**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS**

AMERICAN COUNCIL OF LIFE INSURERS, NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS, NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS-TEXAS, NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS-AMARILLO, NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS-DALLAS, NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS-FORT WORTH, NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS-GREAT SOUTHWEST, and NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS-WICHITA FALLS, Plaintiffs, v. UNITED STATES DEPARTMENT OF LABOR, and THOMAS E. PEREZ, in his official capacity as Secretary, United States Department of Labor, Defendants.	Civil Action No. 1:16-cv-1530

COMPLAINT

Plaintiffs the AMERICAN COUNCIL OF LIFE INSURERS ("ACLI"), the NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS ("NAIFA"), the NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS-TEXAS ("NAIFA-Texas"), the NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL

ADVISORS-AMARILLO ("NAIFA-Amarillo"), the NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS-DALLAS ("NAIFA-Dallas"), the NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS-FORT WORTH ("NAIFA-Fort Worth"), the NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS-GREAT SOUTHWEST ("NAIFA-Great Southwest"), and the NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS-WICHITA FALLS ("NAIFA Wichita Falls") (collectively, "Plaintiffs"), each association on behalf of its members allege, by and through their attorneys, as follows:

INTRODUCTION

1. Plaintiffs bring this action on behalf of their members under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-706, and the First Amendment to the U.S. Constitution, to declare final Fiduciary Rule (the "Rule") recently promulgated by the Department of Labor (the "Department" or "DOL") arbitrary and capricious, contrary to law, and unconstitutional as applied to Plaintiffs' members and their constitutionally protected commercial speech.[1]

2. Plaintiffs and their members have long supported, and continue to support, reasonable and balanced regulation of the retirement savings marketplace. Plaintiffs agree that life insurance companies, insurance agents, broker-dealers, and others should further the best interest of retirement savers. Indeed, working to protect American consumers has long been a

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[1] The Rule is a collection of several related final rules that the Department simultaneously proposed and then adopted. *See* Definition of the Term ''Fiduciary''; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20,946 (Apr. 8, 2016); Best Interest Contract Exemption, 81 Fed. Reg. 21,002 (Apr. 8, 2016); Class Exemption for Principal Transactions in Certain Assets, 81 Fed. Reg. 21,089 (Apr. 8, 2016); Amendment to PTE 75-1, 81 Fed. Reg. 21,139 (Apr. 8, 2016); Amendment to and Partial Revocation of PTE 84–24, 81 Fed. Reg. 21,147 (Apr. 8, 2016); Amendment to and Partial Revocation of PTE 86-128, 81 Fed. Reg. 21,181 (Apr. 8. 2016); Amendments to Class Exemptions 75-1, 77-4, 80-83 and 83-1, 81 Fed. Reg. 21,208 (Apr. 8, 2016). Each of those final rules is part of the final "Rule" that Plaintiffs challenge here.

polestar for life insurance companies and the life insurance agents who market and sell life insurance products. The final Rule promulgated by the Department, however, is not reasonable and balanced and, even worse, it will harm, not help, American retirement savers, who now, more than ever, need access to the guaranteed lifetime income products offered by Plaintiffs. As the White House Task Force on the Middle Class explained in 2010, there is a compelling need to "promot[e] the availability of annuities and other forms of guaranteed lifetime income, which transform savings into guaranteed future income, reducing the risks that retirees will outlive their savings."[2] Instead, the Rule will drive up the costs of those valuable guaranteed lifetime income products, artificially distort the marketplace for retirement products generally, interfere with the free flow of valuable commercial information about those products to American consumers, and thereby worsen, not help resolve, the profound challenges facing retirement investors.

3. Plaintiffs' members issue, market, or sell a variety of life insurance products throughout the United States, including to consumers throughout North Texas. "Annuities" are one important category of retirement product that allows American retirees to collect monthly income guaranteed for life. The ability to secure guaranteed income for life is crucial for many retirement investors who must now manage and balance various retirement risks without a pension, including the significant risk that they will outlive their assets—a risk that has been increasing as Americans' life expectancy improves. The widespread use of annuities in both Individual Retirement Accounts ("IRAs") and employer-sponsored 401(k) plans reflects the exceptional value that consumers assign to those products. In addition, the variety of annuity products available in today's marketplace, and the variety of options to customize those products, allow consumers to tailor and choose the annuity products or suite of products that best

[2] *White House Fact Sheet: Supporting Middle Class Families*, https://www.whitehouse.gov/sites/default/files/Fact_Sheet-Middle_Class_Task_Force.pdf.

meet their specific needs, income level, life situation, and risk preferences. Overwhelming evidence demonstrates that annuities yield unique benefits for, and bring singular peace of mind to, consumers. Studies consistently show that annuity owners are happier and more optimistic about reaching their retirement goals and value the ability to gain access to investments with higher rates of return while still receiving guaranteed income for life. Indeed, for these reasons, in other contexts, the Obama Administration has worked to promote, not impede, retirement savers' access to guaranteed lifetime income products.

4. The Rule promulgated by the Department, however, will injure American consumers by restricting, limiting, or denying them access to information about guaranteed lifetime income products. By imposing a vague and burdensome fiduciary standard on non-fiduciary sales relationships, the Rule will upend the retirement savings marketplace and seriously threaten consumers' access to guaranteed lifetime income products. The Rule is contrary to law, arbitrary and capricious, and violates the First Amendment.

5. In at least two distinct ways, the Rule clearly violates statutory limits Congress has placed on the Department. *First*, Congress has given the Department authority to regulate only "fiduciary" advice. The Department has defied that express limitation in an effort to regulate substantial segments of the retirement savings marketplace by classifying as "fiduciary" advice virtually all commercial interactions between those selling life insurance products and retirement investors, despite the fact that those relationships have never before been deemed fiduciary and do not bear the hallmarks of fiduciary status. "Fiduciary" is a term historically and legally reserved for special relationships of trust and confidence. By arbitrarily relabeling a vast number of non-fiduciary sales relationships as "fiduciary," the Department asserts power to impose an array of complex regulatory obligations and burdens on relationships Congress placed

outside its purview. In so doing, the Rule unreasonably interferes with the ability of Plaintiffs' members to continue to offer truthful, accurate information to consumers about retirement products, and it will disfavor, and compromise consumers' access to, guaranteed lifetime income products issued by insurance companies and offered by insurance agents and others. The Rule thus threatens to limit access to products many consumers affirmatively desire, and foists on them relationships they do not need or want and cannot afford.

6. *Second*, Congress chose to confer on the Internal Revenue Service the authority to enforce rules against certain prohibited transactions in the statute governing IRAs, and specifically elected *not* to authorize enforcement through a private right of action. The Department disagrees with Congress's judgment about the appropriate enforcement scheme, and in the Rule creates precisely the private right of action and enforcement-by-class-action regime that Congress declined to adopt. Indeed, the Department's stated rationale for creating this complex web of fiduciary obligations and exemptions was that it was *dissatisfied* with the actual enforcement mechanisms Congress did create. The Department was not free to override Congress's judgments. The Rule's regime of enforcement by class-action lawsuits, state courts, and local juries plainly exceeds the Department's authority and is contrary to law.

7. In addition, the Rule is arbitrary, capricious, and contrary to law as applied to the annuity products issued, marketed, or sold by Plaintiffs' members, because the Department failed reasonably to assess and evaluate the profound adverse effects and minimal real-world benefits of its approach. The Rule intentionally heaps significant burdens disproportionately on the offering of variable and fixed indexed annuities. Yet the Department entirely failed to account for the resounding *benefits* of those products to retirement investors and the associated costs to consumers resulting from their reduced availability. Indeed, the Department appears to have

made a deliberate choice to limit consumers' access to variable and fixed indexed annuities by making it harder for retirement savers to learn about them. The objective of favoring and disfavoring particular retirement products was itself unlawful. Although Congress authorized the Department to regulate "investment *advice*," it did not authorize the Department to favor and disfavor categories of retirement *products*, and take those choices away from American consumers. And even if the Department had the legal authority to favor or disfavor retirement products—which it does not—basic principles of reasoned decisionmaking required the Department to acknowledge that objective openly and to explain its actions given the clear benefits variable and fixed indexed annuities bring to American retirement savers.

8. The Department also arbitrarily downplayed the risk that its approach will create an "advice gap": by mandating that life insurance agents and broker-dealers engage with retirement investors only as "fiduciaries" or not at all, the Rule will leave in the dark middle-class Americans who cannot afford, and who may not want, the more costly fiduciary relationships mandated by the Rule. The administrative record demonstrated convincingly that the compliance burdens and serious liability risks created by the Rule will induce some insurance agents and broker-dealers to leave the market and others to continue serving only wealthier clients. That is a matter of basic economics. The price of investment advice will rise, and middle- and small-balance savers will lose access to the truthful, non-misleading information they currently receive as part of routine sales conversations. The Department dismissed abundant record evidence demonstrating that reduced access to sales conversations will harm consumers on the basis of erroneous and deeply counterintuitive assumptions that (1) information provided by non-fiduciaries harms, rather than helps, retirement savers, and (2) classifying all such speech as fiduciary will not raise the costs of providing information to

consumers. Indeed, in the Department's apparent view, retirement savers are better off without any first-person information about retirement products at all unless it is communicated in a strictly fiduciary capacity. It was also patently unreasonable for the Department to make confident predictions about the intended effects of the Rule on the retirement savings marketplace when the Department acknowledged just weeks before issuing the final Rule that it lacked any data-based understanding of how American consumers actually make retirement decisions.

9. Further, in assessing the costs and benefits of the Rule—which it was required to do by law—the Department unreasonably disregarded existing federal and state regulation of annuity products, strict rules authored and enforced by expert regulators and structured to accomplish the same ends for consumers as the Rule. Rather than analyze those existing regulations carefully, the Department dismissed them out of hand as inadequate based on select quantitative studies purportedly showing that conflicted advice continues to inflict harm on the marketplace. Reliance on those studies for that conclusion was irrational. These quantitative studies examine investment performance in the late 1990s and early 2000s—principally performance of mutual funds and not annuities—well before today's more stringent state insurance rules and federal securities regulations went into effect. None of that evidence demonstrated that current regulations are insufficient to protect retirement savers. The only other evidence cited by the Department relating to the supposed harms from annuities was threadbare, anecdotal, and outdated. That evidence was wholly insufficient to justify the massive regulatory intervention imposed by the Rule.

10. The Rule's treatment of one particular annuity product—fixed indexed annuities—violated core principles of administrative law in other ways. In the final Rule, the

Department unexpectedly decided to subject fixed indexed annuities to the Best Interest Contract Exemption ("BICE")—a new exemption that imposes significant technical requirements on regulated entities, including private enforcement—rather than to a less burdensome exemption, the Prohibited Transaction Exemption ("PTE") 84-24. The Department did so without providing the public sufficient notice and an opportunity to comment on that decision, thereby violating the APA's foundational notice-and-comment requirement. Had Plaintiffs been afforded that opportunity, they would have made clear that steering fixed indexed annuities into the BICE will impair the ability of independent distributors and agents to sell such products because they are not financial institutions qualifying under the BICE. Moreover, the decision to subject fixed indexed annuities to the BICE (1) ignores Congress's judgment that fixed indexed annuities are insurance products that bear greater similarity to other fixed annuities than to securities, and (2) unreasonably impairs the distribution of fixed indexed annuities through third-party independent marketing organizations. The Department's failure to account for either Congress's judgment regarding fixed indexed annuities or the consequences of subjecting these products to the BICE's requirements renders its decision arbitrary and capricious.

11. Finally, application of the Rule to ordinary sales conversations about retirement products—conversations that are not made in a "fiduciary" capacity but that, day in and day out, provide consumers with a critical source of information about retirement products and retirement savings—abridges the freedom of speech guaranteed by the First Amendment. All commercial speech proposes a commercial transaction, and thus recommends that a customer engage in that transaction. The Rule directly regulates such commercial speech by imposing fiduciary obligations on all recommendations about retirement products. In fact, the Rule effectively outlaws non-fiduciary commercial speech about variable and fixed indexed annuities. The Rule

is presumptively unconstitutional because it restricts and burdens that commercial speech based on its content, and it restricts the ability of Plaintiffs to communicate truthful, commercial information to consumers based on the subject matter of those communications. The Rule piles unreasonable, unworkable, and unnecessary burdens on truthful, non-misleading speech recommending selected retirement products—recommendations that are already required by law to be suitable for the customer in question—and thus is unconstitutional under either strict scrutiny or intermediate scrutiny applicable to content-neutral commercial speech regulation.

12. The Rule raises especially serious First Amendment concerns because it abridges *consumers'* right to receive truthful, non-misleading information about retirement products—information that is important to their personal life decisions. Record evidence before the Department demonstrated what should have been obvious: by forcing all retirement speech to be provided in a fiduciary capacity, the Rule will raise the cost of, and deny many retirement savers access to, information about retirement options—information they now receive from broker-dealers, insurance agents, and others. The Department's apparent belief that government-mandated silence is a preferable alternative to non-fiduciary sales conversations, and the Department's position that no set of clear or simple disclosures could ever enable consumers to make informed choices about retirement products, countermand core First Amendment principles and precedent. The Rule will unconstitutionally deprive American consumers of vital access to truthful retirement information.

13. For those reasons and others, the Rule will work harmful changes on the retirement savings marketplace and will disserve American consumers. The Rule is arbitrary and capricious, contrary to law, and unconstitutional, and it must be vacated under the APA. In the alternative, the Court should enjoin enforcement of the Rule against Plaintiffs' members who

wish to engage in sales conversations with retirement investors that convey truthful commercial speech regarding annuity products.

PARTIES

14. Plaintiff ACLI is a national trade association headquartered at 101 Constitution Avenue, N.W., Suite 700, Washington, District of Columbia 20001. ACLI has approximately 300 members that represent more than 90% of the assets and premiums of the U.S. life insurance and annuity industry. ACLI member companies offer insurance contracts and other investment products and services both to qualified retirement plans—including defined-benefit pension, 401(k), and 403(b) arrangements—and to individuals through IRAs or on a non-qualified basis. ACLI's members are also employer sponsors of retirement plans for their own employees.

15. Plaintiff NAIFA is a national trade association headquartered at 2901 Telestar Court, Falls Church, Virginia 22042. Founded in 1890, NAIFA is one of the nation's oldest and largest associations representing the interests of insurance professionals from every congressional district in the United States. NAIFA members—comprised mainly of insurance agents, many of whom are also registered representatives—assist consumers by focusing their practices on one or more of the following: life insurance and annuities, health insurance and employee benefits, multiline, and financial advising and investments. NAIFA members serve primarily middle-market clients, including individuals and small businesses. In some cases, NAIFA members serve areas with only a single financial professional for multiple counties.

16. Plaintiff NAIFA-Texas is a NAIFA-member state association comprised of approximately 2,500 individual insurance agents and financial advisers throughout the State of Texas. The mission of NAIFA-Texas is to advocate for a positive legislative and regulatory environment, enhance business and professional skills, and promote the ethical conduct of its

members. Founded in 1925, NAIFA-Texas is headquartered at 108 Wild Basin Rd., Suite 160, Austin, TX 78746.

17. Plaintiff NAIFA-Amarillo is a NAIFA-member local association comprised of individual insurance agents and financial advisers in the Amarillo area. The mission of NAIFA-Amarillo is to advocate for a positive legislative and regulatory environment, enhance business and professional skills, and promote the ethical conduct of its members. NAIFA-Amarillo is headquartered at 6900 I-40 West, Suite 160, Amarillo, TX 79106.

18. Plaintiff NAIFA-Dallas is a NAIFA-member local association comprised of approximately 375 individual insurance agents and financial advisers in the Dallas metropolitan area. The mission of NAIFA-Dallas is to advocate for a positive legislative and regulatory environment, enhance business and professional skills, and promote the ethical conduct of its members. Founded in 1913, NAIFA-Dallas is headquartered at 16990 Dallas Parkway, Suite 212, Dallas, TX 75248.

19. Plaintiff NAIFA-Fort Worth is a NAIFA-member local association comprised of individual insurance agents and financial advisers in the Fort Worth metropolitan area. The mission of NAIFA-Fort Worth is to advocate for a positive legislative and regulatory environment, enhance business and professional skills, and promote the ethical conduct of its members. NAIFA-Fort Worth is located at P.O. Box 828, Fort Worth, TX 76101.

20. Plaintiff NAIFA-Great Southwest is a NAIFA-member local association comprised of individual insurance agents and financial advisers in the Dallas-Fort Worth metropolitan area. The mission of NAIFA-Great Southwest is to advocate for a positive legislative and regulatory environment, enhance business and professional skills, and promote

the ethical conduct of its members. NAIFA-Great Southwest is headquartered at 4101 W. Green Oak Blvd., Suite 305-236, Arlington, TX 76016.

21. Plaintiff NAIFA-Wichita Falls is a NAIFA-member local association comprised of individual insurance agents and financial advisers in the Wichita Falls area. The mission of NAIFA-Wichita Falls is to advocate for a positive legislative and regulatory environment, enhance business and professional skills, and promote the ethical conduct of its members. NAIFA-Wichita Falls is headquartered at P.O. Box 97513, Wichita Falls, TX 76307.

22. Defendant the United States Department of Labor is the federal agency that promulgated the regulations at issue in this case.

23. Defendant Thomas E. Perez is the Secretary of the U.S. Department of Labor.

JURISDICTION AND VENUE

24. This action arises under the APA and the U.S. Constitution. The Court has subject matter jurisdiction over this action under 28 U.S.C. § 1331. The Court is authorized to issue the relief sought pursuant to the APA, 5 U.S.C. §§ 702, 705, 706, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202.

25. Plaintiffs have standing to bring this action on behalf of their members, many of whom will be directly regulated and adversely affected by the Rule. ACLI's mission is to advocate for public policy that supports both the industry marketplace and the 75 million American families who rely on life insurers' products for financial and retirement security. The mission of NAIFA, NAIFA-Texas, NAIFA-Amarillo, NAIFA-Dallas, NAIFA-Fort Worth, NAIFA-Great Southwest, and NAIFA-Wichita Falls is to represent the interests of insurance professionals throughout the United States, in Texas, and in the North Texas region, who assist primarily middle-market clients, including individuals and small businesses, in fulfilling their insurance needs. The Rule affects interests central to the missions and purposes of ACLI,

NAIFA, NAIFA-Texas, NAIFA-Amarillo, NAIFA-Dallas, NAIFA-Fort Worth, NAIFA-Great Southwest, and NAIFA-Wichita Falls. ACLI and NAIFA filed comments with the Department during the rulemaking.

26. Venue is proper in this District under 28 U.S.C. § 1391(e) because this is an action against an agency and officer of the United States; NAIFA-Amarillo, NAIFA-Dallas, NAIFA-Fort Worth, NAIFA-Great Southwest, and NAIFA-Wichita Falls reside in this judicial district; and no real property is involved in this action. NAIFA-Dallas resides in the Dallas division of this judicial district.

FACTUAL ALLEGATIONS

I. The Vital Role Of Annuity Products In The Retirement Savings Marketplace

27. The United States faces a challenge in retirement planning caused, in part, by the decline of traditional pensions. *See* Notice of Proposed Rulemaking, 80 Fed. Reg. 21,928, 21,932 (Apr. 20, 2015) ("Proposed Rule"); *see also* Robert C. Merton, *The Crisis in Retirement Planning*, Harv. Bus. Rev. (July-Aug. 2014). Pensions, or "defined-benefit" plans, once promised tens of millions of Americans fixed monthly payments at retirement for the rest of a retiree's life. But over the last two decades, employers increasingly have shifted from the use of defined-benefit plans to "defined-contribution" plans—such as 401(k)s. As a result, investors today typically build their retirement savings through a combination of individual and employer contributions, as well as investment earnings. *See* Merton 1, 4; Michael J. Brien & Constantijn W.A. Panis, *Annuities in the Context of Defined Contribution Plans: A Study for the U.S. Department of Labor, Employee Benefits Security Administration* 1 (Nov. 2011).

28. With that fundamental shift, Americans now manage and balance numerous (and sometimes competing) retirement risks on their own. Retirees may save too little. They may

outlive their assets. They may see the value of their assets effectively eroded by inflation. Or they may invest in assets that ultimately decline in value and provide no safety net. As the Department has previously observed, individuals "are not only increasingly responsible for the adequacy of their savings at the time of retirement, but also for ensuring that their savings last throughout their retirement years and, in many cases, the remaining lifetimes of their spouses and dependents." Request for Information Regarding Lifetime Income Options for Participants and Beneficiaries in Retirement Plans, 75 Fed. Reg. 5,253, 5,254 (Feb. 2, 2010). The result is that retirement today requires more planning than in previous generations.

29. Annuities are life insurance products that play a vital role in the new retirement landscape. As described further below, annuities guarantee retirement investors (who are living longer) a steady stream of wage-like payments during retirement, safeguarding against retirees' exposure to so-called "longevity risk"—that is, the risk of retirees outliving their retirement savings. At the same time, annuities come in many forms, can be customized with a variety of features, and therefore can be configured to reflect the circumstances of each retirement investor. In this new retirement landscape, annuities provide an essential means for retirement investors to manage the particular range of risks they now confront.

A. The Basics Of Annuity Life Insurance Products

30. An annuity is fundamentally a life insurance product. In simple terms, an annuity is a long-term financial contract issued by an insurance company in which the consumer invests money in exchange for periodic payments by the insurer.

