IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MARKET SYNERGY GROUP, INC, Plaintiff, v. UNITED STATES DEPARTMENT OF LABOR, *et al.*, Defendants.	))))))))))))	Civil Action No. 5:16-cv-04083

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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Declaration of Karen Lloyd (July 22, 2016) (attached as Exhibit A)

Ex. 1 – Gradiant Insurance Brokerage (May 27, 2016)

Ex. 2 – C2P Advisory Group (July 1, 2016)

Ex. 3 – InForce Solutions (July 7, 2016)

Ex. 4 – Legacy Marketing Group (July 7, 2016)

Ex. 5 – Futurity First Financial Corporation (July 13, 2016)

Ex. 6 – Financial Independence Group (July 15, 2016)

91 Pens. & Ben. Rep. (BNA) (June 21, 1976) (attached as Exhibit B)

Final Rulemaking Documents

Final Rule, 81 Fed. Reg. 20948 (Apr. 8, 2016) [Link]

Best Interest Contract Exemption, 81 Fed. Reg. 21002 (Apr. 8, 2016) [Link]

Amendment to PTE 84-24, 81 Fed. Reg. 21147 (Apr. 8, 2016) [Link]

Regulatory Impact Analysis for Final Rule and Exemptions (Apr. 8, 2016) [Link]

Proposed Rulemaking Documents

Notice of Proposed Rulemaking, 80 Fed. Reg. 21928 (Apr. 20, 2015) [Link]

Proposed Best Interest Contract Exemption, 80 Fed. Reg. 21960 (Apr. 20, 2015) [Link]

Proposed Amendment to PTE 84-24, 80 Fed. Reg. 22010 (Apr. 20, 2015) [Link]

Relevant Public Comments & Testimony

Cmt. No. 336, Voya Financial, Inc. (July 15, 2015) [Link]

Cmt. No. 429, U.S. Chamber of Commerce (July 17, 2015) [Link]

[1] Per the Court's order, the Department is compiling the administrative record. *See* Minute Order, June 7, 2016. The parties will file a joint appendix of the portions of the administrative record relevant to Plaintiff's motion shortly after briefing is completed. In the interim, record material can be found at https://www.dol.gov/ebsa/regs/conflictsofinterest-proposed.html. This index provides hyperlinks to the record material cited in this brief, to the extent possible.

Cmt. No. 506, Securities Industry and Financial Markets Association (July 20, 2015) [Link]

Cmt. No. 577, University of Miami Investor Rights Clinic (July 20, 2015) [Link]

Cmt. No. 596, Ron A. Rhoades (July 20, 2015) [Link]

Cmt. No. 626, Insured Retirement Institute (July 21, 2015) [Link]

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Cmt. No. 774, Indexed Annuity Leadership Council (July 20, 2015) [Link]

Cmt. No. 3017, Ron A. Rhoades (Sept. 23, 2015) [Link]

Cmt. No. 3034, The Committee for the Fiduciary Standard (Sept. 23, 2015) [Link]

Cmt. No. 3083, Jackson National Life Insurance Company (Sept. 24, 2015) [Link]

Cmt. No. 3090, Fund Democracy (Sept. 24, 2015) [Link]

Cmt. No. 3092, Prudential Financial, Inc. (Sept. 24, 2015) [Link]

Cmt. No. 3098, Northwestern Mutual Life Insurance Company (Sept. 24, 2015) [Link]

Cmt. No. 3111, National Association for Fixed Annuities (Sept. 24, 2015) [Link]

Cmt. No. 3124, Indexed Annuity Leadership Council (Sept. 24, 2015) [Link]

Cmt. No. 3131, Indexed Annuity Leadership Council (Sept. 22, 2015) [Link]

Exemption Cmt. No. 333 (Exemption Comment), Advisors Excel (Sept. 22, 2015) [Link]

Testimony of Bradford Campbell, U.S. Chamber of Commerce (Aug. 11, 2016) [Link]

Testimony of Jim Poolman, Indexed Annuity Leadership Council (Aug. 12, 2016) [Link]

Other Record Material

NAIC, Suitability in Annuity Transactions Model Regulation, LH-275-1 (2015) [Link]

SEC Fast Answers, Mutual Fund Fees and Expenses [Link]

SEC Office of Investor Education and Advocacy Investor Bulletin: Indexed Annuities [Link]

Wink's Sales & Market Report, 4th Quarter, 2014

News Articles

Robert Bloink, and William H. Byrnes, Final DOL Rule Could Place Indexed Annuities Under Variable Umbrella, thinkadvisor.com, 2015 WLNR 34152920 (Nov. 17, 2015), [Link]

Linda Koco, DOL May Classify Indexed Annuities Same As Variable in New Rule, insurancenewsnet.com (Oct. 30, 2015) [Link]

Kerry Pechter, Surprise: DOL Rule Targets Indexed Annuities, retirementincomejournal.com (Apr. 7, 2016) [Link]

Linda Koco, 'Super-IMO' Has Deep Pedigree, insurancenewsnet.com (Apr. 25, 2014) [Link]

Industry Websites

Advisors Excel, DOL Fiduciary Rule FAQs (July 2016) [Link]

EquiTrust Life Ins. Co., EquiTrust Annuity All Product Summary (July 21, 2016) [Link]

Market Synergy Group Network, http://www.marketsynergy.net/network/

ACRONYMNS USED

APA	Administrative Procedure Act
BIC	Best Interest Contract
DOL	Department of Labor
ERISA	Employment Retirement Income Security Act
FIA	Fixed Indexed Annuity
FIG	Financial Independence Group
FINRA	Financial Industry Regulatory Authority
IALC	Indexed Annuity Leadership Council
IMO	Independent Marketing Organizations
IRA	Individual Retirement Arrangements
IRS	Internal Revenue Service
NAIC	National Association of Insurance Commissioners
PTE	Prohibited Transaction Exemption
RFA	Regulatory Flexibility Act
RIA	Regulatory Impact Analysis for Final Rule and Exemptions
SEC	Securities and Exchange Commission
SIFMA	Securities Industry and Financial Markets Association

INTRODUCTION

Under the Employee Retirement Income Security Act ("ERISA"), Congress prohibited fiduciaries to tax-favored retirement accounts from engaging in various transactions that involve inherent conflicts of interest. A rule recently promulgated by the Department of Labor ("DOL") makes clear that investment advisers, including insurance agents, are acting as fiduciaries—as that term is used in ERISA—in most circumstances in which they receive compensation in connection with recommendations regarding the use of money from these accounts. Plaintiff has not challenged this rule. Rather, despite broad statutory authority granted to DOL, and notwithstanding the agency's careful, in-depth analysis of alternative approaches, Plaintiff takes issue with the specific terms of two administrative exemptions DOL granted in connection with the rule to account for circumstances where the conflicts of interest could be sufficiently mitigated. Plaintiff's claims are groundless and its motion for preliminary relief is without merit.

Pursuant to its authority to grant prohibited transaction exemptions, DOL determined that fiduciaries being compensated for fixed indexed annuity ("FIA") transactions should be granted an exemption if they adhere to the conditions in the Best Interest Contract ("BIC") Exemption, which is also available for securities transactions and other investments. This exemption is more protective of retirement investors than the less stringent conditions of Prohibited Transaction Exemption ("PTE") 84-24, which was first granted years ago and now applies only to declared rate annuities. DOL fashioned these exemptions and drew the lines in this way after completing an extensive notice-and-comment rulemaking process, spanning nearly six years, taking into account thousands of comments and testimony from stakeholders, and conducting a thorough regulatory impact analysis to assess the costs and benefits of its rulemaking. And DOL explained the reasonable bases for its determination, including that the risks, complexity, and conflicts of interest in FIA transactions make adherence to the conditions of the BIC Exemption

better suited to protect retirement investors.

Market Synergy Group, Inc. ("Market Synergy") nevertheless challenges DOL's determination, arguing first that DOL did not give the public sufficient notice that it might require those who engage in conflicted FIA transactions to rely on the BIC Exemption and that those transactions should instead be permitted to proceed under PTE 84-24. In fact, DOL provided sufficient notice by expressly requesting comment on whether its proposed treatment of annuities in the exemptions "draw[s] the correct lines" and "strikes the appropriate balance." Other stakeholders recognized this by recommending for and against requiring FIA transactions to adhere to the conditions of the BIC Exemption, rather than PTE 84-24.

Market Synergy also argues that DOL's treatment of FIAs is unsupported by evidence and failed to consider the impact of its actions on Plaintiff and other participants in the "independent agent distribution channel." But DOL relied on comments, information, and data demonstrating the risks, complexity, and conflicts of FIAs and concluded that retirement investors would be sufficiently protected from conflicted FIA transactions if such transactions proceeded under the conditions of the BIC Exemption, rather than PTE 84-24. And DOL evaluated the effect of its rulemaking on the independent distribution channel and recognized that there remain several potential paths available for FIA transactions to proceed in this channel under the BIC Exemption. Because DOL acted in accordance with express congressional authority, provided sufficient notice of its action, conducted an extensive analysis of the relevant issues, and provided a reasoned explanation for its ultimate determination, DOL's determination is entitled to deference, and Plaintiff's claims cannot succeed.

For this failure to establish likelihood of success on the merits, the Court should deny Plaintiff's motion for a preliminary injunction. Moreover, because Plaintiff seeks to delay

applicability dates that do not go into effect until April 2017 and January 2018 to avoid alleged economic harm, Plaintiff cannot establish irreparable harm. Likewise, because Plaintiff seeks to enjoin implementation of an amendment to PTE 84-24 that DOL has determined would benefit retirement investors across the country by requiring investment advisers to act in the best interest of those investors, Plaintiff's requested relief is not in the public interest. For all of these reasons, the Court should deny Plaintiff's motion for a preliminary injunction.

STATEMENT OF FACTS

I. CONGRESSIONAL EFFORTS TO PROTECT EMPLOYEES' RETIREMENT SAVINGS

Congress enacted ERISA in 1974 based on its determination that employees' retirement savings were not being adequately protected to the detriment of retirement investors and the country. Pub. L. No. 93-406, 88 Stat. 829, 898 (1974) (codified at 29 U.S.C. § 1001, *et seq.*); *see* § 1001(a). As part of its effort to remedy this problem, Congress imposed certain safeguards to ensure the impartiality of the investment advice given to retirement investors. As relevant here, Congress defined as "fiduciaries" individuals who engage in important activities related to employee benefit plans[1] and other tax-favored retirement and savings plans,[2] including a person who "renders investment advice for a fee or other compensation, direct or indirect with respect to any moneys or other property of such plan." 29 U.S.C. § 1002(21)(A); 26 U.S.C. § 4975(e)(3). Congress prohibited such fiduciaries from engaging in transactions Congress deemed fraught with conflicts of interest, such as transactions involving self-dealing or third party payments. 29

[1] An "employee benefit plan" under ERISA encompasses various types of employer-created defined benefit pension plans, defined contribution plans (*e.g.*, 401(k) plans in which participants direct investment of retirement savings in their individual accounts), and plans providing certain other benefits. *See* 29 U.S.C. § 1002(3); *id.* § 1003(a).

[2] "Tax-qualified" plans include many employee benefit plans, plus individual retirement accounts, health savings accounts, Coverdell education savings accounts, and certain other trusts and plans (collectively referred to as "IRAs"). *See* 26 U.S.C. § 4975(e)(1).

U.S.C. § 1106; 26 U.S.C. § 4975(c);[3] *see also Lockheed Corp. v. Spink*, 517 U.S. 882, 888 (1996) (recognizing Congress's goal to bar categorically transactions likely to injure a plan and its beneficiaries).[4] And Congress required fiduciaries to employee benefit plans to adhere to duties of prudence and loyalty to plan participants and beneficiaries. 29 U.S.C. § 1104(a).

Congress provided for the Secretary of Labor ("the Secretary"), fiduciaries, and plan participants and beneficiaries to bring actions to enforce the fiduciary obligations and prohibitions that apply to employee benefit plans. *Id.* § 1132(a)(2)-(3), (5). Congress imposed excise taxes on those who violate the prohibited transaction restrictions that apply to IRAs. 26 U.S.C. § 4975(a)-(b). IRA customers may also bring breach of contract and other claims under state law. *See, e.g.*, *Knox v. Vanguard Group, Inc.*, No. 15-13411, 2016 WL 1735812, at *4-6 (D. Mass. May 2, 2016).

Given the breadth of the prohibited transaction restrictions, Congress enumerated statutory exemptions from some of the restrictions. 29 U.S.C. § 1108(b); 26 U.S.C. § 4975(d). In addition, Congress delegated to the Secretary the discretionary authority to grant other "conditional or unconditional" exemptions on a class-wide or individual basis from all or part of the restrictions. 29 U.S.C. § 1108(a) ("*may* grant a conditional or unconditional exemption") (emphasis added); 26 U.S.C. § 4975(c)(2) (same). Consistent with its purpose to protect employees' retirement savings, Congress authorized the Secretary to grant an administrative

[3] In Title I of ERISA, Congress imposed the prohibited transaction restrictions on fiduciaries to employee benefit plans, 29 U.S.C. § 1106, and in Title II of ERISA, which amended the Internal Revenue Code ("the Code"), Congress imposed parallel restrictions on fiduciaries to employee benefit plans as well as fiduciaries to IRAs. *See* 26 U.S.C. § 4975(c).

[4] For example, Congress prohibited a fiduciary from causing the plan to engage in enumerated transactions with "part[ies] in interest," 29 § 1106(a), a term broadly defined to include, among others, persons providing services to the plan, *id.* § 1002(14). In addition, Congress prohibited a fiduciary from "deal[ing] with the assets of the plan in his own interest or for his own account" or "receiv[ing] any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan." *Id.* § 1106(b)(1), (3).

exemption only if he finds the exemption is:

> (1) administratively feasible;
> (2) in the interests of the plan and of its participants and beneficiaries; and
> (3) protective of the rights of participants and beneficiaries of such plan.

Id.; *see also* 29 C.F.R. §§ 2570.30-2570.51.[5]

II. PROVIDERS OF RETIREMENT INVESTMENT ADVICE AND THEIR REGULATION

At least three different (but sometimes overlapping) groups provide investment advice to retirement investors today—registered investment advisers, broker-dealers, and insurance companies and their agents. *See* Regulatory Impact Analysis for Final Rule and Exemptions, April 2016 ("RIA") 100. A registered investment adviser meets the definition of "investment adviser" in the Investment Advisers Act of 1940 ("the Advisers Act"), 15 U.S.C. § 80b-1 *et seq.*, and generally must register with the Securities and Exchange Commission ("SEC"). A registered investment adviser has fiduciary duties similar to, but not coextensive with, ERISA's fiduciary duties of prudence and loyalty, and is not categorically prohibited by the Advisers Act from engaging in transactions like those prohibited by ERISA. *See* RIA 31-33.[6]

Broker-dealers trade securities on others' behalf and are generally governed by the Exchange Act and rules promulgated by the SEC. 15 U.S.C. § 78c(a)(4); RIA 31. They are not required to register as investment advisers if their advice is "solely incidental" to the conduct of their business as a broker or dealer and they receive no "special compensation" for advisory

[5] Pursuant to Reorganization Plan No. 4 of 1978, which, in pertinent part, transferred certain authorities from the Secretary of the Treasury to the Secretary of Labor, the Secretary of Labor has interpretative, rulemaking, and exemptive authority for the prohibited transaction restrictions that apply both to employer-based plans and to IRAs. *See* Act to Prevent Disruption of the Structure and Functioning of the Government, Pub. L. No. 98-532, § 102, 98 Stat. 2705 (1984) (transferring "all authority of the Secretary of the Treasury to issue [regulations, rulings, opinions, and exemptions under section 4975 of the Code] ... to the Secretary of Labor"), 98 Stat. 2705 (codified at 5 U.S.C. app. 1; 29 U.S.C § 1001, note).

