IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, FINANCIAL SERVICES INSTITUTE, INC., FINANCIAL SERVICES ROUNDTABLE, GREATER IRVING-LAS COLINAS CHAMBER OF COMMERCE, HUMBLE AREA CHAMBER OF COMMERCE DBA LAKE HOUSTON AREA CHAMBER OF COMMERCE, INSURED RETIREMENT INSTITUTE, LUBBOCK CHAMBER OF COMMERCE, SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, and TEXAS ASSOCIATION OF BUSINESS, Plaintiffs, v. THOMAS E. PEREZ, SECRETARY OF LABOR, and UNITED STATES DEPARTMENT OF LABOR, Defendants.	Civil Action No. 3:16-cv-1476-M (Consolidated with Nos. 3:16-cv-1530-M and 3:16-cv-1537-M)

AMERICAN COUNCIL OF LIFE INSURERS', NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS', AND NORTH TEXAS INSURANCE AND FINANCIAL ADVISORS' ASSOCIATIONS' MOTION FOR AN INJUNCTION PENDING APPEAL

Pursuant to Federal Rule of Civil Procedure 62(c), the 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 respectfully request that this Court enter an injunction staying the April 10, 2017 "applicability date" of the Department of Labor's Fiduciary Rule and enjoining enforcement of that Rule against Plaintiffs' members pending appellate review of this Court's February 8, 2017 Memorandum Opinion and Order (Dkt. 137) and the Court's February 9, 2017 Judgment (Dkt. 139). The Court should grant the requested relief for the reasons set forth in the accompanying memorandum in support of this motion as well as those set forth in the Chamber Plaintiffs' Motion (Dkt. 144).

Dated: March 11, 2017

Respectfully submitted,

s/ David W. Ogden

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CERTIFICATE OF CONFERENCE

On March 7-9, 2017, Jason Mendro, counsel for the Chamber Plaintiffs, conferred by telephone and email with Galen Thorp, counsel for Defendants, who advised by email on March 9, 2017 that Defendants intend to oppose, pending review of the motion. Kelly Dunbar, counsel for ACLI/NAIFA Plaintiffs, confirmed by email on March 9, 2017 that the same position applies to this motion. Mr. Dunbar conferred by email on March 9, 2017 with Eugene Scalia, counsel for the Chamber Plaintiffs, and Joseph Guerra, counsel for the IALC Plaintiffs, who confirmed on March 9, 2017 that both the Chamber Plaintiffs and the IALC Plaintiffs concur in the relief requested.

s/ David W. Ogden
David W. Ogden

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of March, 2017, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System, which will send a notice of filing to all counsel of record.

s/ David W. Ogden
David W. Ogden

IN THE UNITED STATES DISTRICT COURT
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CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, FINANCIAL SERVICES INSTITUTE, INC., FINANCIAL SERVICES ROUNDTABLE, GREATER IRVING-LAS COLINAS CHAMBER OF COMMERCE, HUMBLE AREA CHAMBER OF COMMERCE DBA LAKE HOUSTON AREA CHAMBER OF COMMERCE, INSURED RETIREMENT INSTITUTE, LUBBOCK CHAMBER OF COMMERCE, SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, and TEXAS ASSOCIATION OF BUSINESS, Plaintiffs, v. THOMAS E. PEREZ, SECRETARY OF LABOR, and UNITED STATES DEPARTMENT OF LABOR, Defendants.	Civil Action No. 3:16-cv-1476-M (Consolidated with Nos. 3:16-cv-1530-M and 3:16-cv-1537-M)

MEMORANDUM IN SUPPORT OF AMERICAN COUNCIL OF LIFE INSURERS', NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS', AND NORTH TEXAS INSURANCE AND FINANCIAL ADVISORS' ASSOCIATIONS' MOTION FOR AN INJUNCTION PENDING APPEAL

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INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 62(c), the American Council of Life Insurers ("ACLI"), National Association of Insurance and Financial Advisors ("NAIFA"), NAIFA-Texas, NAIFA-Amarillo, NAIFA-Dallas, NAIFA-Fort Worth, NAIFA-Great Southwest, and NAIFA-Wichita Falls (collectively, "Plaintiffs") respectfully seek an injunction pending Plaintiffs' appeal to the Fifth Circuit. Plaintiffs join in and incorporate by reference the injunction request filed by the Chamber of Commerce Plaintiffs ("Chamber Plaintiffs"). Plaintiffs move separately to offer additional reasons why an injunction pending appeal is necessary.

