking package, the BICE is uniquely unworkable for independent insurance agent distribution of fixed indexed annuities. *Id.* at 20.
7. 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.*
8. Insurance-licensed-only agents do not and cannot legally work with securities broker-dealers and registered investment advisers. A large percentage do not want to become securities-licensed because they are not interested in selling securities. 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.*
9. 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. 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. *Id.* at 21.
10. While DOL 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, DOL 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.”
11. DOL has not offered any guidance on what this theoretical individual exemption process would even entail, and it has been suggested that DOL itself believes that the process would likely take as long as two years. Even at the end of this undefined process, there would be no guarantee that DOL will grant an exemption. *Id.*
12. It is 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.

a) 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.

b) 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.*

13. DOL’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. *Id.*

14. The Initiative Violated Applicable Law and Procedure.

a) By excluding fixed indexed annuities from the scope of PTE 84-24, as amended, and including them within the scope of the BICE, DOL violated the APA in each of these respects. *Id.* at 22. DOL gave no warning that it would remove fixed indexed annuities from the scope of PTE 84-24. DOL arbitrarily treats fixed indexed annuities differently from all other fixed annuities. This distinction arbitrarily treats similar products differently.

b) DOL’s position is that “a fixed indexed annuity is a Fixed Rate Annuity Contract by definition, except we say it is not.” 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 – DOL, without analysis, justification, sound basis, or prior notice excluded fixed indexed annuities from the very definition that they meet. *Id.* at 28.

c) DOL’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. 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.

(1) Except for the method of calculating interest credited to the contract – a distinction having no bearing on DOL’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 laws. *Id.* at 29.

(2) DOL 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. *Id.* at 30.

(3) DOL 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 DOL did not bother explaining how or why it believes that might be so. *Id.* at 31.

15. DOL failed to consider the detrimental and debilitating effect of its actions on independent insurance agent distribution channels.

a) DOL 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. *Id.* at 32.

b) An “important aspect of the problem” 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. *Id.* 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.

c) 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. *Id.* at 34. Market Synergy, IMOs, independent insurance agents, and others not affiliated with a Financial Institution are completely disenfranchised by the new regulatory regime.

16. DOL exceeded its statutory authority in seeking to manipulate the financial product market rather than regulate fiduciary conduct.

a) Neither ERISA nor the Code authorizes DOL to be the arbiter of which financial products succeed and which fail. *Id.* at 37.

b) 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. DOL 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. *Id.* at 38.

c) DOL 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 Securities Exchange Act authorizes the SEC, not DOL, to regulate the securities product marketplace. *Id.* at 39.

d) DOL’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. *Id.*

17. DOL’s Actions Are Causing Immediate and Irreparable Harm.

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.

(1) 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.* at 40.

(2) 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%.

(3) For the same reasons, it is expected that upwards of 20,000 independent insurance agents will exit the marketplace. *Id.* at 41. 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.

b) 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.

c) No governmental or public interest would be harmed by a preliminary injunction. Market Synergy and others are suffering immediate, ongoing harm now because of industry developments occurring under the specter of the impending regulations, DOL 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. *Id.* at 42.

XI. Government's Response to Market Synergy Complaint

A. Synopsis of Government's Position.

1. Plaintiff has not challenged this rule. Rather, despite broad statutory authority granted to DOL, and notwithstanding the agency's careful, in-depth analysis of alternative approaches, Market Synergy takes issue with the specific terms of two administrative exemptions DOL granted in connection with the rule to account for circumstances where the conflicts of interest could be sufficiently mitigated. *See, Defendants' Opposition to Plaintiff's Motion for a Preliminary Injunction*, Civil Action No. 5:16-cv-04083 (July 22, 2016).

2. DOL determined that fiduciaries being compensated for fixed indexed annuity transactions should be granted an exemption if they adhere to the conditions in the BIC exemption, which is also available for securities transactions and other investments. *Id.*

3. The BIC exemption is more protective of retirement investors than the less stringent conditions of PTE 84-24, which was first granted years ago and now applies only to declared rate annuities. DOL fashioned these exemptions and drew the lines in this way after completing an extensive notice-and-comment rulemaking process, spanning nearly six years, taking into account thousands of comments and testimony from stakeholders, and conducting a thorough regulatory impact analysis to assess the costs and benefits of its rulemaking. *Id.*

4. DOL explained the reasonable bases for its determination, including that the risks, complexity, and conflicts of interest in FIA transactions make adherence to the conditions of the BIC exemption better suited to protect retirement investors. *Id.*