[6] Under the Advisers Act, registered investment advisers who have conflicts of interest are required to disclose them and obtain consent for the transaction, but they are not generally required to mitigate the conflict otherwise. 15 U.S.C. §§ 80b-6, 80b-7 80b-11(g); RIA 29.

services. 15 U.S.C. § 80b-2(a)(11)(C); RIA 32. In giving investment advice, broker-dealers are generally subject only to a "suitability" standard set by the Financial Industry Regulatory Authority ("FINRA"),[7] which requires a broker to have a reasonable basis to believe that a recommended transaction or investment strategy involving securities is suitable for the customer, based on the customer's investment profile. *See* RIA 32-33, 111.

Insurance companies sell annuity contracts as retirement investment options for plan and IRA investors. Annuities—which come in several variations as discussed in the next section—are sold through a variety of distribution channels in which different entities may render investment advice in connection with the sale. RIA 102 (chart). The "independent channel" through which FIAs are commonly sold usually has three participants: insurance companies, insurance agents, and independent marketing organizations ("IMOs"). Insurance companies, or carriers, create the products and are responsible for establishing systems to supervise the recommendation and sale of annuities. RIA 41. Agents, or producers, are licensed by a state to sell insurance products, *id.* 37, and can be either career agents (devoting more than three-quarters of their time to selling one company's products) or independent agents, selling products from multiple companies, *id.* 101. IMOs are intermediaries that act as middlemen between insurance companies and independent agents, with their primary function being to market, distribute, and wholesale various insurance products. *Id.* 102. This intermediary structure can be appealing to both insurance carriers and independent agents because it allows the former to cut their overhead costs and can allow the latter to make twice the commission of their captive counterparts. *Id.*

The National Association of Insurance Commissioners ("NAIC") has adopted a model rule that sets suitability standards for insurers similar in many respects to FINRA suitability

[7] FINRA is a self-regulatory organization of the broker-dealer industry. It is registered with, and operates under the oversight of, the SEC. *See* RIA 33-34.

requirements for brokers.[8] RIA 41. According to the NAIC, the model rule was adopted to establish a framework under which the insurance company, not just the individual agent or broker, must ensure that the annuity transaction is suitable for the particular customer. *See* BIC Exemption, 81 Fed. Reg. 21002, 21018 (Apr. 8, 2016). To do so, the model rule requires insurance companies to develop supervisory systems to ensure the insurers' and their agents' compliance with the model rule and suitability requirements. *Id.*[9] This includes establishing reasonable policies and procedures to assess the suitability of each product recommendation. *Id.* The 2010 version of the NAIC suitability standard has been adopted—in whole or part—by 35 states and DC, but exact requirements vary by state, and one state currently lacks any suitability requirements. *See* NAIC Model Regulation at 13-19 (table of states); RIA 39, 42.

III. ANNUITIES AS A FORM OF RETIREMENT INVESTMENT

Annuities are contracts in which the customer makes a lump sum payment or series of payments in exchange for the insurer's agreement to make periodic payments either immediately or deferred until a future date. RIA 39. To access principal from the annuity apart from the periodic payments, the customer can make partial withdrawals or surrender the annuity, but these options may have onerous consequences, such as significant surrender charges and additional income tax. RIA 40.[10] Three types of deferred annuities are sold as retirement investments:

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[8] The NAIC is the standard-setting and regulatory support organization created and governed by chief insurance regulators from all 50 states, the District of Columbia ("DC"), and five territories. RIA 36. NAIC standards are non-binding models, and state laws often deviate from them in small or large ways. *Id.* 39, 42.

[9] *See* NAIC, Suitability in Annuity Transactions Model Regulation ("NAIC Model Regulation") § 6(F)(2), LH-275-1 (2015), http://www.naic.org/store/free/MDL-275.pdf. Versions prior to 2010 did not require insurance companies to provide supervisory oversight over their agents.

[10] While industry members try to downplay this reality, *see* Cmt. 774 (Indexed Annuity Leadership Council ("IALC")) ("Most products sold today have a surrender charge period of ten years or less and a surrender charge of ten percent or less."), some FIAs have very lengthy surrender periods and very high surrender charges. *See, e.g.*, EquiTrust Life Ins. Co., EquiTrust Annuity All Product Summary (July 21, 2016) [Link] (listing FIAs with 14 year surrender periods and 20% initial surrender charges that taper down to 10% after ten years).

declared rate, indexed, and variable. *See Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 168-69 (D.C. Cir. 2009); *see also* RIA 111-12, 122-26 (including comparison chart). In a declared rate, or "traditional fixed annuity," the insurance company bears the investment risk because it guarantees that the annuity will earn a minimum interest rate, which is established at the beginning of the crediting period. *Am. Equity*, 613 F.3d at 168; RIA 118-19, 123. Declared rate annuities are subject to state insurance laws and are not regulated under federal securities laws. *Am. Equity*, 613 F.3d at 168. By contrast, in the case of a variable annuity, premiums are invested in common stocks and other equities, such that the investment risk is borne by the contract holder and benefit payments vary with the performance of the investment. *Id.* at 168-69; RIA 111, 123. Variable annuities are regulated as securities. RIA 74.

Fixed indexed annuities ("FIAs") are a hybrid. *Am. Equity*, 613 F.3d at 168. Under most state laws, the contract holder is guaranteed 87.5% of premiums paid after any fees or other charges, and then is credited, not with a guaranteed rate of interest, but with a return determined at the end of the crediting period, based on the performance of a specified index or other external reference. RIA 123-24. There are many variations to choose from. A market report from 2014 identified 317 different indexed annuities and 1,648 indexed annuity strategies, counting by index-crediting method. RIA 119 (citing Wink's Sales & Market Report, 4th Quarter, 2014). For FIAs, as compared to declared rate annuities, the contract holder bears more investment risk because the index-based returns can vary widely and are applied at the end of the crediting period. *Id.* 123, 168; *Am. Equity*, 613 F.3d at 178 (recognizing that "[i]n FIAs, as in securities, there is a variability in the potential return that results in a risk to the purchaser"). Congress has directed the SEC not to treat FIAs as securities if they satisfy certain NAIC suitability standards and other standards set forth in the Dodd-Frank Wall Street Reform and Consumer Protection

Act ("Dodd-Frank Act"), Pub. L. No. 111-203, § 989J, 124 Stat. 1376, 1949 (2010). RIA 42.

The costs associated with FIAs can be myriad and opaque. RIA 3, 79, 217, 284. While Plaintiff trumpets that insurance agents offer advice "at no expense," Pl.'s Mem. in Support at 41 ("Pl.'s Br."), commissions and other agent compensation are factored into the pricing of FIAs, lowering returns to contract holders. For FIAs, the insurance company does not simply credit the annual index-linked gains to the investors account, but instead can limit how much is credited by deducting fees (called "spreads," "margins" and "administration fees") and crediting only a percentage of the interest-linked gains and imposing interest rate caps or upper limits on returns. RIA 119.[11] In this way, over a period of years, the insurer can recoup the cost of the commission paid to the agent by subtracting these expenses before crediting the index-based annual return. RIA 119, 126 n.6, 129, 140. And insurers generally reserve the right to change these expenses over time, further shifting investment risk from themselves to investors. RIA 123.

The market for annuities is constantly changing. RIA 309.[12] While declared rate annuities were once dominant, variable annuities overtook them, constituting about two thirds of total annuity sales in 2012. RIA 117. As recently as 2009, declared rate annuities were 22% of sales in the IRA market, but within five years they were only 10%. RIA 218, Fig. 3-11. Since 2011, variable annuities have declined and FIAs have surged. In the IRA market from 2011-2014, variable annuities declined from 75% of sales to 63%, while FIAs grew from 17% to 27%. *Id.* Also, to some extent, variable annuities and FIAs are converging in design. *See* Cmt. 718 at 21-22 (Allianz Life Ins. Co.) (describing various combination products that include

[11] For a concise explanation of these fees and caps, *see* FINRA Investor Alert "Equity-Indexed Annuities—A Complex Choice" [Link]; RIA 119 n.282.

[12] *See also* Wink's Sales & Market Report, 4th Quarter, 2014, Part 2 at 90-91 (listing more than 60 companies that exited, entered, or reentered FIA market).

characteristics of both variable and FIAs); 3083 at 3 (Jackson Nat'l Life Ins. Co.) ("these products [have] becom[e] remarkably similar").

IV. CONFLICTS OF INTEREST THAT INCREASINGLY THREATEN RETIREMENT SAVINGS

Shortly after Congress passed ERISA, DOL issued a regulation articulating when a person "renders investment advice" to meet ERISA's "fiduciary" definition. 40 Fed. Reg. 50842 (Oct. 31, 1975) ("the 1975 regulation"). The 1975 regulation limited the "rendering investment advice" by five criteria, including that the advice be provided on a "regular basis." *See* 29 C.F.R. § 2510.3–21(c)(1) (2015); 26 C.F.R. § 54.4975-9 (2015) (parallel Code provision). DOL also began to grant administrative exemptions, including PTE 84-24, that permitted certain insurers and agents, among others, to engage in otherwise prohibited transactions involving insurance and annuity contracts. *See* 49 Fed. Reg. 13208 (Apr. 3, 1984); 71 Fed. Reg. 5887 (Feb. 3, 2006).

In the time since ERISA's enactment and DOL's grant of PTE 84-24, the retirement savings market has changed profoundly, shifting from defined benefit pension plans (controlled completely by fiduciaries and for which employers bear the investment risk) to participant-directed defined contribution plans, such as individual retirement accounts and 401(k)s. *See* Final Rule, 81 Fed. Reg. 20948, 20954-55 (Apr. 8, 2016). Due to this shift, plan participants are increasingly responsible for managing their own retirement assets, and the majority of those paid to provide retirement investment advice today are not likely to meet the criteria in the 1975 regulation. *Id.* Accordingly, much of the retirement investment advice today is given to consumers by entities who are not subject to ERISA's fiduciary duties and the prohibited transaction restrictions in Title I of ERISA and the Code. *See id.*; *see also* RIA 114-15.

At the same time, compensation arrangements in the retirement investment industry have created incentives for advisers to recommend products that pay them and their firms more money

rather than products that are in their customers' best interests. *See* RIA 21, 127-134 (explaining different forms of conflicted compensation arrangements). Product providers compensated entirely or primarily on a commission basis have a strong incentive to aggressively maximize sales, and when commissions vary depending on the product, the provider has a further incentive to recommend the product paying the highest commission. *See* RIA 120-121, 134. The conflicts arising from compensation-related incentives are exacerbated by arrangements in which an insurer pays agents and brokers an additional percentage of premiums or other bonus if they meet certain goals in terms of volume, persistency, and profitability for the insurer. *Id.* 122.

These types of conflicts are particularly troubling in the context of annuities. Although up-front commissions are common for mutual funds, commissions for annuities are generally much higher and are often less transparent. *See* RIA 131. The Executive Director of the Indexed Annuity Leadership Council ("IALC") stated that the typical commission on an FIA sale is "about six to eight percent give or take," Aug. 12, 2015 Hr'g Tr. 937 (statement of Jim Poolman); Cmt. 3131 (IALC); *see also* RIA 131, compared with an average commission of 1.37% for brokers selling front-end-load mutual funds. *See* RIA 345.[13] Thus, for example, a $90,000 rollover from a 401(k) to an annuity—the median lump sum distribution for a retiring worker, RIA 186-87—could provide the agent a commission of as much as $7,200.[14] These problems are further compounded by the use of bonuses given to independent agents or brokers by insurers for meeting certain sales goals. *Id.* 131-32. As a result, insurance agents have financial incentives to steer investors toward particular annuity products regardless of whether

[13] "Loads" are sales fees associated with certain investment products. Investors pay a front-end sales load when they purchase fund shares and a back-end or deferred sales load when they redeem their shares. *See* SEC Fast Answers, Mutual Fund Fees and Expenses, http://www.sec.gov/answers/mffees.htm#salesloads.

[14] This median roughly matches the $94,223 average premium for FIAs sold in 2015 calculated by Plaintiff's declarant. Moore Decl. ¶ 16(e).

these products best serve retirement investors. *Id.* And if a customer has an unexpected need for liquidity and chooses to access the FIA's account value, surrender charges and adverse tax consequences may reduce accrued returns or even erode a portion of the premium. *Id.* 140, 284.

While these kinds of commissions introduce acute conflicts of interest, the individual consumers who are now the predominate recipients of this advice often lack the expertise of their advisers and are frequently unaware of the nature and extent of the conflicts. *Id.* 9, 105, 127, 131-32, 142-43.[15] Consumers today are also confronted with myriad choices of financial products, many of which did not exist or were uncommon in 1975. *See* RIA 3. Advisers may also market themselves with titles giving the impression of specialized advisory expertise, including some titles like "financial adviser" or "wealth manager" that imply expertise but that anyone can use. *Id.* 100.

Under these circumstances, DOL found that the predictable result is that conflicts bias investment advisers to the detriment of investors. In its RIA, DOL quantified the extent of harm in the IRA market for front-end-load mutual funds, finding the impact of conflicts of interest on investment outcomes in that market to be large and negative. *See* RIA 158-60, Fig. 3-17. A review of the data suggests that IRA holders receiving conflicted investment advice in that market can expect their investments to underperform by an average of one-half to one percent per year over the next 20 years. *Id.* 158. This underperformance—in one segment of the market alone—could cost IRA investors between $95 billion and $189 billion over the next 10 years. *Id.*

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[15] The conflicts posed by these compensation practices have been well-documented by regulators and outside groups and acknowledged by the financial services industry. *See* RIA 133. In an October 2013 report, FINRA used firms' responses to a conflict of interests letter, in-person meetings, and a follow-up compensation questionnaire to identify conflicts that encourage advisers to meet certain production thresholds to obtain large rewards, favor some products over others to enhance firm revenue or profit, and give preference to proprietary products. *Id.* 134. A RAND study prepared for the SEC also identified financial conflicts that advisers often operate under when recommending a transaction to a client. *Id.* 130. Financial service providers also affirmed the prevalent use of a wide variety of compensation arrangements with the potential for biased investment advice. *Id.* 133 & n.315.

Based on a wide body of evidence, DOL also concluded that the harm is wide-spread throughout the market. *Id.* Surveys show that insurance professionals themselves believe that agents sometimes act on conflicts of interest at customers' expense. *Id.* 147. The North American Securities Administrators Association, representing state securities regulators, noted that these problems have been particularly acute in the FIA market:

> Equity-indexed annuities are extremely complex investment products that have often been used as instruments of fraud and abuse. For years, they have taken an especially heavy toll on our nation's most vulnerable investors, our senior citizens for whom they are clearly unsuitable.

Amendment to PTE 84-24, 81 Fed. Reg. 21147, 21154 (Apr. 8, 2016). The SEC similarly noted "complaints of abusive sales practices" in the FIA market, including inadequate disclosure to investors and outsized commissions. 74 Fed. Reg. 3138, 3138-39 (Jan. 16, 2009). Commenters on the rulemaking expressed similar concerns. *See* Cmts. 596 (Ron A. Rhoades), 3090 (Professor Bullard for Fund Democracy), 3034 (Committee for the Fiduciary Standard). And FINRA and other securities regulators have expressed concerns that the sales materials associated with FIAs often do not fully and accurately describe the products and could confuse or mislead investors. RIA 43.