The factors governing injunctions pending appeal compel the issuance of such relief here. As set forth in the Chamber Plaintiffs' motion and further explained below, Plaintiffs' members will suffer substantial and irreparable harms—economic and operational injuries and loss of constitutional rights—if the Rule is not enjoined pending appeal. The Department of Labor ("DOL") will not be harmed by a modest stay of the Rule to preserve the status quo pending appeal—a proposition made clear by the President's memorandum to DOL and the pending rulemaking—and the public interest strongly favors a short delay to permit appellate review. With respect, Plaintiffs are also likely to prevail on their appeal of this Court's merits decision, including their claim that the Rule violates the First Amendment by unduly burdening Plaintiffs' members' commercial speech and their claims that DOL breached its duty of reasoned decision-making in adopting a regulation that interferes with consumer access to annuity products without addressing the substantial consumer benefits of those products, and without rationally considering whether existing regulation has already addressed the concerns animating the Rule.

This case also presents special circumstances that warrant an injunction pending appeal. As this Court is aware, shortly before the Court issued its decision, President Trump directed DOL to consider rescinding or revising the Rule and to examine, among other things, whether

the Rule "has harmed or is likely to harm investors due to a reduction of Americans' access to certain retirement savings offerings." Presidential Memorandum on Fiduciary Duty Rule § 1 (Feb. 3, 2017) (Dkt. 136-2). With the Rule's "applicability date" of April 10 now rapidly approaching and in the wake of that presidential directive, DOL issued a notice of proposed rulemaking to extend the applicability date for an additional 60 days so that "if the examination" ordered by the President "prompts [DOL] to propose rescinding or revising the [R]ule," regulated parties could avoid "fac[ing] two major changes in the regulatory environment rather than one." 82 Fed. Reg. 12,319, 12,320 (Mar. 2, 2017). That notice remains pending.[1]

In these circumstances, an injunction pending appeal is vital. The comment period on the 60-day extension does not close until March 17, and DOL may not be in a position before the applicability date or sufficiently in advance to avoid imposing additional compliance costs that can never be recovered. Nor is there any guarantee that DOL will grant the extension. Given the April 10 applicability date and the significant scope of the changes required to comply with the Rule, Plaintiffs' members will be irreparably harmed without clarity now. Moreover, resolution of this appeal will almost certainly extend beyond a 60-day administrative extension, and while DOL could of course entertain further extensions, the uncertainty such a process will entail would impose considerable costs and constitutional injuries pending Fifth Circuit review.

For these reasons as well as those set forth by the Chamber Plaintiffs, Plaintiffs respectfully ask the Court to enjoin the Rule pending Fifth Circuit review.[2]

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[1] As explained by the Chamber Plaintiffs, *see* Chamber Mem. 3 n.6 (Dkt. 144-2), DOL's issuance on March 10, 2017 of the "Temporary Enforcement Policy on Fiduciary Duty Rule" confirms the uncertainty, confusion, and need for injunctive relief, but without providing adequate relief for Plaintiffs pending appeal. *See* DOL, *Temporary Enforcement Policy on Fiduciary Duty Rule*, Bulletin No. 2017-01 (Mar. 10, 2017).

[2] Plaintiffs join in the Chamber Plaintiffs' request that the Court rule on this motion no later than March 20, 2017 to permit sufficient time for Plaintiffs to seek an injunction pending appeal from the Fifth Circuit in the event this Court denies the motion. In addition, because Plaintiffs join in and incorporate the Chamber Plaintiffs' motion, Plaintiffs have not included a separate proposed order.