5. DOL provided sufficient notice by expressly requesting comment on whether its proposed treatment of annuities in the exemptions "draw[s] the correct lines" and "strikes the appropriate balance." Other stakeholders recognized this by recommending for and against requiring FIA transactions to adhere to the conditions of the BIC Exemption, rather than PTE 84-24. *Id.*

6. DOL relied on comments, information, and data demonstrating the risks, complexity, and conflicts of FIAs and concluded that retirement investors would be sufficiently protected from conflicted FIA transactions if such transactions proceeded under the conditions of the BIC exemption, rather than PTE 84-24. *Id.*

7. DOL evaluated the effect of its rulemaking on the independent distribution channel and recognized that there remain several potential paths available for FIA transactions to proceed in this channel under the BIC exemption.

8. Market Synergy's claims are groundless and its motion for preliminary relief is without merit. Because Market Synergy fails to establish likelihood of success on the merits, the Court should deny Plaintiff's motion for a preliminary injunction. *Id.*

9. Because Market Synergy seeks to delay applicability dates that do not go into effect until April 2017 and January 2018 to avoid alleged economic harm, Market Synergy cannot establish irreparable harm. Likewise, because Market Synergy seeks to enjoin implementation of an amendment to PTE 84-24 that DOL has determined would benefit retirement investors across the country by requiring investment advisers to act in the best interest of those investors, Market Synergy's requested relief is not in the public interest. *Id.*

B. Government's Position in More Detail.

1. Plaintiff challenges four aspects of DOL's decision to allow conflicted FIA transactions, if at all, under the conditions of the BIC Exemption under the Administrative Procedure Act (APA) and the Regulatory Flexibility Act. See, *Defendants' Opposition to Plaintiff's Motion for a Preliminary Injunction*, Civil Action No. 5:16-cv-04083 (July 22, 2016) at 32. Under both statutes, the agency is entitled to great deference.

2. ("[D]eference ... is especially strong where the challenged decisions involve technical or scientific matters within the agency's area of expertise." *Id.*

3. DOL Provided Sufficient Notice of Its Decision to Require Those Who Engage in FIA Transactions to Rely on the BIC Exemption Rather than PTE 84-24

4. Under the APA, when an agency engages in notice-and-comment rulemaking, the agency's notice of proposed rulemaking must "permit interested parties to comment meaningfully." *Id.* "The final rule ... need not be the one proposed in the [notice]," so long as it is "a 'logical outgrowth' of its notice." *Id.*

5. "A final rule is a logical outgrowth if affected parties should have anticipated that the relevant modification was possible." *Id.* at 33. A notice satisfies the logical outgrowth test "if it 'expressly ask[s] for comments on a particular issue or otherwise ma[kes] clear that the agency [is] contemplating a particular change.'" *Id.*

6. DOL's decision to require those engaging in FIA transactions to rely on the BIC Exemption, rather than PTE 84-24, for exemptive relief, grew logically right out of its 2015 proposal. *Id.*

a) In that proposal, DOL raised a question about the line to be drawn between variable annuities and other types of annuities for purposes of distinguishing transactions that would be required to use the more protective BIC Exemption and those that could continue to use PTE 84-24 as modified.

(1) DOL directly invited comment on whether its proposal had “drawn the correct lines between insurance and annuity products that are securities and those that are not.”

(2) DOL explicitly queried whether its decision to “leave in place relief for IRA transactions involving insurance and annuity contracts that are not securities strikes the appropriate balance and is protective of the interests of IRAs.” *Id.* at 33.

b) Comments [in the 2015 proposal] made apparent that DOL was considering whether the proposed categorizations were protective enough of IRA investors and that based on the comments elicited, it could decide to put FIA transactions on the other side of the proposed line. *Id.*

c) In arguing to the contrary, Plaintiff relies exclusively on the fact that the proposed exemptions would have revoked use of PTE 84-24 for “transactions involving variable annuity contracts and other annuity contracts that are securities under federal securities law” while proposing to allow “transactions involving insurance and annuity contracts that are not securities” to continue to use PTE 84-24. *Id.*

7. Even if the scope of DOL’s consideration was not obvious to Plaintiff by virtue of the proposed partial revocation of PTE 84-24 as applied to variable annuities, it had to have been apparent when the agency explicitly requested comment on whether it had struck the right balance in the proposal. *Id.*

a) It was apparent to other market participants who commented on the proposal that “[t]he Proposal specifically requests comment on which exemption, the BIC Exemption, or a revised PTE 84-24, should apply to different types of annuity products.” *Id.*

b) Numerous market participants demonstrated their awareness that DOL was contemplating redrawing the lines between annuity and other insurance products by recommending for and against such action. *Id.*

c) The comments of other market participants that anticipated the possibility of a different outcome than proposed demonstrate that Plaintiff had every reason to anticipate the same *Id.* at 34.