V. THE DEPARTMENT'S ACTION TO PROTECT RETIREMENT SAVINGS

Against this backdrop, DOL evaluated its existing regulations governing retirement investment advice and determined that changes needed to be made to accomplish Congress's intent in ERISA to protect employees' retirement savings. *See* 29 U.S.C. 1001(b) (purposes of ERISA); 75 Fed. Reg. 65263, 65264 (Oct. 22, 2010) (discussing need for changes); 81 Fed. Reg. 20946, 20953-56 (same). DOL initially published a notice in 2010 to amend the 1975 regulation's interpretation of the "investment advice" prong of ERISA's fiduciary definition. *See* 75 Fed. Reg. 65263. DOL received extensive public comments on the proposal. *See* 81 Fed.

Reg. 20957. Some comments asked DOL to issue new exemptions to minimize disruption of current compensation practices. 80 Fed. Reg. 21932; *see also* RIA 5. In light of all the comments, and because of the significant impact of the rulemaking, DOL decided to withdraw the proposal and issue a new one. 80 Fed. Reg. 21928, 21956; RIA 5. Thereafter, DOL participated in numerous stakeholder meetings, studied the issues raised by commenters, and requested data from industry to assess the harmful effects of conflicts. 81 Fed. Reg. 20957. Although the industry provided very little data, RIA 169 & n.385, these efforts permitted DOL to produce a more robust RIA. *Id.* 5.

A. The 2015 Proposed Rule and Exemptions

On April 20, 2015, DOL published a new proposed rule revising the 1975 regulation's interpretation of the "investment advice" prong of ERISA's fiduciary definition. 80 Fed. Reg. 21928. The proposed rule included many changes from the 2010 proposal in response to comments. *See* 80 Fed. Reg. 21929, 21932, 21954. DOL also responded to the 2010 commenters' requests for additional administrative exemptions to accommodate existing compensation practices, proposing to adjust the conditions for some existing exemptions and proposing two new exemptions that could be used for a broad range of compensation practices. 80 Fed. Reg. 21948; RIA 6. The new and amended exemptions would all include impartial conduct standards so that, at a minimum, advisers relying on the exemptions would be required to adhere to basic fiduciary standards of fair dealing. 80 Fed. Reg. 21947. In this way, DOL sought to ensure that, despite the conflicts inherent in the otherwise prohibited, but exempted transactions, advice would be in the interest of retirement investors and protective of their rights, in accordance with statutory requirements. *See* 80 Fed. Reg. 21969-70; RIA 289; *see also* 29 U.S.C. § 1108(a); 26 U.S.C. § 4975(c)(2).

Proposed Best Interest Contract ("BIC") Exemption. The new BIC Exemption would

allow fiduciaries rendering investment advice to use a variety of compensation arrangements that would otherwise result in prohibited transactions. 80 Fed. Reg. 21961. The principal conditions of the proposed exemption were that both the financial institution and its investment adviser would enter into a written contract with the retirement investor, acknowledging the fiduciary status of both the adviser and the financial institution and committing to adhere to impartial conduct standards when providing advice. *Id.* 21969. These standards included requirements that the adviser and financial institution, among other things: (1) provide advice in the investor's "best interest," a term defined to mirror the duties of prudence and loyalty in Title I of ERISA, 29 U.S.C. § 1104(a), and (2) charge no more than reasonable compensation for the total services provided to the investor, 80 Fed. Reg. 21969-70 (also requiring avoidance of material misrepresentations and compliance with applicable state and federal law). The proposed exemption also required financial institutions to warrant that they have adopted policies and procedures to mitigate dangers posed by material conflicts of interest; disclose important information related to fees, compensation, and material conflicts; and retain information related to investment recommendations. *Id.* 21984. The proposed exemption was available for recommendations on all types of annuity contracts, among other products. *Id.* 21984, 21987.

<u>Proposed Amendment of PTE 84-24.</u> In addition to proposing to make the BIC Exemption available to all annuities, DOL also proposed to amend the existing PTE 84-24. 80 Fed. Reg. 22010. As proposed, parties involved in retirement plan transactions in connection with the purchase of mutual funds, variable annuity contracts, and other annuity contracts that are securities under federal securities laws would no longer be able to rely on PTE 84-24. *Id.* 22012. Instead, DOL stated the view that the more investor-protective conditions of the proposed BIC Exemption were more appropriate for such transactions. *Id.* As proposed, the

revised PTE 84-24 would have remained available for transactions involving insurance and annuity contracts that are not securities. *Id.* 22014-15. However, it would also be amended to require that fiduciaries relying on that exemption adhere to impartial conduct standards. *Id.*

In the proposal, DOL made clear that it was seeking comment on whether the line it had drawn between annuities that are securities and those that are not was the right approach to take:

> The Department is not certain that the conditions of the Best Interest Contract Exemption, including some of the disclosure requirements, would be readily applicable to insurance and annuity contracts that are not securities, or that the distribution methods and channels of insurance products that are not securities would fit within the exemption's framework. While the Best Interest Contract Exemption will be available for such products, the Department is seeking comment in that proposal on a number of issues related to use of that exemption for such insurance and annuity products.
>
> The Department requests comment on this approach. *In particular, the Department requests comment on whether the proposal to revoke relief for securities transactions involving IRAs (i.e., annuities that are securities and mutual funds) but leave in place relief for IRA transactions involving insurance and annuity contracts that are not securities strikes the appropriate balance and is protective of the interests of the IRAs.*

Id. 22015 (emphasis added). Likewise DOL requested "comment on this approach" in the proposed BIC Exemption:

> In particular, we ask *whether we have drawn the correct lines between insurance and annuity products that are securities and those that are not*, in terms of our decision to continue to allow IRA transactions involving non-security insurance and annuity contracts to occur under the conditions of PTE 84–24 while requiring IRA transactions involving securities to occur under the conditions of this proposed Best Interest Contract Exemption.

80 Fed. Reg. 21975 (emphasis added).

DOL also noted that part of the reason the proposed exemptions allowed insurance products that are not securities to continue to rely on PTE 84-24 (as amended) was due to DOL's "uncertainty as to whether the [proposed] disclosure requirements" would be readily applicable to such products and "whether the distribution methods and channels of insurance products that

are not securities fit within th[e] [BIC] exemption's framework." *Id.* "[T]o evaluate [its] approach," DOL specifically requested comment on whether the BIC exemption could be revised to make its disclosure requirements effective in the case of such products. *Id.* And DOL asked for public comment on "the distribution methods and channels applicable to insurance and annuity products that are not securities[]"; the "common structures of insurance agencies[]"; and "whether any conditions of the proposed [BIC] Exemption … would be inapplicable to non-security insurance and annuity products" or "particularly difficult for insurance companies to comply with." *Id.*

Preliminary regulatory impact analysis. In conjunction with the 2015 proposal, DOL made available on its website a detailed regulatory impact analysis, which contained an in-depth economic assessment of the market for retirement investment advice. *See* DOL, Fiduciary Investment Advice: Regulatory Impact Analysis (April 14, 2015) ("Prelim. RIA"). In conducting its analysis, DOL reviewed a wide body of economic evidence including statistical analyses of investor results in conflicted investment channels, experimental studies, government reports documenting abuse, and economic theory on the dangers posed by conflicts of interest. *Id.* 75-94, 137, 140. The analysis provided detailed responses to comments received on the 2010 proposal. The analysis concluded that widespread conflicts of interest were causing serious harm to retirement investors and that the 2015 proposal would produce large financial gains for IRA and plan investors, which would easily justify the compliance costs. *Id.* 8-9, 99-100, 235-236.

Comments and hearings. DOL initially provided a 75-day comment period, but extended the comment period for two weeks in response to stakeholder requests. 81 Fed. Reg. 20958. In August 2015, DOL held a four-day public hearing on the proposal, at which over 75 speakers testified. *Id.* DOL published the hearing transcript on its website and provided the opportunity

to comment on the proposed regulation, exemptions, and hearing transcript until September 24, 2015. *Id.* In total, DOL received over 3,000 individual comment letters and 30 petitions with over 300,000 signatories on the proposal. *Id.* DOL also held numerous meetings with interested stakeholders, including meetings discussing the RIA. RIA 7.

DOL received extensive comments on whether the conditions of PTE 84-24 or the BIC Exemption were appropriate for annuities, including FIAs. Groups representing FIA providers urged DOL to maintain its position in the proposals to allow advisers involved in FIA transactions to rely on PTE 84-24 while criticizing parts of the proposed BIC Exemption. *See, e.g.*, Cmts. 762, 3111 (Nat'l Ass'n for Fixed Annuities); 774, 3124 (IALC); *see also* Aug. 12, 2016 Hr'g Tr. 904 (Jim Poolman, IALC). Other groups urged that variable annuities and FIAs be treated alike, preferably in PTE 84-24. *See, e.g.*, Cmt. 336 (Voya Financial); 429 (Chamber of Commerce); 506 (SIFMA); 626, 3092 (Insured Retirement Inst.); 676, 3098 (Nw. Mutual Life Ins. Co.); 718 (Allianz Life. Ins. Co.); 767 (Guardian Life Ins. Co.); 3083 (Jackson Nat'l Life Ins. Co.); Aug. 11, 2015 Hr'g Tr. 610-11 (Bradford Campbell, Chamber of Commerce). By contrast, other commenters urged DOL to require advisers involved in FIA transactions to satisfy the conditions of the BIC Exemption, rather than PTE 84-24. *See, e.g.*, Cmts. 577 (University of Miami Investor Rights Center) (arguing all annuities should come within the BIC Exemption), 596, 3017 (Ron Rhoades), 3090 (Fund Democracy).

B. The 2016 Final Rule and Exemptions

After carefully evaluating the extensive record developed on the 2015 proposal, DOL published its final rule on April 8, 2016 ("the Rule"), revising the 1975 regulation's interpretation of the "investment advice" prong of ERISA's fiduciary definition. 81 Fed. Reg. 20946. The revisions ensure that those who make recommendations regarding plan or IRA monies or investments, including rollovers from those savings vehicles, are now covered by the

regulation as fiduciaries.[16] *See* RIA 16.

Final BIC Exemption. On the same day it published the Rule, DOL also published the final BIC Exemption. 81 Fed. Reg. 21002. The exemption provides broad prohibited transaction relief for a range of compensation practices that ERISA and the Code would otherwise prohibit, so long as advisers and financial institutions adhere to basic fiduciary standards and take certain specified steps to mitigate the impact of conflicts of interest. *Id.* 21003. In particular, to rely on the exemption, financial institutions must:

1) acknowledge fiduciary status with respect to investment advice to the investors;
2) adhere to "impartial conduct standards" requiring them to:
    - give advice in the retirement investor's best interest (i.e., prudent advice based on the investment objectives, risk tolerance, financial circumstances, and needs of the investor, without regard to financial or other interests of the adviser or financial institution);
    - charge no more than reasonable compensation; and
    - make no misleading statements about investment transactions, compensation, and conflicts of interest.
3) implement policies and procedures reasonably and prudently designed to prevent violations of the impartial conduct standards;
4) fairly disclose the fees, compensation, and material conflicts of interest associated with their recommendations;
5) refrain from giving or using incentives for advisers to act contrary to the customer's best interest.[17]

81 Fed. Reg. 21007. For fiduciary advice to non-Title I plans and IRAs, the first four requirements must be contained in a contract between the financial institution and the retirement investor. *Id.* 21020. The contract must also describe whether the financial institution or adviser will monitor the customer's investments, and if so, the frequency and situations in which the investor will be alerted.

[16] Because Plaintiff's claims are limited to the amendment of PTE 84-24 and do not challenge the Rule itself, Defendants have provided a limited discussion of the Rule herein.

[17] The Department provided specific, non-exclusive examples of ways financial institutions can manage adviser incentives. 81 Fed. Reg. 21038-40.

DOL's intent in the exemption was to hold financial institutions and their advisers responsible for adhering to fundamental fiduciary standards, while leaving them the flexibility and discretion to determine how best to satisfy these basic standards in light of the unique attributes of their businesses. 81 Fed. Reg. 21007. In response to comments asking DOL to provide certainty as to treatment of proprietary products, the exemption clarifies that financial institutions that restrict their advisers' recommendations to proprietary products or products that generate third party payments may rely on the exemption and provides specific provisions for such transactions. BIC Exemption § IV; 81 Fed. Reg. 21029, 21052-55, 21080-81.[18] The exemption expressly provides that it does not ban differential compensation such as commissions based on customers' investment decisions, as long as the policies and incentive practices, when viewed as a whole, are reasonably and prudently designed to avoid misalignment of the adviser's interests and those of the retirement investor. BIC Exemption § II(d)(3); 81 Fed. Reg. 21077.

The final BIC Exemption reflects many changes made in response to comments, including from the insurance industry, to make its conditions less costly and more readily complied with by financial institutions. 81 Fed. Reg. 21018; RIA 68-72; *see also id.* 251-52 (chart comparing proposed and final BIC Exemptions), 273-79, 283. For example, changes were made to simplify implementation of the contracts, including permitting master contracts to cover multiple transactions, allowing contracts to be signed at any point up until the transaction, and not requiring individual advisers to sign the contracts. *See* 81 Fed. Reg. 21022-25, 21076; RIA 71-72, 278-79. Compliance costs are reduced by eliminating and substantially modifying certain data collection and disclosure requirements. *See id.* 21056 (eliminating extensive data retention

[18] Proprietary products are defined in the exemption as products that are managed, issued, or sponsored by the financial institution, and third party payments are defined to include sales charges that are not paid directly by the plan or investor, as well as revenue sharing payments and 12b-1 fees, among other payments. BIC Exemption § VIII (l), (q); 81 Fed. Reg. 21068, 21084.

requirement and now requiring financial institutions to maintain only records necessary to determine whether the conditions of the exemption have been met); *id.* 21008, 21048-49 (eliminating pre-transaction disclosure of cost chart and now requiring a disclosure focusing on the financial institution's material conflicts of interest with more specific information to be provided upon request); *id.* 21008, 21048-52 (eliminating annual disclosure requirement and substantially reducing the specificity of information required for website disclosure). DOL determined that these changes further minimize any risk of unintended negative impact on small investors' access to affordable advice. *Id.* 21009. Additionally, DOL revised the "reasonable compensation" standard throughout the exemption to match what is already required under ERISA and the Code. 81 Fed. Reg. 21018.

DOL also considered and rejected the suggestion that the definition of "financial institution" be expanded to include marketing intermediaries, such as IMOs. *Id.* 21067. DOL concluded that the definition, which determines the types of firms that can execute a best interest contract, should be limited to entities that are subject to well-established regulatory conditions and oversight. *Id.* DOL stated, however, that entities could be added to the definition through individual exemptions:

> If parties wish to expand the definition of Financial Institution to include marketing intermediaries or other entities, they can submit an application to the Department for an individual exemption, with information regarding their role in the distribution of financial products, the regulatory oversight of such entities, and their ability to effectively supervise individual Advisers' compliance with the terms of this exemption.

Id. And if an exemption is granted, intermediaries other than the applicant could rely on the individual exemption provided they meet the same conditions. *See* BIC Exemption § VIII(e)(5); 81 Fed. Reg. 21083. Moreover, the exemption would not prevent an insurance company from continuing to contract with IMOs or similar organizations to take on the supervisory

responsibility required of financial institutions. *See* 81 Fed. Reg. 21034 (final exemption was intentionally designed to allow flexibility so that financial institutions could design oversight procedures "that are effective for their particular business models"); NAIC Model Regulation § 6(F)(2) (providing for insurers to contract with IMOs for maintenance of supervisory procedures). *See* RIA 41.

DOL also recognized that annuities are sometimes sold by independent, state-licensed agents who represent multiple insurance companies. DOL required the responsible financial institution under the contract to assume responsibility for such agents' advice to ensure adherence to the standards. *See* 81 Fed. Reg. 21039. Thus, if an insurance company executed the contract with a retirement investor, it would be responsible for adopting policies and procedures to ensure that the adviser's recommendations were in the investor's best interest and satisfied the other provisions in the contract. Because the NAIC Model Regulation places the responsibility for establishing a supervision system directly on the insurance company, DOL concluded that the exemption would work with state insurance regulations. *Id.* 21018-19. Like the proposal, the final BIC Exemption is available for advice on all annuities. *Id.* 21017.