31. Annuities come in two basic types: "fixed" and "variable." In the case of a fixed annuity, a life insurer guarantees payments to the annuity owner. Fixed annuities may provide payments in a set amount based on a specified rate of return, or a specified formula that applies a market-based index, such as the S&P 500, with a guarantee that the interest credited will be no

less than a specified minimum. This latter type of fixed annuity is known as a fixed indexed annuity. In contrast, a variable annuity allows the owner to benefit from potential investment market growth: the payment amount depends on the performance of the underlying portfolio of assets (stocks, bonds, etc.) selected by the consumer from a menu of options and on the selection of guaranteed benefit options. This range of annuity options allows retirement investors with widely varying tolerances for risk (and different portfolios of other assets) to select the annuity that best meets their personal preferences, needs, and circumstances.

32. Annuities also feature different timing options. An “immediate” annuity allows consumers to convert a lump-sum payment into a stream of guaranteed monthly income right away. “Deferred” annuities allow the owner to invest over time and then convert the balance into income at a future date once he or she has built up enough savings. Both immediate and deferred annuity contracts may provide that the insurer’s payments will expire after a given period of time (say, 20 years) or will last the lifetime of the annuity owner or a designee.

33. Annuities are also readily customizable to meet the specific needs of retirement savers. Specifically, retirement investors can purchase additional features and riders to protect against other retirement risks. For example, variable and fixed indexed annuities typically provide a guaranteed death benefit, which is paid to a surviving spouse or other dependents when the annuity owner passes away. Hardship or disability provisions permit an annuity owner who experiences a medical or other emergency to withdraw funds early without penalty. Retirement investors can also purchase riders that guarantee a minimum level of lifetime income or in other ways protect against market downturns. Other riders may guarantee that the annuity owner will receive a return of at least the initial amount paid as the premium, ensuring that he or she will never be paid less than the amount invested. Such options allow retirement investors to

customize their annuity to guard against unexpected life events, inflation, or downturns in the market.

34. The following example illustrates how a variable annuity works: a married couple purchased a variable annuity when they were both age 50. The annuity contract offered the potential for future gains based on the performance of investment options selected and a rider to the contract that guaranteed a minimum return. If either spouse died before retirement, the contract provided that a death benefit would be paid to the survivor. And once they retired at age 67, the contract offered a guaranteed stream of income that would continue for as long as either spouse was living.

35. Like other financial products, annuities are available to retirement investors who have IRAs and employer-sponsored plans like 401(k)s. An IRA is a personal savings account created by Congress that gives tax-advantaged treatment to income the taxpayer sets aside for retirement. Depending on the type of IRA selected by the investor, contributions are made on a pre- or post-tax basis, with investment earnings treated as tax-deferred or tax-free. IRAs play an increasing role in today's retirement savings marketplace because of their portability and independence from any given employer. As individuals move between jobs or retire, they can transfer assets from an employer-sponsored plan to an IRA—a process commonly known as a "rollover." Rollovers from 401(k)s are commonplace and now account for the vast majority of IRA assets.

36. A 401(k) is an employer-sponsored defined-contribution plan that provides similar tax advantages to an IRA, allowing participating employees to contribute to the plan on a pre- or post-tax basis with investment earnings treated as either tax-deferred or tax-free depending upon the type of contribution. In some 401(k)s, the plan trustee manages the assets in

which the plan is invested on behalf of all plan participants. In many others, the plan trustee creates a menu of investment options from which each participant selects specific investments for his or her individual account.

B. The Significant Benefits Of Annuities To Retirement Investors

37. Annuities play a significant part in today's retirement savings marketplace, particularly with respect to the retail IRA market. Indeed, the Department itself has found that thirty-one percent of IRAs include investments in annuities. *See, e.g.*, Fiduciary Investment Advice, Regulatory Impact Analysis 54 (Apr. 2015) ("Proposed RIA"). The widespread use of annuities reflects the significant value that retirement investors attach to annuity products as a means to help save for retirement while also managing and balancing different retirement risks. *See* NAIFA Comments 7 (July 21, 2015), https://www.dol.gov/ebsa/pdf/1210-AB32-2-00635.pdf ("[L]ow- and middle-income Americans rely heavily on annuity products of all kinds to provide them income security in retirement.").

38. First and foremost, an annuity is the only form of longevity protection in the market. It allows investors to convert retirement savings into a stream of monthly income guaranteed for life—a process known as "annuitization." As discussed above, with the shift away from defined-benefit plans, without an annuity, a retiree now bears the risk of outliving his or her retirement savings. That risk is becoming only more significant as Americans live longer. An annuity enables the retirement saver to transfer that longevity risk—the risk they will live longer than expected—to the insurer.

39. The peace of mind that annuities provide in the face of that longevity risk demonstrably improves retirees' overall well-being and mental health. A study commissioned by the Department itself "found that beneficiaries of lifelong-guaranteed income—such as from a privately-purchased annuity…—were more satisfied in retirement and suffered from fewer

depression symptoms than those without such income." Brien & Panis 1. The "boost in well-being became stronger" the longer the person was retired—a finding "consistent with the notion that retirees who rely on finite savings and [defined-contribution] plan assets grow increasingly worried about funding retirement expenses as they grow older and deplete their assets, whereas recipients of lifelong-guaranteed income, other than from Social Security, are less concerned with outliving their resources." *Id*.

40. The record before the Department contained additional and concrete evidence supporting the unique and substantial value of annuity products to retirement investors. A 2012 report found that, among retirees with similar wealth and health, those with annuitized income are happiest. *See* Steve Nyce & Billie Jean Quade, *Annuities and Retirement Happiness*, Towers Watson Insider 1 (Sept. 2012); ACLI Comments 48 (July 21, 2015) (citing Nyce & Quade), https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA25/00193.pdf. A 2014 study found that four out of five annuity owners agree that annuities are a good fit for their financial needs and a substantial majority would recommend an annuity to their family and friends. *See* LIMRA International, *LIMRA Secure Retirement Study: Knowledge of Annuities Boosts Ownership* 6, 8 (Oct. 2014); *see also* ACLI Comments 48 (citing LIMRA study).

41. Other studies in the administrative record are to the same effect. A survey of "Boomers" (aged 50 to 65) conducted by the Insured Retirement Institute ("IRI") found that annuity owners "are far more optimistic about reaching their retirement income goals" than the general population, with 92% of annuity owners believing they have done a good job preparing for retirement, compared to 75% of the general population, and 86% of annuity owners expecting to have enough money to live comfortably during retirement, versus 73% of the general

population. *See* IRI, *Boomer Expectations for Retirement* 12 (Apr. 2011); IRI Comments 12 (July 21, 2015) (citing IRI study), https://www.dol.gov/ebsa/pdf/1210-AB32-2-00626.pdf. And, according to a 2013 Gallup survey, 87% of annuity owners expect to use their annuity as a financial cushion in case they live beyond their life expectancy; 82% of annuity owners value "being able to invest in the stock market through annuities and still get guaranteed income for life"; and 85% of annuity owners appreciate the protection annuities provide "against losing the money they invest." Gallup Org. et al., *2013 Survey of Owners of Individual Annuity Contracts* 10, 31 (2013); Comm. of Annuity Insurers Comments 13 (July 21, 2015) (citing Gallup Org. et al.), https://www.dol.gov/ebsa/pdf/1210-AB32-2-00650.pdf.

42. Recognizing the importance of guaranteed lifetime income products to planning for a secure retirement, the Obama Administration previously sought to expand, not discourage, the purchase of annuity products. In 2010, for example, the White House Task Force on the Middle Class explained the need to "promot[e] the availability of annuities and other forms of guaranteed lifetime income, which transform savings into guaranteed future income, reducing the risks that retirees will outlive their savings." *White House Fact Sheet: Supporting Middle Class Families*, https://www.whitehouse.gov/sites/default/files/Fact_Sheet-Middle_Class_Task_Force.pdf. Likewise, the Department of Labor and the Department of the Treasury jointly issued a request for information in 2010 to determine how they could "facilitate access to, and use of, lifetime income or other arrangements designed to provide a stream of income after retirement." 75 Fed. Reg. at 5,254. And, in 2014, the Internal Revenue Service issued guidance designed to expand the use of annuities in 401(k) plans to help retirees protect themselves from outliving their savings. *See* Internal Revenue Service, Notice 2014-66, https://www.irs.gov/pub/irs-drop/n-14-66.pdf.

43. Given that consumers have different needs and varying risk profiles, it is important that consumers have a range of annuity options available to them. The current marketplace reflects that choice. For example, annuities can help protect consumers against longevity risk. Moreover, the different types of annuities provide retirement investors with differing risk preferences with the tools to address additional retirement risks, including the risks that their assets will decline in value ("investment risk") and that rising consumer prices will diminish their purchasing power ("inflation risk").

44. In particular, variable and fixed indexed annuities allow retirement investors to take advantage of the potentially larger rates of return of rising capital markets. In that way, they serve as an effective hedge against inflation risk. Historically, returns from investing in the stock market have consistently exceeded returns from investing in bonds (and far exceeded holding savings in cash), so long as the investment is held long enough. With retirement savers accumulating savings long before they retire and retirees increasingly living 20 or 30 or more years after they retire, the opportunity to have retirement savings in variable and fixed indexed annuities that grow along with the investment markets is vital to retirement security for many savers.

45. The guaranteed death benefit option available for many annuities provides insurance against yet another risk—namely, the risk that a spouse or other dependent will outlive the annuity owner and be left without sufficient assets on which to live. American retirement investors are often as concerned about managing this risk—continuing to provide for those who depend on them after they die—as they are about managing their own longevity, investment, and inflation risks.

46. Retirement investors can even further refine their annuity contract to balance longevity, investment, and inflation risks through the use of optional riders. A guaranteed minimum income benefit, for example, allows the retirement investor to adjust exposure to investment risk by guaranteeing a certain minimum level of payments, even if the annuitant's investments perform poorly. Other riders permit access to funds without penalty in the event of catastrophic illness or other devastating life events.

47. It would be extremely difficult for individual retirement investors to obtain variable and fixed indexed annuities' unique combination of benefits using other investment tools. Theoretically, an investor might be able to do so by combining mutual funds, hedging instruments, and phased purchases of fixed immediate annuities and term life insurance. But maintaining an appropriate balance of such investments would require active, financially sophisticated management that would not be practicable or cost-effective for many individual investors planning for retirement. As a practical matter, few individual investors could obtain this package of benefits without purchasing a variable or fixed indexed annuity.

48. Today's annuity marketplace thus provides retirement investors a wide array of products suited to different life situations and varied risk-tolerance levels. For some retirement investors, a fixed annuity's protection against investment risk is worth sacrificing potentially greater returns. Other retirement investors are willing to tolerate the greater investment risk of a variable annuity to obtain potentially greater upside and protection against inflation risk. And still others prefer a fixed indexed annuity's mix of protections against both investment and inflation risk. This range of options available in the marketplace ensures guaranteed lifetime income products meet the retirement planning needs of a wide range of Americans.

C. Access To Annuity Products Depends Upon Truthful, Non-Misleading Retirement Investment Information

49. In order to navigate the retirement savings marketplace, retirement investors need truthful, timely information regarding retirement products available in the market. *See* NAIFA Comments 3. Retirement investors with substantial assets may hire a fiduciary investment adviser solely to provide investment advice, but ordinary retail retirement investors often obtain the valuable information they need about different investment options the same way they learn about many other important products: through conversations with a salesperson. For the annuity products issued by life insurance companies (whose interests ACLI represents), that salesperson is most often an insurance agent or broker-dealer (whose interests NAIFA, NAIFA-Texas, NAIFA-Amarillo, NAIFA-Dallas, NAIFA-Fort Worth, NAIFA-Great Southwest, and NAIFA-Wichita Falls represent). As explained below, variable annuities—because they are securities—may be sold only by a broker-dealer registered with the Securities and Exchange Commission ("SEC") and the Financial Industry Regulatory Authority ("FINRA"). Fixed annuities, in turn, may be sold by registered broker-dealers or life insurance agents and other distributors regulated by state insurance commissions.

50. As with any other sales interaction, potential annuity purchasers often ask insurance agents and broker-dealers questions that will assist them in determining whether or not a product is appropriate for them. Agents thus explain a product's features, describe its benefits and drawbacks, and point out characteristics that might make the product more or less suitable for a given purpose. For some retirement investors, a sales conversation may be one of the most useful sources of information they have in planning for their retirement. *See, e.g.,* Daniel R. Fischel & Todd D. Kendall Comments 7, 21 (Apr. 12, 2011), https://www.dol.gov/ebsa/pdf/1210-ab32-ph056.pdf.

51. This exchange of truthful, non-misleading commercial information between retirement investors and salespersons is especially critical in the case of annuities. The range of annuities available reflects varying risk tolerances, and many retirement investors wish to customize their annuities further by selecting from among a wide array of optional features, such as lifetime income guarantees and guaranteed withdrawal benefits. These varied features allow each retirement investor to select the product that is the best fit.

52. In addition, retirement investors ordinarily purchase an annuity only once or twice in their lifetimes, meaning that without financial assistance, they are often unfamiliar with what annuities are and how they work. And many purchasers find it difficult to compare the value of a lump sum of savings to the value of a steady stream of wage-like payments received for life. As a result, absent further education and information provided by insurance agents or broker-dealers, consumers often underestimate the value of purchasing an annuity. *See, e.g.*, Jeffrey R. Brown Comments (July 21, 2015), https://www.dol.gov/ebsa/pdf/1210-AB32-2-00793.pdf; Brown et al., *Cognitive Constraints on Valuing Annuities* (2014), http://users.nber.org/~luttmer/ssannuity_paper.pdf; Brown et al., *Why Don't People Insure Late-Life Consumption? A Framing Explanation of the Under-Annuitization Puzzle*, Amer. Econ. Rev. (2008); *see also* ACLI Comments 6 (discussing the "annuity puzzle").

53. An insurance agent or broker-dealer thus must spend a considerable amount of time educating purchasers about attributes of annuities and how to value different products as part of a retirement portfolio. A typical annuity sales conversation may cover the objectives, investment profile, and risk tolerance of the purchaser; what an annuity is and the different types of annuities on the market; features that address a buyer's specific concerns about liquidity, inflation, and premature death; product fees and charges; income-replacement needs and how to

meet them using different annuity products; a description of the funds or indices on which the performance of a given variable or fixed indexed annuity will be based; and basic asset-allocation concepts and examples of how annuities can implement an asset-allocation plan. These commercial relationships provide consumers with wide-ranging and valuable information that help retirement investors make informed purchasing decisions.

D. Existing Distribution And Compensation Models Ensure That Retirement Investors Get The Information They Need About Annuity Products

54. The need to provide so much information to prospective annuity purchasers means that selling annuities is not inexpensive. These challenges are well recognized, and they were explained directly to the Department in the rulemaking process. Lack of familiarity with and undervaluation of annuities are among the major reasons why fewer retirement investors purchase annuities "than would be anticipated by economic theory" or by research showing the great benefits of annuitization. Brien & Panis 2. Policymakers, including the Department, and academic researchers have long expressed concern about this "annuity puzzle." *See* 75 Fed. Reg. at 5,253, 5,254; Brien & Panis 1-3.

55. To educate consumers effectively about annuities, insurance agents and broker-dealers must devote substantial time to learning how annuities work, the different types of annuities, and the optional features offered. Given the extensive training required, some insurers use so-called "captive" or "affiliated" insurance agents and broker-dealers to sell annuity products. Such agents and broker-dealers devote all or substantially all of their sales efforts to the insurer's own products. In this model, salespersons receive benefits as employees directly from the issuer, such as health and retirement plan coverage and contributions, office allowances, travel expense reimbursements, and other benefits customary in the industry. Insurers may also rely on third-party independent marketing organizations ("IMOs") to distribute annuities to

independent insurance agents, who then interface directly with customers.[3] IMOs—which are used most often to distribute fixed annuities, including fixed indexed annuities—offer on-hand sales support, product recommendations, and training for individual agents. The use of IMOs and affiliated insurance agents and broker-dealers are two ways that life insurers ensure that highly trained, professional salespeople sell their annuity products to consumers.

56. Life insurers have long sought to structure compensation in a way that encourages insurance agents and broker-dealers to devote the necessary time and attention to the sale of annuities. For that reason, insurers typically pay a sales commission upon the completion of an annuity sale to compensate agents and broker-dealers for the significant effort involved in learning about and marketing and selling annuity products. The vast majority of annuities today are sold on a commission-based compensation structure.

57. The use of commissions to sell annuities also reflects the "buy and hold" nature of many annuity products. *See, e.g.*, ACLI Comments 6. In a fee-for-advice arrangement, a consumer pays an adviser to manage his or her money on an ongoing basis pursuant to a pre-determined investment strategy. A fee-based arrangement therefore makes little sense for broker-dealers and insurance agents who market and sell annuities, as these products do not typically necessitate continual advice and investment management. NAIFA Comments 6. In addition, fee-based models typically carry account balance minimums (typically between $100,000 and $250,000), and are used with customers that maintain high balances and are engaged in active trading. *Id.* They are therefore more expensive and may be inappropriate for many investors with small or mid-sized accounts who trade infrequently. Indeed, the SEC and

[3] Independent insurance agents must be state-licensed and complete an annuity-specific training course, as well as training about each specific product the agent wishes to sell. NAIC 2010 Suitability Model §§ 6(F)(1)(b)-(c), 7(A) (2010).

FINRA recognize that transitioning clients to fee-based arrangements is suitable only under certain circumstances. In recent years, those regulators have increasingly scrutinized broker-dealers' placement of investors into accounts that require payment of a fixed fee but generate little or no activity to justify that fee. The Department's presumptive preference for such arrangements in all circumstances is therefore inconsistent with other expert regulators' concerns.

58. For these reasons, the use of sales commissions—both to compensate fairly insurance agents and broker-dealers for marketing annuity products and to keep costs lower for consumers—has been the common practice in the insurance industry for decades.

II. THE EXISTING REGULATORY FRAMEWORK GOVERNING ANNUITIES

59. Annuities of all types long have been subject to substantial regulation. Indeed, variable annuities—which are subject to regulation by the SEC and FINRA as well as state insurance rules—are among the most regulated products in the retirement savings marketplace today.

A. The Investment Advisers Act And The Securities Exchange Act

60. The SEC is the primary regulator of the federal securities marketplace. Pursuant to the Securities Exchange Act of 1934, the SEC has broad authority to regulate "transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets," including by placing restrictions on the registration and availability of certain securities products. 15 U.S.C. §§ 78b, 78l. The Exchange Act also provides the SEC power to oversee securities self-regulatory organizations, including FINRA. *See id.* § 78s. FINRA is a non-governmental organization that regulates the conduct of member broker-dealers participating in the exchange markets. FINRA's rules are subject to approval by the SEC. *Id.* § 78s(b).

61. For many years, the federal securities laws have recognized two distinct types of relationships through which investors of all types—including *retirement* investors—can obtain investment information to aid them in making investment decisions: (1) a fiduciary advice relationship with an "investment adviser"; and (2) a sales relationship with a "broker-dealer." Robust, but distinct, legal standards govern each relationship.

62. "Investment advisers" are regulated under the Investment Advisers Act of 1940. That statute defines an "investment adviser" as "any person 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). The statute requires investment advisers to act in their clients' best interests when providing financial advice, and not to subordinate clients' interests to their own. *See SEC v. Capital Gains Research Bureau, Inc*., 375 U.S. 180, 191-192 (1963); *Goldstein v. SEC*, 451 F.3d 873, 881 (D.C. Cir. 2006) (noting "fiduciary duty of loyalty between an adviser and his client").

63. The Investment Advisers Act further requires that, consistent with a fiduciary's duty to act in the best interest of the customer when providing advice, "any material conflicts of interest shall be disclosed and may be consented to by the customer." 15 U.S.C. § 80b-11(g)(1). The Supreme Court has stated that the purpose of the Act "was to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry." *Capital Gains*, 375 U.S. at 186.

64. The Investment Advisers Act also expressly excludes from its definition of a fiduciary "investment adviser" "any broker or dealer whose" provision of investment advice "is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation" for that investment advice. 15 U.S.C. § 80b-2(a)(11). Broker-dealers are

statutorily defined as entities or persons who trade securities on behalf of investors and sell investors financial products. *Id*. § 78c(a)(4), (5). Thus, Congress excluded broker-dealers who sell investment *products* (but who do not sell investment *advice*) from the Investment Advisers Act. While investment advisers who sell advice are regulated as fiduciaries, broker-dealers who sell *products* are not fiduciaries under the Investment Advisers Act, but *sellers* under the Securities Exchange Act of 1934.

65. Although not fiduciaries, broker-dealers are subject to stringent federal oversight in their provision of financial services under the Exchange Act. In particular, broker-dealers must register with FINRA and must comply with a "suitability" standard, which requires broker-dealers to have reasonable grounds for believing that a securities transaction is suitable for the customer based upon the customer's financial needs and investment objectives. The federal securities laws also impose broad antifraud provisions and require a variety of disclosures intended to ensure truthful and transparent investment markets.[4]

66. Most investment advisers charge clients fees for advisory services based on the percentage of assets under management—that is, consumers pay investment advisers for their ongoing advice. Few investment advisers receive commission-based compensation. By contrast, and reflecting the fact that broker-dealers sell investment *products* (not *advice*), the compensation in a broker-dealer relationship is typically transaction-based and earned primarily through commissions or similar fees on specific transactions.

[4] Section 913 of Title IX of the Dodd-Frank Act directed the SEC to study the effectiveness of the current standard of care for broker-dealers and investment advisers in providing personalized investment advice and recommendations about securities to retail customers. It also empowered (but did not require) the SEC to subject broker-dealers to the same standard as investment advisers when providing personalized investment advice to retail customers. The SEC has not yet promulgated a rule harmonizing these standards.