8. Plaintiff cannot rely on the fact that the proposal distinguished between contracts that are securities and those that are not. *Id.* at 35. As explained, the appropriateness of that distinction with respect to annuity products was explicitly under consideration.

a) As several commenters recognized, the demarcation in the proposals between annuity contracts that are securities and those that are not is not entirely clear. *Id.* Under securities laws, annuities are securities, but certain “annuity contracts” are treated as “exempt securities.” *Id.* at 36.

b) Even on Plaintiff’s reading of the 2015 proposals, it would have had reason, as others did, to comment on the treatment of FIAs under the proposals. *Id.*

9. DOL Provided a Well-Reasoned Explanation for Its Decision To Require Those Who Engage in FIA Transactions to Rely on the BIC Exemption Rather than PTE 84-24

a) DOL also provided a well-reasoned basis for requiring those seeking to enter into conflicted FIA transactions to satisfy the conditions of the BIC Exemption, rather than PTE 84-24, in order to do so. DOL granted the BIC exemption and amended PTE 84-24 based on its finding that the conditions of the exemptions satisfy the statutory requirements that they be administratively feasible, in the interest of retirement investors, and protective of their interests. *Id.* at 36.

b) The scope of review under the ‘arbitrary and capricious’ standard is narrow and a court is not to substitute its judgment for that of the agency. *Id.* Under that standard, “a reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute.” *Id.* 37.

c) DOL made its findings based on “significant concerns about [FIAs] complexity, risk, and conflicts of interest,” which make FIAs similar to variable annuities and securities in relevant ways, and consequently make similar safeguards appropriate. 81 Fed. Reg. 21157-58. Its decision is supported by case law, which notes that an FIA “is a hybrid financial product that combines some of the benefits of fixed annuities with the added earning potential of a security.” *Id.*

d) For a variety of reasons, FIAs “involve considerations of investment not present in the conventional contract of insurance.” These include “a variability in the potential return that results in a risk to the purchaser,” and an “appeal to the purchaser not on the usual insurance basis of stability and security but on the prospect of ‘growth’ through sound investment management.” *Id.*

e) After reviewing the public comments, DOL concluded that PTE 84-24 was not sufficiently protective of retirement investors in the case of FIA transactions and that the BIC Exemption—as adapted—was better suited to protect retirement investors. *Id.*

f) DOL explained in detail the ways in which FIAs “are complex products requiring careful consideration of their terms and risks,” listing the host of relevant considerations, and concluding that customers can easily misunderstand, overestimate, or underestimate many of these issues. *Id.* at 38.

g) Because different indexing methods can result in varying rates of return, investors need to understand the trade-offs that they make by choosing a particular indexing method. Index-linked gains are generally not fully credited, with the amount credited depending on the particular features of the FIA, such as participation rates, interest rate caps, and the rules regarding interest compounding. *Id.*

h) FIAs, unlike most declared rate annuities, may also offer guaranteed living benefit riders which come in three different types. These benefits “may come at an extra cost and, because of their variability and complexity, may not be fully understood by the consumer. Given these and other complexities, retirement investors “are acutely dependent on sound advice that is untainted by the conflicts of interest posed by Advisers’ incentives to secure the annuity purchase, which can be quite substantial.” *Id.* at 39.

i) The D.C. Circuit has recognized, “[i]n FIAs, as in securities, there is a variability in the potential return that results in a risk to the purchaser. Principal can be lost if the annuity is cancelled early, due to surrender charges and tax consequences.

(1) FIAs are not the same as declared rate annuities aside from “the method for computing interest earnings credited to the policies. FIAs tend to have more varied and complex features and are more likely to be marketed in competition with investments such as mutual funds, rather than as guaranteed investment streams.