<u>Final Amendment of PTE 84-24.</u> After carefully considering the competing comments regarding which annuities should be required to satisfy the conditions of the BIC Exemption or be permitted to satisfy the less stringent conditions in PTE 84-24 in order to qualify for an exemption, *see* RIA 282-83, DOL determined that PTE 84-24 should be available for the receipt of commissions only in connection with recommendations concerning "fixed rate annuity contracts" as defined in the exemption. PTE 84-24 § VI(k), 81 Fed. Reg. 21176; *see also* RIA 283-85.[19] This definition does not include variable annuities, FIAs, or similar annuities; as a

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[19] As part of its regulatory undertaking, the Department proposed and ultimately included the impartial conduct

(*footnote continued on next page*)

result, fiduciaries advising on these products can no longer rely on PTE 84-24 but must instead satisfy the conditions of the BIC Exemption if they wish to be exempted from the prohibited transaction provisions that would otherwise apply. 81 Fed. Reg. 21152-53.

DOL explained that it reserved the amended PTE 84-24 for simpler annuities that "provide payments that are the subject of insurance companies' contractual guarantees and that are predictable" and that have "terms that are more understandable to consumers." *Id.* 21152. By contrast, "[g]iven the complexity, investment risks, and conflicted sales practices associated with [variable annuities and FIAs], the Department ... determined that recommendations to purchase such annuities should be subject to the greater protections of the [BIC] Exemption." *Id.* 21153. DOL explained that FIAs are "complex products requiring careful consideration of their terms and risks," and as a result of their complexity, "[r]etirement [i]nvestors are acutely dependent on sound advice that is untainted by the conflicts of interest posed by [a]dvisers' incentives to secure the annuity purchase, which can be quite substantial." *Id.* 21018. DOL further explained that "[b]oth categories of annuities, variable and indexed annuities, are susceptible to abuse, and [r]etirement [i]nvestors would equally benefit in both cases from the protections of [the BIC Exemption], including the conditions that clearly establish the enforceable standards of fiduciary conduct and fair dealing." *Id.* Consistent with comments from some sellers of variable annuities, who strenuously argued that their products should be treated the same as FIAs, DOL explained that, by limiting the availability of PTE 84-24, it was creating a level playing field for variable annuities, FIAs, and mutual funds and avoiding a regulatory incentive for advisers to preferentially recommend FIAs. *Id.*

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standards as a requirement in every exemption that covered fiduciaries who provided investment advice for a fee. *See*, *e.g.*, 80 Fed. Reg. 22014 (proposing impartial conduct standards in amended PTE 84-24); 80 Fed. Reg. 21969-70 (same for BIC Exemption); 80 Fed. Reg. 22021, 22023-24 (Apr. 20, 2015) (same for PTE 86-128).

Final regulatory impact analysis. DOL also produced its final regulatory impact analysis of the Rule and exemptions in April 2016. The analysis found that conflicted advice is widespread, causing serious harm to plan and IRA investors, and that disclosing conflicts alone would fail to adequately mitigate the conflicts or remedy the harm. RIA 8. For example, DOL found that IRA holders receiving conflicted investment advice can expect their front-end loan mutual fund investments to underperform by an average of one-half to one percent per year over the next 20 years. *Id.* 9. As noted above, the underperformance associated with conflicts of interest could cost IRA investors in excess of $95 billion over the next 10 years. *Id.* The RIA further noted that while these expected losses are large, they represent only a portion of what retirement investors stand to lose as a result of adviser conflicts. *See id.*

The RIA concluded that, by extending fiduciary status and providing flexible and protective exemptions that apply to an array of compensation arrangements, the final rule and exemptions will mitigate conflicts, support consumer choice, and deliver substantial gains for retirement investors and economic benefits that more than justify the costs. *Id.* 7; *id.* 167-78 ("Gains to Investors"). The RIA estimated that, in the front-end-load mutual fund segment alone, investors could gain between $33 billion and $36 billion over 10 years. *Id.* 97, 167. DOL concluded that these gains alone outweighed all of the expected costs of the Rule and exemptions. *Id.* 97, 168. With regard to annuities in particular, DOL found the data insufficient to quantify the gains to investors but expected the Rule to create substantial net benefits. *Id.* 168. DOL reasoned that conflicts of interest in the annuity market are likely to be more pronounced and less transparent than in the mutual fund market due to generally higher annuity commissions that are not readily apparent to the consumer and that incentivize insurance agents to steer consumers toward certain products that may not be in their best interest. *Id.*

Based on the available data and considering cost-saving revisions to the final BIC Exemption, DOL concluded that the total costs to industry to comply with the Rule and exemptions would be between $10 billion and $31.5 billion over 10 years with a primary estimate of $16.1 billion. *See id.* 10, 219-52. Because DOL largely deferred to cost estimates provided by the financial industry and did not include in its cost estimate the benefits to consumers of mitigating conflicts of interest with respect to other investment products, or conflicts other than those associated with up-front fees, DOL took an extremely conservative approach in its cost-benefit analysis, if anything overestimating the costs and underestimating the benefits of the rulemaking. *See id.* 9.

In response to comments that costs to the insurance industry could be high, DOL attempted to quantify them, even though the industry had not provided much usable data despite DOL's request for such data. RIA 211. Using publicly available sources of information, DOL estimated the number of affected insurance companies and also determined which ones sold certain kinds of annuities. *Id.* 104. It also analyzed annuity sales by type of agent, and the role of IMOs and other intermediaries. *Id.* 102. It applied the cost data from broker-dealers because insurers will have to perform similar tasks to comply with the Rule and exemptions, even though the products they sell may vary. *Id.* 237. It concluded that the total costs for insurers to comply with the Rule and all of the new and amended exemptions, including the BIC Exemption, ranged from $1.1 billion to $1.3 billion over a ten-year period. *Id.* 238 Figure 5-11; *see also id.* 248-50 (summaries for insurers and others using discount rates and various assumptions). In addition, in making its determination to require FIA transactions to satisfy the conditions of the BIC Exemption, DOL specifically assessed in the RIA the costs to annuity providers of complying with the BIC Exemption rather than PTE 84-24. *See* RIA 262-63, 285-86.

DOL also analyzed the impact of the Rule and exemptions on affected small businesses as required by the Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.* ("RFA"). RIA 254-60. Treating 99.3% of insurers as small entities based on the Small Business Administration's definition, it analyzed the costs they would incur and discussed changes made in the rulemaking to reduce costs to large and small firms. RIA 255-260. It noted the possibility that some small service providers may find that the increased costs associated with ERISA fiduciary status outweigh the benefit of continuing to service the ERISA plan or IRA markets. RIA 258. DOL did not believe that this outcome would be widespread or result in a diminution of the amount or quality of advice available to small or other retirement investors, as firms would fill the void for those markets. RIA 258. DOL also noted anecdotal evidence that small entities do not have as many business arrangements that give rise to conflicts of interest. *Id.*

Applicability dates of the Rule and exemptions. The proposed rule had provided that the requirements of the rulemaking would become applicable eight months after publication. 80 Fed. Reg. 21950. Many commenters expressed concern that eight months would be inadequate to come into full compliance and suggested that DOL extend the applicability date. *See* RIA 291. Such commenters generally expressed concerns with meeting the conditions of the new and amended exemptions rather than with the definition of investment advice in the Rule. *Id.* 292.

After carefully considering these comments, DOL delayed the applicability date of the Rule and the exemptions until April 10, 2017, or one year after publication. 81 Fed. Reg. 20992-93. DOL also provided an additional nine-month transition period after the April 2017 date for the industry to come into full compliance with all of the conditions of the BIC Exemption. *See* BIC Exemption § IX, 81 Fed. Reg. 21069. During the transition period, while some of the requirements will be in place, financial institutions and advisers will be able to rely on the BIC

Exemption without yet being required to enter into the contract or affirmatively warrant that they have adopted and will comply with written policies designed to ensure that advisers adhere to the impartial conduct standards and provide required disclosures. *See id.* § IX, 81 Fed. Reg. 21069.

C. Subsequent Individual Exemption Applications

Pursuant to the invitation included in the BIC Exemption preamble, six market intermediaries have submitted applications for an individual exemption to become financial institutions for purposes of BIC Exemption § VIII(e)(5).[20] *See* Lloyd Decl. ¶¶ 4-5 (attached as Exhibit A). These applications will be processed under DOL's regulations for individual exemptions, which provide for a back-and-forth between DOL and the applicant and notice-and-comment procedures before any exemption is finalized. *See* 29 C.F.R. §§ 2570.30-2570.52.

One applicant, Financial Independence Group ("FIG"), is also one of Plaintiff's members. *See* Lloyd Decl. Ex. 6; Market Synergy Group Network, http://www.marketsynergy.net/network/. FIG's application states that it "is licensed as an insurance agency" and "also has an affiliated registered investment advisor." Lloyd Decl. Ex. 6 at 2. It further states that "FIG's experience in supervising advisors and ensuring the protection of investors utilizing its affiliated [registered investment advisor] well equips FIG to establish a [special financial institution under the BIC Exemption] to appropriately train, monitor, and supervise insurance-license-only agents with whom it will contract." Id.

Another applicant, InForce Solutions, describing itself as a "brokerage general agency" providing back office services for multiple field marketing intermediaries, stated that such intermediaries currently have on staff "field suitability officers" who focus on "educating insurance agents about the importance of the suitability reviews required by insurance laws," and

[20] Application material is subject to public inspection. *See* 29 C.F.R. § 2570.51.

"field compliance officers" who, among other things, focus on "adherence to established compliance policies and procedures and employee and agent education on relevant insurance regulations." *Id.* Ex. 3 at 2. The applicant represented to DOL that it "will be positioned to leverage its strong understanding of insurance agents and their sales practices, supervisory experience, compliance with regulations, and its collective [FMO] suitability and compliance experience to provide the Best Interest, supervisory and compliance structures as required by [the BIC Exemption]." *Id.* at 3.

Another applicant, Legacy Marketing Group, Inc., describing itself as an entity that "partners with unaffiliated insurance companies to design, distribute and market products for the U.S. fixed annuity and life insurance market," represented to DOL that it "has extensive experience in training and supervising the activities of individual insurance agents to protect the purchasers of fixed annuities, and ensuring compliance with existing legal standards imposed by the departments of insurance in all 50 states." *Id.* Ex. 4 at 2.

VI. PROCEDURAL HISTORY

On June 8, 2016, Market Synergy Group, Inc., filed suit to challenge the amendment of PTE 84-24 and seeks its vacatur. *See* Compl., ECF No. 1. Plaintiff is an insurance agency licensed in Kansas that was created in 2014 and serves as a network of eleven insurance market intermediaries. *See* Sparks Decl. ¶¶ 2-3, 15, ECF No. 11-1; *see also* Linda Koco, 'Super-IMO' Has Deep Pedigree, insurancenewsnet.com (Apr. 25, 2014) [Link]. It develops proprietary annuity products, and provides other support to its network members. Sparks Decl. ¶ 14. Accordingly to Plaintiff's declarations, this network was responsible for approximately $15 billion of the $53 billion in FIA sales in 2015. *Id.* ¶ 15; Moore Decl. ¶ 16, ECF No. 11-2.

Plaintiff claims that DOL failed to provide sufficient notice of its final action, that its decision was arbitrary and capricious, that its cost-benefit analysis failed to address the

consequences for the independent distribution channel, and that DOL's regulation of products exceeded its statutory authority. *See* Compl., ECF No. 1. On June 17, 2016, Plaintiff moved for a preliminary injunction "enjoining the [Department] ... from ... enforce[ing]" PTE 84-24 as amended for FIAs "during the pendency of this litigation." Pl.'s Mot. for Prelim. Injunction, ECF No. 10. Based on the parties' request, the Court suspended DOL's obligation to answer the complaint and set a schedule for briefing and argument of the preliminary injunction motion. *See* Notice of Hearing, July 12, 2016; Minute Order July 6, 2016; Joint Motion, ECF No. 14, June 30, 2016.

STATEMENT OF ISSUE

Whether a preliminary injunction should be entered regarding a regulatory exemption that is not applicable until April 2017 where the agency determined that the regulation is important to the protection of retirement investors, conducted an extensive rulemaking responsive to public comments, provided notice of the actions it was considering, weighed the important aspects of the issues, and explained its reasoning at length, and where Plaintiff's alleged harms depend primarily on the actions of third parties not bound by this litigation.

STANDARD OF REVIEW

"A preliminary injunction is an extraordinary remedy, and ... it should not be issued unless the movant's right to relief is clear and unequivocal." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003) (internal citation omitted).[21] "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). To succeed on a motion for a preliminary injunction, a plaintiff must "show all four PI factors." *Lane v. Buckley*, No. 15-8111, 2016 WL 1055840, at *2 (10th Cir. Mar. 17, 2016).

Plaintiff is incorrect when it proposes a modified test with a lesser burden than the "likely to succeed on the merits" requirement in *Winter*. Pl.'s Br. 22. This "modified test" set out in *Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250, 1255-56 (10th Cir. 2003), has likely been overruled by *Winter*. *See Dine Citizens Against Ruining Our Environment v. Jewell*, No. 15-0209, 2015 WL 4997207, at *30 (D.N.M. Aug. 14, 2015) ("*Winter* raises serious doubts about the continued vitality" of the modified test). Post-*Winter* a plaintiff must "show all four PI factors" to obtain preliminary relief. *Lane*, 2016 WL 1055840, at *2.[22] Moreover, even under prior Tenth Circuit case law, that test does not apply where "a preliminary injunction seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme." *Heideman*, 348 F.3d at 1189. That is exactly the relief Plaintiff seeks here. *See Aid For Women v. Foulston*, 441 F.3d 1101, 1115 n.15 (10th Cir. 2006) ("[W]e presume that all governmental action pursuant to a statutory scheme is taken in the public interest.").

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[21] Unless otherwise indicated, internal citations, quotations, and alterations are omitted throughout this brief.

[22] The Tenth Circuit has otherwise mentioned this "modified test" only once in the context of a preliminary injunction post-*Winter*, and, in that case, the court did not apply the modified test or explicitly address the viability of the test in light of *Winter*. *See Roda Drilling Co. v. Siegal*, 552 F.3d 1203, 1208-09 n.3 (10th Cir. 2009).

ARGUMENT

I. PLAINTIFF FAILS TO SHOW A LIKELIHOOD OF SUCCESS ON THE MERITS

Plaintiff challenges under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 500 *et seq.*, and Regulatory Flexibility Act ("RFA"), 5 U.S.C. §§ 601 *et seq.*, four aspects of DOL's decision to allow conflicted FIA transactions, if at all, under the conditions of the BIC Exemption. Pl.'s Br. 23. Under both statutes, the agency is entitled to great deference. *See Council Tree Investors, Inc. v. FCC*, 739 F.3d 544, 555 (10th Cir. 2014) (under the APA, "the standard of review is very deferential to the agency," "[a] presumption of validity attaches to the agency action," and "the burden of proof rests with the parties who challenge such action"); *see also Morris v. U.S. Nuclear Regulatory Comm'n*, 598 F.3d 677, 691 (10th Cir. 2010) ("[D]eference ... is especially strong where the challenged decisions involve technical or scientific matters within the agency's area of expertise."); *Helicopter Ass'n Int'l v. FAA*, 722 F.3d 430, 438 (D.C. Cir. 2013) (review under RFA is "highly deferential, particularly with regard to an agency's predictive judgments about the likely economic effects of a rule"). "[J]judicial review of agency action is limited to the evidence before the agency." *Unified Gov't of Wyandotte County/Kansas City v. GSA*, No. 11-2400, 2012 WL 602838, at *1-2 (D. Kan. Feb. 24, 2012). DOL's thorough analysis and reasoned conclusions make that deference well warranted here, and none of Plaintiff's claims is likely to succeed on the merits.