67. SEC and FINRA rules require that registered representatives recommend fee-based accounts (over, for example, a transaction-based brokerage account) only to those clients for which they are suitable. The SEC and FINRA enforce the federal prohibitions against the practice of "reverse churning," which involves placing investors in accounts that pay a fixed fee but generate little or no trading activity to justify that fee. Mary Jo White, Remarks at National Society of Compliance Professionals National Membership Meeting (Oct. 22, 2013), http://www.sec.gov/News/Speech/Detail/Speech/1370539960588#.Uq4WqltJMVw. The SEC and FINRA therefore recognize that there are certain transactions for which a sales commission benefits consumers.

B. Robust Federal And State Regulation Of Annuities

68. The buying and selling of annuity products is subject to comprehensive state regulation, federal regulation, or both. As insurance products, all annuities are subject to state insurance laws and regulations. In addition, because they have been classified as non-exempt securities, variable annuities are subject to an additional layer of regulation by the SEC and FINRA. Fixed annuities, including fixed indexed annuities, are regulated by States. *See* 15 U.S.C. § 77c(a)(8).[5]

69. In recent years, regulators at both the federal and state levels have substantially strengthened these protections, including by adopting suitability rules targeted specifically at annuity products. These existing regulations protect retirement investors in several ways—including by mandating that broker-dealers conduct suitability assessments prior to the sale of

[5] FINRA has brought enforcement actions against broker-dealers for selling fixed indexed annuities without providing their firms with notice of the outside business activity pursuant to FINRA Rule 3270. *See, e.g.*, Bill Singer, *Equity Indexed Annuities Sales Set Up FINRA Outside Business Activity Case*, Forbes, Sept. 10, 2012, http://www.forbes.com/sites/billsinger/2012/09/10/equity-indexed-annuities-sales-set-up-finra-outside-business-activity-case/#468cdacd7d93.

annuities; restricting non-cash compensation in connection with the sale of variable annuities; and imposing strict disclosure and advertising rules to ensure that the benefits and risks associated with annuities are accurately communicated to consumers.

1. FINRA's extensive regulation of variable annuities

70. Any entity or person who sells variable annuities—whether an affiliated insurance agent or independent distributor—must be a broker-dealer and must register with FINRA. As such, variable-annuity sellers—both broker-dealers and insurance agents registered as such—must comply not only with a *general* suitability rule that governs the sale of all securities (*see* FINRA Rule 2111) but also with *specific* and more stringent suitability standards imposed on variable annuities alone (*see* FINRA Rule 2330). In the last several years, FINRA has substantially enhanced the regulation of variable annuities.

71. FINRA Rule 2111 now imposes three important suitability obligations with respect to all sales of securities: reasonable-basis suitability, customer-specific suitability, and quantitative suitability. The *reasonable-basis* obligation requires a broker-dealer to have grounds to believe, based on reasonable diligence, that a recommendation is suitable for at least some investors. The *customer-specific obligation* requires a broker-dealer to have a reasonable basis to believe that the recommendation is suitable for a particular customer based on that customer's investment profile. The *quantitative suitability obligation* requires a broker-dealer to have a reasonable basis for believing that a series of recommended transactions are not excessive and unsuitable for the customer when taken together.

72. In addition, FINRA Rule 2330 imposes heightened suitability requirements specific to the sale of certain variable annuities. In addition to satisfying the general FINRA Rule 2111 requirements, a registered insurance agent or broker-dealer selling a deferred variable annuity must have a reasonable basis to believe that the customer has been informed of that

product's various features, including "the potential surrender period and surrender charge; potential tax penalty if customers sell or redeem deferred variable annuities before reaching the age of 59½; mortality and expense fees; investment advisory fees; potential charges for and features of riders; the insurance and investment components of deferred variable annuities; and market risk."

73. The broker-dealer or registered insurance agent must obtain specific information from a customer—including the customer's investment objectives, liquid net worth, financial sophistication, and tax status—before recommending the purchase or exchange of a deferred variable annuity. Based on the customer's information, the broker-dealer or registered insurance agent must make an affirmative determination that the customer would benefit from variable annuity features such as tax-deferred growth, annuitization, or the death or living benefit, and that the particular deferred variable annuity as a whole is suitable for the customer. In the case of an exchange of a deferred variable annuity, the broker-dealer or registered insurance agent must consider whether the customer has had another variable annuity exchange within the preceding 36 months, and would incur surrender charges, face a new surrender period, benefit from product enhancements or improvements, or lose existing benefits.

74. FINRA Rule 2330 also imposes strict review, approval, and supervision requirements with respect to the marketing and sale of deferred variable annuities. Prior to transmitting a customer's application to the issuing insurance company for processing, a registered principal must review and determine whether he or she approves of the recommended purchase or exchange of the deferred variable annuity. The determination must be documented and signed by the registered principal. In addition, FINRA members must implement

supervisory procedures to determine whether any broker-dealers or registered insurance agents engage in transactions contrary to the provisions of FINRA Rule 2330 or other FINRA rules.

75. The SEC and FINRA likewise heavily regulate the dissemination of information regarding variable annuity products to potential customers through registration and advertising rules to ensure that customers receive objective and truthful information. Variable annuities must be registered with and reviewed by the SEC before they can be offered to the public. *See* 15 U.S.C. § 77f-h. Potential purchasers of an individual variable annuity must receive an SEC-reviewed prospectus summarizing the annuity's funding options and disclosing associated fees. *See id.* § 77j. And FINRA advertising regulations mandate that variable annuity products be clearly identified and limit the representations that broker-dealers may make regarding liquidity, guarantees, and product comparisons. *See* FINRA Rule 2210-2.

76. The SEC and FINRA have substantial enforcement authority with respect to the regulations and standards discussed above. The SEC is responsible for investigating and prosecuting violations of securities laws, including federal antifraud laws governing the sale of securities. 15 U.S.C. § 78j(b). As the independent regulatory authority of the broker-dealer industry, FINRA is responsible for enforcing its registration, advertising, and suitability rules—including FINRA Rules 2111 and 2330—through examinations, investigations, and formal disciplinary actions against firms and associated persons. FINRA has the authority to fine, suspend, or bar broker-dealers and firms from the industry.

2. State-law suitability and disclosure requirements

77. Alongside robust and recently strengthened federal regulation of variable annuities, a strong framework of state and local insurance laws applies to the sale by licensed insurance agents of annuities, including fixed indexed annuities, and mandates similar suitability assessments and disclosures designed to protect consumers.

78. All States provide a comprehensive network of consumer protections under insurance laws and regulations. Model laws and regulations promulgated by the National Association of Insurance Commissioners ("NAIC") promote uniformity among the States. NAIC suitability and supervision standards governing licensed agents selling annuities are modeled on FINRA Rules 2111 and 2330. Under the Model Rule, an agent may not recommend an annuity unless the agent has "reasonable grounds for believing that the recommendation is suitable for the consumer." NAIC 2010 Suitability Model § 6(A). In conducting the suitability assessment, an insurance agent must seek information from the consumer regarding his or her age, annual income, financial situation and experience, financial objectives, intended use of the annuity, financial time horizon, existing assets, liquidity needs, liquid net worth, risk tolerance, and tax status. *Id.* §§ 5(I), 6(A). An agent must also have a reasonable basis to believe that the "consumer would benefit from certain features of the annuity, such as tax-deferred growth, annuitization or death or living benefit," as well as from "the annuity as a whole." *Id.* § 6(A)(2) & (3). The Model Rule requires agents to ensure the consumer has been reasonably informed of various features of the annuity, such as the potential surrender period and surrender charge, potential tax penalties involved, the various features of and charges for riders, and limitations on interest returns. *Id.* § 6(A)(1).

79. In addition, the NAIC has promulgated model rules that establish extensive disclosure obligations on the part of insurance agents; protect consumers seeking to use existing life insurance or annuity contract values to purchase a new policy; and prohibit unfair or deceptive practices, including misrepresentations and false advertising about annuities and their benefits, advantages, conditions, or terms. *See, e.g.*, ACLI Comments 50. In complying with these rules, insurers provide substantial written point-of-sale disclosures.

80. State securities administrators (for variable annuities) and state insurance commissioners (for fixed rate and fixed indexed annuities) have authority to examine and investigate the affairs of every insurer operating in the insurance department's State to protect consumers against any unfair trade practice. In comments to the Department, NAIC described States' enforcement of regulations governing the sale of annuities and insurance products: "[S]tates … have extensive enforcement authority to examine companies, revoke producer and company licenses to operate, as well as collect and analyze industry data." NAIC Comments 1 (July 21, 2015), https://www.dol.gov/ebsa/pdf/1210-AB32-2-00752.pdf. The expansive authority afforded state insurance commissioners allows them to identify market issues and take appropriate disciplinary action swiftly when appropriate. *Id.* As a result of these enforcement mechanisms, and state insurance laws generally, only 0.03% of all consumer securities- and annuities-related complaints in 2014 had to do with fixed indexed annuities. *See* Nat'l Ass'n for Fixed Annuities Comments 11 (July 21, 2015), https://www.dol.gov/ebsa/pdf/1210-ZA25-00176.pdf.

III. THE DEPARTMENT'S PROPOSED OVERHAUL OF THE RETIREMENT SAVINGS MARKETPLACE

A. ERISA And The Internal Revenue Code

81. In 1974, Congress enacted ERISA and related provisions of the Internal Revenue Code (the "Tax Code") against the backdrop of the federal securities laws, which, as noted above, had long distinguished between fiduciary investment advisers and non-fiduciary broker-dealers. Financial professionals who work with retirement accounts like 401(k) plans and IRAs are regulated under ERISA and the Tax Code. The ERISA and Tax Code provisions governing 401(k)s and IRAs overlap, but differ in key respects.

82. ERISA is a "comprehensive and reticulated statute" designed to promote the creation of employee benefit plans, including retirement plans like 401(k)s, and to provide protections to plan participants and beneficiaries. *Nachman Corp. v. PBGC*, 446 U.S. 359, 361 (1980). ERISA achieves these purposes, in significant part, by requiring any "person" who is deemed a "fiduciary" to a covered plan to act in accordance with certain statutory duties and to refrain from certain prohibited transactions. Thus, fiduciaries of covered 401(k) plans must act prudently—with care, diligence, loyalty, and skill—and solely in the best interest of the plan, *see* 29 U.S.C. § 1104, and they may not engage in transactions that would be inconsistent with fiduciary status, such as by receiving unreasonable compensation, *id.* § 1106. The Tax Code incorporates ERISA's list of prohibited transactions, imposing a separate excise tax penalty for each such transaction. 26 U.S.C. § 4975. ERISA also makes plan fiduciaries personally liable for any losses to the plan from violating their statutory responsibilities. 29 U.S.C. § 1109. It specifically provides a private right of action so that plan participants and beneficiaries can directly enforce its terms. *Id.* § 1132. ERISA therefore extends fiduciary protection to employee beneficiaries who often depend upon a third-party (*i.e.*, their employer) to manage their benefit plans and underlying investments.

83. A different set of regulatory controls applies to persons deemed to be fiduciaries with respect to IRAs, where individuals have more control over their benefit plans and underlying investments. IRA fiduciaries are barred from engaging in any of the enumerated transactions that are prohibited by the Tax Code and ERISA alike. But IRA fiduciaries are *not* bound by ERISA's general fiduciary obligations of prudence and loyalty. *See generally* 26 U.S.C. § 4975. Instead, the Tax Code bars IRA fiduciaries from engaging in what it terms "prohibited transactions." *Id.* § 4975(c). Moreover, in contrast to the private right of action

created in ERISA, Congress created no statutory right of action for IRA owners. IRA fiduciaries are not personally liable to IRA owners for losses caused by such violations. *Id.*; 29 U.S.C. § 1109. Congress provided that the Internal Revenue Service—not beneficiaries or investors—could enforce the prohibited transaction rules governing an IRA fiduciary under section 4975 of the Tax Code.

84. ERISA's legislative history makes clear that this distinction—a private right of action for ERISA participants but not for IRA owners—was contemplated and intended by Congress. The Senate Finance Committee explained that the proposed legislation "relies heavily on the tax laws in order to secure compliance with the new requirements that it imposes on pension plans." S. Rpt. No. 93-383, at 33 (1973). The Committee stated "that primary reliance on the tax laws represents the best means for enforcing the new improved standards imposed by the bill …. [T]he Internal Revenue Service has administered the fiduciary standards embodied in the prohibited transactions provisions since 1954." *Id.* at 34.

85. Congress has also enacted exemptions from the prohibited-transaction rules for IRA and plan fiduciaries. In addition, Congress has given the Secretary of Labor authority to grant exemptions to other classes of fiduciaries and transactions from the prohibited-transaction rules, but only where the exemptions are "(1) administratively feasible, (2) in the interests of the plan [or IRA] and of its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries of such plan [or IRA]." 29 U.S.C. § 1108(a).[6]

[6] As originally enacted in 1974, section 408 of ERISA and section 4975 of the Tax Code required the Secretary of Labor to consult and coordinate with the Secretary of the Treasury, and vice versa, in exercising their respective exemption-granting authority. In 1978, however, Congress transferred the Secretary of the Treasury's authority to regulate prohibited transactions and grant class exemptions under section 4975 to the Secretary of Labor. *See* Reorganization Plan No. 4 of 1978, § 102, 92 Stat. 3790 (Aug. 10, 1978, as amended Sept. 20, 1978).

86. ERISA and the Tax Code define a "fiduciary" to encompass not only any person who exercises certain types of authority or control over a plan or IRA but also—as central here—any person who provides qualifying "investment advice." Specifically, advising may trigger fiduciary status if the person "renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of [an IRA or ERISA-covered plan], or has any authority or responsibility to do so." 29 U.S.C. § 1002(21)(A)(ii); 26 U.S.C. § 4975(e)(3)(B). Neither ERISA nor the Tax Code defines "investment advice."

87. The Secretary of Labor may prescribe regulations defining "technical and trade terms" under ERISA and the corresponding provisions of the Tax Code. 29 U.S.C. § 1135. Prior to the rulemaking at issue, the Department had exercised its regulatory authority with respect to the scope of activities that qualify as "investment advice" in accord with the time-honored distinction in securities law between the fiduciary relationship investors have with investment advisers and the sales relationship investors have with broker-dealers and insurance agents.

88. In 1975, one year after ERISA's enactment, the Department adopted, through notice-and-comment rulemaking, regulations (the "1975 regulations") delineating when investment advice triggers fiduciary status under ERISA and the Tax Code. *See* Final ERISA Rule, 40 Fed. Reg. 50,842 (1975); Final Tax Code Rule, 40 Fed. Reg. 50,840 (1975) (final rule under the Tax Code). Those regulations established a straightforward, five-part test that has guided the industry for four decades. Under that test, a person offers fiduciary "investment advice" under ERISA and the Tax Code if the person (1) renders advice as to the value of securities or other property, or makes recommendations as to the advisability of investing in, purchasing, or selling securities or other property, (2) on a regular basis, (3) pursuant to a mutual

agreement, arrangement, or understanding with the plan or a plan fiduciary that (4) the advice would serve as the primary basis for investment decisions with respect to plan assets, and that (5) the advice was individualized based on the particular needs of the plan. *See* 40 Fed. Reg. at 50,843 (codified at 29 C.F.R. § 2510-3.21(c)).

89. From 1975 to 2010, the Department refined the application of the five-part test to adapt to the evolving circumstances of American retirees by granting prohibited-transaction exemption ("PTE") classes and by issuing interpretive guidance to the regulated community.

90. Most relevant here, in 1977, pursuant to its exemption-granting authority, the Department recognized a PTE class (now referred to as "PTE 84-24") for certain transactions involving the receipt of sales commissions by insurance agents, broker-dealers, and others in connection with insurance and annuity contracts. *See* Amendment to Class Exemption for Certain Transactions Involving Insurance Agents and Brokers, 49 Fed. Reg. 13,208 (Apr. 3, 1984); Class Exemption for Certain Transactions Involving Insurance Agents and Brokers, 42 Fed. Reg. 32,395 (June 24, 1977). The Department created PTE 84-24 partly out of concern that insurance sales might otherwise sometimes qualify as the provision of "investment advice." Section 406 of ERISA and section 4975 of the Tax Code prohibit plan and IRA fiduciaries—including "investment advice" fiduciaries—from engaging in transactions with parties in interest. PTE 84-24 enabled an insurance agent to continue to receive sales commissions, even if the agent was a fiduciary under the 1975 regulations. Without the safe harbor of PTE 84-24, the receipt of a commission would have rendered the fiduciary a party in interest, thereby triggering prohibited-transaction liability.

B. The Department's Abandoned Rulemaking In 2010

91. In 2010, the Department proposed to overhaul its balanced, longstanding approach to fiduciary regulation reflected in the 1975 regulations. The Department first

proposed a version of the Fiduciary Rule in a notice of proposed rulemaking ("NPRM") in 2010. The proposed Rule would have drastically expanded the scope of fiduciary obligations under ERISA and the Tax Code. Less than a year later, however, the Department announced the withdrawal of the 2010 NPRM in the face of bipartisan opposition in Congress, substantial criticism by the regulated community, and a record of comments before the Department that demonstrated serious problems with the Rule—including comments that demonstrated the deleterious effects the Rule would have had on the marketing and sale of annuity products.

C. The Department's Revived Rulemaking In 2015

92. The Department revived the Rule in 2015. Despite the intervening years to study key issues neglected in the 2010 NPRM, the 2015 NPRM, like the prior proposal, failed to confront or take seriously the dramatic impact the Rule would have on the sale of guaranteed income products like annuities and on the related provision of retirement investment information to retail investors. The Department likewise neglected to consider the expansion of federal and state regulations related to the sale of annuities.

1. The proposed Rule

93. The regulations proposed by the 2015 NPRM would have applied fiduciary status to any person who receives a fee, directly or indirectly, for providing an investment or investment management recommendation to an IRA owner, to an employee benefit plan, or to a plan fiduciary, participant, or beneficiary. The proposed regulation departed from the 40-year-old definition of fiduciary investment advice in numerous respects, including the following:

a. Whereas the 1975 regulations considered advice to be fiduciary in nature only if it is "individualized … based on the particular needs of the plan," 29 C.F.R. § 2510.3-21(c)(ii)(B) (2015), the 2015 NPRM proposed to include information that is "individualized" as well as information that is merely "specifically directed to the recipient," Proposed Rule, 80 Fed. Reg. at 21,940.

b. Under the 2015 NPRM, fiduciary status would no longer have been limited to services provided pursuant to a "mutual…understanding" that any advice is meant "to serve as a primary basis for investment decisions with respect to plan assets," 29 C.F.R. § 2510.3-21(c)(ii)(B) (2015), and instead would have extended even to the most incidental or insignificant recommendations. The proposed Rule also would have eliminated the mutuality requirement.

c. In lieu of the requirement in the 1975 regulations that fiduciary investment advice be given "on a regular basis," 29 C.F.R. § 2510.3-21(c)(ii)(B) (2015), the Department proposed to impose fiduciary duties on recommendations that are "provided only once," Proposed Rule, 80 Fed. Reg. at 21,940.

d. The 2015 NPRM defined "recommendation" (a term not defined in the 1975 regulations) as covering even a mere "suggestion" to take or not take some action. Proposed Rule, 80 Fed. Reg. at 21,960.

e. The Department proposed to extend the definition of fiduciary investment advice to rollover recommendations, reversing a contrary position that the Department had taken in 2005. Proposed Rule, 80 Fed. Reg. at 21,939.

94. The Department recognized that its proposed Rule would create unreasonable barriers to the sale of retirement products and it proposed a series of carve-outs and exemptions to attempt to remedy that problem. The Department explained that the carve-outs were designed to exclude communications that "Congress did not intend to cover as 'fiduciary advice' and that parties would not ordinarily view as … characterized by a relationship of trust or impartiality."

Proposed Rule, 80 Fed. Reg. at 21,941. Creation of the carve-outs thus was an express recognition that the new definition was not fully consonant with congressional intent and swept too broadly.

95. Nevertheless, the Department so severely restricted the carve-outs and exemptions that sellers of financial products in reality would be left with one option: the BICE. *See* Proposed Best Interest Contract Exemption, 80 Fed. Reg. 21,960 (Apr. 20, 2015) ("Proposed BICE"). As proposed, the BICE reflected the Department's acknowledgment that variable compensation, including sales commissions, is an important feature of the retirement savings marketplace. Under the proposed Rule, however, the receipt of commissions would have violated fiduciary status or triggered prohibited-transaction liability. Thus, for example, a broker-dealer who receives commissions on annuity sales would have faced penalties absent an exemption. The Department proposed to enable broker-dealers to receive the commission by first executing a contract promising to act in the investor's "best interest."

96. As proposed, the BICE in theory would have allowed an ordinary seller (such as an insurance agent or broker-dealer) to transact with IRA owners and ERISA plan participants—and to receive variable compensation in connection with the sale of retirement products—provided that certain conditions were met. In reality, the proposed conditions were so numerous and onerous that, for many sellers, the exemption would have been impractical in the annuity marketplace.