(2) The added complexity of FIAs exacerbates their risks because consumers more often misapprehend the degree to which they are taking on risk. *Id.*

10. The conflicts of interest particular to FIA transactions also led DOL to conclude that the BIC Exemption, rather than PTE 84-24 as amended, was more appropriate for FIA transactions. *Id.* at 40.

a) Because Plaintiff acknowledges that it needs an exemption to continue advising retirement investors under the rule, it cannot dispute that the FIA transactions it seeks to carry out are the sort that Congress prohibited—absent an applicable exemption—because they are inherently fraught with conflicts of interest. *Id.*

b) FIA commissions are typically higher than those for other products, including declared rate annuities. *Id.* DOL determined that “the increasing complexity and conflicted payment structures associated with [FIAs] have heightened the conflicts of interest experienced by investment advice providers that recommend them.”

11. Noting the concern that FIAs, in particular, have often been used as instruments of fraud and abuse, DOL determined that the BIC Exemption, which includes “stringent anti-conflict policies and procedures” would be more appropriate to protect retirement investors. *Id.*

a) DOL determined that a level playing field for variable annuities, indexed annuities, and mutual funds was important to “avoid[] creating a regulatory incentive to preferentially recommend indexed annuities. *Id.* FIAs cannot meet another part of the definition—FIAs do “vary, in part or in whole, based on ... the investment experience of an index or investment model. *Id.* at 41.

b) The complexity and risk associated with FIAs’ dependence on an index is one of the factors that led DOL to conclude that transactions involving FIAs should satisfy the conditions of the BIC Exemption. *Id.*

c) DOL did not arbitrarily exclude FIAs from the definition of Fixed Rate Annuity Contract; the definition captured, at least in part, the basis on which DOL concluded that PTE 84-24 could be used for declared rate annuities but not for FIAs. *Id.*

d) Based on comments in response to DOL’s direct solicitation, DOL determined that the distinction in proposed PTE 84-24 between transactions that involve securities and those that involve insurance products that are not securities was poorly-founded and not the best place to draw the line. *Id.* at 41.

(1) DOL faced the choice of either grouping FIAs with variable annuities or with declared rate annuities. It was entirely reasonable, based on the copious evidence collected and the deep analysis reflected in DOL’s explanation of its decision, for DOL to conclude that FIAs should be grouped with variable annuities and other products requiring closer regulation rather than the relatively simpler declared rate annuities. *Id.* at 41.

(2) DOL’s careful analysis reflects its obligation to approve only those exemptions that would be in the interest and protective of retirement investors. *Id.* at 42. DOL’s decision is entitled to deference unless it falls below the APA’s generous “arbitrary and capricious” threshold. *Id.*

12. DOL’s Substantial Consideration of the Effects of the Rulemaking on the Insurance Industry Easily Meets the Applicable Standards.

- a) As demonstrated by the preambles to the rule and exemptions and by its thorough regulatory impact analysis, DOL sufficiently considered the important aspects of the problem, including the impact on the “independent agent distribution channel” of importance to Plaintiff, and amply satisfied the requirements of the APA and RFA. *Id.*
- b) DOL appropriately considered the impact of its actions on the independent distribution channel.
- c) Under the arbitrary and capricious standard, DOL need only have based its decision on “a consideration of the relevant factors” and “important aspect[s] of the problem.”
- (1) DOL described and acknowledged independent agents, IMOs, and the independent distribution channel throughout its analysis.
 - (2) Because these entities are closely aligned with insurance companies, handling about 18% of all annuity sales and 60% of FIA sales, many of DOL’s references to insurers and their advisers implicitly and explicitly include these entities as well. *Id.* at 43.
- d) While DOL could not quantify the precise cost as to independent agents and IMOs because it did not have sufficient data and the industry declined to provide the information in response to DOL’s request, DOL’s reasoned consideration of the impact of the rulemaking on these entities and the market for retirement investment advice easily meets the APA standard applicable. *Id.*
- e) DOL did not need to further single out the independent distribution channel or weigh additional evidence for its conclusion to be justified. DOL has demonstrated that the rulemaking will substantially benefit investors and that these benefits far outweigh the cost to the financial industry, including the insurance industry. *Id.* at 44.
- f) DOL determined that any potential negative effect on the market “will be justified by the rule’s intended long-term effects of greater market efficiency and a distributional outcome that favors retirement investors over the financial industry. *Id.*
- g) Plaintiff has not demonstrated that market costs will make the BIC Exemption unworkable for IMOs and independent agents. IMOs could maintain their current role with independent agents, with insurers serving as the contract-signing financial institution while IMOs provide support for independent agents. *Id.* Plaintiff’s doubt that insurance companies will continue to work with independent agents is largely driven by a misunderstanding of the impartial conduct standards and the supervisory structure of the BIC Exemption. *Id.* at 45.