A. The Department Provided Sufficient Notice Of Its Decision to Require Those Who Engage in FIA Transactions to Rely on the BIC Exemption Rather than PTE 84-24

Under the APA, when an agency engages in notice-and-comment rulemaking, the agency's notice of proposed rulemaking must "'permit interested parties to comment meaningfully.'" *Alternate Fuels, Inc. v. Lujan*, No. 91-2132, 1992 WL 279743, at *4 (D. Kan. Sept. 22, 1992) (quoting *Florida Power & Light Co. v. United States,* 846 F.2d 765, 771 (D.C.

Cir. 1988)); 5 U.S.C. § 553(b)(3). "The final rule ... need not be the one proposed in the [notice]," so long as it is "a 'logical outgrowth' of its notice." *U.S. Telecom Ass'n v. FCC*, No. 15-1063, 2016 WL 3251234, at *10 (D.C. Cir. June 14, 2016); *accord Kaw Valley, Inc. v. EPA*, 844 F. Supp. 705, 710 (D. Kan. 1994) (citing *Am. Mining Congress v. Thomas*, 772 F.2d 617, 639 (10th Cir. 1985)). "A final rule is a logical outgrowth if affected parties should have anticipated that the relevant modification was possible." *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1107 (D.C. Cir. 2014). In particular, a notice satisfies the logical outgrowth test "if it 'expressly ask[s] for comments on a particular issue or otherwise ma[kes] clear that the agency [is] contemplating a particular change.'" *U. S. Telecom Ass'n*, 2016 WL 3251234, at *10.

Here, DOL's decision to require those engaging in FIA transactions to rely on the BIC Exemption, rather than PTE 84-24, for exemptive relief, grew logically right out of its 2015 proposal.[23] In that proposal, DOL raised a question about the line to be drawn between variable annuities and other types of annuities for purposes of distinguishing transactions that would be required to use the more protective BIC Exemption and those that could continue to use PTE 84-24 as modified. DOL directly invited comment on whether its proposal had "drawn the correct lines between insurance and annuity products that are securities and those that are not." 80 Fed. Reg. 21975. DOL explicitly queried whether its decision to "leave in place relief for IRA transactions involving insurance and annuity contracts that are not securities strikes the appropriate balance and is protective of the interests of IRAs." *Id.* 22015. These comments made apparent that DOL was considering whether the proposed categorizations were protective enough of IRA investors and that based on the comments elicited, it could decide to put FIA transactions on the other side of the proposed line.

[23] Availability of the BIC Exemption for FIA transactions was never in doubt, as the transactions were included in both the proposed and final versions of the exemption. *See* 80 Fed. Reg. 21984, 21987.

In arguing to the contrary, Plaintiff relies exclusively on the fact that the proposed exemptions would have revoked use of PTE 84-24 for "transactions involving variable annuity contracts and other annuity contracts that are securities under federal securities law" while proposing to allow "transactions involving insurance and annuity contracts that are not securities" to continue to use PTE 84-24. Pl.'s Br. 24-25 (quoting exemptions as proposed). Based on these statements in the proposals, Plaintiff says that it surmised that it had no need to comment because FIAs "are not regulated as securities under federal securities law." *Id.* at 25. But a proposed rule "[i]s simply a proposal," which means that the Department "was *considering* the matter." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174-75 (2007).[24] Even if the scope of DOL's consideration was not obvious to Plaintiff by virtue of the proposed partial revocation of PTE 84-24 as applied to variable annuities, it had to have been apparent when the agency explicitly requested comment on whether it had struck the right balance in the proposal.

Indeed, it was apparent to other market participants who commented on the proposal that "[t]he Proposal specifically requests comment on which exemption, the BIC Exemption, or a revised PTE 84-24, should apply to different types of annuity products." Cmt. 718 at 8 (Allianz Life Ins. Co.). Numerous market participants demonstrated their awareness that DOL was contemplating redrawing the lines between annuity and other insurance products by recommending for and against such action. *See, e.g.,* Cmt. 774 (IALC) (recommending against requiring fixed annuities to rely on the BIC Exemption); Cmt. 3017 (Ron A. Rhoades) (recommending that FIA transactions rely on the BIC Exemption and repeal of PTE 84-24); Cmt. 3090 (Fund Democracy) (recommending against allowing FIAs to rely on PTE 84-24); Cmt.

[24] *See also Select Specialty Hosp.-Akron v. Sebelius*, 820 F. Supp. 2d 13, 23 (D.D.C. 2011) ("The whole rationale of notice and comment rests on the expectation that the final rules will be somewhat different—and improved—from the rules originally proposed by the agency.").

3111 (Nat'l Ass'n for Fixed Annuities) (recommending that DOL continue to include FIAs under PTE 84-24 as proposed). Even one of Plaintiff's members submitted a comment that discussed the independent distribution channel and incorporated by reference IALC's Comment 774. *See* Exemption Cmt. 333 (Advisors Excel).[25] The comments of other market participants that anticipated the possibility of a different outcome than proposed demonstrate that Plaintiff had every reason to anticipate the same.[26]

In addition, Plaintiff cannot rely on the fact that the proposal distinguished between contracts that are securities and those that are not. As explained, the appropriateness of that distinction with respect to annuity products was explicitly under consideration. And as several commenters recognized, the demarcation in the proposals between annuity contracts that are securities and those that are not is not entirely clear. *See, e.g.,* Cmt. 506 at 11-12 (Securities Industry and Financial Markets Ass'n) (urging DOL to abandon distinction based on securities to avoid uncertainty regarding which exemption would apply); Cmt. 762 at 21 (Nat'l Ass'n for Fixed Annuities) (seeking clarification regarding availability of PTE 84-24 for certain annuity contracts). Indeed, as Plaintiff acknowledges, Pl.'s Br. 25-26, under securities laws, annuities

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[25] Plaintiff submitted a declaration from Advisor Excel's founder, David Callanan, but it did not mention his participation in the rulemaking process. *See* Callanan Decl., ECF No. 11-7. It is notable that, unlike some other declarants, Mr. Callanan does not profess surprise at DOL's final exemption. *See id.* ¶ 19.

[26] Plaintiff cites press articles, which are not part of the administrative record in this case, in an attempt to show that the FIA industry was "shocked" by DOL's action. Pl.'s Br. 26, 14 (citing Sparks declaration, ¶¶ 34-35, which in turn, cites press articles). To the extent the Court relies on such articles, "it is only fair that the [C]ourt consider [D]efendants' materials for the same purposes," *Native Fish Soc. v. Nat'l Marine Fisheries Servs.*, 992 F. Supp. 2d 1095, 1107 (D. Or. 2014). Other articles show that long before DOL issued the final rulemaking, the industry was aware of the possibility that FIAs could be ineligible for PTE 84-24. *See, e.g.*, Robert Bloink, and William H. Byrnes, Final DOL Rule Could Place Indexed Annuities Under Variable Umbrella, ThinkAdvisor.com, 2015 WLNR 34152920 (Nov. 17, 2015), [Link]; Linda Koco, DOL May Classify Indexed Annuities Same As Variable in New Rule, insurancenewsnet.com (Oct. 30, 2015) [Link]. *See also* Kerry Pechter, Surprise: DOL Rule Targets Indexed Annuities, retirementincomejournal.com (Apr. 7, 2016) [Link] ("Cathy Weatherford, CEO of the Insured Retirement Institute, said ... 'We're not surprised that [FIAs] were taken out of PTE 84-24 .... We have been advising our members that this was a possibility, based on our discussions with the DOL and the Administration.'"). Indeed, the publisher of the October 30, 2015 article was characterized by one of Plaintiff's declarants as a "major trade journal." Sparks Decl. ¶ 34, ECF No. 11-1.

are securities, but certain "annuity contracts" are treated as "exempt securities." *See* Securities Act of 1933, 15 U.S.C. § 77c(a)(2), (8). Thus, even on Plaintiff's reading of the 2015 proposals, it would have had reason, as others did, to comment on the treatment of FIAs under the proposals.[27]

B. The Department Provided A Well-Reasoned Explanation For Its Decision To Require Those Who Engage in FIA Transactions to Rely on the BIC Exemption Rather than PTE 84-24

DOL also provided a well-reasoned basis for requiring those seeking to enter into conflicted FIA transactions to satisfy the conditions of the BIC Exemption, rather than PTE 84-24, in order to do so. DOL granted the BIC exemption and amended PTE 84-24 based on its finding that the conditions of the exemptions satisfy the statutory requirements that they be administratively feasible, in the interest of retirement investors, and protective of their interests. 81 Fed. Reg. 21075, 21173-74.

Plaintiff argues that DOL's action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "'The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency.'" *In re FCC 11-161*, 753 F.3d 1015, 1041 (10th Cir. 2014) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

[27] Moreover, even if the final rulemaking could be "regarded objectively as an abrupt departure from a proposed rule," it would be harmless error because other commenters—including one of Plaintiff's members—made the same points that Plaintiff now presses, and DOL had the opportunity to consider those views. *Allina Health Servs.*, 746 F.3d at, 1110; *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 708 (10th Cir. 2009) (holding that in APA cases "errors in [] administrative proceedings will not require reversal unless Plaintiffs can show they were prejudiced"); *see, e.g.*, Exemption Cmt. 333 (Advisors Excel); Cmt. 774 (IALC) (recommending against requiring FIA transactions to rely on the BIC Exemption because of, among other things, the distribution channels for FIAs); Cmt. 3092 (Insured Retirement Inst.) (recommending DOL provide exemptive relief for all fixed and variable annuities under PTE 84-24 based on their common characteristics); Heitz Decl. ¶ 11, ECF No. 11-3 (acknowledging that commenters provided DOL with information on the role of IMOs). *Cf. Alternate Fuels, Inc. v. Lujan*, No. 91-2132, 1992 WL 279743, at *4-6 (D. Kan. Sept. 22, 1992) (holding that under the APA, "a technical flaw in the notice [] can be overcome if the participants had actual notice" and that defective notice is remediable only on a showing of "substantial prejudice to the complaining party.").

Under that standard, "a reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute." *Id.* "A reviewing court must uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Id.* Moreover, where Congress expressly delegates to an agency "the authority to grant [an] exemption and ... to make certain other determinations in order to do so ... [t]hat grant and those determinations ... are ... entitled to great deference." *AFL-CIO v. Donovan*, 757 F.2d 330, 341 (D.C. Cir. 1985).

DOL made its findings based on "significant concerns about [FIAs'] complexity, risk, and conflicts of interest," which make FIAs similar to variable annuities and securities in relevant ways, and consequently make similar safeguards appropriate. 81 Fed. Reg. 21157-58. Its decision is supported by case law, which notes that an FIA "is a hybrid financial product that combines some of the benefits of fixed annuities with the added earning potential of a security." *Am. Equity*, 613 F.3d at 168.[28] For a variety of reasons, FIAs "involve considerations of investment not present in the conventional contract of insurance." *Id.* at 174. These include "a variability in the potential return that results in a risk to the purchaser," and an "appeal to the purchaser not on the usual insurance basis of stability and security but on the prospect of 'growth' through sound investment management." *Id.* Accordingly, after reviewing the public comments, DOL concluded that PTE 84-24 was not sufficiently protective of retirement investors in the case of FIA transactions and that the BIC Exemption—as adapted—was better suited to protect retirement investors. 81 Fed. Reg. 21158.

Specifically, DOL explained in detail the ways in which FIAs "are complex products

[28] The SEC issued a final rule that would have subjected FIAs to additional requirements under the Securities Act of 1933, and the D.C. Circuit upheld the reasonableness of the SEC's rationale for doing so, which included FIAs' appeal and risk to the purchaser. The Court struck down the rule for failure to sufficiently analyze "efficiency, competition, and capital formation" as required by the Securities Act—but not required here. *See id.* at 179.

requiring careful consideration of their terms and risks," listing the host of relevant considerations,[29] and concluding that customers can easily misunderstand, overestimate, or underestimate many of these issues. 81 Fed. Reg. 21018; *id.* 21017 (quoting FINRA publication stating that FIAs "are anything but easy to understand"); *see also* RIA 119, 123, 138-140 (describing the complex features of FIAs and the multiple variables to consider in choosing one). For example, FIAs can be linked to a variety of indices, *see* RIA 119, and "there are several methods for determining changes in the index such as point-to-point, annual reset, high-water-mark, and low-water-mark," *id.* 123. "Because different indexing methods can result in varying rates of return, investors need to understand the trade-offs that they make by choosing a particular indexing method." *Id.* 123. Furthermore, index-linked gains are generally not fully credited, with the amount credited depending on the particular features of the FIA, such as participation rates, interest rate caps, and the rules regarding interest compounding. *Id.* 282. FIAs, unlike most declared rate annuities, may also offer guaranteed living benefit riders which come in three different types. *Id.* 119, 125-126. These benefits "may come at an extra cost and, because of their variability and complexity, may not be fully understood by the consumer." *Id.* 119. Given these and other complexities, retirement investors "are acutely dependent on sound advice that is untainted by the conflicts of interest posed by Advisers' incentives to secure the

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[29] Specifically, the Department explained that an investor would need to understand:

> surrender terms and charges; interest rate caps; the particular market index or indexes to which the annuity is linked; the scope of any downside risk; associated administrative and other charges; the insurer's authority to revise terms and charges over the life of the investment; the specific methodology used to compute the index-linked interest rate; and any optional benefits that may be offered, such as living benefits and death benefits. In operation, the index-linked interest rate can be affected by participation rates; spread, margin or asset fees; interest rate caps; the particular method for determining the change in the relevant index over the annuity's period (annual, high water mark, or point-to-point); and the method for calculating interest earned during the annuity's term (e.g., simple or compounded interest).

81 Fed. Reg. 21018.

annuity purchase, which can be quite substantial." 81 Fed. Reg. 21018.

As for risk, Plaintiff is simply incorrect that "the insurance company bears the entire investment risk." Pl.'s Br. 7. Instead, as the D.C. Circuit has recognized, "[i]n FIAs, as in securities, there is a variability in the potential return that results in a risk to the purchaser." *Am. Equity*, 613 F.3d at 174; *see also* RIA 123; *Brokers' Choice of Am.*, 757 F.3d at 1148 (noting that due to caps on maximum interest earned and fees, it is "common for an annuitant's yields to be somewhat lower than expected"). Principal can be lost if the annuity is cancelled early, due to surrender charges and tax consequences. *See* 81 Fed. Reg. 21017-18.[30] Both surrender periods and charges continue to be substantial.[31] Furthermore, contrary to Plaintiff's claim, FIAs are not the same as declared rate annuities aside from "the method for computing interest earnings credited to the policies." Pl.'s Br. 6. As noted, FIAs tend to have more varied and complex features and are more likely to be marketed in competition with investments such as mutual funds, rather than as guaranteed investment streams. *See* RIA 124-26 (chart comparing features of declared rate annuities and FIAs), 282-286; 81 Fed. Reg. 21086-88 (comparing different types of deferred annuities). The added complexity of FIAs exacerbates their risks because consumers more often misapprehend the degree to which they are taking on risk.

The conflicts of interest particular to FIA transactions also led DOL to conclude that the

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[30] As the SEC has recognized:

> You can lose money buying an indexed annuity. If you need to cancel your annuity early, you may have to pay a significant surrender charge and tax penalties. A surrender charge may result in a loss of principal, so that an investor may receive less than his original purchase payments. Thus, even with a specified minimum value from the insurance company, it can take several years for an investment in an indexed annuity to 'break even.'

SEC Office of Investor Education and Advocacy Investor Bulletin: Indexed Annuities [Link]; RIA 284.