ARGUMENT

An injunction pending appeal is required because Plaintiffs (1) are likely to prevail on appeal and (2) will be irreparably harmed without it, and its issuance (3) will not substantially harm DOL and (4) advances the public interest. *Barber v. Bryant*, 833 F.3d 510, 511 (5th Cir. 2016). Here, where Plaintiffs' speech rights are at stake, all four factors "are closely tied to" likely success on the merits. *Florida Businessmen for Free Enter. v. City of Hollywood*, 648 F.2d 956, 958 (5th Cir. 1981). Moreover, as the Chamber Plaintiffs explain, because the requested injunction "seeks to maintain the status quo," *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981), this test is not "mechanical," and an injunction should issue where, as here, "the balance of equities weighs heavily in favor of" the injunction and a party "present[s] a substantial case on the merits when a serious legal question is involved." *Campaign for S. Equal. v. Bryant*, 773 F.3d 55, 57 (5th Cir. 2014) (internal quotation marks omitted).

I. THE BALANCE OF EQUITIES OVERWHELMINGLY FAVORS AN INJUNCTION

A. Plaintiffs Will Be Irreparably Injured Absent An Injunction

For reasons set forth fully by the Chamber Plaintiffs, Chamber Mem. 5-12 (Dkt. 144-2), an injunction pending appeal is necessary to avert serious and irreparable harm to Plaintiffs' members—life insurance companies and life insurance agents who market and sell annuity products to retirement savers. Plaintiffs submit two additional points.

First, Plaintiffs' members will suffer certain and irreparable harm because application of the Rule will substantially burden their protected commercial speech, as explained in Part II, below. Upon the applicability date, Plaintiffs' members will be deemed "fiduciaries" subject to new and extensive regulation as a result of ordinary sales speech. And insurance agents and brokers selling fixed indexed or variable annuities, particularly those selling an insurer's own

"proprietary" products to retail investors, will be subject to even more extensive burdens under this regulatory regime, which discriminates based on content, speaker, and listener.

Those constitutional injuries are irreparable as a matter of law. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The Fifth Circuit has "repeatedly" applied that principle in finding that First Amendment burdens "establish[] irreparable harm." *Texans for Free Enter. v. Texas Ethics Comm'n*, 732 F.3d 535, 539 & n.7 (5th Cir. 2013) (collecting authorities). "Once First Amendment rights have been chilled, there is no effective remedy, and it is well established in the Fifth Circuit that infringement of First Amendment rights, standing alone, constitutes irreparable harm." *Associated Builders & Contractors of Se. Texas v. Rung*, 2016 WL 8188655, at *14 (E.D. Tex. Oct. 24, 2016); *see also Nat'l Fed'n of Indep. Bus. v. Perez*, 2016 WL 3766121, at *39 (N.D. Tex. June 27, 2016) (applying principle to DOL rule).

Second, and independently, Plaintiffs' members will face ongoing, substantial, and unrecoverable compliance costs absent an injunction pending appeal, *see, e.g.*, Chamber Mem. 5-12—injuries that, as the Fifth Circuit has recently made clear, are irreparable and justify the entry of injunctive relief. *See Texas v. EPA*, 829 F.3d 405, 433-434 (5th Cir. 2016). Although DOL greatly underestimates those costs, DOL itself found that application of the Rule would result in *annual* compliance costs for insurance companies ranging from approximately $87 million to more than half a billion dollars. AR554. Overall, the Rule will inflict billions of dollars in compliance costs on regulated industries, as the Chamber Plaintiffs explain. *See* Chamber Mem. 6. Those economic injuries are especially significant because, if the Rule is invalidated, Plaintiffs' members may face two seismic operational changes: overhauling their

businesses to comply with the applicability date and then (where possible) changing course again once the Rule is vacated.

Under the law of the Fifth Circuit, such economic injuries are, by definition, irreparable because "[n]o mechanism … exists for [Plaintiffs] to recover the compliance costs they will incur if the [challenged] Rule is invalidated on the merits." *Texas v. EPA*, 829 F.3d at 434; *see American Health Care Ass'n v. Burwell*, 2016 WL 6585295, at *15 (N.D. Miss. Nov. 7, 2016) (considering compliance costs as part of irreparable-injury analysis); *Nevada v. DOL*, 2016 WL 6879615, at *7 (E.D. Tex. Nov. 22, 2016) (same). Indeed, "under Fifth Circuit law" substantial "compliance costs"—such as those imposed by the Rule on Plaintiffs' members—that "cannot be recovered later from the government if the Rule is invalidated" "are irreparable." *Dialysis Patient Citizens v. Burwell*, 2017 WL 365271, at *6 (E.D. Tex. Jan. 25, 2017).