h) An insurer supervising an agent will not need to supervise the sale of other companies' products, but will need to ensure only that recommendations and sales concerning its own products meet the standards. Properly understood, the BIC Exemption does not force insurers to move to a captive sales force. Instead, the legal risk is no greater than the exposure advisers to ERISA employee benefit plans have long faced. *Id.*

i) IMOs could even take on a new or expanded role in the market. Nothing prevents an insurer from contracting with a third party, such as an IMO, to take on much or all of the insurer's oversight responsibility. *Id.* Insurers have existing supervisory obligations under state law. *Id.* Some IMOs may already provide supervisory services on behalf of insurers. *Id.* at 46. Plaintiff implies that it already has a relationship with many, if not most, of the insurers whose products its independent agents are selling. *Id.*

j) IMOs may seek individual exemptions to become "financial institutions" separately charged with duties under the exemption. *Id.* Market Synergy cannot claim that DOL failed to consider an aspect of a problem while recognizing that DOL provided solutions for IMOs like Plaintiff. *Id.*

k) Because DOL considered the important aspects associated with its rulemaking, including the independent agent distribution channel, it has satisfied APA requirements. *Id.*

13. DOL's cost-benefit analysis satisfies all other legal requirements

a) The BIC Exemption is administratively feasible

(1) DOL has satisfied statutory requirements by affirmatively finding that the exemption is administratively feasible. *Id.* at 47. DOL's finding satisfies this statutory requirement *Id.* at 48. Plaintiff has no entitlement to an exemption for particular transactions and does not argue that PTE 84-24 as amended is "unworkable." The "administratively feasible" criterion provides no basis for enjoining implementation of amended PTE 84-24 or reinstating its predecessor. *Id.* at 48.

(2) DOL satisfied the procedural requirements of the Regulatory Flexibility Act

(3) The RFA requires that a rule promulgated after a mandatory notice and comment period be accompanied by a “final regulatory flexibility analysis” with descriptions of specific aspects of the rule, its compliance requirements, and certain other matters. The RFA’s requirements are purely procedural” and merely “require agencies to publish analyses that address certain legally delineated topics. *Id.* The Court reviews agency compliance with the RFA “only to determine whether an agency has made a reasonable, good-faith effort to carry out [the RFA’s] mandate.” *Id.*

b) DOL performed a complete analysis of the rule and exemptions and thus met the RFA’s requirements. That analysis is summarized in the Federal Register preambles and laid out in more detail in Chapters 5 and 6 of the final RIA, with cross-references to other portions of the RIA. *Id.* at 49.

(1) DOL’s extensive analysis is not undermined merely because one corner of the industry wishes they were more frequently referenced by name. Of the seven requirements, Plaintiff challenges only § 604(a)(6) of the RFA’s requirement that an agency describe the steps “taken to minimize the significant economic impact on small entities consistent with the stated objectives of the applicable statutes,” including the “reasons for selecting the alternative adopted in the final rule.”

(2) DOL specifically addressed whether PTE 84-24 should continue to remain available for FIA transactions. *Id.* The discussion of alternatives and the explanation for the changes made to the proposed rule, along with the discussion throughout the RIA of how the rule and exemptions meet the “stated objectives of the applicable statutes,” amply satisfy § 604(a)(6)’s requirements. *Id.*

14. DOL Acted Well Within Its Statutory Authority to Grant Conditional Exemptions When It Granted the BIC Exemption and Amended PTE 84-24.

a) DOL has express authority to grant administrative exemptions to the prohibited transaction restrictions in ERISA and the Code. *Id.* at 50.

(1) DOL did not grant “preferential ... treatment” to certain products based on “unsupported product biases.”

(a) FIA transactions are not alone in having to satisfy the conditions of the BIC Exemption. Indeed, the BIC Exemption contains no product limitations and the primary exemption available for many types of products where the investments involve conflicted compensation.

(b) DOL provided ample support for its determination that, due to the complexities, risks, and conflicts of interest involved in FIA transactions, they must satisfy the conditions of the BIC Exemption. *Id.*

(2) Nothing in Congress's delegation of authority suggests that DOL cannot consider the characteristics of particular types of products in granting an administrative exemption. Congress delegated to DOL broad authority to grant "conditional or unconditional" exemptions, of "any fiduciary or transaction," from "all or part" of the prohibited transaction restrictions. *Id.* at 52.