[31] *See* Wink's Sales & Market Report, 4th Quarter, 2014, Part 1 at 13, 23, Part 2 at 10 (the most common surrender period is ten years, but higher periods are still relatively common); Cmt. 774 (IALC) ("Most products sold today have a surrender charge period of ten years or less and a surrender charge of ten percent or less."). And some FIAs currently on the market have 14 year surrender periods and surrender penalties as high as 20%. *See, e.g.*, EquiTrust Life Ins. Co., EquiTrust Annuity All Product Summary (July 21, 2016) [Link] (listing two such products).

BIC Exemption, rather than PTE 84-24 as amended, was more appropriate for FIA transactions. 81 Fed. Reg. 21153. Plaintiff does not dispute that those who render investment advice to qualified retirement plans for compensation are ERISA fiduciaries. And because Plaintiff acknowledges that it needs an exemption to continue advising retirement investors under the Rule, it cannot dispute that the FIA transactions it seeks to carry out are the sort that Congress prohibited—absent an applicable exemption—because they are inherently fraught with conflicts of interest. 29 U.S.C. § 1106; *see also Lockheed Corp. v. Spink*, 517 U.S. 882, 888 (1996) (recognizing Congress's goal to bar categorically transactions likely to injure a plan and its beneficiaries); *see supra* Stmt. of Facts § IV (explaining conflicts in the annuity market in particular). Moreover, FIA commissions are typically higher than those for other products, including declared rate annuities. *See* RIA 131; Cmt. 3090 (Fund Democracy). And DOL determined that "the increasing complexity and conflicted payment structures associated with [FIAs] have heightened the conflicts of interest experienced by investment advice providers that recommend them." 81 Fed. Reg. 21153. Noting the concern that FIAs, in particular, "have often been used as instruments of fraud and abuse," 81 Fed. Reg. 21154, the Department determined that the BIC Exemption, which includes "stringent anti-conflict policies and procedures" would be more appropriate to protect retirement investors, *id.* 21154.

Several other factors support DOL's action. Namely, DOL determined that a level playing field for variable annuities, indexed annuities, and mutual funds was important to "avoid[] creating a regulatory incentive to preferentially recommend indexed annuities." 81 Fed. Reg. 21018. Relatedly, while Plaintiff trumpets that "all issuers of [FIAs] have adopted ... policies and procedures that meet" the NAIC model suitability standards, "as they must to qualify for exemption" from securities regulations, Pl.'s Br. 29 n.7, a commenter argued that

"IRA owners need greater protections when investing in indexed annuities precisely because such products are not regulated as securities," 81 Fed. Reg. 21157.

Plaintiff's attempts to show that DOL did not provide a reasoned basis for requiring FIA transactions to satisfy the conditions of the BIC Exemption can readily be dismissed. Plaintiff asserts FIAs meet the definition of "Fixed Rate Annuity Contract" other than "the last … purely arbitrary exclusionary sentence in the definition." Pl.'s Br. 28. That is simply incorrect. Due to facts Plaintiff concedes, *see* Sparks Decl. ¶ 9, FIAs cannot meet another part of the definition—FIAs *do* "vary, in part or in whole, based on ... the investment experience of an index or investment model." 81 Fed. Reg. 21174, § I(b)(1). And the complexity and risk associated with FIAs' dependence on an index is one of the factors that led DOL to conclude that transactions involving FIAs should satisfy the conditions of the BIC Exemption. *See* 81 Fed. Reg. 21154-55. Thus, DOL did not arbitrarily exclude FIAs from the definition of Fixed Rate Annuity Contract; the definition captured, at least in part, the basis on which DOL concluded that PTE 84-24 could be used for declared rate annuities but not for FIAs.

Plaintiff also makes much of DOL's distinction in proposed PTE 84-24 between transactions that involve securities and those that involve insurance products that are not securities. Pl.'s Br. 29; 80 Fed. Reg. 22015. Based on comments in response to DOL's direct solicitation, DOL determined that this distinction was not well-founded and not the best place to draw the line. 81 Fed. Reg. 21053, 21156-58. DOL faced the choice of either grouping FIAs with variable annuities or with declared rate annuities. It was entirely reasonable, based on the copious evidence collected and the deep analysis reflected in DOL's explanation of its decision, for DOL to conclude that FIAs should be grouped with variable annuities and other products requiring closer regulation rather than the relatively simpler declared rate annuities. *Id.*; *see also*

supra Stmt. of Facts § III. DOL's careful analysis reflects its obligation to approve only those exemptions that would be in the interest and protective of retirement investors. *See* 29 U.S.C. § 1108(a); 26 U.S.C. § 4975(c)(2). And even if it were a close or debatable question, DOL's decision is entitled to deference unless it falls below the APA's generous "arbitrary and capricious" threshold. *See In re FCC 11-161*, 753 F.3d at 1041; *AFL-CIO*, 757 F.2d at 341. It does not.[32]

C. The Department's Substantial Consideration of the Effects of the Rulemaking on the Insurance Industry Easily Meets the Applicable Standards

As demonstrated by the preambles to the Rule and exemptions and by its thorough regulatory impact analysis,[33] DOL sufficiently considered the important aspects of the problem—including the impact on the "independent agent distribution channel" of importance to Plaintiff, Pl.'s Br. 32—and amply satisfied the requirements of the APA and RFA.

1. The Department appropriately considered the impact of its actions on the independent distribution channel

Under the arbitrary and capricious standard, DOL need only have based its decision on "a consideration of the relevant factors" and "important aspect[s] of the problem." *Friends of the Bow v. Thompson*, 124 F.3d 1210, 1215 (10th Cir. 1997). While Plaintiff asserts that DOL failed to weigh the impact of the rulemaking on market intermediaries and independent agents, the record demonstrates otherwise. DOL described and acknowledged independent agents, IMOs,

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[32] In any event, the remedy Market Synergy seeks would be inappropriate. DOL amended PTE 84-24, along with several other exemptions, on June 8, 2016 to incorporate investor-protective impartial conduct standards. Although Plaintiff does not challenge those standards, it nevertheless asks the Court to permit it to proceed under the pre-amendment version of PTE 84-24 that will no longer be applicable to any other entity. Under no circumstances should Plaintiff be permitted to avoid compliance with impartial conduct standards that it does not challenge.

[33] DOL's RIA was conducted primarily to satisfy Executive Order 12866, which is an internal government requirement that is not judicially enforceable. *See* RIA 16-17; *Nat'l Trucking Equipment Ass'n v. Nat'l Hwy. Traffic Safety Admin.*, 711 F.3d 662, 670 (6th Cir. 2013) (express terms of E.O. 12866 preclude judicial review of an agency's compliance with its standard). But it amply demonstrates the basis for and reasonableness of the rulemaking.

and the independent distribution channel throughout its analysis.[34] Because these entities are closely aligned with insurance companies—handling about 18% of all annuity sales and 60% of FIA sales, *see* RIA 102—many of DOL's references to insurers and their advisers implicitly and explicitly include these entities as well. *See, e.g.*, RIA 310 ("Other types of firms that advise plan and IRA investors, such as … insurers using captive agents, independent insurance agents, [and IMOs] … will face choices about how to respond to this final rule and exemptions. … [These] firms will gravitate toward structures and practices that efficiently avoid or manage conflicts to deliver impartial advice consistent with fiduciary conduct standards. Firms that achieve these ends most efficiently will gain market share."). While DOL could not quantify the precise cost as to independent agents and IMOs because it did not have sufficient data and the industry declined to provide the information in response to DOL's request,[35] DOL's reasoned consideration of the impact of the rulemaking on these entities and the market for retirement investment advice easily meets the APA standard applicable here.

DOL did not need to further single out the independent distribution channel or weigh additional evidence for its conclusion to be justified. DOL has demonstrated that the rulemaking

[34] *See, e.g.,* RIA 38 (discussing independent agents); *id.* 101-04 (describing agents and market intermediaries, including observation that insurers in FIA market "heavily rely on independent insurance agents"); *id.* 105 ("The type of products and the distribution channels are intertwined[.]"); *id.* 131 (chart of sales by distribution channel); *id.* 144 (discussing "potential conflicts affecting insurance intermediaries"); *id.* 238 & n.519 (acknowledging that "[i]ndependent insurance agents could also be affected" and that some of their costs could be encompassed in the calculation of insurer costs); *id.* at 254 ("[s]mall service providers affected by this rule include ... insurance companies and agents, ... and others providing investment advice to plan and IRA investors"); *id.* 310-11 (discussing choices IMOs and independent agents will face). *See also* 81 Fed. Reg. 21067 (BIC Exemption discussing IMOs in context of financial institution definition); *id.* 21166 (PTE 84-24 stating that DOL did not intend to disrupt payment of commissions through intermediaries).

[35] Plaintiff baldly asserts, without any support, that IMOs and independent agents chose not to provide data requested by DOL "in reliance on the … assumption that PTE 84-24 would continue to be applicable to their sales of [FIAs]." Pl.'s Br. 32 n.8. It is unclear on what basis Plaintiff believes it can speak to the reasons this entire segment of the industry, let alone the insurance companies who also possess much relevant data, failed to respond to DOL's request. Regardless, as discussed above, the proffered basis was not reasonable, and the industry may not complain about the absence of detailed calculations when they did not respond to DOL's request for data that might have (but, of course, might not have) supported plaintiff's position.

will substantially benefit investors and that these benefits far outweigh the cost to the financial industry, including the insurance industry. *See* RIA 326-328. Accordingly, DOL determined that any potential negative effect on the market "will be justified by the rule's intended long-term effects of greater market efficiency and a distributional outcome that favors retirement investors over the financial industry." *Id.* 309. For example, "advisers may migrate from advisory firms where conflicts had been most deeply embedded to firms that are well-situated to efficiently provide impartial advice compliant with the final rule and exemptions." *Id.* 311.[36] The same evidence and reasoning undergirds DOL's decision that the BIC Exemption provides a better basis for FIA transactions.

In any event, Plaintiff has not demonstrated that market costs will make the BIC Exemption unworkable for IMOs and independent agents. There are several ways IMOs could operate under the conditions of the BIC exemption. First, IMOs could maintain their current role with independent agents, with insurers serving as the contract-signing financial institution while IMOs provide support for independent agents. Plaintiff speculates that insurers will not be willing to sign the contract to serve as the financial institution for independent agents. Pl.'s Br. 35. But one of Plaintiff's declarants anticipates that at least some insurers will follow this path. *See* Callanan Decl. ¶ 21, ECF No. 11-7 (stating only that "*some* may change to a 'captive'

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[36] DOL anticipated that some current market participants may exit the market or take another role. *See* 81 Fed. Reg. 21075; RIA 307-312. Such market adjustments happen even without new regulation. RIA 309 ("[T]he markets for financial advice, financial products and other financial services are highly dynamic. They are characterized by innovation in both product lines and business models, and by large ongoing shifts in labor and other resources across product and service vendors and business models."). DOL concluded based on the evidence that most advisers will remain. *See, e.g., id.* 77-78 (reforms in the United Kingdom "did not cause a large exit of advisers" and "some of those that left have since returned"). And DOL concluded that some disruption of current practices was not only anticipated but necessary given DOL's conclusions, reached after an extended and open rulemaking process, that plan participants and IRA holders are being harmed every day by conflicted advice. *See id.* 166-68. Some additional contraction in the independent distribution channel would not harm investors, especially if offset by better rates and less conflicted advice. *See id.* 169 & n.384; id. 102, Fig. 3-4 (noting that independent agents handle only about 18% of the total annuity market, although a larger share of the FIA portion of that market). The mere fact that some agents might exit the retirement advice market or take another role does not make the rulemaking irrational.

model" (emphasis added)). And Plaintiff's doubt that insurance companies will continue to work with independent agents is largely driven by a misunderstanding of the impartial conduct standards and the supervisory structure of the BIC Exemption. An insurer supervising an agent will not need to supervise the sale of *other companies'* products, but will need to ensure only that recommendations and sales concerning *its own* products meet the standards. *See* 81 Fed. Reg. 21029 ("[The] standard does not impose an unattainable obligation ... to somehow identify the single 'best' investment ... out of all the investments in the national or international marketplace, assuming such advice were even possible."); *id.* 21077 (setting requirements for the financial institution's own practices and those of its affiliates and related entities, not unrelated competitors); *cf.* NAIC Model Regulation § 6(F)(3) (insurer not required to include in its system of supervision a producer's recommendations of products other than annuities offered by the insurer). Properly understood, the BIC Exemption does not force insurers to move to a captive sales force. *See, e.g.*, RIA 310-11; *cf.* Callanan Decl. ¶ 21 (anticipating that some insurers will continue to use independent agents but "may decide to eliminate the IMO"). Nor does it impose "unquantifiable legal risk." Pl.'s Br. 36. Instead, the legal risk is no greater than the exposure advisers to ERISA employee benefit plans have long faced. *Cf.* 29 U.S.C. § 1132(a)(1), (3) (permitting retirement investors to sue for violations of Title I of ERISA).

Second, IMOs could even take on a new or expanded role in the market. Nothing prevents an insurer from contracting with a third party, such as an IMO, to take on much or all of the insurer's oversight responsibility. *See* 81 Fed. Reg. 21034. Plaintiff protests, relying exclusively on its president's bare assertion, that neither it nor its affiliated IMOs could "effectively supervise an Adviser's compliance with the [BIC Exemption]." Pl.'s Br. 35. But insurers have existing supervisory obligations under state law. *See* 81 Fed. Reg. 21018 & n.30

(NAIC Model Regulation § 6(F)(1) requires insurers to "establish a supervision system" and "maintain procedures for review of each recommendation prior to issuance"). Some IMOs may already provide supervisory services on behalf of insurers. Moreover, Plaintiff implies that it already has a relationship with many, if not most, of the insurers whose products its independent agents are selling. *See* Pl.'s Br. 35 (stating only that there are "some" insurers "which the IMO or Market Synergy may have no relationship with").

Third, as Plaintiff acknowledges, Pl.'s Br. 34, IMOs may seek individual exemptions to become "financial institutions" separately charged with duties under the exemption. BIC Exemption § VIII(c)(5). Plaintiff asserts that this option would be too uncertain and lengthy, and possibly too costly. Pl.'s Br. 34. But this speculation does not alter the fact that the option is available, and if DOL granted an exemption to an applicant, other IMOs that satisfy the terms of the exemption could also act as financial institutions. *See* BIC Exemption § VIII(e)(5); 81 Fed. Reg. 21083. And Market Synergy cannot claim that DOL failed to consider an aspect of a problem while recognizing that DOL provided solutions for IMOs like Plaintiff.

Because DOL considered the important aspects associated with its rulemaking, including the independent agent distribution channel, it has satisfied APA requirements.[37] *See Sierra Club, Inc. v. Bostick*, 787 F.3d 1043, 1047 (10th Cir. 2015) ("The agency need only demonstrate that it considered relevant factors and alternatives and that the choice it made was reasonable based on

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[37] Plaintiff's citation of *Michigan v. EPA*, 135 S. Ct. 2699 (2015) does not support its position because DOL provided a detailed RIA that weighed the costs and benefits to the industry and the public. *See supra* Stmt. of Facts § V(B). Moreover, *Michigan*, which concerned EPA's failure to conduct a cost-benefit analysis in the face of a statute that required it, does not undermine prior court decisions noting that the APA does not inherently require detailed cost-benefit analyses. *See Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 510-12 & n.30 (1981) ("Congress uses specific language when intending that an agency engage in cost-benefit analysis."); *Village of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 670-71 (D.C. Cir. 2011) (rejecting argument that "the APA's arbitrary and capricious standard alone requires an agency to engage in cost-benefit analysis"). Even where a statute requires such an analysis, "the APA imposes no general obligation on agencies to produce empirical evidence." *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009)

that consideration.”).