B. The Balance Of Equities Favors Preserving The Status Quo

An injunction is also warranted because the injury to Plaintiffs' members outweighs any harm to DOL. As described above and by the Chamber Plaintiffs, the injuries to members of the life insurance industry from application of the Rule would be substantial and irreparable. The Rule "sharply alters the pre-existing status quo" that has governed for decades, *American Health Care*, 2016 WL 6585295, at *18, and DOL would suffer no comparable harm from enjoining enforcement of the Rule for the short time necessary for the Fifth Circuit to resolve Plaintiffs' claims. Indeed, given that the President has ordered "an updated economic and legal analysis concerning the likely impact" of the Rule, 82 Fed. Reg. at 12,319, an injunction pending appeal may well benefit DOL, permitting DOL's reevaluation to occur in a full and orderly fashion. *See* Chamber Mem. 12-13.

C. The Public Interest Favors An Injunction

An injunction pending appeal would also advance the public interest, as explained by the Chamber Plaintiffs. *See* Chamber Mem. 13-15. It is not in the public interest for the life insurance industry to be compelled to make substantial operational and business changes to comply with the Rule's applicability date on April 10—changes that will inevitably engender consumer confusion and large up-front transitional costs—only to have the Rule later vacated by the Fifth Circuit. Upending the status quo now creates a grave and significant risk that insurers, agents, and brokers, as well as "retirement investors and other stakeholders," will all "face two major changes in the regulatory environment rather than one," 82 Fed. Reg. at 12,320, leading to additional operational difficulties, costs, and consumer confusion. Staying the Rule to permit appellate review sensibly avoids those results.

Furthermore, there is a strong "public interest" in ensuring that "government agencies be enjoined from acting in a manner contrary to law." *Associated Builders & Contractors of Se. Tex.*, 2016 WL 8188655, at *15. For that reason, courts in this Circuit regularly grant relief to preserve the status quo pending judicial review of agency rules. *See, e.g., Nevada*, 2016 WL 6879615, at *8; *American Health Care Ass'n*, 2016 WL 6585295, at *18; *Texas v. United States*, 2016 WL 4426495, at *17 (N.D. Tex. Aug. 21, 2016). Given the serious questions regarding the Rule's legality that will be raised on appeal, this Court should do the same here.

II. PLAINTIFFS ARE LIKELY TO PREVAIL ON APPEAL AND, AT A MINIMUM, THE APPEAL WILL PRESENT A SUBSTANTIAL CASE ON A SERIOUS LEGAL ISSUE

An injunction pending appeal is also warranted because Plaintiffs are likely to prevail on their substantive challenges to the Rule. We recognize, of course, that this Court has ruled otherwise—a circumstance that is always present when an appellant seeks an injunction pending appeal from the district court. We believe, however, that Plaintiffs are likely to establish that the

Rule (1) violates the First Amendment by unreasonably burdening the commercial speech rights of Plaintiffs' members and (2) is unlawful under the Administrative Procedure Act (APA) because DOL unreasonably failed to consider important aspects of the issues before it.[3]

A. The Rule Violates The First Amendment

1. The First Amendment protects commercial speech and prohibits speech regulations that discriminate based on content. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011). The unconstitutionality of the Rule follows straightforwardly from the Supreme Court's application of those principles in *Sorrell*. As with the restrictions struck down in *Sorrell*, the Rule here is targeted at and triggered by commercial speech—namely, "recommendations" by an insurance agent or broker to purchase a product. 29 C.F.R. § 2510.3-21(b)(1). Indeed, the Rule prohibits retirement product "recommendations"—for example, a statement that "you would really like our annuities"—unless those recommendations are conveyed in a fiduciary relationship. And, like the restrictions invalidated in *Sorrell*, these speech restrictions are premised on DOL's fear of "dangers posed by conflicts of interest and asymmetries of information," AR5—that is, the fear that consumers will be persuaded by truthful commercial information about retirement products. 564 U.S. at 576.