(3) Nothing in DOL's exemptive authority suggests that DOL cannot take into account the relevant characteristics of those products in crafting the conditions of administrative exemptions to accord with statutory requirements, and Plaintiff cites no authority to the contrary. *Id.* at 53.

(4) DOL's authority to grant administrative exemptions is not limited because the "SEC ... regulate[s] the securities product marketplace," and "states ... overs[ee] ... insurance products."

(a) The SEC's authority to regulate securities does not impact DOL's authority under ERISA and the Code to grant administrative exemptions from the prohibited transaction restrictions. DOL's exemptive authority does not turn, in any way, on whether the transaction at issue involves securities. *Id.*

(b) That FIAs may be subject to overlapping regulation does not mean that DOL exceeded its authority in granting the BIC Exemption and amending PTE 84-24. DOL consulted with state insurance regulators and the NAIC to "craft the exemption so that it will work with, and complement, state insurance regulations." DOL also made clear in its rulemaking that the exemptions do not "preempt or supersede state insurance law and enforcement." *Id.* at 54.

(5) Given Congress's broad delegation of authority to DOL to grant conditional administrative exemptions and to use its expertise to make the requisite findings, DOL acted well within its statutory authority in determining that FIA transactions must satisfy the conditions of the BIC Exemption. *Id.*

15. Relief Requested.

a) Because Plaintiff has failed to establish likelihood of success on the merits of any of its claims, the Court need not reach the other prongs of the preliminary injunction standard. Plaintiff also fails to establish that implementation of amended PTE 84-24 would result in irreparable harm or that a preliminary injunction would prevent such harm. *Id.*

b) Plaintiff Cannot Show Irreparable Harm Because the Case Can Be Resolved Before the New Exemption Goes into Effect

(1) 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.” it is undisputed that the terms of amended PTE 84-24 are not yet applicable; no federal regulation specifically requires Plaintiff or any other entity to take any action with regard to the rule or exemptions. Many months remain before April 2017, during which this Court could address the merits of the claims. And some of the conditions of the BIC Exemption do not go into effect until January 2018. *Id.* at 55.

c) Plaintiff’s Alleged Irreparable Harm Depends on the Actions of Third Parties and Neither Directly Results from the Rulemaking nor Would Certainly Be Remedied By an Injunction

(1) Plaintiff hopes that an injunction would change the behavior of insurance companies such that its IMOs and independent agents will not be “irretrievably left behind by their product suppliers.” An injunction here would not “preserve the relative position of the parties” as to each other. *Id.* at 56.

(2) Between now and April 2017, the status of the parties toward each other will be unchanged. Instead, Plaintiff expects other companies to make their own choices regarding how to comply with the new DOL rules. Any current injury to Plaintiff would flow only from that third party action. Such indirect causation should not be grounds for an injunction. *Id.*

(3) The lack of direct injury to Plaintiff by DOL’s action also means that the requested injunction provides no assurance of relief. The insurance companies would not be bound by the decision, and there is no certainty that any of them would modify their behavior due to the injunction. *ID.* at 57.

d) Plaintiff’s Injury is not Certain but is Instead Built on Speculation

(1) Plaintiff has not “demonstrated that this threat is a real one, and not just a theoretical or speculative possibility.” Plaintiff’s assertion that “insurance companies will shift their distribution to career agents, banks, registered investment advisers, and broker-dealers” goes well beyond its own declarants’ speculation. *Id.* Any purported certainty as to how insurance companies will respond is unwarranted, and disregards the various options available for the independent distribution channel. *Id.*

(2) Plaintiff’s rejection of the BIC Exemption’s provision of a process for IMOs to seek to qualify as “financial institutions” is substantially undermined by the fact that at least six market intermediaries, including one of Plaintiff’s own members, are pursuing that option. *Id.* at 58.

(3) Plaintiff also has not shown that the harms its alleges are “actual.” Bare allegations are insufficient to establish irreparable harm. *Id.*

e) Plaintiff Has Not Shown that an Injunction is in the Public Interest or that the Balance of Equities Tips in its Favor.

(1) To be entitled to a preliminary injunction, Plaintiff must show that its alleged injury “outweighs the injury to the other party under the preliminary injunction” and “is not adverse to the public interest.” The injunction Plaintiff seeks—enjoining, during the pendency of this litigation, implementation of the amendment to PTE 84-24 as it relates to FIA transactions—would have no practical, positive effect for Plaintiff given that the amendment is not applicable until April 2017 and the third parties on which Market Synergy depends are unlikely to rely on its terms. *Id.* at 60.