97. The 2015 NPRM also proposed to rework PTE 84-24. *See* Proposed Amendment to and Proposed Partial Revocation of PTE 84–24, 80 Fed. Reg. 22,010 (Apr. 20, 2015) ("Proposed PTE 84-24"). Under the 1975 regulations, there was typically little risk that an ordinary sales transaction of insurance products would inadvertently trigger fiduciary status. But

where an insurance agent was, for some reason a plan fiduciary, the existing PTE 84-24 permitted him or her to receive a commission on the sale of an annuity to the plan so long as certain conditions were met to mitigate the conflict of interest. Because the 2015 NPRM's expanded definition of "investment advice" would have swept in almost any sales conversation, PTE 84-24 would have been an important source of relief for the sale of annuities.

98. The Department, however, proposed to make the exemption's standards more onerous while also revoking the exemption in part and thereby channeling the sale of even more insurance products into the BICE. In particular, the Department proposed to revoke PTE 84-24 as it pertains to mutual fund shares and to variable annuities and other annuity contracts that are deemed non-exempt securities under federal law. Proposed PTE 84-24, 80 Fed. Reg. at 22,012. Under the 2015 NPRM, broker-dealers selling variable annuities would have had to comply with the BICE's stringent standards, while agents or others selling fixed annuities, including fixed indexed annuities—products that are not "securities under federal securities laws"—could have relied on PTE 84-24.

99. The Department solicited comments about whether it should follow through on moving variable annuities and mutual funds out of PTE 84-24 and into the BICE when finalizing the proposed Rule. Proposed PTE 84-24, 80 Fed. Reg. at 22,015. The Department did *not* request comments about whether it should exclude even more products, such as fixed indexed annuities, from PTE 84-24.

2. The proposed Regulatory Impact Analysis

100. The proposed Rule was accompanied by a 243-page Regulatory Impact Analysis ("RIA") that vastly overstated the benefits and underestimated (or wholly disregarded) the costs of the Rule, particularly with respect to life insurance firms and annuity products. As ACLI explained in its comments to the Department, although the proposed RIA mentioned annuities

172 times, although it acknowledged that "31 percent of IRAs include investments in annuities," and although it stated that "insurance companies [will] be significantly affected by the proposal," it failed to examine meaningfully the impact of the Rule on insurers, the annuity market, or on the availability of lifetime income in the retirement savings marketplace. ACLI Comments 42-56 (quoting Proposed RIA 54, 56).

D. The Administrative Record Demonstrates That The Proposed Rule Would Have A Serious Effect On The Offering Of Annuity Products, The Provision Of Information About Annuity Products, And Thus Retirement Savers

101. In response to the 2015 NPRM, many commenters, including ACLI and NAIFA, presented substantial evidence to the Department regarding, among other things: (1) the importance of annuities—and variable annuities, in particular—to retirement investors; (2) the need to explain annuities to consumers who are often unfamiliar with guaranteed lifetime income products; (3) the negative effects of the proposed Rule on the sale of annuities, given the treatment of commission payments and the proposed exclusion of variable annuities from PTE 84-24; and (4) existing regulation of annuities by the SEC, FINRA, and state securities and insurance departments. As explained below, the Department failed meaningfully to respond to or account for these comments in promulgating the final Rule.

102. ***Importance of Annuities to Retirement Investors.*** The record before the Department was replete with evidence concerning the value of annuities to the retirement savings marketplace. Commenters stressed, for example, that annuities are the sole source of guaranteed lifetime income during retirement. *See* ACLI Comments 2; Comm. of Annuity Insurers Comments 4 ("Other than Social Security and defined benefit plans, annuities are the only means that Americans have to *guarantee* they will not outlive their retirement income."). Commenters also pointed to evidence that those who own annuities "have a higher confidence in their overall retirement expectations." IRI Comments 12.

103. Many commenters discussed the different annuity options available to retirement investors to guard against longevity, inflation, and investment risks. For example, the Committee of Annuity Insurers explained that "[a]nnuities often combine insurance against longevity risk with other 'living benefits' that protect against additional financial risks that retirees face, including investment risk and inflation risk." Comm. of Annuity Insurers Comments 4. Regarding the specific benefits of variable annuities, commenters emphasized that such products provide critically important insurance protections, while affording retirement savers the flexibility of monitoring and managing their investment portfolios. *See, e.g.*, ACLI Comments 19; Lincoln Fin. Comments 5-6 (July 21, 2015), https://www.dol.gov/ebsa/pdf/1210-AB32-2-00643.pdf. ACLI member MetLife explained that it and other annuity providers "have innovated to develop annuity products that preserve retirees' access to capital while also providing guaranteed minimum income or withdrawal benefits." MetLife Comments 7 (July 21, 2015), https://www.dol.gov/ebsa/pdf/1210-AB32-2-00732.pdf. "These benefits insure against the risks of the market losses that could otherwise completely erode retirement savings while preserving the benefits of financial market investing as a means of mitigating inflation risks." *Id.* Commenters also stressed these products' growing popularity: "Of the total $564 billion in guaranteed income sales over the last five years, 75% was through variable annuities." Lincoln Fin. Comments 6 (citing industry-wide statistics provided by the LIMRA Secure Retirement Institute and the U.S. Individual Annuity Sales Survey (2010-2015(Q1))).

104. ***Need To Explain Annuities to Consumers.*** The record also made clear that: (1) annuities are not well known to the general investing public; and (2) consumers have difficulty placing a value on guaranteed lifetime income products. *See* ACLI Comments 6. The Department was made aware of the "critical role" financial professionals "play … in helping

consumers understand … how best to utilize [annuity products] to prepare for retirement." IRI Comments 12. Commenters explained that financial professionals often introduce retirement savers to annuities, "help them to understand the value proposition, and educate them on the variety of annuities available with features that can address concerns regarding liquidity, inflation, premature death, etc." ACLI Comments 6. With guidance from a broker-dealer or licensed insurance agent, retirement investors are able to "consider the appropriate balance of immediate and/or deferred annuities to manage that portion of typically 'core' monthly expenses with confidence that their critical ongoing living expenses will always be covered." Americans for Annuity Protection Comments 9 (July 21, 2015), https://www.dol.gov/ebsa/pdf/1210-AB32-2-00785.pdf. The Insured Retirement Institute, among others, documented the benefits of working with a financial professional for middle- and small-balance retirement investors, and women and minorities in particular. IRI Comments 12-13.

105. ***Effect of the Fiduciary Rule on Annuity Sales.*** The administrative record demonstrated the potentially crippling effects of the Rule on consumers' access to guaranteed lifetime income products. The record before the Department made clear that: (1) the sale of annuity products takes more time and effort on the part of insurance agents or broker-dealers; (2) commissions are an efficient means of compensating agents and broker-dealers sufficiently for the sale of annuity products; and (3) because the proposed BICE was unworkable, the proposed Rule would seriously impair consumers' access to annuity products and information about annuity products.

106. ACLI, for example, expressed the concern that the Rule would "drive distributors to level compensation structures that will no longer appropriately compensate agents for the sale of annuities, which in turn will result in less access by the public to these important retirement

security products." ACLI Comments 6. Lincoln Financial explained that "[c]onsumer preferences validate that commission-based compensation structures are an important option that must remain an available choice for retirement savers .... It therefore makes sense that annuities have been sold on a commission basis for over 30 years under prohibited transaction exemption (PTE) 84-24." Lincoln Fin. Comments 4. An inability to receive traditional forms of compensation "may result in the limited availability of and consumer access to products such as group annuities and individual annuities because agents and insurance companies will be dissuaded (or prevented by their broker-dealers) from selling them." Guardian Comments 24 (July 21, 2015), https://www.dol.gov/ebsa/pdf/1210-AB32-2-00767.pdf; *see also* NAIFA Comments 7 (explaining that the Rule "will result in fewer annuity products being sold" because, among other things, the Rule "foists a heightened burden on advisors who offer annuity products to non-fee-paying clients").

107. The risk of litigation and liability under the BICE was a key concern noted, time and again, in the record. Commenters explained that broker-dealers may be further dissuaded from selling annuity products under the Rule, because they would be prevented from doing so "without taking on significant fiduciary obligations and costs." Comm. of Annuity Insurers Comments 14; *see also* Morgan Stanley Comments 34 (July 21, 2015), https://www.dol.gov/ebsa/pdf/1210-AB32-2-00662.pdf.

108. In addition, the administrative record demonstrated that the Rule, as proposed, would disfavor the sale of variable annuities, given the Department's exclusion of variable annuities from PTE 84-24. ACLI member Prudential, for example, noted that "[t]he Department apparently intends that the BIC Exemption serve as the sole source of relief for variable annuity sales to IRAs." Prudential Comments 23 (July 21, 2015), https://www.dol.gov/ebsa/pdf/1210-

AB32-2-00687.pdf. And "because the BIC Exemption conditions are significantly more burdensome than the conditions of PTE 84-24, the Department's proposal to prohibit reliance on PTE 84-24 for variable annuity sales has the effect … of favoring fixed versus variable annuities." *Id.*; *see also* MetLife Comments 40. The upshot of these comments was that variable annuities should be included in PTE 84-24, and not subject to the highly burdensome requirements of the BICE.

109. Given that the Department had neither proposed nor requested comments about shifting fixed indexed annuities from coverage under PTE 84-24 to coverage under the BICE, neither ACLI nor NAIFA commented on the policy wisdom of such a change in regulatory approach or on the mechanics of applying the BICE to fixed indexed annuities.

110. ***Existing Regulation of Annuities.*** The record also demonstrated the strength of recently imposed regulatory controls of annuity products. ACLI submitted to the Department a 269-page appendix highlighting the extensive network of regulations governing insurance product sales activities. Like other commenters, ACLI stressed that the Rule did not account for the exacting standards—imposed by federal securities laws and state law—that govern the sale of annuity products. *See* ACLI Comments 49-50.

111. Other regulators themselves made many of these points to the Department. FINRA discussed its comprehensive regulation of the broker-dealer industry through adopting investor protection rules, examining broker-dealers for compliance with the federal securities laws and FINRA rules, and enforcing those rules through investigations and disciplinary action. *See* FINRA Comments 1-3 (July 17, 2015), http://www.finra.org/sites/default/files/FINRACommentLetter_DOL_07-17-15.pdf (stressing that among the many requirements imposed is the principle that broker-dealers ensure recommendations are suitable for customers).

112. The state insurance commissioners, among others, made clear that existing state regulations address many of the same concerns that the proposed Rule purported to remedy. NAIC explained that state insurance commissions "have not only acted to implement a robust set of consumer protection and education standards for annuity and insurance transactions, but have extensive enforcement authority to examine companies, revoke producer and company licenses to operate, as well as collect and analyze industry data." NAIC Comments 1.

E. The Department Adopts A Final Rule That Will Harm Retirement Savers And Arbitrarily Interfere With The Sale Of Variable And Fixed Indexed Annuities

113. The Department released its final Rule on April 6, 2016 and published it in the Federal Register on April 8, 2016. Despite extensive record evidence showing that the central features of the Rule would actually harm the retirement savers it was meant to help—and despite assurances from the Department that it had addressed those concerns—the Department retained all of the proposed Rule's major features, *see* Definition of the Term ''Fiduciary''; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20,946, 20,960 (Apr. 8, 2016) ("Final Rule") ("The final rule largely adopts the general structure of the 2015 Proposal[.]"), and, in several key respects, and without notice, actually made the Rule more harmful than before.

1. The final Rule's definition of "investment advice" sweeps in truthful, non-misleading, non-fiduciary speech about retirement products

114. The final Rule adjusted the Department's proposed definition of "fiduciary" "investment advice" in only small ways. Under the final Rule, a person is a "fiduciary" if he or she receives compensation, directly or indirectly, for making a recommendation regarding securities or other investment property held in an ERISA plan or IRA. Such a recommendation triggers fiduciary status if: (1) it is made under a written or verbal agreement, arrangement, or understanding that it is based on the particular investment needs of the retirement investor; or

(2) it is directed to a specific person or persons regarding the advisability of a particular retirement investment or investment management decision. Actions that may not constitute a recommendation when viewed individually may amount to a recommendation when considered in the aggregate.

115. In addition to financial professionals long understood as providing fiduciary advice—namely, professionals paid to provide impartial investment advice and thereby deemed "investment advisers" under the Investment Advisers Act—the Rule sweeps into its definition of fiduciaries, and subjects to a similar set of onerous obligations and prohibitions, every broker-dealer or insurance agent who directs information or recommendations about retirement products to a particular person or set of persons.[7] That latter group has never been considered to be a fiduciary or have fiduciary obligations.

2. The final Rule deems non-fiduciary sales conversations to be fiduciary advice

116. As it had in the proposed Rule, the Department recognized in the preamble to the final Rule that its "broad test [for fiduciary investment advice] could sweep in some relationships that are not appropriately regarded as fiduciary in nature and that the Department does not believe Congress intended to cover as fiduciary relationships." Final Rule, 81 Fed. Reg. at 20,948.

117. Given that recognition, the Department should have carved out from the Rule's regulatory ambit ordinary sales conversations where both parties understand that they are acting

[7] Given its sweeping and overbroad definition of fiduciary advice, the final Rule contains an exception for general "investment education." *See, e.g.*, Final Rule, 81 Fed. Reg. at 20,975-20,979 (discussing investment education carve-out); *id.* at 20,998-20,999 (codified at 29 C.F.R. § 2510.3-21(b)(2)(iv)). Notably, however, that exception is inapplicable if there is any mention of "specific investment products," and thus—despite the exception—the Rule applies with full force to the provision of virtually any information about specific products provided to a customer by a broker-dealer or insurance agent. *Id.* at 20,998 (29 C.F.R. § 2510.3-21(b)(2)(iv)(B)).

at arms' length and are not in a fiduciary relationship of trust or confidence. Instead, the Department adopted only a narrow "seller's exclusion" limited to sales communications with large group ERISA plans—those with $50 million or more in assets. The Rule subjects all other sales conversations—with smaller plan sponsors, plan participants, and retail IRA consumers—to the fiduciary duties imposed by ERISA and the Tax Code, whether or not those buyers expect or even want to pay for fiduciary advice.

118. The Department defended its narrow seller's exclusion on its claim that small plan sponsors and individual retirement savers are simply incapable of distinguishing between fiduciary advice and truthful, non-misleading sales speech. The Department maintained that no amount of explanation can dispel this disability: even "simple and clear" disclosures "could be ineffective – or even harmful." Final Rule, 81 Fed. Reg. at 20,951. "[M]ore fundamentally," moreover, the Department "reject[ed] the purported dichotomy between a mere 'sales' recommendation, on the one hand, and advice, on the other in the context of the retail market for investment products." *Id.* at 20,981. According to the Department, "sales and advice go hand in hand in the retail market." *Id.* "When plan participants, IRA owners, and small businesses talk to financial service professionals about the investments they should make, they typically pay for, and receive, advice." *Id.* The final Rule thereby bans non-fiduciary commercial speech in the covered retirement savings marketplace: an insurance agent or broker-dealer may offer sales recommendations and provide specific product information *only* as a fiduciary.

3. The final Rule unexpectedly subjects fixed indexed annuities to the burdensome strictures of the BICE

119. In adopting the final PTE 84-24, the Department acknowledged that "lifetime income products are increasingly critical for retirement savers due to the shift away from defined benefit plans." Amendment to and Partial Revocation of PTE 84–24, 81 Fed. Reg. 21,147,

21,152 (Apr. 8, 2016) ("Final PTE 84-24"). In an apparent effort to privilege and disfavor particular retirement products in the marketplace, however, the Department subjected different annuity products to differential regulation.

120. Thus, the Department permitted certain fixed annuity contracts to be sold under the more "streamlined" PTE 84-24, instead of requiring them to be sold under the "more stringent" BICE. Final PTE 84-24, 81 Fed. Reg. at 21,153, 21,155. The final Rule bars selling variable annuities under PTE 84-24. In addition, and without prior warning in the 2015 NPRM, the Department moved fixed indexed annuities from PTE 84-24 into the BICE. Market reaction to the decision made clear that the move of fixed indexed annuities into the BICE was not expected.[8] These choices were apparently part of the Department's decision to heap special burdens on certain retirement products it disfavors and in that way to prevent consumers from purchasing those products.

4. The final Rule adopts a prohibitively burdensome Best Interest Contract Exemption

121. In promulgating the final BICE, the Department acknowledged that it had "received many comments on the proposed exemptions approach to annuity contracts." Best Interest Contract Exemption, 81 Fed. Reg. 21,002, 21,017 (Apr. 8, 2016) ("Final BICE"). Despite that, the Department admitted that the "final exemption was not revised from the proposal with respect to the coverage of insurance and annuity products," other than a handful of changes purportedly intended to make the BICE more "usable." *Id*.

[8] Andrew Ackerman & Leslie Scism, *Obama Retirement-Savings Rule Faces Industry-Led Court Battle*, Wall St. J. (May 31, 2016), http://www.wsj.com/articles/industry-groups-prepare-lawsuit-over-obama-retirement-rule-1464704230 ("The tougher treatment [of fixed indexed annuities] came as an apparent surprise to the stock market. Shares of American Equity Investment Life Holding, one of the leading sellers of indexed annuities …, fell 15% on the day the Labor Department rules were unveiled, while shares of many other life insurers with more-diversified product lineups were flat to up.").

122. To receive "otherwise prohibited compensation" under the BICE for selling a retirement product—such as a sales commission for the sale of an annuity product—a financial institution must enter into a written contract with a retirement investor that governs the conduct of the insurance agent or broker-dealer as well as the financial institution (that is, the life insurance company). *See* Final BICE, 81 Fed. Reg. at 21,076. While the proposed Rule would have required individual "advisers" and "financial institutions" to execute the contract, the final Rule permits only financial institutions to sign the contract, and precludes advisers from doing so.

123. Many aspects of the BICE are unreasonably burdensome. *First*, the Rule limits the insurance companies that can qualify as "financial institutions" to those that are "domiciled in a state whose law requires that actuarial review of reserves be conducted annually by an independent firm of actuaries and reported to the appropriate regulatory authority." Final BICE, 81 Fed. Reg. at 21,083. Because *no* State requires insurers to undertake an annual actuarial review by an independent firm of actuaries that must be reported to the appropriate regulatory authority, the Rule's inclusion of this limit in the definition of "financial institution" completely excludes *all* insurance companies from the BICE.[9] The Rule thus bars all commissions for variable and fixed indexed annuities and effectively blocks most sales.

124. *Second*, although fixed indexed annuities are often sold by IMOs, the BICE excludes marketing or distribution affiliates and intermediaries from the definition of "financial institution," thereby precluding IMOs from signing the contract. Final BICE, 81 Fed. Reg. at

[9] On May 4, 2016, ACLI informed the Department that *no* State requires an annual actuarial review by an independent firm of actuaries that must be reported to the appropriate regulatory authority. Department staff indicated that this was a mistake and that the Department would adjust the definition, so as not to exclude insurance companies categorically from the BICE. As of the filing of this Complaint, however, the Department has done nothing to fix this fundamental problem.

21,067. As a result, annuity issuers either will be forced to assume the risk of an insurance agent's failure to comply with the BICE, or will have to stop using IMOs to distribute annuity products. Both strategies will massively disrupt existing distribution channels for fixed indexed annuities.

125. *Third*, the BICE requires the financial institution to guarantee that the financial institution and the insurance agent or broker-dealer will comply with "Impartial Conduct Standards." Under the Impartial Conduct Standards, the financial institution and the insurance agent or broker-dealer must "provide investment advice that is … in the Best Interest of the Retirement Investor … without regard to the financial or other interests of" the insurance agent or broker-dealer or the financial institution. Final BICE, 81 Fed. Reg. at 21,077. The Rule provides no meaningful content to that vague and open-ended standard.

126. *Fourth*, the Rule requires the contract, in addition, to warrant that the insurance agent or broker-dealer and the financial institution will not receive, "directly or indirectly, compensation for their services that is in excess of reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2)." Final BICE, 81 Fed. Reg. at 21,077. The Rule provides no meaningful content to that vague and open-ended standard.

127. *Fifth*, the contract must obligate the financial institution to "adopt[]" and "comply" with "written policies and procedures" designed to ensure that insurance agents and broker-dealers adhere to the Impartial Conduct Standards. Final BICE, 81 Fed. Reg. at 21,077. The BICE therefore subjects financial institutions to potential liability for compliance violations by others over whom they may currently exercise little supervisory control.

128. *Sixth*, the final BICE is enforceable by a private right of action—one not based on the statute but conjured up by the Department—in the IRA marketplace, where Congress has

created no such right. Specifically, the BICE affirmatively prohibits a contract from containing "[e]xculpatory provisions disclaiming or otherwise limiting liability … for a violation of the contract's terms." Final BICE, 81 Fed. Reg. at 21,077. In issuing the final Rule, the Department explained that, in purpose and design, "[t]he contract [requirement] creates a mechanism for IRA investors to enforce their rights and ensures that they will have a remedy," including "class litigation." Final Rule, 81 Fed. Reg. at 20,947.

129. Thus, to continue to receive variable compensation (including commissions), the Department through the BICE required that financial institutions, such as life insurance companies, enter into written contracts with retirement investors that contain a host of open-ended and ill-defined standards to be enforced not by federal agencies but through litigation brought by private parties represented by plaintiffs' lawyers, and interpreted and applied by non-expert state and federal judges and local juries, with the certainty that this will result in conflicting and unforeseen interpretation of those standards across the country. In promulgating the final BICE, the Department disregarded substantial record evidence making clear that the lack of predictability and inconsistent application engendered by this enforcement approach would radically increase the cost and risk or destroy the value of the BICE for many if not most sellers of annuities, and thus would lead to a marked increase in cost and reduction in availability and information about variable (and now fixed indexed) annuity products.