2. The Department’s cost-benefit analysis satisfies all other legal requirements

Plaintiff also appears to argue that the BIC Exemption is “unworkable” for independent agent FIA sales under two other theories. Pl.’s Br. 33. Neither is meritorious.

a. The BIC Exemption is administratively feasible

DOL has satisfied statutory requirements, *see* 29 U.S.C. § 1108(a); 26 U.S.C. § 4975(c)(2), by affirmatively finding that the exemption is administratively feasible. *See* 81 Fed. Reg. 21003 (“[T]he Department has determined that the exemption is administratively feasible[.]”), *id.* 21009, 21020, 21045, 21061, 21075 (finding exemption administratively feasible based on its “protective conditions”). This requirement has long been construed to require consideration of whether an exemption is feasible for DOL to administer. *See* 91 Pens. & Ben. Rep. (BNA) A-4 (June 21, 1976) (attached as Exhibit B) (DOL statement at American Bar Association event characterizing the “administratively feasible” criterion to “involve[] consideration of the resources of the Department and the Internal Revenue Service in relation to the amount of monitoring by the agencies that the exemption would require”); Bill Schmidheiser, Note, ERISA’s Prohibited Transaction Restrictions: Policies and Problems, 4 J. Corp. L. 377, 405 (1978) (citing Exhibit B for proposition that criterion “means feasible for the Departments to administer, given the Departments’ resources and the nature of the transaction sought to be exempted”). While Plaintiff argues that the “administratively feasible” criterion requires a showing that the exemption is workable for the industry, *see* Pl.’s Br. 37, its argument is completely unsupported and contrary to the plain language of the standard, which suggests that the term refers to workability for the *administrative* agency—not the regulated industry. No court has adopted a contrary interpretation even though hundreds of administrative exemptions

have been granted over the years.[38] Thus, the agency's finding satisfies this statutory requirement.[39]

Moreover, there is a fundamental mismatch between this legal theory and Plaintiff's requested relief. Plaintiff seeks to enjoin implementation of the amendment to PTE 84-24. Pl.'s Br. 43. But Plaintiff has no entitlement to an exemption for particular transactions, *see* 29 U.S.C. § 1108(a) (Secretary "may" grant exemptions), and does not argue that PTE 84-24 as amended is "unworkable." Accordingly, the "administratively feasible" criterion provides no basis for enjoining implementation of amended PTE 84-24 or reinstating its predecessor.[40]

b. DOL satisfied the procedural requirements of the Regulatory Flexibility Act

Plaintiff's RFA claim fails because the RFA merely sets forth a procedural requirement that DOL fully satisfied. The RFA requires agencies to "assess the impact of their regulations on small businesses." *U.S. Cellular Corp. v. FCC*, 254 F.3d 78, 88 (D.C. Cir. 2001). Among other things, the RFA requires that a rule promulgated after a mandatory notice and comment period be accompanied by a "final regulatory flexibility analysis" with descriptions of specific aspects of the rule, its compliance requirements, and certain other matters. 5 U.S.C. § 604(a). "[T]he Act's requirements are purely procedural" and merely "require[] agencies to publish analyses that address certain legally delineated topics." *Nat'l Tel. Coop. Ass'n v. FCC*, 563 F.3d 536, 540 (D.C. Cir. 2009). Judicial review is "highly deferential, particularly with regard to an agency's

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[38] All current exemptions are maintained on DOL's website; for class exemptions, visit https://www.dol.gov/ebsa/Regs/ClassExemptions/main.html, and for individual exemptions, visit https://www.dol.gov/ebsa/regs/ind_exemptionsmain.html.

[39] Even if the provision could be said to impose a requirement on the agency to show that the exemption is administratively feasible for the industry, DOL determined that it is sufficiently feasible for the industry.

[40] While Plaintiff argues that the BIC Exemption is infeasible in part, it does not seek vacatur of that exemption. And the infeasibility of one exemption does not provide grounds for striking down a different exemption. *Cf. Omega World Travel, Inc. v. Trans World Airlines*, 111 F.3d 14, 16 (4th Cir. 1997) ("[A] preliminary injunction may never issue to prevent an injury or harm which not even the moving party contends was caused by the wrong claimed in the underlying action.").

predictive judgments about the likely economic effects of a rule." *Helicopter Ass'n*, 722 F.3d at 438. The Court reviews agency compliance with the RFA "only to determine whether an agency has made a reasonable, good-faith effort to carry out [the RFA's] mandate." *Alenco Commc'ns v. FCC*, 201 F.3d 608, 625 (5th Cir. 2000).

DOL performed a complete analysis of the Rule and exemptions and thus met the RFA's requirements. That analysis is summarized in the Federal Register preambles and laid out in more detail in Chapters 5 and 6 of the final RIA, with cross-references to other portions of the RIA.[41] *See* 81 Fed. Reg. 20993-94, 21002, 21074-75; RIA § 6. Of the seven requirements, Plaintiff challenges only § 604(a)(6)'s requirement that an agency describe the steps "taken to minimize the significant economic impact on small entities consistent with the stated objectives of the applicable statutes," including the "reasons for selecting the alternative adopted in the final rule."[42] *See* Pl.'s Br. 72. Among other alternatives, DOL specifically addressed whether PTE 84-24 should continue to remain available for FIA transactions. *See* RIA § 7.10 at 282-86.[43] And DOL specifically cross-referenced the discussion of the changes made to the proposed rule to minimize impact on small entities. *See id.* § 6.6 (citing § 5.3.1). Taken together, the discussion of alternatives and the explanation for the changes made to the proposed rule, along with the discussion throughout the RIA of how the Rule and exemptions meet the "stated

[41] The RFA does not require the analysis to follow the regulation step-by-step or to be complete in isolation from other required analyses. *See* 5 U.S.C. § 605(a) (RFA's requirements can be met "in conjunction with or as a part of any other ... analysis required by any other law"); *Assoc. Fisheries of Maine v. Daley*, 127 F.3d 104, 115 (1st Cir. 1997); *N.C. Fisheries Ass'n, Inc. v. Gutierrez*, 518 F. Supp. 2d 62, 96 (D.D.C. 2007).

[42] "[A] description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected[.]" 5 U.S.C. § 604(a)(6).

[43] An entire section of the RIA is dedicated to alternatives, including several of relevance to insurance companies and participants in the independent distribution channel. *See, e.g., id.* § 7.4 at 268-71 (discussing disclosure alternative); *id.* § 7.7 at 273-79 (discussing cost savings from modification of contract exemption).

objectives of the applicable statutes," amply satisfy § 604(a)(6)'s requirements. *Cf. Nat'l Coal. for Marine Conservation v. Evans*, 231 F. Supp. 2d 119, 143 (D.D.C. 2002) (RFA satisfied where the administrative record "shows that [the agency] gave explicit consideration to ... alternatives that were less onerous *and* more onerous than the final ... Rule"); *Blue Water Fisherman's Ass'n v. Mineta*, 122 F. Supp. 2d 150, 178 (D.D.C. 2000) (RFA satisfied even though agency "did not give in depth consideration to every alternative" because "the RFA requires only that agencies consider alternatives that would accomplish the stated objectives" of the relevant statute).

Plaintiff believes that participants in the independent distribution channel should have been separately discussed rather than generally treated with the insurance companies for whom they distribute products. Pl.'s Br. 32 n.8. But it again cites no support for the proposition that this kind of granularity is required. To the contrary, DOL's extensive analysis is not undermined merely because one corner of the industry wishes they were more frequently referenced by name. *See Nat'l Ass'n of Mortg. Brokers v. Bd. of Governors of Fed. Reserve Sys.*, 773 F. Supp. 2d 151, 179 (D.D.C. 2011) (finding RFA satisfied where agency "addressed the effects of all of the Rule's prohibitions ... collectively" without singling out the provision challenged by plaintiff). "If an agency makes a reasonable, good-faith effort to carry out RFA's mandate, then its decision will stand." *Fla. Bankers Ass'n v. Dep't of Treasury*, 19 F. Supp. 3d 111 (D.D.C. 2014), *vacated on other grounds*, 799 F.3d 1065 (D.C. Cir. 2015). DOL has met that standard.[44]

[44] Even if Plaintiff's RFA claim were meritorious, Plaintiff would not inherently be entitled to relief. Instead, if the Court finds that "continued enforcement is in the public interest," 5 U.S.C. § 611(a)(4)(B), the Rule and exemption should remain in effect. *See N.C. Fisheries Ass'n*, 518 F. Supp. 2d at 82 ("the conclusion that the amendment violates the ... RFA would not obligate the Court to enjoin its enforcement"). As discussed below, *see infra* Arg. § III, the public interest is so decidedly in favor of the Rule and exemption, and any procedural error is sufficiently harmless, that the Court should exercise its discretion not to vacate the exemption.

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

Lastly, Plaintiff claims that DOL acted in excess of its statutory authority "by granting preferential exemptive treatment to some products [fixed-rate annuities] over others [FIAs] based on [DOL]'s own unsupported product biases." Pl.'s Br. 37. In so doing, Plaintiff misstates the facts, fails to cite any case law in support of its novel argument, and seeks to ignore DOL's express authority to grant administrative exemptions to the prohibited transaction restrictions in ERISA and the Code. Where, as here, Congress expressly delegated to DOL "the authority to grant [an] exemption and ... to make certain other determinations in order to do so ... [t]hat grant and those determinations ... are ... entitled to great deference." *AFL-CIO*, 757 F.2d at 341. As such, there is no merit to Plaintiff's claim.

As a preliminary matter, Plaintiff is simply incorrect in asserting that DOL granted "preferential … treatment" to certain products based on "unsupported product biases." Pl.'s Br. 37. FIA transactions are not alone in having to satisfy the conditions of the BIC Exemption. Indeed, the BIC Exemption contains no product limitations and the primary exemption available for many types of products where the investments involve conflicted compensation. Moreover, the treatment of FIAs is not based on "unsupported product biases" (an assertion that is itself unsupported); to the contrary, as set forth above, *see supra* Arg. § I(B), DOL provided ample support for its determination that, due to the complexities, risks, and conflicts of interest involved in FIA transactions, they must satisfy the conditions of the BIC Exemption. To the extent Plaintiff challenges the bases for that determination, it merely restates its second claim.

Furthermore, in asserting that DOL exceeded its authority by requiring FIAs to satisfy the conditions of the BIC Exemption, Plaintiff seeks to ignore Congress's express delegation of authority to DOL to grant administrative exemptions and to make the requisite findings in order

to do so. Pl.'s Br. at 37 (referring to DOL's "ostensible exemptive authority"). As explained above, Congress expressly delegated to DOL broad authority to grant a "conditional or unconditional exemption of any fiduciary or transaction, or class of fiduciaries or transactions, from all or part of the" prohibited transaction restrictions. 29 U.S.C. § 1108(a); 26 U.S.C. § 4975(c)(2) (parallel provision for tax-favored plans, including IRAs). Moreover, Congress authorized DOL to grant an exemption only if the Secretary finds that the exemption is (i) administratively feasible; (ii) in the interest of retirement investors; and (iii) protective of their interests. 29 U.S.C. § 1108(a); 26 U.S.C. § 4975(c)(2). DOL relied on that authority in granting the BIC Exemption and amending PTE 84-24, and DOL crafted the conditions of the exemptions to accord with statutory requirements that they serve the interests, and protect the rights, of retirement investors—including, for example, that fiduciaries adhere to impartial conduct standards. *See* 81 Fed. Reg. 21,173; 81 Fed. Reg. 21009, 21,061; RIA 289. Plaintiff's refusal to fully acknowledge DOL's exemptive authority does not diminish it or alter the great deference accorded to DOL's grant and findings pursuant to that authority. *See AFL-CIO*, 757 F.2d at 343.

Moreover, nothing in Congress's delegation of authority suggests that DOL cannot consider the characteristics of particular types of products in granting an administrative exemption, as Plaintiff suggests. *See* Pl.'s Br. 37-39. Instead, Congress delegated to DOL broad authority to grant "conditional *or* unconditional" exemptions, of "*any* fiduciary or transaction," from "*all or part*" of the prohibited transaction restrictions. 29 U.S.C. § 1108(a); *see also* 26 U.S.C. 4975(c)(2). It is difficult to imagine how DOL could make the required findings that an exemption is in the interest, and protective of the rights, of retirement investors without assessing the complexities, risks, and conflicts associated with the particular products involved in the transactions that are subject of the exemptions. Many exemptions granted by the Department

have focused on particular products.[45] Thus, while DOL's rulemaking does not directly regulate the design or manufacture of insurance products, RIA 311, nothing in DOL's exemptive authority suggests that DOL cannot take into account the relevant characteristics of those products in crafting the conditions of administrative exemptions to accord with statutory requirements, and Plaintiff cites no authority to the contrary.

Also, contrary to Plaintiff's assertions, DOL's authority to grant administrative exemptions is not limited because the "SEC … regulate[s] the securities product marketplace," and "states … overs[ee] … insurance products." Pl.'s Br. 38.[46] The SEC's authority to regulate securities does not impact DOL's authority under ERISA and the Code to grant administrative exemptions from the prohibited transaction restrictions. *See, e.g., Uselton v. Commercial Lovelace Motor Freight, Inc.*, 940 F.2d 564, 585 (10th Cir. 1991) (discussing with approval the overlap of ERISA and securities regulation). Moreover, DOL's exemptive authority does not turn, in any way, on whether the transaction at issue involves securities. *See* 29 U.S.C. § 1106(a)(1)(A), (D) (including within the list of prohibited transactions the "sale or exchange, or leasing, of *any property* between a plan and a party interest," and the "transfer to, or use by or for the benefit of a party in interest, of *any assets* of the plan" (emphasis added)). Congress thus provided that DOL's regulation of employer-based plans would necessarily involve regulation of products that meet the definition of securities under securities laws, and DOL has granted

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[45] *See, e.g.*, Class Exemption for the Acquisition and Sale of Trust REIT Shares by Individual Account Plans Sponsored by Trust REITs, PTE 2004-07, 69 Fed. Reg. 23220 (Apr. 28, 2004); Class Exemption Relating to Certain Employee Benefit Plan Foreign Exchange Transactions, PTE 94-20, 59 Fed. Reg. 8022 (Feb. 17, 1994); Transactions Between Individual Retirement Accounts and Authorized Purchasers of American Eagle Coins, PTE 91-55, 56 Fed. Reg. 49209 (Sept. 27, 1991); Class Exemption Covering Certain Short Term Investments PTE 81-8, 46 Fed. Reg. 7511 (Jan. 23, 1981) (banker's acceptances, commercial paper, repurchase agreements and certificates of deposit); Class Exemption for Certain Transactions between Investment Companies and Employee Benefit Plans, PTE 77-4, 42 Fed. Reg. 18732 (Apr. 8, 1977), as amended at 81 Fed. Reg. 21208 (Apr. 8, 2016) (mutual funds).

[46] Plaintiff's argument that DOL overstepped its authority because only the SEC can "regulate the securities product marketplace" is rather contradictory given Plaintiff's position that FIAs "are not securities." Pl.'s Br. 29.

numerous exemptions that pertain to such products.[47] Plaintiff's position is unsupported.

In addition, that FIAs may be subject to overlapping regulation does not mean that DOL exceeded its authority in granting the BIC Exemption and amending PTE 84-24. Indeed, Plaintiff would still be subject to both state and federal regulation even under its preferred relief. At any rate, in the course of its rulemaking, DOL consulted with state insurance regulators and the NAIC to "craft[] the exemption so that it will work with, and complement, state insurance regulations." 81 Fed. Reg. 21019. DOL also made clear in its rulemaking that the exemptions do not "preempt or supersede state insurance law and enforcement." 81 Fed. Reg. 21019.