(2) Because Plaintiff seeks an injunction that would prevent it from having to comply with the impartial conduct standards in amended PTE 84-24, Plaintiff’s requested injunction would give it an undeserved competitive advantage over others giving investment advice and ill serve the consumers suffering from conflicted investment advice. *Id.*

(3) The harm that Plaintiff alleges it will suffer as a result of having to meet the best interest standard is simply insufficient to justify this continued harm to retirement investors. *Id.* An injunction would result in the public continuing to subsidize those who render retirement investment advice, rather than the tax-favored retirement plans that the subsidies were meant to benefit.

C. The Oral Argument on the Motion for Preliminary Injunction Occurred on August 21, 2016, before U.S. District Court Judge Randolph D. Moss.

XII. Thrivent Financial Challenge to the Final Rule

A. Thrivent Financial Position.

1. Thrivent Financial seeks judicial review of DOL's issuance of regulations promulgating a new definition of investment advice fiduciary under the Employee Retirement Income Security Act of 1974 ("ERISA"). See, *Thrivent Financial for Lutherans v. Perez*, Civil Action No. 0:16-cv-03289, (September 29, 2016).
2. Thrivent challenges DOL's new "best interest contract" prohibited transaction exemption. *Id.*
3. Thrivent challenges only DOL's adoption of the BIC Exemption to the extent that it requires Thrivent to abandon its longstanding commitment to alternative dispute resolution. Thrivent's lawsuit is not challenging the validity of the fiduciary rule. *Id.*
4. The fiduciary rule would dramatically reshape the way life insurers and financial service providers like Thrivent can market and sell their financial products, including mutual funds and both variable and fixed annuities. Thrivent's sales representatives market and sell numerous proprietary Thrivent insurance and investment products on a commission basis. They regularly offer proprietary investment products for IRAs and rollovers from ERISA plans. Under DOL's New Rule, these sales representatives would be redefined as fiduciaries under ERISA and the Code. *Id.*
5. Thrivent's longstanding practice of paying these representatives on a commission basis would—for the first time—be treated as a "prohibited transaction" under ERISA. *Id.*
6. The BIC Exemption would allow Thrivent to engage in transactions that would otherwise be prohibited. To avail itself of the BIC Exemption, however, Thrivent would be forced to agree contractually with its customers that they could pursue a breach of contract action against Thrivent and that they could participate in judicial class actions against Thrivent. *Id.*
 - a) Thrivent indicates that it has long been committed to resolving disputes with its Members through private one-on-one mediation and arbitration. As a fraternal benefit society, Thrivent's relationship with its Members differs significantly from the relationships that commercial stock and mutual life insurance companies have with their customers.
 - b) Specifically, as a fraternal benefit society, the Code and state law require that Thrivent Members share a common bond. Thrivent's mission is to provide insurance and other fraternal benefits to Members as permitted under the law, and to strengthen and assist Christian communities through fraternal and benevolent activities and financial assistance.

c) In support of its mission, Thrivent offers its Members a broad range of proprietary products, including whole life insurance, universal life insurance, term life insurance, fixed and indexed annuities, variable annuities, and (through an affiliate) mutual funds. For more than fifteen years Thrivent's Articles of Incorporation and Bylaws ("Bylaws") have therefore required that disputes with Members related to insurance products be resolved through a one-on-one alternative dispute resolution process that includes mediation and culminates in arbitration, if necessary.

d) As a fraternal benefit society, state law requires that Thrivent's Bylaws, including the arbitration requirement, are uniformly incorporated into insurance contracts with all of its Members. Thrivent's insurance contracts incorporating its alternative dispute resolution program have been approved for sale in all fifty states and the District of Columbia, and its dispute resolution program has been upheld and enforced by state and federal courts throughout the country.

7. Under the new definition of fiduciary, a person who makes "recommendations" to a retirement saver, and who receives a fee or other compensation in connection with that recommendation, becomes a fiduciary under ERISA and/or the Code. *Id.*

a) Further, Thrivent receives direct compensation for the sale of insurance products that can vary depending on the product sold.

b) As a consequence, Thrivent's financial representatives' sales of numerous proprietary Thrivent insurance and investment products and/or sales on a commission basis would, for the first time, constitute "prohibited transactions" under ERISA.