130. *Finally*, the final Rule adopts a highly prescriptive regulatory regime to govern the sale of "proprietary products" under the BICE, for example, sales by a career life insurance agent who sells only products of the life insurance company for whom the agent works. *See* Final BICE, 81 Fed. Reg. at 21,080-21,081; *id*. at 21,084 (defining proprietary products). In order to sell a menu of proprietary products, the financial institution must "reasonably conclude[]

that the limitations on the universe of recommended investments and Material Conflicts of Interest will not cause the Financial Institution or its Advisers to receive compensation in excess of reasonable compensation" elsewhere defined. *Id.* at 21,081. In addition, the financial institution must "reasonably determine[] … that these limitations and Material Conflicts of Interest will not cause the Financial Institution or its Advisers to recommend imprudent investments" and document that conclusion in writing. *Id.* Finally, any recommendation made by an insurance agent or broker-dealer with respect to a proprietary product cannot be "based on the financial or other interests of the Adviser or on the Adviser's consideration of any factors or interests other than the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Adviser." *Id*. The Department failed to explain how that standard could be satisfied in the common and important circumstance in which an insurance agent is authorized to sell only the proprietary products of the financial institution for which the agent works.

5. The final 2016 RIA fails to justify the extraordinary burdens imposed by the final Rule on truthful, non-misleading, non-fiduciary speech about suitable retirement products

131. In issuing the final Rule, the Department also issued a final RIA that purported to address the serious deficiencies in the Department's original cost-benefit analysis. *See, e.g., Regulating Advice Markets: Regulatory Impact Analysis for Final Rule and Exemptions* 311-312 (Apr. 2016) ("Final RIA"). But in its final RIA—now 382 pages—the Department substantially overstated any possible benefit of the Rule while ignoring or failing to grapple honestly with the significant costs the Rule will impose on providers of annuities and on retirement savers who would benefit from guaranteed lifetime income products.

a. The Department unreasonably overestimated the Rule's supposed benefits

132. Focusing primarily on studies showing that front-end load mutual funds may not have performed as well as other funds in the historical period 1991 to 2005, the Department estimated that the Rule would result in gains to investors of between $33 billion and $36 billion over 10 years. Final RIA 10. Four fundamental flaws in the Department's quantitative assessment rendered it wholly unreliable.

133. *First*, it quantified purported benefits in only one segment of the IRA market—that of front-end load mutual funds (that is, mutual funds for which commission fees and expenses are deducted at the time of purchase). The Department did not—and has never—purported to measure the benefits of the proposed Rule for other retirement products, including annuity products. *Second*, data used in all nine academic studies on which the Department based its quantitative assessment pre-date full implementation of enhanced regulations governing the sale of retirement products. Data used in seven of the nine studies ends in 2005 or earlier. Data in the other two studies ends in 2007 and 2009. Critically, none of the studies examines the performance of annuities following implementation of these enhanced regulations. *Third*, the studies' outdated data fail to capture recent changes in the market for fund sales and performance, as demonstrated by subsequent analysis. *See* Investment Company Institute ("ICI") Comments 9-10 (July 21, 2015), https://www.dol.gov/ebsa/pdf/1210-AB32-2-00747.pdf; *see also* Robert Litan & Hal Singer Comments 22 (July 20, 2015), https://www.dol.gov/ebsa/pdf/1210-AB32-2-00517.pdf ("Litan & Singer July 2015 Comments"). *Fourth*, the Department failed to analyze other relevant bodies of work, such as studies demonstrating the overwhelming benefits of financial advisers. *See* ACLI Comments 43 & n.41. Indeed, none of the studies on

which the Department relied compares whether investors are better off using investment advisers (who are fiduciaries) as opposed to broker-dealers (who are not).

134. The Department also failed to respond meaningfully to public comments that provided empirical performance data that conflicted with its flawed benefits estimate. *See, e.g.*, ICI Comments 16-26. In the final RIA, for example, the Department acknowledged ICI's criticism that the Department had relied on outdated data in developing estimates of the harm caused by conflicted advice and the associated gains to investors likely to result from the Rule. In response, the Department "conducted its own analysis" through an outside consulting group "to supplement the evidence." Final RIA 330. The report—which was published just one month prior to publication of the final Rule—concluded that ICI's criticisms of the academic literature and front-end load performance results did not undermine the Department's estimates of the benefits of the Rule. In addition, the Department analyzed new data in an attempt to bolster its cost-benefit analysis. *Id.* at 333-334.

135. Neither the consulting report to the Department nor the Department's independent analysis of mutual fund performance between 1980 and 2015 was made available for review in the record or for comment prior to publication of the Rule.

b. The Department failed to assess reasonably the Rule's costs

136. The final RIA quantified only the costs to regulated entities of complying with the Rule. It failed entirely to consider the adverse impacts of the Rule on American retirement savers, many of whom will experience reduced access to information about guaranteed lifetime income retirement products and access to those products themselves. Nevertheless, the Department was compelled to acknowledge a substantial increase in its assessment of compliance costs, estimating expenditures to total between $10 billion and $31.5 billion over 10 years with a primary estimate of $16.1 billion. *See* Final RIA 10.

137. For the first time, the Department also attempted to assess the compliance costs of life insurance companies. To that end, without meaningful explanation, the Department assumed that "insurers and broker-dealers will have to do many of the same things to comply with the final rule and exemptions," Final RIA 237, and the Department relied on data provided by the Securities Industry and Financial Markets Association and the Financial Services Institute—non-life insurance associations—to estimate costs to life insurance companies, *id*. at 237-238. In making that extrapolation, the Department made no attempt to identify or account for the different types and features of life insurance products and how those products are distributed.

138. The Department also disregarded the costs associated with moving retirement investors from transaction-based brokerage accounts to fee-based accounts that incur costs based on assets under management. *See* ICI Comments 6-8. The ongoing payments associated with a fee-based structure are likely to far exceed the cost to investors of a commission on a one-time annuity sale. ICI noted in comments to the Department that "[f]actoring in the additional costs of moving some investors with larger balances … to fee-based accounts, plus the lower performance for investors who would not be eligible for fee-based accounts, it is possible that annual losses to investors could [a]mount to nearly $19 billion within ten years." *Id.* at 8.

139. In addition, the Department all but ignored the broader and substantial market effects of the Rule, claiming that any "assessment of the financial industry's response to the final rule and exemptions is subject to uncertainty," and that "[i]ndustry responses are likely to vary across market segments, across business models, and across firms." Final RIA 309. In the Final RIA, however, the Department signaled that the objective of the Rule was to drive certain retirement products from the market, while benefitting others. The Department acknowledged

that "the final rule and exemptions … are *intended* and expected … to move markets toward a more optimal mix of … financial products." *Id.* at 308 (emphasis added).

140. The Department did not identify by name those retirement products that should be driven from the market. But many of the assumptions that the Department made regarding variable and fixed indexed annuities reflect the Department's apparent intent to curb their sale. For example, the Department stated that annuity "products are often complex" and that "[m]ost IRA investors therefore have the ability to judge neither the suitability nor the price of any recommended product." Final RIA 138. The Department also relied upon two FINRA investment bulletins from 2012 regarding variable and fixed indexed annuities, both of which are aimed at preparing investors to probe whether these products are or are not suitable in light of individual investment profile, risk tolerance, and liquidity needs. *See*, *e.g.*, *id.* at 139-140.

141. The Department's purported analysis of variable and fixed indexed annuities wholly ignored the benefits of these products to retirement savers and the unique ways those products help consumers balance retirement risks. For example, the Department's purported analysis did not account for guaranteed lifetime withdrawal benefits, minimum income benefits, guaranteed death benefit, and optional riders that, for example, permit access to funds without penalty in the event of catastrophic illness. The Department stated that some of these customization features "may not be fully understood by the consumer," Final RIA 119, but that is precisely *why* truthful information about these valuable products is so important to consumers.

142. In short, despite the final RIA's eleventh-hour effort to plug gaping holes in the proposed RIA with respect to annuities, the Department failed to account reasonably for the many and varied benefits of those products to retirement investors.

c. The Department failed to grapple with the risk the Rule will deprive middle- and small-balance investors of meaningful information about retirement options, including annuities

143. The record developed in response to the proposed Rule demonstrated that, by classifying truthful and non-misleading commercial information as fiduciary advice, the Department would deprive middle- and small-balance savers of access to meaningful information about their retirement options. The final RIA failed adequately to respond to those concerns about an "advice gap," and appeared to rest on the indefensible, undefended, and unconstitutional assumption that truthful and non-misleading commercial information conveyed in a sales relationship—absent artificially imposed fiduciary obligations—affords no benefit to, and may harm, consumers. The Department has taken the position, in other words, that hearing no speech is better for consumers than hearing sales speech.

144. Other assumptions the Department made were similarly unfounded. For example, the Department stated that "the price of advice should not be higher" under the Rule. Final RIA 313. But that is certainly wrong, seriously understating the record-documented costs (acknowledged by the Department) that insurance companies, broker-dealers, and insurance agents will incur to comply with a Rule that dramatically changes the definition of fiduciary "investment advice." In addition, as in the proposed RIA, the Department did not even attempt to quantify the significant liability costs associated with the Rule, which subjects financial institutions to litigation for alleged violations of the BICE. That the Department has neglected to define certain critical terms in the BICE—leaving their interpretation to lay juries and state courts across the country—only enhances the risks and costs associated with potential litigation.

145. The Department also questioned the extent to which small investors benefit from non-fiduciary advice and sales information. *See* Final RIA 314-315. In doing so, the Department apparently assumed, contrary to law and common sense, that consumers do not

benefit from access to truthful and non-misleading commercial information about suitable retirement products. The Rule will reduce the availability of truthful, non-misleading information about such products by increasing dramatically the cost and legal risk of providing it. In its final RIA, the Department simply ignored the fact that truthful, non-misleading information about retirement products conveyed by a salesperson is useful to consumers, especially consumers who cannot afford to pay a fee-for-service investment adviser.

146. In a proposed information collection request issued on February 29, 2016—just six weeks prior to the publication of the final Rule—the Department effectively admitted that it does not yet understand the value of the truthful, non-misleading information conveyed through ordinary sales communications. In that proposal, the Department conceded that "[r]elatively little is known about how people make planning and financial decisions before and during retirement" due to "lack of data." Proposed Information Collection Request, 81 Fed. Reg. 10,280, 10,281 (Feb. 29, 2016). That concession leads to an obvious question: Given its lack of knowledge about how retirement decisions are made, how could the Department possibly reliably assess the benefits (or costs) of its proposed overhaul of the retirement savings marketplace?

147. In addition, the Department inadequately responded in its final RIA to evidence concerning the growing advice gap resulting from implementation of a similar regulation, called the Retail Distribution Review, in 2012 in the United Kingdom ("UK"). The number of investment advisers in the United Kingdom dropped from more than 40,000 shortly before the UK regulation was promulgated to approximately 28,000 by the end of 2014 as the market adjusted to the imminent new rules. *See* ACLI Comments 45; Towers Watson, Advice Gap Analysis: Report to FCA 32 (Dec. 5, 2014), https://www.fca.org.uk/static/documents/research/

advice-gap-analysis-report.pdf. As the cost of financial investment information rose, middle- and small-balance clients lost access to valuable retirement information. *See, e.g.*, FCA, *Financial Advice Market Review Call for Input* 15-16 (Oct. 2015), http://www.fca.org.uk/your-fca/documents/famr-cfi; ACLI Comments 45.

148. In response to this evidence, the Department claimed that “numbers have rebounded, and ... that there is sufficient advisory capacity.” Final RIA 84. But, as commenters explained, and as a study commissioned by the Department itself recognized, “supply and demand may not be perfectly aligned across the market,” and because there is greater demand in the UK for transaction-based financial assistance, the RDR and its emphasis on holistic investment advice “could lead to a capacity mismatch, particularly at the lower end of the market.” Jeremy Burke & Angela A. Hung, *Financial Advice Markets: A Cross-Country Comparison* 30 (Apr. 21, 2015); *see also* Gibson, Dunn & Crutcher Comments 4-5 (Sept. 24, 2015), https://www.dol.gov/ebsa/pdf/1210-AB32-2-03061.pdf.

149. Moreover, the Department’s rosy assessment of the UK situation contradicted statements by UK regulators themselves, who have acknowledged that the UK saw a decline in the number of financial advisers offering professional advice between 2011 and 2014 and that a number of firms offering advice are focusing on wealthier customers. HM Treasury, Financial Advice Market Review: Terms of Reference (updated Mar. 14, 2015), https://www.gov.uk/government/publications/financial-advice-market-review-terms-of-reference/financial-advice-market-review-terms-of-reference. In August 2015, the UK’s Financial Conduct Authority announced a “major new review” of the steps needed to “radically improve” access to financial advice and assistance. Major New Review to Radically Improve Access to Financial Advice Launched (Aug. 3, 2015), https://www.gov.uk/government/news/ major-new-review-to-

radically-improve-access-to-financial-advice-launched. In commissioning the review, the FCA pointed to an "advice gap" for investors seeking professional financial assistance, particularly for those who "do not have significant wealth." *Id.*

150. In the final RIA, the Department relied on the existence of so-called robo-advisers as an option for small investors who lose access to financial assistance from broker-dealers and insurance agents. Final RIA 319-320. Robo-advisers are essentially interactive online tools that use algorithms to generate recommendations based on data input by the user. But the Department did not cite any evidence establishing that robo-advisers effectively substitute for in-person sales conversations. Indeed, the Department conceded that automated advice likely does *not* offer the same benefits financial professionals do—benefits that include encouraging greater savings, responding to client-specific questions, and dissuading emotional investing, such as liquidating assets during a downturn like the 2008 market crash. *See id.* at 320-321; ACLI Comments 47. The Department failed to explain how robo-advisers could serve as adequate substitutes given those crucial limitations.

151. Nonetheless, in the final Rule, while interfering with information disseminated by human sales people, the Department actually attempted to encourage the growth of robo-advisers. The Department stated, without evidentiary support or any basis in logic, that robo-advice is less prone to conflicts of interest, and the Department therefore elected to exclude robo-advice from the BICE so as not to interfere with the development of that market. Final BICE, 81 Fed. Reg. at 21,058. The Department's favoritism toward robo-advisers is particularly suspect given recent reports by FINRA and the SEC cited in the record that express concerns that automated investment tools rely on incorrect assumptions, neglect to react to shifts in the market,

present consumers with limited options, and may be prone to conflicts of interest in the form of revenue sharing or the sale of proprietary and affiliated products.[10]

d. The Department unreasonably discounted the effectiveness of existing regulatory controls

152. In the final RIA, the Department dismissed as insufficient the comprehensive regulatory framework governing the marketing and sale of annuity products, a framework that works to achieve many of the same goals as the Rule. The Department noted, for example, that the suitability standard is "widely understood to be less exacting than the fiduciary duty to act in a customer's best interest." Final RIA 111. Of course, the fact that it is "less exacting"—even if true—does not mean that the suitability standard falls short of protecting consumers. Yet the RIA makes no effort to show that it does, in fact, fall short.

153. The Department attempted to justify its conclusion that current regulation of annuities is inadequate by focusing on the higher commissions associated with the sale of guaranteed lifetime income products. But the Department's blinkered focus on the amount of the commissions associated with annuities missed the fact that commissions reflect the time and effort needed to sell annuity products, as the record demonstrated. The mere fact of higher commission payments plainly does not support the conclusion that, "notwithstanding existing protections, there is convincing evidence that advice conflicts are inflicting losses on [retirement] investors." Final RIA at 110-111.

[10] *See* FINRA, *Report on Digital Investment Advice* 6, 13 (Mar. 2016), https://www.finra.org/sites/default/files/digital-investment-advice-report.pdf; SEC, *Investor Alert: Automated Investment Tools* (May 8, 2015), http://www.sec.gov/oiea/investor-alerts-bulletins/autolistingtoolshtm.html; *see also* Mass. Sec. Div., *Policy Statement, Robo-Advisers and State Investment Adviser Registration* 1 (Apr. 1, 2016), http://www.sec.state.ma.us/sct/sctpdf/Policy-Statement--Robo-Advisers-and-State-Investment-Adviser-Registration.pdf.

154. The only evidence of quantifiable harm relied upon by the Department is derived from nine off-point studies from the late 1990s through the mid-2000s. Final RIA 159-160. As explained above, those studies—all but one of which exclusively examine the sale and performance of mutual funds—were based on data predating the implementation of strengthened FINRA and state suitability rules governing the sale of annuity products. These rules require, among other things, that the broker-dealer or insurance agent reasonably believe that the purchase of an annuity is suitable for the consumer based on his or her particular circumstances. The rules also impose supervision requirements, including the development of policies, procedures, and training, to ensure compliance with the suitability standard. None of the nine studies cited by the Department examines the sale of annuities following implementation of the more stringent suitability standards, including FINRA Rule 2330.

155. In the final RIA, the Department pointed for the first time to media reports and lawsuits alleging financial loss from annuities, apparently as evidence of harm. Final RIA 132. That was not a reasonable inference. Isolated lawsuits and media reports are not reliable evidence of actual harm to consumers, much less proof that existing regulatory controls on annuity products are insufficient. To the contrary, such lawsuits are themselves efforts to enforce the already extant regulatory regime. The Department's failure to grapple meaningfully with existing regulation infected the Department's analysis of the benefits and costs of the Rule.

COUNT ONE
(APA, 5 U.S.C. § 706)

THE RULE UNLAWFULLY AND ARBITRARILY IMPOSES FIDUCIARY DUTIES ON COMMERCIAL SALES RELATIONSHIPS AND COMMUNICATIONS THAT ARE NOT FIDUCIARY IN NATURE

156. Plaintiffs incorporate by reference the allegations of the preceding paragraphs.

157. The Rule is contrary to law and arbitrary and capricious because the Rule imposes fiduciary duties on a wide range of communications, commercial relationships, and exchanges of truthful commercial information that are plainly not fiduciary in nature—even under the Department's own understanding of that term.

158. Under ERISA, a "person is a fiduciary" only "to the extent" that, as relevant here, "he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of [a covered] plan, or has any authority or responsibility to do so." 29 U.S.C. § 1002(21)(A); *see* 26 U.S.C. § 4975(e)(3)(B) (corresponding Code provision).

159. The Department has acknowledged that the statutory text limits the contexts in which someone may be deemed a fiduciary. In the 2015 NPRM, for example, the Department explained that Congress "did not intend to cover as 'fiduciary advice' [communications] that parties would not ordinarily view as … characterized by a relationship of trust or impartiality." Proposed Rule, 80 Fed. Reg. at 21,941. Based on that understanding, the Department declared that it was statutorily obligated to avoid regulating "activities that do not implicate relationships of trust and expectations of impartiality." *Id.* at 21,938.

160. The Department's recognition that Congress intended that fiduciary obligations not be imposed absent a relationship of trust and expectation of impartiality is well founded in the text, purpose, and structure of ERISA. Congress placed the "render[ing] investment advice" prong of ERISA's fiduciary definition between two other prongs that clearly require ongoing relationships of trust and confidence. The first prong covers any person who has "discretionary authority or discretionary control respecting management" of a plan or "management or disposition of its assets." 29 U.S.C. § 1002(21)(A)(i). The third prong applies to any person with "discretionary authority or discretionary responsibility in the administration of such plan."

Id. § 1002(21)(A)(iii). "Management" and "administration" are ongoing, not one-time responsibilities. And a person afforded "discretionary" "authority," "control," or "responsibility" over plan assets or plan administration is plainly one in whom significant trust has been reposed. The necessary implication is that the "render[ing] investment advice" prong likewise requires an ongoing relationship of trust and confidence—and does not apply to arm's-length, one-time sales relationships.

161. ERISA's legislative history and statutory history further confirm the requirement that a fiduciary be a person in an ongoing relationship of trust and confidence. When it enacted ERISA and the Tax Code's prohibited-transaction provisions, Congress understood a "fiduciary [to be] one who occupies a position of confidence or trust." H.R. Rep. No. 93-533, at 11 (1973). Congress borrowed the designation "fiduciary" from the law of trusts, "in essence, codif[ying] and mak[ing] applicable to these fiduciaries certain principles developed in the law of trusts." *Id.*; *see also Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-111 (1989). Congress thus granted the Department limited authority—not a boundless license—to regulate advisory relationships exhibiting "trust and confidence." Caryl A. Yzenbaard et al., *Bogert's Trusts & Trustees* § 481 (2015).

162. Of particular relevance, moreover, Congress itself has codified a distinction between sales communications and fiduciary advice. The Investment Advisers Act imposes fiduciary obligations only on an "investment adviser" who is paid specifically for investment advice, and exempts from those obligations a "broker or dealer" who provides advice "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). In imposing fiduciary obligations on those who "render[] investment advice for a fee or other compensation" with respect to ERISA

plans or IRAs, 29 U.S.C. § 1002(21)(A); 26 U.S.C. § 4975(e)(3)(B), Congress likewise intended to regulate those who are hired for their trusted investment advice, not to over-regulate or interfere with ordinary sales relationships and the valuable information that might be communicated in such relationships.

163. The recent enactment of the Dodd-Frank Act further confirms Congress's intent that ERISA's fiduciary duties should impose obligations only on those hired specifically to provide impartial investment advice, and not on broker-dealers engaged in ordinary sales conversations. In the Dodd-Frank Act, Congress "direct[ed] the *SEC*" (not DOL) to assess whether "the standards of care applicable to broker-dealers and investment advisers" are adequate, and "authorize[d], but [did] not require, the *SEC*" (not DOL) "to issue rules addressing [those] standards of care." Final Rule, 81 Fed. Reg. at 20,990 (emphases added). Congress thus understood that existing statutes (such as ERISA) did not already impose a fiduciary-like standard of care for ordinary sales conversations by broker-dealers. And Congress tasked the SEC, as the expert agency responsible for regulating investment products (not DOL), with studying and then deciding whether to impose new, higher obligations on broker-dealers.