Likewise, as in *Sorrell*, the Rule discriminates among subject matter, speaker, and listener. *Sorrell*, 564 U.S. at 563-564. For example, insurance agents "recommending" fixed-rate annuities need only comply with the streamlined PTE 84-24 to receive sales commissions, while an agent or broker discussing variable or fixed indexed annuities must comply with the

[3] As explained in the Chamber Plaintiffs' motion and above, under Fifth Circuit precedent, where the balance of equities weighs heavily in favor of an injunction, a plaintiff need establish only that there is "a substantial case on the merits" and a "serious legal question." Those standards are undoubtedly satisfied here. But Plaintiffs also demonstrate why they are likely to prevail on their claims on appeal.

more onerous BICE. And the BICE's already stringent conditions are even more stringent when the topics being discussed are an insurer's own "proprietary" products. AR136-137.

For those reasons, a comparison of *Sorrell* and the Rule makes clear that the Rule is subject to and necessarily fails intermediate scrutiny, as well as any "stricter" standard. 564 U.S. at 571. The Supreme Court has repeatedly rejected arguments that there is a legitimate interest in depriving consumers of accurate commercial information "for what the government perceives to be their own good." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996); *see Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561-562 (1980); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

Moreover, several less restrictive alternatives were available. For example, to dispel any confusion about when someone is acting as a salesperson rather than a fiduciary adviser, DOL could have mandated clear disclosures. *E.g.*, *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985). Likewise, Congress could have regulated any concerns with particular products or compensation practices directly, or DOL could have undertaken to educate consumers itself. *E.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014). DOL rejected these more tailored approaches that avoid burdening any speech, instead opting to regulate commercial speech directly, based on a view the Supreme Court has long foreclosed—that truthful commercial speech is harmful to consumers.

2. DOL's core arguments for rejecting the First Amendment claim are unlikely to withstand scrutiny on appeal.

First, DOL's claim that the Rule is subject to little or no First Amendment review on the ground that it merely regulates "professional conduct" rests on multiple legal errors. Most

importantly, the Rule does far more than regulate *existing* fiduciary relationships. By DOL's own admission, the Rule "artificially *create*[s]" such relationships, DOL MSJ Br. 42 (Dkt. 49), as a result of sales conversations "suggesti[ng]" the purchase of a product, 29 C.F.R. § 2510.3-21(b)(1). Under Fifth Circuit precedent, the professional speech doctrine is "properly limited" to "the actual practice of the profession" in existing "fiduciary relationship[s]." *Serafine v. Branaman*, 810 F.3d 354, 360 (5th Cir. 2016). By incorrectly characterizing the Rule as mere regulation of existing fiduciary relationships, DOL misses the central thrust of Plaintiffs' objection—namely, that the First Amendment bars the imposition of fiduciary status and accompanying regulatory burdens on *non*-fiduciary speech.

Second, DOL's claim that any commercial speech affected by the Rule is "misleading" is also incorrect. The Rule applies to *any* "suggestion" to buy an annuity or other retirement product, 29 C.F.R. § 2510.3-21(b)(1)—regardless of whether the information provided is true and regardless of whether the consumer understands the agent or broker to be selling a product, not offering disinterested advice. Contrary to DOL's position, the fact that a seller has a financial interest in a transaction does not make its speech inherently deceptive, and thus subject to regulation or a ban. If that were the law, virtually all sales recommendations would be denied the protection of the First Amendment. The Supreme Court's commercial speech jurisprudence, however, rests on the opposite proposition—that "a great deal of vital expression" "results from an economic motive." *Sorrell*, 564 U.S. at 567; *see Central Hudson*, 447 U.S. at 562; *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 167 & n.63 (5th Cir. 2007). An economic motive does not render sales speech misleading.