8. Because Thrivent employs captive agents who sell proprietary products on a commission basis, and because Thrivent receives differential compensation, Thrivent cannot continue to do business and offer the full suite of products currently offered to its Members without relief—through the BIC Exemption—from the New rule. *Id.*

a) In order to take advantage of the BIC Exemption, however, Thrivent would be forced to abandon the dispute resolution procedures that best support Member relations and maintain its fraternal character.

9. There is no provision in ERISA that indicates Congress's intent to create a class action remedy that must be exclusively pursued in a judicial forum. *Id.*

10. Thrivent seeks an order from this Court declaring unlawful, vacating, and enjoining implementation of the BIC Exemption's requirement that best interest contracts include a provision permitting judicial class actions to resolve claims. *Id.*

B. Thrivent Financial Position in More Detail.

1. The rule dramatically expands the definition of a “fiduciary” under ERISA and the Code. Under the new definition of fiduciary, a person who makes “recommendations” to a retirement saver, and who receives a fee or other compensation in connection with that recommendation, becomes a fiduciary under ERISA and/or the Code.

a) Thrivent receives direct compensation for the sale of insurance products that can vary depending on the product sold. As a consequence, Thrivent’s financial representatives’ sales of numerous proprietary Thrivent insurance and investment products and/or sales on a commission basis would, for the first time, constitute “prohibited transactions” under ERISA. *Id.* at 5.

2. The sale of proprietary investment products for IRAs and rollovers from ERISA plans would constitute prohibited self-dealing and Thrivent’s existing commission structure could be considered a prohibited transaction as well. Prior to the implementation of the rule, transactions involving IRAs have never before been regulated by DOL, under ERISA or otherwise. *Id.*

3. Under the rule, a person shall be deemed to be rendering investment advice if: Such person provides a “recommendation” for a fee or other compensation as to buying, holding, selling or exchanging securities or other investment property in a plan or IRA and how investments “should be invested after [they] are rolled over, transferred, or distributed from the plan or IRA;” and “management of securities or other investment property, including ... recommendations with respect to rollovers” from the plan and selection of investment advisors. *Id.*

4. Because Thrivent representatives receive commissions and other transaction-based compensation, and Thrivent receives differential compensation, in connection with the sale of these proprietary products, Thrivent will need to rely on an exemption to avoid engaging in a non-exempt prohibited transaction under ERISA or the Code.

a) With respect to Thrivent’s sale of fixed indexed annuities, the BIC Exemption is the only prohibited transaction exemption available to Thrivent. As a result, Thrivent has no other alternative to availing itself of the BIC Exemption if it desires to continue providing its Members the opportunity to purchase fixed index annuities in connection with certain transactions such as IRA rollovers. *Id.* at 24.

5. Thrivent’s challenge is limited to the BIC Exemption’s preclusion of class action waivers, as a result of the exemption’s profound challenges to Thrivent’s relationship with its Members, its dispute resolution process, and its governance.

a) In an effort to avoid contentious litigation with DOL, in late July 2016 Thrivent approached DOL in order to obtain an individual prohibited transaction exemption (“IPTE”) under Section 408(a) of ERISA. *Id.* at 26.

- b) The requested IPTE would have mirrored the BIC Exemption, in all respects except that the contract or other agreement entered into by Thrivent and its Members would include language regarding restrictions on participation in class and other representative actions and all disputes that arise in connection with the sale of Thrivent's insurance and annuity products would be addressed in accordance with Thrivent's MDRP.
6. Violation of the APA and the Federal Arbitration Act-Agency Action in Excess of Express Statutory Authority.
- a) Under the FAA, valid arbitration agreements must be enforced according to their terms unless the FAA "has been overridden by a contrary congressional command." *Id.* at 27.
 - b) Nothing in ERISA gives DOL authority to preclude financial institutions and their clients from entering into and enforcing arbitration agreements that include class action waivers. *Id.*
 - c) DOL exceeded its statutory authority by purporting, in the BIC Exemption, to bar all waivers of participation in class actions or other representative actions without regard to whether those waivers are in connection with arbitration agreements. *Id.* at 28.
 - d) DOL's promulgation of the BIC Exemption violates the APA § 706. *Id.*
7. Relief Requested
- a) Declaratory judgment that the BIC Exemption's requirement that best interest contracts include a provision permitting judicial class actions to resolve claims violates the APA and the FAA;
 - b) Preliminary and permanent injunction prohibiting the application or enforcement of the BIC Exemption's requirement that best interest contracts include a provision permitting judicial class actions to resolve claims. *Id.* at 28.

XIII. Government's Response to Thrivent Financial Complaint: Not yet filed as of October 6, 2016.