164. The Department exempted certain sales conversations from fiduciary status—such as conversations with sponsors of ERISA plans with $50 million or more in assets. In that context, the Department recognized that a sales relationship—because it is not based on "trust or impartiality"—is not a fiduciary relationship.

165. But outside these narrow confines, despite its recognition of the statute's limits, the Department deemed all other information conveyed in commercial sales relationships in the retirement savings marketplace to be fiduciary in nature. Under the Rule, any sales conversation (or series of sales conversations) by definition conveys a "recommendation" that gives rise to

fiduciary obligations. That is contrary to Congress's intent, historical practice, and common understanding, as even the Department itself has recognized.

166. The effect of the Rule is to impose fiduciary obligations on non-fiduciary relationships. In that way, the Rule banishes non-fiduciary commercial information from the retail IRA marketplace. The Department based this extraordinary expansion of the scope of fiduciary status on an express and categorical rejection of "the purported dichotomy between a mere 'sales' recommendation … and advice." Final Rule, 81 Fed. Reg. at 20,981.

167. In doing so, the Department rejected a "dichotomy" that Congress expressly implemented in the Investment Advisers Act; that had for decades animated the Department's own regulations; and that accords with common sense. In fact, the Department's reasoning violates the APA's command of reasoned decisionmaking and is contrary to law in at least two respects. *First*, the Department failed to identify sufficient record evidence to support its unqualified conclusion that all sales conversations involving ERISA plans or retirement investors are made in a context consumers expect to be one of "trust and confidence." That is an empirical proposition, and the Department failed to marshal evidence of consumer expectations to support it. That consumers may sometimes be *confused* about when an insurance agent or broker-dealer is providing impartial advice or making a sales pitch is different in kind from evidence establishing that *all* consumers *expect* those relationships to be ones of fiduciary trust and confidence and all recommendations to be impartial.

168. *Second*, and in any event, the Department unreasonably rejected requests to expand the seller's exclusion to cover additional if not all arm's-length commercial relationships in the ERISA plan and retail IRA context. The rationales offered by the Department for refusing to do so do not withstand scrutiny. The Department repeatedly emphasized that small ERISA

plans and retail IRA investors are often confused about whether they are receiving sales information or impartial advice. But any such confusion does not justify defining fiduciary investment advice to encompass garden-variety sales conversations in which both seller and buyer fully understand that the seller is offering a product, and that the buyer and seller may have different financial interests.

169. At most, the Department's finding about role confusion might justify imposing fiduciary obligations when confusion actually exists, or requiring simple and effective disclosures to dispel that confusion. Imposing a disclosure requirement to establish a sales relationship—rather than deeming non-fiduciary speech fiduciary speech without regard to the particular facts—would have been consistent with Congress's substitution, under the Investment Advisers Act and elsewhere, of "a philosophy of full disclosure for the philosophy of caveat emptor" in order to "achieve a high standard of business ethics in the securities industry." *Capital Gains*, 375 U.S. at 186. It would also have been consistent with the limits the Department recognized Congress imposed on the scope of fiduciary obligations under the statute.

170. The Department's rejection of these disclosure alternatives was unfounded. To support its claim that clear, simple disclosures would be ineffective or counterproductive, the Department relied primarily on a five-page theoretical paper that is supported, not by real-world, empirical evidence, but by limited experimental evidence from a few stylized role-playing experiments involving, for example, dice games offering the chance to earn $5 coffee-shop gift cards. *See* George Loewenstein et al., *The Limits of Transparency: Pitfalls and Potential of Disclosing Conflicts of Interest*, 101 Am. Econ. Rev., No. 3, 2011, at 423-428; Proposed Rule, 80 Fed. Reg. at 21,942 n. 19 (citing Loewenstein et al.). Moreover, the Department's sweeping conclusions about the inadequacies of disclosure are undermined by the Department's own

extensive reliance on disclosure to protect retirement investors in a range of other contexts. *E.g.*, Final Rule, 81 Fed. Reg. at 20,974, 20,983; Final BICE, 81 Fed. Reg. at 21,046-21,049.

171. Equally important, the Department failed to justify its critical assumption that ERISA plan sponsors, plan participants, and IRA owners are incapable of deciding which financial products to purchase without the benefit of a fiduciary adviser. To the contrary, the administrative record supported the commonsense recognition that many consumers, when provided with truthful information about suitable retirement products, will make choices that serve their own interests, as the high degree of satisfaction demonstrated by holders of variable and fixed indexed annuities plainly attests. And even if the Department could have marshaled empirical support for its deeply paternalistic view—and it did not—that would provide no basis for the Department's indiscriminate application of the fiduciary label. ERISA and the Tax Code give the Department authority to regulate fiduciary investment advice, not to transform non-fiduciary commercial communications into fiduciary conversations by fiat. Put simply: The statute prohibits imposition of fiduciary duties unless the relationship is one of trust and confidence; it does not permit the Department to impose them because it wishes to alter the choices consumers make without the benefit of such a relationship.

172. In failing to limit the Rule to communications and relationships that possess the fiduciary characteristics the Department itself knew to be required by Congress, the Department acted contrary to law and engaged in arbitrary and capricious decisionmaking. Its overbroad and inconsistent application of the fiduciary standard is particularly damaging to Plaintiffs' members and American consumers. Annuity products have long been distributed as part of commercial sales relationships. Under the Rule, those non-fiduciary communications are by executive fiat deemed fiduciary—even when a customer is fully aware of the sales relationship, even when

there are clear disclosures, and even when a customer desires that relationship—contrary to the limits Congress imposed and the Department itself has acknowledged. The Rule must therefore be vacated.

COUNT TWO
(APA, 5 U.S.C. § 706)

THE BICE IS ARBITRARY CONTRARY TO LAW AND ARBITRARY AND CAPRICIOUS

173. Plaintiffs incorporate by reference the allegations of the preceding paragraphs.

174. The BICE—which is a critical piece of the Rule—is unlawful for two independent reasons: (1) the BICE unlawfully creates private rights and remedies not authorized by Congress and (2) the Department failed to comply with the statutory prerequisites for promulgating it. The BICE's unlawfulness requires vacatur of the Rule as a whole because it is the only available exemption for many of the new prohibited transactions created by the Rule. The invalidity of the BICE would therefore virtually eliminate many commonplace sales transactions, including commission-based variable and fixed indexed annuity sales to IRAs, an outcome the Department itself recognized would be very harmful. The BICE is thus central to the Department's regulatory package and cannot reasonably be severed from the final Rule; without it, the Rule cannot survive.

A. The BICE Creates A Private Right Of Action Congress Has Not Authorized

175. The BICE is unlawful because it creates private enforcement with respect to IRA owners, even though Congress has never authorized such enforcement. Much like the Department's definition of "fiduciary," the BICE reflects the Department's effort to bootstrap its cabined authority to create regulatory exemptions into broad authority to impose a private remedial scheme for IRA sales that parallels ERISA's enforcement scheme.

176. Indeed, the BICE is the Department's effort to second-guess Congress's decisions about enforcement. As the Department acknowledges, "no private right of action under ERISA is available to IRA owners." Proposed Rule, 80 Fed. Reg. at 21,938; *see also* Final BICE, 81 Fed. Reg. at 21,004, 21,008, 21,021. Yet the BICE forces broker-dealers or others who wish to sell variable and fixed indexed annuities pursuant to compensation structures that have dominated the life insurance industry to subject themselves to suit by individuals. That is, in fact, the point of the BICE. The Department knows well that broker-dealers and insurance agents will need to avail themselves of the BICE in order to continue selling annuity products. But the Department has structured the BICE to force those same broker-dealers and insurance agents to subject themselves to substantial and open-ended liability. As the Department put it, "[t]he contract creates a mechanism for IRA investors to enforce their rights," Final Rule, 81 Fed. Reg. at 20,947—despite the fact that Congress has never created a private right of action for IRA investors and plainly decided not to do so.

177. Congress vested *enforcement* authority over IRAs not in the Department of Labor, and not in private suits by investors, but in the Treasury Department. *See* Reorganization Plan No. 4 of 1978, § 105, 92 Stat. 3790 (Aug. 10, 1978, as amended Sept. 20, 1978). As President Carter explained when deciding *not* to reallocate the Treasury Department's "enforcement powers" to the Department of Labor, only the Treasury Department possesses the "special expertise" needed to administer the excise tax mechanism that Congress designed to enforce compliance with fiduciary standards for IRAs. *See* Message of the President (Aug. 10, 1978), http://www.presidency.ucsb.edu/ws/?pid=31167. The Department's encroachment on Treasury's enforcement authority is reason enough to invalidate the BICE's right of action. At a minimum,

the Department's remodeling of the enforcement regime for IRAs is owed no deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

178. Moreover, the Department's private right of action completely upends the calibrated remedial scheme Congress created under ERISA and the Tax Code. Congress intended the excise tax imposed under the Tax Code to be the "primary means" of enforcing the prohibited-transaction rules. S. Rpt. No. 93-383, at 33 (1973). Congress likewise limited private enforcement to statutory actions by plan participants and beneficiaries. Congress did not authorize either such liability or such enforcement with respect to IRAs. The Department has acknowledged as much, *see, e.g.*, Final BICE, 81 Fed. Reg. at 21,004 ("IRA owners do not have a statutory right to bring suit against fiduciaries"), but it has countermanded that congressional judgment through the creation of a private right of action to enforce the BICE, *see*, *e.g.*, *id.* at 21,008 (opining that it is "generally critical that investors have a remedy to redress the injury"); *id.* at 21,021 ("the contractual requirement creates a mechanism for investors to enforce their rights" even though Congress has not created "an independent statutory right to bring suit").[11]

179. Agency regulations cannot create a private right of action where Congress has not done so by statute. *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001) ("Agencies may play the sorcerer's apprentice but not the sorcerer himself."). Neither ERISA nor the Tax Code creates a private right of action against those advising IRA owners. Notwithstanding these limitations on its authority to regulate IRAs directly, the Department is impermissibly attempting to regulate IRAs indirectly through the BICE. Such regulation would de facto result in a vast expansion of ERISA-like private rights and remedies to IRA owners. This use of the Department's lawful

[11] In its preamble to the BICE, the Department acknowledged these distinct enforcement mechanisms, but concluded that "[w]ithout a contract, the possible imposition of an excise tax provides an additional, but inadequate, incentive to ensure compliance with the exemption's standards-based approach." Final BICE, 81 Fed. Reg. at 21,022.

authority under ERISA to define technical terms and create PTE classes unlawfully subverts the choices Congress has made with respect to private enforcement. Although the new remedy is nominally based on a contractual right, the Department has mandated the contract by regulation and in the contract imposed both the fiduciary obligations and private right of action Congress created in a statute for ERISA plans. Indeed, the Department's decision to require a written contract when the BICE is used for IRA sales but *not* to require a written contract when the BICE is used for ERISA plans makes clear that the contract requirement creates for IRAs by regulation precisely the private right of action that Congress created for ERISA plans but chose not to adopt for IRAs.

180. The Department may not use its statutory authority to create exemptions to regulatory controls to give it authority to create new private remedies for IRA investors that Congress chose not to create. Courts have repeatedly recognized that agencies may not bootstrap their otherwise legitimate rulemaking authority into dominion over an industry or activity over which they lack such authority. *See, e.g.*, *Bus. Roundtable v. SEC*, 905 F.2d 406, 412-13 (D.C. Cir. 1990); *Am. Bankers Ass'n v. SEC*, 804 F.2d 739, 754-755 (D.C. Cir. 1986). For those reasons, the Department lacked the statutory authority to create a private right of action to enforce the BICE. Because the BICE, and its associated private right of action, formed a key part of the entire Rule, this Court should vacate the Rule as a whole.

B. The BICE Is Not "Administratively Feasible"

181. The Department's statutory authority to establish a Prohibited Transaction Exemption class like the BICE—and thus to exempt specified fiduciaries and transactions from liability for violations of the prohibited-transaction rules—is conditioned on making certain findings required by the statute. Among other things, "[t]he Secretary may not grant an exemption … unless he finds that such exemption is … administratively feasible." 29 U.S.C.

§ 1108(a); *see also* 26 U.S.C. § 4975(c)(2); Reorganization Plan No. 4 of 1978, § 102, 92 Stat. 3790 (Aug. 10, 1978, as amended Sept. 20, 1978).

182. The Department was thus statutorily required to make a determination that compliance with the BICE would be administratively feasible. *See Gerber v. Norton*, 294 F.3d 173, 185 (D.C. Cir. 2002) ("When a statute requires an agency to make a finding as a prerequisite to action, it must do so."); *see also Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1216 (D.C. Cir. 2004); *Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, 656 F.3d 580, 587 (7th Cir. 2011).

183. The Department violated that statutory requirement here. In issuing the Rule, the Department asserted the BICE would be administratively feasible, but that assertion ignored the record before the Department demonstrating that compliance with the BICE is clearly all but unworkable, particularly for life insurance companies, broker-dealers, and insurance agents marketing and selling guaranteed lifetime income products. For example:

a. The broad and unqualified "best interest" standard—when enforced through private lawsuits rather than by an agency—gives little meaningful compliance guidance to insurance companies. Nor does the Department explain how firms could reasonably rely on the BICE to continue commission-based sales when the Department itself has evidenced such a deep skepticism of such compensation structures. *See, e.g.*, Final RIA 133 ("Economic theory predicts that adviser conflicts [through commissions] can bias advice and harm advice recipients.").

b. The lack of clarity regarding "reasonable compensation" will subject life insurers to grave uncertainty regarding payment of commissions, particularly in light of the Department's refusal to "provide specific examples of 'reasonable'" compensation.

Final BICE, 81 Fed. Reg. at 21,031. The Department's assertion that, by tying reasonable compensation to "ERISA section 408(b)(2) and Code section 4975(d)(2)," the BICE clarifies what counts as reasonable is misguided. *Id.* at 21,029-21,031. According to ERISA regulations, whether compensation is "reasonable … depends on the particular facts and circumstances of each case." 29 C.F.R. § 2550.408c-2(b)(1). In over 200 advisory opinions dealing with reasonable compensation under ERISA § 408(b)(2), the Department has consistently said that such questions are "inherently factual" and declined to opine on them. *See, e.g.*, Advisory Opinion Procedure, 41 Fed. Reg. 36,281, 36,282 (1976). Nor does the Department confront the fact that the "reasonable compensation" requirement will be interpreted and enforced not by expert agencies, such as the IRS, but by courts and local juries across the country.

c. The BICE's standards for the sale of proprietary products are onerous and ill-defined. The record made clear that many insurers deploy an affiliated sales force with expertise in the multiple features of variable annuities. Although the final BICE purports to allow for the sale of proprietary products, the conditions imposed by the Rule make doing so fraught with litigation risk, especially given the Department's professed "deep and continuing concern" regarding proprietary sales. Final BICE, 81 Fed. Reg. at 21,052; Final Rule, 81 Fed. Reg. at 20,963. In particular, the Department's position that an adviser "may not, consistent with the Best Interest obligation, recommend a product from its limited menu" "if another type of investment" would be in the investor's best interest, Final BICE, 81 Fed. Reg. at 21,055, imposes an unworkable standard on insurance companies that sell proprietary products, such as a menu of variable annuity products, because those life insurers will be subject to lawsuits claiming that other products would have better satisfied a retail investor's needs.

d. The Department sought to simplify execution of the BICE by requiring the financial institution to execute the contract, rather than individual agents. Final BICE, 81 Fed. Reg. at 21,008. In doing so, the Department failed to consider that annuity carriers often contract with IMOs that act as an intermediary between independent insurance agents and the annuity carrier. By narrowly defining financial institutions to exclude such intermediaries, and by allowing financial institutions alone to execute the BICE, the final Rule forces issuers to assume the risk of liability on the part of agents acting at least two levels below them in the distribution chain. That disjuncture renders the BICE infeasible for a major distribution channel for guaranteed lifetime income products. The Department neglected to analyze the effects of this decision on existing distribution channels for annuity products, including the use of IMOs.

e. Finally, as set forth above, the Rule excludes *all* insurance companies from the BICE by limiting the insurance companies that can qualify as signatories of the contract. *See supra* ¶ 123.

184. In short, the record before the Department demonstrated that the BICE, when enforced through a private right of action, is unworkable, and that it is especially so for the annuity products issued, marketed, or sold by Plaintiffs' members. The Department's contrary conclusion fails the APA's requirement of reasoned decisionmaking. And because the Department's analysis of the costs and benefits of the BICE (wrongly and improperly) assumed a workable BICE, the invalidity of the BICE requires vacatur of the Rule as a whole.

COUNT THREE
(APA, 5 U.S.C. § 706)

THE FINAL RULE'S TREATMENT OF VARIABLE AND FIXED INDEXED ANNUITIES IS ARBITRARY AND CAPRICIOUS AND CONTRARY TO LAW

A. The Rule Unlawfully And Arbitrarily Disfavors Certain Annuities

1. The Department lacks statutory authority to favor or disfavor particular types of retirement products

185. Plaintiffs incorporate by reference the allegations of the preceding paragraphs.

186. The Rule is unlawful because it has the purpose and effect of granting special and preferential advantages to the Department's favored retirement products, while heaping disproportionate burdens on products the Department disfavors. No statute authorizes the Department to decide which financial products should succeed and which should fail, or to premise decisions about fiduciary status on its views of the relative merits of different products.

187. The Department has claimed that it "has not specified that any particular investment product … is illegal or per se imprudent." Final BICE, 81 Fed. Reg. at 21,032. That assertion is disingenuous. Contrary to that assurance, the Rule reflects a clear effort to channel investors towards and away from particular products. Specifically, the Rule permits favored products that the Department seeks to "promote"—such as certain fixed annuities—to be sold under the more "streamlined" PTE 84-24, while steering disfavored products, like variable annuities and fixed indexed annuities, into the "more stringent" BICE. Final PTE 84-24, 81 Fed. Reg. at 21,152-21,153, 21,155, 21,158. Indeed, the Department acknowledged the advantages conferred by exempting some products from the BICE, citing the serious litigation risk, "including class litigation, and liability and associated reputational risk" under the BICE. Final Rule, 81 Fed. Reg. at 20947. Similarly, in deciding not to include robo-advice in the BICE, the Department explained that its inclusion "could adversely affect the incentives currently shaping

the market for robo-advice," Final BICE, 81 Fed. Reg. at 21,058—reflecting a clear awareness that the Department's decision to place a product or provider in the BICE would impair access to that product or by that speaker. *See, e.g.*, Final RIA 319 ("The final rule and exemptions are likely to promote healthier development of emerging business models that rely heavily on technology to generate and deliver advice.").

188. The Department's attempt to manipulate the availability and costs of products in the retirement savings marketplace, and thus to regulate not *advice* but the *products* themselves, is contrary to law. The Department lacks statutory authority to regulate retirement products, or to favor some over others. The Exchange Act authorizes the SEC, not the Department, to regulate the securities marketplace, including securities products. *See* 15 U.S.C. § 78a *et seq*. States and not the federal government are entrusted with the regulation of insurance products. *See* McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015. ERISA and the Tax Code grant the Department limited authority to regulate fiduciary investment *advice* provided in connection with ERISA plans and IRAs. 29 U.S.C. § 1002(21)(A)(ii); 26 U.S.C. § 4975(e)(3)(B). Neither statute evidences congressional authorization to parlay authority over investment advice into the very different legal authority to regulate investment products. Because the Final Rule has the impermissible purpose and effect of erecting a hierarchy among retirement products, and thereby interfering with the range of choices available to consumers in the market, it must be vacated.

2. The Department failed to acknowledge, much less justify, the negative impacts of the Rule on variable and fixed indexed annuities

189. Plaintiffs incorporate by reference the allegations of the preceding paragraphs.

190. The Rule is arbitrary and capricious because the Department failed to confront or attempt to justify the Rule's overwhelmingly negative effects on fixed indexed and variable

annuities and retirement savers who benefit from access to those products and information about them.

191. The administrative record demonstrated that broker-dealers and insurance agents must devote more time, attention, and expertise to educate consumers about variable and fixed annuities than many other investments due to the greater range of customization options. As numerous commenters explained, without fuller information, retirement investors typically underestimate the value of these products. And because variable and fixed annuity products allow purchasers to customize their annuities by selecting from among a wide array of optional features—such as lifetime income guarantees and guaranteed withdrawal benefits—providing information to inform those choices also requires more time.

192. Effectively educating retirement investors about how variable and fixed indexed annuities work, how they can be customized, and their value as part of a retirement portfolio thus requires far more advance preparation and training and produces a significantly more involved sales conversation, compared to other simpler and more familiar financial products. Broker-dealers and agents must be compensated to provide those more involved services. Commenters emphasized to the Department that both basic economic principles and years of experience have demonstrated that variable annuities cannot be sold effectively without differential, commission-based compensation. These comments apply with equal force to the sale of fixed indexed annuities, which, under the final Rule, must be sold in accordance with the more stringent BICE.

193. Further, numerous commenters explained to the Department the efficiencies of being able to sell variable annuities through "captive" or "affiliated" broker-dealers—that is, broker-dealers who exclusively or primarily sell the insurer's own proprietary products. Using

affiliated brokers is one effective way insurers maintain the highly trained, professional sales force necessary to tackle the challenges of selling annuities.