Third, DOL's contention that Plaintiffs waived their objection is unavailing. Plaintiffs brought their First Amendment claim directly under the Declaratory Judgment Act (in addition to

the APA), seeking to enjoin *prospective application* of the Rule to members' constitutionally protected sales speech. Compl. ¶¶ 1, 238, 256 (Dkt. 1, Case No. 3:16-cv-1530); *id.*, Prayer for Relief ¶ b. Typical administrative law doctrines of exhaustion and waiver do not limit the availability of "simple pre-enforcement attack[s] on [speech] regulation[s]." *Weaver v. U.S. Info. Agency*, 87 F.3d 1429, 1434 (D.C. Cir. 1996); *see, e.g.*, *Minnesota Citizens Concerned for Life v. FEC*, 113 F.3d 129 (8th Cir. 1997) (pre-enforcement challenge to FEC regulations on First Amendment grounds brought under the Declaratory Judgment Act). Any other rule would allow the government to violate citizens' First Amendment rights in perpetuity provided no one objected at the time a rule was proposed. That is not the law.

B. The Rule Is Arbitrary And Capricious

Plaintiffs are also likely to prevail on their claim that DOL violated the APA for at least two reasons. ***First***, DOL wholly failed to consider important disadvantages of the Rule—specifically, the harm to consumers from decreased access to variable and fixed indexed annuities. "[R]easonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions." *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2016). But here DOL conceded that it did not assess the disadvantages of decreased access to variable and fixed indexed annuities as a "separate consideration." DOL MSJ Br. 68. That omission renders the Rule arbitrary and capricious.

The administrative record demonstrated the enormous benefits that variable and fixed indexed annuities provide for many retirement consumers. AR39744, 39773, 40340-40344, 41877, 42417-42418. Commenters stressed, for example, that annuities are the sole source of guaranteed lifetime income during retirement, an important benefit in a retirement marketplace in which consumers are living longer but without pensions. *See, e.g.*, AR39731, 40097.

The record also demonstrated that the Rule would seriously interfere with consumers' access to certain annuities, skewing the marketplace. In particular, insurers have long paid a sales commission to compensate agents and brokers for the significant effort involved in learning about, marketing, and selling annuities. AR39731. But under the Rule, for insurers to continue to pay commissions, variable and fixed indexed annuities would need to be sold under the BICE, while fixed-rate annuities can be sold under the less onerous PTE 84-24. By exposing those who sell variable and fixed indexed annuities to the BICE—with the risk of "class litigation, and liability and associated reputational risk," AR2—the Rule creates substantial incentives to recommend fixed-rate annuities over variable and fixed indexed annuities. As a result, the Rule will decrease consumer access to variable and fixed indexed annuities—even when those annuities would have important *benefits* for retirement savers.

The Court addressed this concern in a footnote, stating that it was "unpersuaded that the new rules reduce consumer access to FIAs or variable annuities." Op. 64 n.200 (Dkt. 137). But substantial record evidence shows *why* consumer access to variable and fixed indexed annuities would be undermined by the Rule. And DOL itself anticipated (and may have intended) that effect. For example, DOL explained that placing fixed-rated annuities in "PTE 84-24 will promote access to the[m]." AR232. It also stated that moving fixed indexed annuities to the BICE was necessary to "avoid[] creating a regulatory incentive to preferentially recommend indexed annuities" over products in the BICE. AR74, 238.

DOL thus plainly understood that placing products in the BICE rather than PTE 84-24 would decrease access to those products. Reasoned decision-making required DOL to account openly for the benefits of the products it sought to drive from the market. It did not. Its failure

to consider this "important aspect of the problem," *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983), renders the Rule unlawful.

Second, DOL unreasonably disregarded the extensive, and recently strengthened, regulatory framework that already protects consumers with respect to annuities. In particular, DOL failed reasonably to examine whether changes in federal and state regulation of annuities since 2009—the date of the latest mutual fund study DOL identified in the record as demonstrating harm to investors—had already addressed the concerns that animated the Rule. Indeed, the data and virtually all the anecdotal evidence relied on by DOL preceded important changes in extant regulatory programs, programs intended by other regulators (such as state insurance commissions and FINRA) to protect consumers from the same harms posited by DOL. DOL's failure to assess meaningfully the extant regulatory programs renders the Rule arbitrary and capricious as well. *See, e.g.*, *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 179 (D.C. Cir. 2010).

CONCLUSION

Plaintiffs respectfully request that this Court stay the Rule's applicability date and enjoin enforcement of the Rule pending appeal.

Dated: March 11, 2017

Respectfully submitted,

s/ David W. Ogden

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