Given Congress's broad delegation of authority to DOL to grant conditional administrative exemptions and to use its expertise to make the requisite findings, DOL acted well within its statutory authority in determining that FIA transactions must satisfy the conditions of the BIC Exemption. That determination is entitled to great deference. As such, Plaintiff's fourth and final claim cannot succeed on the merits.

II. PLAINTIFF FAILS TO SHOW THAT IT WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF A PRELIMINARY INJUNCTION

Because Plaintiff has failed to establish likelihood of success on the merits of any of its claims, the Court need not reach the other prongs of the preliminary injunction standard. *See Crandall v. City and County of Denver*, 594 F.3d 1231, 1236 n.3 (10th Cir. 2010). At any rate, Plaintiff also fails to establish that implementation of amended PTE 84-24 would result in irreparable harm or that a preliminary injunction would prevent such harm. "To constitute

[47] For example, DOL's exemptions have addressed the execution of securities transactions, *see* PTE 86-128, 51 Fed. Reg. 41686 (Nov. 18, 1986), as amended 67 Fed. Reg. 64137 (Oct. 17, 2002), 81 Fed. Reg. 21181 (April 8, 2016); mutual funds, *see* PTE 77-4, 42 Fed. Reg. 18732 (Apr. 8, 1977), as amended 81 Fed. Reg. 21208 (Apr. 8, 2016); and principal transactions involving securities, along with underwriting of securities and securities market makers, PTE 75-1, Parts II, III, and IV, 40 Fed. Reg. 50845 (Oct. 31, 1975), as amended 71 Fed. Reg. 5883 (Feb. 3, 2006), 81 Fed. Reg. 21208 (Apr. 8, 2016).

irreparable harm, an injury must be certain, great, actual and not theoretical." *Heideman*, 348 F.3d at 1189. Irreparable harm is not "merely serious or substantial." *Id.* "[T]he party seeking injunctive relief must show that the injury complained of is of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Id.* "A speculative injury or the mere possibility of harm will not suffice." *Ireland v. Dodson*, No. 07-4082-JAR, 2007 WL 3232566, at *6 (D. Kan. Nov. 1, 2007). Plaintiff fails to make such a showing.

A. Plaintiff Cannot Show Irreparable Harm Because the Case Can Be Resolved Before the New Exemption Goes Into Effect

The purpose of a preliminary injunction is "merely to preserve the relative positions of the parties until a trial on the merits can be held." *Advisors Excel, LLC v. Zagula Kaye Consulting, LLC*, No. 15-4010, 2015 WL 736344, at *3 (D. Kan. Feb. 20, 2015) (quoting *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)). Here, it is undisputed that the terms of amended PTE 84-24 are not yet applicable; no federal regulation specifically *requires* Plaintiff or any other entity to take any action with regard to the Rule or exemptions. Many months remain before April 2017, during which this Court could address the merits of the claims. And some of the conditions of the BIC Exemption do not go into effect until January 2018. *See* 81 Fed. Reg. 20993. Even with a relatively relaxed merits briefing schedule, this Court can also hear dispositive motions well before the applicability date.[48] There is thus no imminent direct injury. *Cf. Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1294-95 (D. Colo. 2012) (finding three months in the future sufficient to show imminence).[49]

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[48] Indeed, the other cases filed that challenge this rulemaking have already scheduled oral argument on summary judgment briefs. *See* Order, *Chamber of Commerce v. Perez*, No. 3:16-cv-01476-M, ECF No. 45 (N.D. Tex. July 7, 2016) (Nov. 17, 2016 argument in three consolidated cases); Minute Order, *Nat'l Ass'n for Fixed Annuities v. Perez*, No. 1:16-cv-01035-RDM (D.D.C. June 7, 2016) (Aug. 25, 2016 argument on combined motion for preliminary injunction and summary judgment).

[49] Plaintiff also asks the Court to set a new applicability date, "[i]n the event that the Department prevails on the

(*footnote continued on next page*)

B. Plaintiff's Alleged Irreparable Harm Depends on the Actions of Third Parties and Neither Directly Results From the Rulemaking Nor Would Certainly Be Remedied By an Injunction

Plaintiff hopes that an injunction would change the behavior of insurance companies such that its IMOs and independent agents will not be "irretrievably left behind by their product suppliers." Sparks Decl. ¶ 56; *id.* ¶ 55 ("Regardless of each company's particular decisions, the industry is moving and must move swiftly because of the fast-approaching operative date of the new rules."). This is not the purpose of a preliminary injunction. An injunction here would not "preserve the relative position of the *parties*" as to each other. *Advisors Excel*, 2015 WL 736344, at *3 (emphasis added). Between now and April 2017, the status of the parties toward each other will be unchanged. Instead, Plaintiff expects other companies to make their own choices regarding how to comply with the new DOL rules. Any current injury to Plaintiff would flow only from that third party action. Such indirect causation should not be grounds for an injunction. *See Safari Club Int'l v. Jewell*, 47 F. Supp. 3d 29, 32-33 (D.D.C. 2014) (no irreparable harm from economic cost of plaintiffs' decision to cancel elephant hunts because regulation did not directly force this result); *Am. Meat Inst. v. U.S. Dep't of Agric.*, 968 F. Supp. 2d 38, 80-81 (D.D.C. 2013), *aff'd,* 760 F.3d 18 (D.C. Cir. 2014) (en banc) (alleged harm not irreparable because not the direct result of the rule where "Plaintiffs' declarants appear[ed] most concerned that they w[ould] ultimately lose future business because others may respond to the new [rule] and react in a manner that may ultimately affect their companies negatively").

The lack of direct injury to Plaintiff by DOL's action also means that the requested

merits." Pl.'s Br. 43. But Plaintiff has brought no challenge to the reasonableness of the applicability date. And Plaintiff cites no authority for the proposition that the Court could grant this requested relief. Indeed, if the Court rejects Plaintiff's merits claims that amended PTE 84-24 violates the APA and the RFA, no grounds for relief would be available at all. It is wishful thinking to construe a preliminary injunction as a tolling mechanism to preserve a period for action after an adverse merits decision.

injunction provides no assurance of relief. The insurance companies would not be bound by the decision, and there is no certainty that any of them, let alone those upon which Plaintiff relies, would modify their behavior due to the injunction.

C. Plaintiff's Injury is not Certain But is Instead Built on Speculation

Plaintiff has not "demonstrated that this threat is a real one, and not just a theoretical or speculative possibility." *Advisors Excel*, 2015 WL 736344, at *4. *See also Winter*, 555 U.S. at 22 (an "injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief"). Plaintiff's assertion that "insurance companies *will* shift their distribution to career agents, banks, registered investment advisers, and broker-dealers," Pl.'s Br. 40 (emphasis added), goes well beyond its own declarants' speculation. *Cf.* Sparks Decl. ¶ 52 ("insurance companies will likely shift their distribution"); Tripses Decl. ¶ 21, ECF No. 11-5 ("legitimate concerns as to whether the majority of the insurance companies we do business with will take on this new cost and legal exposure" "many of those companies likely will either ... mov[e] to a captive sales force or greatly restrict the number of IMOs with whom they do business"). This purported certainty as to how insurance companies will respond is unwarranted, and disregards the various options available for the independent distribution channel, *see supra* Arg. § I(C)(1), including options that at least two of Plaintiff's members are in fact pursuing.[50]

Plaintiff's predictions are also built on other faulty assumptions. For example, Plaintiff asserts that some insurance companies believe they "would not be allowed to compensate an

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[50] *See* Advisors Excel, DOL Fiduciary Rule FAQs (July 2016) [Link] (stating that Advisors Excel "has put plans in place to become a financial institution through one of the various vehicles permissible in the rule"); *supra* Stmt. of Facts § V(C) (describing Financial Independence Group's application for an individual exemption to become a financial institution under the BIC Exemption).

IMO at all or without drastic changes" under the final rulemaking. Pl.'s Br. 21 (citing Tripses Decl. ¶ 21; Sparks Decl. ¶ 55). While compensation incentives may need to be adjusted in light of the new requirements, *see* 81 Fed. Reg. 21033-40, DOL did not adopt any sort of blanket rule prohibiting compensation to IMOs. *See id.* 21034 (final exemption was intentionally designed to allow flexibility so that financial institutions could design oversight procedures "that are effective for their particular business models"); NAIC Model Regulation § 6(F)(2) (providing for insurers to contract with IMOs); RIA 41. Moreover, Plaintiff's rejection of the BIC Exemption's provision of a process for IMOs to seek to qualify as "financial institutions" is substantially undermined by the fact that at least six market intermediaries, including one of Plaintiff's own members, are pursuing that option. Lloyd Decl. ¶¶ 4-5 & Exs. 1-6. In light of the mistaken foundations on which Plaintiff's declarants build their predictions of dire consequences for their companies, they have failed to provide the Court with grounds on which to find injury that is "certain, great, actual 'and not theoretical.'" *Heideman*, 348 F.3d at 1189.

Plaintiff also has not shown that the harms its alleges are "actual." Bare allegations are insufficient to establish irreparable harm. *See, e.g.*, *Digital Ally, Inc. v. DragonEye Technology, LLC*, 2013 WL 5671296, at *10 (D. Kan. Oct. 17, 2013) (rejecting contentions as "unfounded, speculative, and theoretical" because "[c]onclusory statements—without more—are insufficient to show irreparable harm"). And conclusory projections cannot provide the basis for a preliminary injunction. *See Voile Mfg. Corp. v. Dandurand*, 551 F. Supp. 2d 1301, 1307 (D. Utah 2008) (rejecting a "conclusory affidavit" because "[c]ourts require more than unsupported factual conclusions" to support a finding of irreparable harm); *Carbajal v. Warner*, 2012 WL 7658629, at *4 (D. Colo. Nov. 13, 2012) (declining to issue injunction where there was "no evidentiary support for Plaintiff's broad, conclusory allegations other than his self-serving

statements"); *Nat'l Mining Ass'n v. Jackson*, 768 F. Supp. 2d 34, 54 (D.D.C. 2011) (more than "conclusory projection[s]" needed to establish irreparable harm). Plaintiff generally asserts that it (through its IMOs and agents) will lose customers, market share, goodwill, competitive position, and some ability to recruit new agents. Pl.'s Br. 41. But Plaintiff provides no specific basis for many of these assertions, and in the case of those for which it does assert a basis, the projections are entirely conclusory. For example, Plaintiff and its declarants provide only ballpark estimates of alleged harms without the details necessary to determine the accuracy of those estimates or the means for arriving at their estimates. *See* Pl.'s Br. 41 & Sparks Decl. ¶ 61 (asserting that Plaintiff would see "a revenue drop approaching 80%" without basis for estimate); *id.* (asserting without support that "upwards of 20,000 independent insurance agents will exit the marketplace"). And complaints about possible loss of market share caused by the rulemaking are far too speculative in this dynamic, constantly changing market in which Plaintiff itself has only existed for two years. *See* RIA 117-19, 309. *Voile Mfg. Corp.*, 551 F. Supp. 2d at 1307 ("[A] probable loss in market share .... alone does not amount to irreparable harm[.]").

In sum, Plaintiff has not established irreparable harm.

III. PLAINTIFF HAS NOT SHOWN THAT AN INJUNCTION IS IN THE PUBLIC INTEREST OR THAT THE BALANCE OF EQUITIES TIPS IN ITS FAVOR.

While Plaintiff's failure to demonstrate the likelihood that it will prevail on any of its claims or that it will suffer any irreparable harm provides more than sufficient bases to deny its request for a preliminary injunction, the final two factors of the preliminary injunction analysis also strongly militate against entering injunctive relief. To be entitled to a preliminary injunction, Plaintiff must show that its alleged injury "outweighs the injury to the other party under the preliminary injunction" and "is not adverse to the public interest." *Heideman*, 348 F.3d at 1190-91. Plaintiff cannot do so.

As noted above, the injunction Plaintiff seeks—enjoining, during the pendency of this litigation, implementation of the amendment to PTE 84-24 as it relates to FIA transactions—would have no practical, positive effect for Plaintiff given that the amendment is not applicable until April 2017 and the third parties on which Market Synergy depends are unlikely to rely on its terms.[51] *See supra* Arg. § II. In the meantime, however, a preliminary injunction would lead to the very outcome DOL sought to avoid in setting the carefully considered deadlines: confusion about the legal status of the rulemaking for an entire industry seeking to come into compliance with it, *see* 81 Fed. Reg. 20993, and the potential delay of safeguards against conflicted investment advice that cumulatively costs retirement investors billions of dollars in lost retirement income. *Id.* Indeed, because Plaintiff seeks an injunction that would prevent it from having to comply with the impartial conduct standards in amended PTE 84-24, Plaintiff's requested injunction would give it an undeserved competitive advantage over others giving investment advice and ill serve the consumers suffering from conflicted investment advice.

Plaintiff relies on *Wyoming v. U.S. Department of the Interior*, 136 F. Supp. 3d 1317, 1351, for the proposition that "[d]elayed agency efforts, without more, do not constitute irreparable harm." Pl.'s Br. 42. But the court in *Wyoming* found that delayed implementation of the specific rule at issue in that case would cause the government "no appreciable harm" and that there was "no showing" in that situation of public harm from delayed implementation of the rule at issue. 136 F. Supp. at 1352. Here, by contrast, Plaintiff has not met its burden to show that the public interest supports its requested relief, and indeed fails to refute the substantial evidence relied on by DOL that conflicted retirement investment advice could cost IRA investors well

[51] Indeed, an injunction could arguably have a negative effect on Plaintiff as well, by giving the false impression that Plaintiff may not need to reform its practices to come into compliance with the rulemaking by the applicability dates, and potentially delaying its efforts to do so, when, in fact, it is unlikely to prevail on the merits and will likely indeed be required to come into compliance by the applicability dates.

more than $95 billion over the next ten years. 81 Fed. Reg. 20950; RIA 158. Based on all of the evidence it reviewed, DOL is confident that the harm to IRA investors in the FIA market easily exceeds the estimated cost to the annuity industry from excluding FIAs from PTE 84-24. *See* RIA 262-63, 285-86. As explained above, the conflicts of interest causing these harms to investors are particularly acute in the annuity market. *See* RIA 109, 111, 131-32, 168. The harm that Plaintiff alleges it will suffer as a result of having to meet the best interest standard is simply insufficient to justify this continued harm to retirement investors.

Further, not only would an injunction have a detrimental effect on the rest of the industry seeking to come into compliance with the rulemaking and on consumers relying on advisers with conflicts of interest; it would also result in the public continuing to subsidize those who render retirement investment advice, rather than the tax-favored retirement plans that the subsidies were meant to benefit. *See* RIA 287-88. The protection afforded under ERISA and the Code to consumers, and the tax subsidies that they enjoy, reflect Congress's recognition of the importance of plans and IRAs to the nation's retirement security. *See* 29 U.S.C. § 1001. These subsidies are estimated to amount to $17 billion in 2016 alone. RIA 288. The rulemaking seeks to ensure that these tax preferences fulfill their purpose of helping consumers achieve retirement security, rather than unduly enriching conflicted investment advisers.

Until now, retirement investment advisers have been able to operate with significant conflicts of interest, and retirement investors and the public have been paying the price of their tainted advice. This is the problem the Rule and exemptions seek to ameliorate, and Plaintiff has not shown that it is entitled to enjoin part of the solution DOL crafted to do so. Instead, Plaintiff asks for relief that would prolong and sustain the ongoing harm to retirement investors.

CONCLUSION

Therefore, the Court should deny Plaintiff's motion for a preliminary injunction.

Dated: July 22, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

On July 22, 2016, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court for the District of Kansas, using the electronic case filing system of the court. I hereby certify that I have served the plaintiff electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Galen N. Thorp ___________________
GALEN N. THORP