194. The Rule, however, unreasonably threatens those essential compensation and distribution models. It produces this result not directly but rather through the combined effect of several sweeping and unworkable provisions. The Rule first arbitrarily deems all ordinary commercial sales conversations to be fiduciary investment advice. The Rule then excludes a very limited range of commercial speech from fiduciary regulation, but limits that relief only to large plan sponsors, leaving sales conversations to the rest of the affected retirement savings marketplace—that is, small plan sponsors, plan beneficiaries, and individual retirement investors—subject to the fiduciary duties imposed by ERISA and the Tax Code. Because ERISA and the Tax Code bar insurance agents or broker-dealers (when they act as "fiduciaries") from receiving a commission or limiting their sales to proprietary products, those statutory requirements foreclose those practices for most sales unless an insurance agent or broker-dealer can comply with the BICE.

195. In its current form, the Rule completely excludes *all* insurance companies from the BICE by limiting the insurance companies that can qualify as signatories of the best interest contract. *See supra* ¶ 123. Moreover, even if that exclusion were altered, the administrative record demonstrated that many broker-dealers and insurance agents will decline to use the BICE, particularly with respect to fixed indexed and variable annuity sales, because it is so ambiguous and onerous and because the Department delegated enforcement of the BICE to the plaintiffs' bar in state and federal courts across the country. To qualify for the BICE, a broker-dealer or insurance agent must commit to satisfy numerous imprecise standards, including that he or she will not be paid more than "reasonable compensation" and will act in the "best interest" of the

purchaser "without regard to" the broker-dealer's or insurance agent's own interests. In addition, affiliated broker-dealers who wish to sell only proprietary products must guarantee that doing so does not prevent the broker-dealer from receiving unreasonable compensation or making imprudent recommendations.

196. The Department's assurances that the final Rule will be manageable are unfounded. For example, the Department promised that compliance with these standards will be "measured based on the circumstances existing at the time of the recommendation, not based on ultimate performance of the investment with the benefit of hindsight." Final BICE, 81 Fed. Reg. at 21,022. But the Department cannot keep that promise, because it has assigned enforcement of those standards not to itself or another expert agency but instead has delegated it to lay person juries and state and federal courts in class-action litigation throughout the nation. An expert agency would be capable of issuing and enforcing more balanced uniform guidance. But federal and state courts may not feel bound by the Department's directions. The Department's decision to delegate enforcement of fiduciary obligations in this manner creates enormous liability risk for anyone who relies on the BICE to sell variable or fixed indexed annuity products.

197. Faced with this minefield of unpredictable liability risk, many firms or distributors may simply stop selling variable or fixed indexed annuities. Even if they do not stop selling those products, insurance agents or broker-dealers may scale back the sale of annuity products, out of fear that sales of those products under the BICE will lead to substantial liability down the road. In any event, the costs of those annuity products may rise as the market adjusts to the liability risks created by the BICE.

198. In short, by disfavoring essential distribution and compensation practices for annuity products, the Rule will severely interfere with retirement investors' access to variable

and fixed indexed annuities. The Department made no effort to justify that draconian consequence. Nor did it confront the record evidence demonstrating the enormous value that flows to consumers from having the choice of a range of annuity products in the marketplace. Consumers benefit from access to information about the range of annuity options available to them at the time of purchase. Subjecting variable and fixed indexed annuities to the BICE restricts access to information about these particular products and thus will impair retirement savers' decisionmaking.

199. The loss of access to these products will harm millions of retirement investors and retirees with retirement needs that only a variable or fixed indexed annuity can satisfy, as well as Plaintiffs' members. No other financial instrument allows ordinary retirees to invest in the investment market while also seamlessly obtaining lifetime income guarantees and a guaranteed death benefit. And the record before the Department demonstrated that the peace of mind annuities provide demonstrably improves retirees' overall well-being and mental health, and that retirees and retirement investors are overwhelmingly satisfied with the annuities they have purchased.

200. To be sure, in issuing the final BICE, the Department cited the concern that it would lead broker-dealers to "stop selling" variable annuity products. Final BICE, 81 Fed. Reg. at 21,017. In response, the Department asserted that its revisions to the BICE's disclosure and data collection requirements should address such concerns. *Id.* at 21,018. That response failed to grapple with the record before the agency or the key implications of the Rule for variable and fixed indexed annuity products. Indeed, the Department's suggestion that the availability of variable and fixed indexed annuity products would be unaffected by the BICE is in serious tension with its acknowledgment elsewhere that products sold under PTE 84-24 would have a

significant market advantages over products sold under the BICE. *Compare, e.g.*, Final PTE 84-24, 81 Fed. Reg. at 21,153, *with id.* at 21,152. Similarly, as noted above, the Department's decision not to subject robo-advice to the BICE was expressly based on its desire *not* to interfere with the growth of that model, an implicit recognition that inclusion in the BICE raises cost, increases liability risk, and thus affects the availability of products and business models.

201. Furthermore, the final RIA fails to acknowledge that the Rule will significantly restrict access to variable and fixed indexed annuities. The final RIA predicted that some financial products "are likely to lose market share" and that "some insurers may be challenged," but claimed that those market impacts will be limited to "[f]inancial products that are relatively expensive, underperforming, and/or not optimally aligned with affected IRA and plan investors' interests, and that are currently relying on sales incentives that can bias advice to keep their net flows competitive." Final RIA 311. But if the Department believed that all variable and fixed indexed annuities harm retirement investors, then the APA required the Department to say so and to confront contrary evidence in the record. The APA's requirement of reasoned decisionmaking does not permit the Department to hide behind mere assertions that its Rule will eliminate only those products that never should have been sold in the first place, while elsewhere claiming that the Rule will not negatively affect variable or fixed indexed annuity sales.

202. Indeed, throughout the rulemaking, the Department cycled between assurances that the market impacts of the Rule will be insignificant and vague claims that only harmful products will be affected. At the same time, the Department's purpose appears to have been to engineer the market for retirement products by increasing the costs and risks of selling products it disfavors, in particular variable and fixed indexed annuities. The Department could not have justified such radical market intervention if it had tried. But in any event, the APA obligated the

Department to acknowledge that it was doing so and to attempt to justify that approach. The Department violated that requirement of reasoned decisionmaking here. By "entirely fail[ing] to consider an important aspect of the problem"—namely, the serious effects of the Rule on the marketing and availability of variable and fixed indexed annuities and the corresponding cost to retirement savers and retirees—the Department promulgated a Rule that is arbitrary and capricious and that must be vacated under the APA. *Motor Vehicles Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

B. The Department Unreasonably Ignored The Risks Of Denying Middle- And Small-Balance Retirement Savers Access To Truthful, Non-Misleading Information About Variable And Fixed Indexed Annuities And Of Reducing Their Access To Those Beneficial Products

203. Plaintiffs incorporate by reference the allegations of the preceding paragraphs.

204. The Rule is also arbitrary and capricious because the Department inadequately and unrealistically evaluated the costs associated with restricting retirement investors' access to information, assistance, and guidance about certain retirement products, including variable and fixed indexed annuities. *See, e.g.*, NAIFA Comments 3-5. The Department's failure to account for this "advice gap" infects the entire Rule, and requires its vacatur.

205. Although the Department acknowledged that, as a result of the Rule, "the amount of advice provided might rise or fall and the mix of kinds of advice may change," Final RIA 311, it failed on multiple fronts to asses meaningfully these critical implications or to respond to record evidence and comments on this point:

a. For example, the Department suggested that "the price of advice should not be higher merely because an adviser charges direct fees and avoids prohibited transactions." Final RIA 313. That claim is false: providing consumers with information regarding retirement products as a fiduciary will be more costly, given the significant outlay of time and resources necessary to comply with the duties that flow from fiduciary status, and given the radically heightened litigation risk of the BICE, a massive impact that the Department did not even attempt to quantify. *See, e.g.*, NAIFA Comments 4-7.

b. The record demonstrated that increased compliance costs and the threat of litigation will induce some insurance agents and broker-dealers to leave the market, lowering supply and increasing the price of investment information under the Rule. As a result of these trends, middle- and small-balance savers could be priced out of the market and deprived of important access to investment information. *See, e.g.*, Oliver Wyman Comments 38 (July 13, 2015), https://www.dol.gov/ebsa/pdf/1210-AB32-2-00515.pdf ("Individuals with small balance accounts are likely to lose access to retirement help and support with selecting appropriate products").

206. The Department's efforts to explain its rejection of "advice-gap" concerns were wholly deficient. To a significant degree, they rested not on the proposition that retirement investors would retain comparable access to information as at present, but instead on the notion that information provided by non-fiduciaries—including truthful, non-misleading information regarding the types, features, and benefits of guaranteed lifetime income products—was not of value, and may even be harmful. The Department seemed to believe that loss of access to that kind of truthful commercial speech was not a loss at all; indeed, at times, it seems that shutting down such information is one of the Department's central goals. In addition, the Department unreasonably dismissed as merely "correlati[ve]" record evidence demonstrating the relationship between access to retirement information and increased retirement savings, Final RIA 315, despite contrary evidence. The Department also illogically discounted the vital role financial

professionals play in helping consumers understand the variety of annuity products available and how best to utilize them to manage their ongoing living expenses. *E.g.*, IRI Comments 12; Ams. for Annuity Prot. Comments 9.

207. In its final RIA, the Department put great stock in robo-advisers to help serve small-balance investors. Final RIA 319-20. But commenters pointed to recent reports by the SEC and FINRA discussing the limits of robo-advice, including their reliance on incorrect assumptions; failure to react to shifts in the marketplace; consideration of limited options; and access to limited information about particular investors. The Department at times conceded the benefits of human professionals, *see* Final RIA 320-21, but the Department did not explain how robo-advisers can or should substitute for human advice given those important limitations.

208. The Department's subsequent acknowledgment that it does not understand the retirement savings marketplace renders its emphatic assurances about the advice gap suspect. Well after the Department proposed the Rule and conducted its purported analysis of costs and benefits, the Department issued a proposed information collection request to investigate how retirement planning strategies and decisions evolve over time. In that proposal, the Department conceded that "[r]elatively little is known about how people make planning and financial decisions before and during retirement" due to "lack of data." Proposed Information Collection Request, 81 Fed. Reg. at 10,281. It was not reasonable to cut off retirement savers from truthful, non-misleading information about retirement options without a data-based understanding about the role of such information in retirement savers' planning and decisionmaking.

209. The Department's assessment of the risk of creating an advice gap was also deficient given its failure to account reasonably for the gap created by a similar regulation adopted in the UK, a problem acknowledged by UK's regulators.

210. In short, the Department's failure to account for the costs of denying American retirement investors access to truthful, non-misleading commercial information about guaranteed lifetime income products is arbitrary and capricious and requires vacatur of the Rule.

C. The Department Did Not Reasonably Account For Existing Regulation Of Annuity Products

211. Plaintiffs incorporate by reference the allegations of the preceding paragraphs.

212. The Rule is arbitrary and capricious because the Department failed to account reasonably for the extensive regulatory framework that already protects retirement plan participants, particularly when purchasing annuity products. The Department's superficial discussion of the existing regulatory framework falls well short of its obligation "to determine whether, under the existing regime, sufficient protections [already] exist[]." *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 179 (D.C. Cir. 2009).

213. In promulgating the Rule, the Department assumed that broker-dealers currently do not adequately consider customers' interests when selling products like variable annuities. In doing so, the Department dismissed as insufficient the significant suitability requirements broker-dealers must satisfy specifically when selling variable annuities. *See* Final RIA 111 (asserting that fiduciary obligations are "more exacting" than suitability standards).

214. For example, under FINRA's general suitability rule, FINRA Rule 2111—which was adopted in 2012 and significantly strengthened the suitability framework—a broker-dealer must have grounds to believe his or her recommendation is both suitable in general and suitable for the particular customer based on that customer's investment profile. FINRA Rule 2111 also requires a broker-dealer to conclude that any series of recommended transactions is not excessive or otherwise unsuitable. More significantly, FINRA Rule 2330—which was fully implemented in 2010—imposes even more stringent suitability requirements on broker-dealers and registered

insurance agents recommending the purchase of a deferred variable annuity. Broker-dealers and registered insurance agents must obtain specific information from the customer, including his or her investment objectives, liquid net worth, financial sophistication, and tax status, before making an affirmative determination that the customer would benefit from the unique features of the product. FINRA Rule 2330 also requires principal approval of a variable annuity sale, and the development of policies and procedures to ensure compliance with the rule.

215. The Department likewise failed to recognize the protective impact of state regulations governing guaranteed lifetime income products, including States' adoption of NAIC model code provisions subjecting the recommended sale and replacement (or exchange) of annuity products to a rigorous suitability standard. The NAIC Model Suitability Standard borrows heavily from the federal suitability regulations discussed above and applies to variable and fixed indexed annuities. States have also adopted restrictions on improper replacements and reverse churning.

216. Rather than meaningfully assessing whether these recently enacted regulatory regimes already protect investors considering guaranteed income retirement products, the Department relied on outdated studies preceding the current regulatory provisions to conclude that existing regulation is inadequate. The nine quantitative studies the Department relied upon to assess the impact of conflicts on the market and the resulting need for the Rule exclusively assess the performance of retirement products from 1991 until 2009 (with only two of the studies examining data past 2005), *see* Final RIA 159-160—well before the more stringent rules applicable to annuities, including FINRA's suitability rules, fully took effect. *See, e.g.*, ACLI Comments 44. Not one of these studies purports to examine the sale of variable annuities following implementation of FINRA Rule 2330.

217. In addition, to the extent that the Department relied on new information—including a new consulting study and new data analysis—to attempt to bolster the reliability of those studies, it independently violated the APA because commenters did not have a sufficient opportunity to comment on those materials. *See*, *e.g.*, *Conn. Light & Power Co. v. NRC*, 673 F.2d 525, 530-531 (D.C. Cir. 1982) ("[It is] serious procedural error … [to] fail[] to reveal portions of the technical basis for [the] rule in time to allow for meaningful commentary.").

218. Given the lack of applicable data and studies, the Department's new discussion of existing regulations in the Rule resorts to reliance on anecdotal and non-representative media reports and lawsuit allegations about annuity products. Many of these allegations and reports themselves concern the period before implementation of the FINRA and NAIC suitability rules. Others relate to the 2008 market downturn when class-action litigation reached record levels. It was unreasonable for the Department to fail to engage in careful analysis of existing regulatory controls based on such incomplete and unreliable evidence. Its categorical conclusion that those controls must not be working based on dated quantitative studies, isolated media reports, and the mere fact of litigation involving annuity products is arbitrary and capricious.

219. For these and other reasons, the Department's analysis of the regulatory framework governing the sale of annuity products is arbitrary and capricious and cannot withstand scrutiny. Because the effectiveness of existing regulations strikes at the core the Department's assessment of the costs and benefits of the Rule and because the Department's cost-benefit analysis drove the Department's decisions about how to structure the final Rule, these errors require vacatur of the Rule.

COUNT FOUR
(APA, 5 U.S.C. §§ 553, 706)

THE DEPARTMENT FAILED TO PROVIDE NOTICE AND AN OPPORTUNITY TO COMMENT ON ITS ARBITRARY DECISION TO MOVE FIXED INDEXED ANNUITIES FROM PTE 84-24 INTO THE BICE

220. Plaintiffs incorporate by reference the allegations of the preceding paragraphs.

221. The Rule must be vacated because the Department failed to provide adequate notice and an opportunity to comment on provisions forcing fixed indexed annuities to be sold under the BICE, rather than under PTE 84-24. *See* 5 U.S.C. § 553(b), (c). The decision to subject the sale of fixed indexed annuities to the more stringent requirements of the BICE was also arbitrary and capricious because it failed to account wholly for these products' insurance features and the means by which they are distributed. The Department's violations on these issues requires vacatur of the Rule as a whole to avoid, among other things, artificial regulatory distinctions among retirement products that the Department may not draw.

A. The Department Did Not Provide Notice And An Opportunity To Comment On The Decision To Move Fixed Indexed Annuities From PTE 84-24 To The BICE

222. For decades, the Department has permitted all types of annuities to be sold under PTE 84-24. In the 2015 NPRM, the Department proposed to revoke use of PTE 84-24 to sell "variable annuities and other annuity contracts that are securities under federal securities law"—thus, forcing such annuities to be sold using the BICE. Proposed PTE 84-24, 80 Fed. Reg. at 22,012. The Department, however, proposed no change to the scope of PTE 84-24 with respect to other types of annuities, including fixed indexed annuities, which are excluded from regulation as "securities" under the Securities Act of 1933 and therefore would not have fallen within the ambit of the proposed BICE. *See* Dodd-Frank Wall Street Reform and Consumer Protect Act, Pub. L. No. 111-203, § 989J (2010) ("Dodd-Frank Act"); *Am. Equity Inv. Life Ins.*

Co., 613 F.3d at 176-179 (deeming arbitrary and capricious the SEC's proposal to regulate fixed indexed annuities as securities). Indeed, the proposed Rule expressly solicited comments about its proposal to move variable annuities from PTE 84-24 and into the BICE. Proposed PTE 84-24, 80 Fed. Reg. at 22,015. The Department did *not* request comments about whether it should exclude any additional financial products from PTE 84-24.

223. Had the Department given appropriate notice it was considering moving fixed indexed annuities from PTE 84-24 into the BICE, ACLI and NAIFA would have submitted comments explaining why selling fixed indexed annuities under the BICE is infeasible and why BICE treatment for fixed indexed annuities is unreasonable for many of the same reasons as variable annuities. As just one example: the vast majority of fixed indexed annuities currently are distributed by IMOs. Such IMOs do not qualify as "financial institutions" under the BICE, as promulgated by the Department. And the BICE is available only if a "financial institution" executes a best interest contract. Selling fixed indexed annuities under the BICE would thus require completely overhauling existing distribution channels, with great expense and disruption. ACLI and NAIFA never had the opportunity to raise this significant concern with the Department, and the Department, in turn, never had the opportunity to consider and respond to that concern in crafting its final Rule.

224. Notwithstanding this lack of notice, the Department in its final Rule excluded fixed indexed annuities from PTE 84-24, forcing those annuities to be sold under the BICE. The Department's decision to exclude the sale of fixed indexed annuities from PTE 84-24 was not a "logical outgrowth" of the Department's proposed regulations. *Shell Oil Co. v. EPA*, 950 F.2d 741, 747 (D.C. Cir. 1991). The Department's failure to provide adequate notice and an opportunity to comment violates the APA. *See* 5 U.S.C. § 553(b), (c).

B. The Department's Decision To Move Fixed Indexed Annuities From PTE 84-24 To The BICE Was Arbitrary And Capricious

225. The Department's decision to exclude the sale of fixed indexed annuities from PTE 84-24 was arbitrary and capricious for two related reasons. *First*, the Department failed to appreciate the insurance features and protections against market risk that these products offer and the fact that, like other fixed annuities, fixed indexed annuities are excluded from the definition of security under the federal securities laws, and thus, outside the SEC's jurisdiction. *Second*, the Department did not account for the fact that fixed indexed annuities often are distributed by third-party IMOs that contract with independent agents and broker-dealers to sell these products to consumers. The Department declined to classify IMOs as "financial institutions" for purposes of the BICE, forcing annuity insurers to assume downstream liability risk for IMOs and agents and broker-dealers. The Department failed to address the possibility that the current distribution model for other fixed indexed annuities would be unworkable under the BICE.

226. The Department's rationale for subjecting variable annuities to the requirements of the BICE under the proposed Rule rested, at least in part, on the SEC's classification of such products as non-exempt securities. That justification does not apply to fixed indexed annuities. In 2009, the D.C. Circuit held that an SEC rule classifying fixed indexed annuities as non-exempt securities was arbitrary and capricious. *Am. Equity Inv. Life Ins. Co.*, 613 F.3d at 176-179. As part of Dodd-Frank, and following the D.C. Circuit's vacatur of the SEC's rule, Congress passed the Harkin Amendment, which ratified the D.C. Circuit's decision by mandating that fixed indexed annuities continue to be treated as insurance products exempt from federal securities regulations. By forcing fixed indexed annuities to be sold under the BICE, the Department has disregarded Congress's judgment that fixed indexed annuities are insurance products that should be treated like fixed annuities.

227. In addition, although the Department noted in its RIA that fixed indexed annuities often are sold by IMOs, Final RIA 102-103, the Department did not consider the effect of the BICE on this distribution channel. The Department acknowledged that the "intermediary structure" offered by IMOs "can be appealing to both insurance carriers (insurers) and … can provide independent producers (agents) with support that career agents can get from their large insurance carriers." *Id.* at 102-103. For example, IMOs offer on-hand sales support, product recommendations, training for agents, and business leads. *Id.* at 103.

228. In spite of these advantages, the Department declined to define IMOs as "financial institutions" capable of signing BICE contracts. *See* Final BICE, 81 Fed. Reg. at 21,067. In addition, the Department mandated that a financial institution execute the BICE, dropping the proposal to allow individual advisers to execute the contract. *Id.* at 21,008.

229. Taken together, these changes will upend one of the primary distribution channels for fixed indexed annuities. Either annuity issuers must assume the risk that an insurance agent will fail to comply with the BICE, even if that agent contracts with an IMO and not with the issuer to sell the products. Or the issuer must stop using IMOs to distribute annuity products. Both alternatives will be costly and disruptive. Yet nowhere in its cost-benefit analysis or commentary did the Department consider the effect of the BICE on the distribution of fixed indexed annuities and on the use of IMOs in particular. By failing to consider the BICE's effect on the distribution of fixed indexed annuities, the Department arbitrarily ignored an "important aspect of the problem." *State Farm*, 463 U.S. at 43.

230. Because the Department failed to provide adequate notice and an opportunity to comment about whether to exclude the sale of fixed indexed annuities from PTE 84-24, and because that decision was arbitrary and capricious, the Rule must be vacated.

COUNT FIVE
(APA, 5 U.S.C. §§ 553, 706)

THE DEPARTMENT FAILED TO PROVIDE NOTICE AND AN OPPORTUNITY TO COMMENT ON ITS ARBITRARY DECISION TO MOVE THE SALE OF GROUP ANNUITIES FROM PTE 84-24 TO THE BICE

231. Plaintiffs incorporate by reference the allegations of the preceding paragraphs.

232. The 2015 NPRM proposed to exclude variable annuities "purchase[d] by an *Individual Retirement Account*" from PTE 84-24, and move the regulation of such purchases to the BICE. Proposed PTE 84-24, 80 Fed. Reg. at 22,018 (emphasis added). By contrast, as proposed, variable annuities purchased *by an ERISA plan*—that is, group variable annuities—would have remained under PTE 84-24. *Id.*

233. The Department never solicited comments about excluding group annuities from PTE 84-24. Nor did it indicate in the 2015 NPRM that it was considering that possibility.

234. Despite that lack of notice, the Final Rule unexpectedly excludes variable and fixed indexed annuities "purchase[d] *by a Plan* or IRA" from the final PTE 84-24, and thus forces group variable (and fixed indexed) annuities to be sold under the BICE. Final PTE 84–24, 81 Fed. Reg. at 21,174 (emphasis added). The Department's decision to exclude group variable (and fixed indexed) annuities from PTE 84-24 was not a "logical outgrowth" of the 2015 NPRM. *Shell Oil Co.*, 950 F.2d at 747.

235. The effect of this decision is to subject the sale of group annuities, which are used typically by small business owners to fund their employee benefit plans, to the more stringent BICE, rather than the streamlined PTE 84-24. Among other things, this classification will irrationally make it difficult for independent distributors and agents to sell group variable annuities because they themselves are not financial institutions qualifying under the BICE.

236. The Department's failure to provide adequate notice and an opportunity to comment on this decision violates the APA; the decision itself is arbitrary and capricious. *See* 5 U.S.C. § 553(b), (c).

COUNT SIX
(U.S. Const. amend. I; Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202; APA, 5 U.S.C. § 706)

THE RULE VIOLATES THE FIRST AMENDMENT AS APPLIED TO TRUTHFUL, NON-MISLEADING COMMERCIAL SPEECH ABOUT RETIREMENT PRODUCTS BY NON-FIDUCIARY SALESPERSONS

237. Plaintiffs incorporate by reference the allegations of the preceding paragraphs.

238. An actual controversy exists between the Department and Plaintiffs over whether the application of the Rule to truthful, non-misleading speech in connection with sales conversations involving suitable retirement products—speech in which Plaintiffs' members customarily engage—violates the First Amendment of the U.S. Constitution. On behalf of their members—who face an actual and imminent threat to their commercial speech rights from the Rule's implementation—and on behalf of their customers who depend on such speech for access to truthful, non-misleading information about their suitable retirement options, Plaintiffs request a judicial declaration that the Rule is unconstitutional as applied to truthful, non-misleading, non-fiduciary commercial speech about retirement products, and that the Department may not enforce the regulation against Plaintiffs' members engaging in such constitutionally protected speech.

239. Indeed, Plaintiffs' members are already subject to comprehensive regulation that ensures that only truthful and non-misleading information is conveyed to consumers about their retirement options and that consumers are given recommendations that are suitable for them. Those regulations, by and large, reflect regulation that has been traditionally permitted of commercial speech. The Rule, however, goes far beyond that traditional regulation, imposing burdens far greater than needed to achieve any important government objective, by, among other

things, requiring that all speech in the affected retirement savings marketplace must be spoken by a fiduciary or not at all. For that reason, the Rule violates the First Amendment.

A. The Rule Is An Unconstitutional Content-Based Regulation

240. The Rule directly regulates and burdens speech. Plaintiffs' members offer consumers a range of annuity products, which are marketed and sold to consumers, often through affiliated sales forces of broker-dealers and insurance agents or IMOs. The Rule, however, restricts such communications, defining the terms and conditions on which they can be made, and imposing liability as well as differential burdens based on the content of that speech. And the Rule outright bans truthful commercial information unless such information is conveyed in the context of a heavily regulated fiduciary relationship.

241. Where a rule "imposes a restriction on the content of protected speech, it is invalid unless [the government] can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest." *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 799 (2011). Regulations that disfavor particular types of speech or speakers are thus subject to "heightened judicial scrutiny," *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011), and the fact that the regulation is content-based is "all but dispositive" in the ordinary case, *id*. at 571.

242. The Rule restricts speech "'propos[ing] a commercial transaction,'" or speech incident thereto. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). But that does not give the government license to suppress messages with which it disagrees. *See Sorrell*, 564 U.S. at 566. "A 'consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue,'" *id.*—a proposition certainly true where information about retirement options is at issue—and regardless of the status of the speech as political or commercial, "the State cannot engage in

content-based discrimination to advance its own side of a debate," *id.* at 580.

243. Government regulation of speech is content-based either (1) if it draws facial distinctions based on a message, defining the regulated speech by particular subject matter or by the function or purpose of the speech; or (2) if the regulation cannot be justified without reference to the content. *See Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015).

244. The Rule is content-based under each test. The Rule draws numerous facial distinctions. First of all, it regulates a particular subject matter: "investment advice," or investment "recommendations," broadly defined to encompass any "suggestion" to take or not take some action. The Rule then curbs speech with this content by imposing fiduciary status on the speaker, thereby triggering liability under ERISA and the Tax Code for violations of the prohibited-transaction rules. *Cf. Sorrell*, 264 U.S. at 564 ("The statute … disfavors marketing, that is, speech with a particular content."). As the Department's own definition of "recommendation" makes clear, whether a given communication subjects the speaker to fiduciary regulation depends, in substantial part, "on [the communication's] content." Final Rule, 81 Fed. Reg. at 20,997 (codified at 29 C.F.R. § 2510.3-21(b)(1)).

245. The complex of exemptions built into the Rule further discriminates among "recommendations" according to the speaker, the product being discussed, the listener, and the purpose or function of the speech. For example, to be exempt from the blanket liability imposed on those offering investment "recommendations," an insurance agent discussing a *certain fixed* annuity need only comply with PTE 84-24, whereas a broker-dealer or others discussing a *variable* or *fixed indexed* annuity must comply with the more onerous requirements of the BICE. In addition, the exception for "transactions with independent fiduciaries with financial expertise" (also known as the "seller's exclusion") provides specific listener-based relief from fiduciary

status by creating less burdensome conditions on sales conversations to certain types of counterparties. *See* Final Rule, 81 Fed. Reg. at 20,999-21,000 (codified at 29 C.F.R. § 2510.3-21(c)). The Department's decision not to subject robo-advisers to the BICE favors a privileged class of speakers. Indeed, the Department forthrightly acknowledged that it kept robo-advisers out of the BICE to avoid "adversely affect[ing] the incentives currently shaping the market for robo-advice." Final BICE, 81 Fed. Reg. at 21,058.

246. The Rule likewise excludes from the definition of investment advice the provision of specific categories of information as "investment education," so long as they do not contain a recommendation "with respect to specific investment products." *See* Final Rule, 81 Fed. Reg. at 20,998 (codified at 29 C.F.R. § 2510.3-21(b)(2)(iv)). The Rule thus not only disfavors speech that falls within the Department's expansive definition of "investment advice"; it heaps special disfavor on commercial speakers communicating truthful information about suitable variable and fixed indexed annuity products to mid-sized plans and retail investors.

247. Beyond that, the Rule's multiple facial distinctions cannot be justified without reference to the content of the speech itself. In justifying the regulation, the Department treated investment "recommendations"—presumptively truthful speech about suitable products—as a source of pervasive risk to consumers, citing "dangers posed by conflicts of interest and by the asymmetries of information" in the investment market. Final Rule, 81 Fed. Reg. at 20,950. The Department's solution of imposing blanket fiduciary status for such speech and then creating limited conditional relief has no content-neutral justification. Nor did the Department proffer any such justification. The Department simply deemed some types of recommendations, and the truthful, non-misleading information supporting them, worse than others and adjusted its restrictions on speech to retirement savers according to its preferences.

248. Because the Rule restricts Plaintiffs' members from communicating truthful, non-misleading commercial information about insurance products on the basis of the speech's content, the regulation is "presumptively unconstitutional and may be justified only if the [Department] proves that [it is] narrowly tailored to serve compelling state interests." *Reed*, 135 S. Ct. at 2226. To withstand strict scrutiny, the Department "must specifically identify an 'actual problem' in need of solving, and the curtailment of free speech must be actually necessary to the solution." *Brown*, 564 U.S. at 799 (citations omitted). The availability of a less restrictive alternative is fatal under this standard of review. *See United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000). The Department has not identified a problem that justifies a content-based speech restriction on all recommendations, let alone restrictions specifically disfavoring certain products like variable and fixed indexed annuities. And several less restrictive alternatives, including more effective disclosure, could advance any legitimate aims the Department has in preventing marketplace confusion between advisory and sales relationships and helping investors to act in their own best interest.

B. The Rule Fails Intermediate Scrutiny

249. The Rule also fails intermediate scrutiny. The Constitution protects commercial speech because of both consumers' and society's strong interests "in the free flow of commercial information." *Virginia State Board of Pharmacy*, 425 U.S. at 763-764; *accord Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 561 (1980). Given these profound consumer and societal interests in the dissemination of commercial information, the Supreme Court has firmly "rejected the 'highly paternalistic' view that government has complete power to suppress or regulate commercial speech." *Cent. Hudson*, 447 U.S. at 564.

250. As a threshold matter, the Department's approach to the rulemaking rests on premises fundamentally at war with the First Amendment. The Rule assumes that consumers are

better off with no information, as opposed to information they learn during a sales conversation. The Rule is thus based on an unconstitutional preference for silence over the free flow of commercial information. Contrary to the Department's position, "the First Amendment presumes that some accurate information is better than no information at all." *Cent. Hudson*, 447 U.S. at 562. Indeed, the Department's position that making more information available to retirement savers is ineffective—and may even be harmful—flies in the face of well-established First Amendment principles. *See, e.g.*, *Sorrell*, 564 U.S. at 576.

251. A typical "sales conversation" in which Plaintiffs' members engage with prospective buyers may impart valuable information to help consumers make important investment and retirement decisions. The Rule bars Plaintiffs' members from engaging in such truthful commercial speech in a non-fiduciary capacity absent an exemption.

252. The Department intended this impingement on the commercial speech rights of Plaintiffs' members and the First Amendment right of consumers to receive such information. The Department contemplated that the Rule would reach commercial speech in all but the limited circumstance of transactions involving so-called "independent fiduciaries with financial expertise"—that is, counterparties deemed by the Department as capable of distinguishing between a sales conversation and fiduciary advice. *See* Final Rule, 81 Fed. Reg. at 20,982, 20,999. With respect to this limited set of presumptively sophisticated consumers, a seller can avoid being a fiduciary by making disclosures and not receiving a fee for advisory services. In contrast, commercial speech directed to all IRA owners, all plan participants and beneficiaries, and smaller plan fiduciaries automatically exposes a speaker to liability for violating the prohibited-transaction rules governing fiduciaries under ERISA and the Tax Code.

253. Regulations that restrict speakers' exercise of their commercial speech rights are subject to intermediate scrutiny and will be upheld only if the government demonstrates that the regulation of speech directly advances a substantial government interest and is not more extensive than necessary to serve that interest. *Cent. Hudson*, 447 U.S. at 564. The government has a substantial interest in helping retirement savers make wise investment decisions. But the Department cannot show that the Rule either directly advances this interest or is narrowly tailored to serve this interest. To the contrary, as ample evidence in the administrative record demonstrated, the Rule will create a serious deficit in access to investment information that will hit hardest small plans and retail investors, who need this information most.

254. The Rule is certainly not narrowly tailored. The Department must show that the curtailment of First Amendment freedoms is no more extensive than necessary to effectuate the Department's legitimate aims. The Rule is the opposite of "narrow tailoring" because it in fact bans commercial speech in the first instance. In addition, the Department unreasonably rejected less restrictive alternatives. With respect to disclosure, for example, the Department concluded that the dangers of so-called conflicted "investment advice" cannot be cured and may even be exacerbated by more disclosure. Final Rule, 81 Fed. Reg. at 20,950-20,951. That reasoning fails on its own terms, but it also runs contrary to the First Amendment's premise that consumers can and must be allowed to make informed choices.

255. In short, Plaintiffs' members have a protected constitutional right to communicate truthful, non-misleading commercial information about retirement products (including making recommendations about those products), and the Department may not restrict this right without justifying, under intermediate scrutiny, both the direct effectiveness and narrow fit of the regulation chosen. The Rule, however, unconstitutionally overreaches by outlawing protected

commercial speech in the retirement savings market and therefore cannot withstand this intermediate level of review. By assuming that even fully informed consumers cannot act in their own interest, and that government-mandated silence is better than truthful commercial speech imparted in non-fiduciary sales relationships, the Department impermissibly rejected not only ample, narrower alternatives but also fundamental premises of the First Amendment.

256. For this reason—as well as for the independent reason that the Rule is a presumptively unconstitutional content-based restriction—Plaintiffs seek declaratory and related injunctive relief from enforcement of the regulation as applied to the commercial speech regarding annuity products by Plaintiffs' members. Plaintiffs are also entitled to relief under 5 U.S.C. §§ 702, 706(2)(B).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this Court:

a) Declare the Rule arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law within the meaning of 5 U.S.C. § 706(2)(A), contrary to constitutional right under 5 U.S.C. § 706(2)(B), promulgated in excess of statutory jurisdiction, authority, or limitations within the meaning of 5 U.S.C. § 706(2)(C), and promulgated without observance of procedures required by law within the meaning of 5 U.S.C. § 706(2)(D); vacate the Rule; and enjoin the Department and all its officers, employees and agents from implementing, applying, or enforcing the Rule;

b) Declare the Rule unconstitutional as applied to the constitutionally protected commercial speech of Plaintiffs' members, and enjoin Defendants from enforcing the Rule against Plaintiffs' members engaged in constitutionally protected commercial speech;

c) Award Plaintiffs their costs and reasonable attorney's fees as appropriate; and

d) Grant such further and other relief as this Court deems just and proper.

Dated: June 8, 2016

Respectfully submitted,

s/ David W. Ogden

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* Application for admission *pro hac vice* to be submitted

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS

American Council of Life Insurers, National Association of Insurance and Financial Advisors, National Association of Insurance and Financial Advisors-Texas (see attachment for complete list)

(b) County of Residence of First Listed Plaintiff Washington, DC
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*

(see attachment)

DEFENDANTS

United States Department of Labor and Thomas E. Perez, in his official capacity as Secretary, United States Department of Labor

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ❒ 1 U.S. Government Plaintiff
- ❒ 3 Federal Question *(U.S. Government Not a Party)*
- ☒ 2 U.S. Government Defendant
- ❒ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*

(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	❒ 1	❒ 1	Incorporated *or* Principal Place of Business In This State	❒ 4	❒ 4
Citizen of Another State	❒ 2	❒ 2	Incorporated *and* Principal Place of Business In Another State	❒ 5	❒ 5
Citizen or Subject of a Foreign Country	❒ 3	❒ 3	Foreign Nation	❒ 6	❒ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

CONTRACT
- ❒ 110 Insurance
- ❒ 120 Marine
- ❒ 130 Miller Act
- ❒ 140 Negotiable Instrument
- ❒ 150 Recovery of Overpayment & Enforcement of Judgment
- ❒ 151 Medicare Act
- ❒ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ❒ 153 Recovery of Overpayment of Veteran's Benefits
- ❒ 160 Stockholders' Suits
- ❒ 190 Other Contract
- ❒ 195 Contract Product Liability
- ❒ 196 Franchise

REAL PROPERTY
- ❒ 210 Land Condemnation
- ❒ 220 Foreclosure
- ❒ 230 Rent Lease & Ejectment
- ❒ 240 Torts to Land
- ❒ 245 Tort Product Liability
- ❒ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ❒ 310 Airplane
- ❒ 315 Airplane Product Liability
- ❒ 320 Assault, Libel & Slander
- ❒ 330 Federal Employers' Liability
- ❒ 340 Marine
- ❒ 345 Marine Product Liability
- ❒ 350 Motor Vehicle
- ❒ 355 Motor Vehicle Product Liability
- ❒ 360 Other Personal Injury
- ❒ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ❒ 365 Personal Injury - Product Liability
- ❒ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ❒ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ❒ 370 Other Fraud
- ❒ 371 Truth in Lending
- ❒ 380 Other Personal Property Damage
- ❒ 385 Property Damage Product Liability

CIVIL RIGHTS
- ❒ 440 Other Civil Rights
- ❒ 441 Voting
- ❒ 442 Employment
- ❒ 443 Housing/ Accommodations
- ❒ 445 Amer. w/Disabilities - Employment
- ❒ 446 Amer. w/Disabilities - Other
- ❒ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ❒ 463 Alien Detainee
- ❒ 510 Motions to Vacate Sentence
- ❒ 530 General
- ❒ 535 Death Penalty

Other:
- ❒ 540 Mandamus & Other
- ❒ 550 Civil Rights
- ❒ 555 Prison Condition
- ❒ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
- ❒ 625 Drug Related Seizure of Property 21 USC 881
- ❒ 690 Other

LABOR
- ❒ 710 Fair Labor Standards Act
- ❒ 720 Labor/Management Relations
- ❒ 740 Railway Labor Act
- ❒ 751 Family and Medical Leave Act
- ❒ 790 Other Labor Litigation
- ❒ 791 Employee Retirement Income Security Act

IMMIGRATION
- ❒ 462 Naturalization Application
- ❒ 465 Other Immigration Actions

BANKRUPTCY
- ❒ 422 Appeal 28 USC 158
- ❒ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ❒ 820 Copyrights
- ❒ 830 Patent
- ❒ 840 Trademark

SOCIAL SECURITY
- ❒ 861 HIA (1395ff)
- ❒ 862 Black Lung (923)
- ❒ 863 DIWC/DIWW (405(g))
- ❒ 864 SSID Title XVI
- ❒ 865 RSI (405(g))

FEDERAL TAX SUITS
- ❒ 870 Taxes (U.S. Plaintiff or Defendant)
- ❒ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ❒ 375 False Claims Act
- ❒ 376 Qui Tam (31 USC 3729(a))
- ❒ 400 State Reapportionment
- ❒ 410 Antitrust
- ❒ 430 Banks and Banking
- ❒ 450 Commerce
- ❒ 460 Deportation
- ❒ 470 Racketeer Influenced and Corrupt Organizations
- ❒ 480 Consumer Credit
- ❒ 490 Cable/Sat TV
- ❒ 850 Securities/Commodities/ Exchange
- ❒ 890 Other Statutory Actions
- ❒ 891 Agricultural Acts
- ❒ 893 Environmental Matters
- ❒ 895 Freedom of Information Act
- ❒ 896 Arbitration
- ☒ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ❒ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

- ☒ 1 Original Proceeding
- ❒ 2 Removed from State Court
- ❒ 3 Remanded from Appellate Court
- ❒ 4 Reinstated or Reopened
- ❒ 5 Transferred from Another District *(specify)*
- ❒ 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing ***(Do not cite jurisdictional statutes unless diversity)***:
U.S. Const. amend. I; 5 U.S.C. § 702; 28 U.S.C. § 2201

Brief description of cause:
Challenge to April 2016 Conflict of Interest Rule and related Prohibited Transaction Exemptions

VII. REQUESTED IN COMPLAINT:

❒ CHECK IF THIS IS A **CLASS ACTION** UNDER RULE 23, F.R.Cv.P.

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ❒ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE (see attachment) DOCKET NUMBER

DATE 06/08/2016

SIGNATURE OF ATTORNEY OF RECORD s/ David W. Ogden

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

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INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I.(a) **Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) **County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) **Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. **Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked**.** (See Section III below**; NOTE: federal question actions take precedence over diversity cases.**)

III. **Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. **Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

V. **Origin.** Place an "X" in one of the six boxes.
Original Proceedings. (1) Cases which originate in the United States district courts.
Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

VI. **Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service

VII. **Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. **Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If a related case exists, whether pending or closed, insert the docket numbers and the corresponding judge names for such cases. A case is realted to this filing if the case: 1) involves some or all of the same parties and is based on the same or a similar claim; 2) involves the same property, transaction, or event; 3) involves substantially similar issues of law and fact; and/or 4) involves the same estate in a bankruptcy appeal.

Date and Attorney Signature. Date and sign the civil cover sheet.

ATTACHMENT

I. (a) Plaintiffs

American Council of Life Insurers
National Association of Insurance and Financial Advisors
National Association of Insurance and Financial Advisors-Texas
National Association of Insurance and Financial Advisors-Amarillo
National Association of Insurance and Financial Advisors-Dallas
National Association of Insurance and Financial Advisors-Fort Worth
National Association of Insurance and Financial Advisors-Great Southwest
National Association of Insurance and Financial Advisors-Wichita Falls

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VII. Related Cases

Chief Judge Barbara M.G. Lynn (N.D. Tex.), No. 16-cv-1476
Judge Randolph D. Moss (D.D.C.), No. 16-cv-1035
Unassigned (D. Kan.), No. 16-cv-4083