IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MARKET SYNERGY GROUP, INC.,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF LABOR, THOMAS E. PEREZ, in his official capacity as Secretary of the United States Department of Labor, and PHYLLIS C. BORZI, in her official capacity as Assistant Secretary of the United States Department of Labor,

Defendants.

Civil Action No. 5:16-cv-04083

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff Market Synergy Group, Inc. ("Market Synergy") complains against defendants United States Department of Labor, Thomas E. Perez, and Phyllis C. Borzi (collectively, the "Department"), averring as follows:

NATURE OF THE ACTION

1. This is a lawsuit under the Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*, and the Regulatory Flexibility Act of 1980, 5 U.S.C. § 601 *et seq.*, challenging a final regulatory action taken by the Department on April 8, 2016. Through this suit, Market Synergy seeks declaratory and injunctive relief against the Department.

2. The suit addresses an improper and unlawful exercise of purported federal agency rulemaking authority. Specifically, the suit challenges the conduct of the Department in promulgating a revision to a longstanding exemption from the prohibited transaction provisions of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §

1001 *et seq.*, *Amendment to and Partial Revocation of Prohibited Transaction Exemption (PTE) 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters*, 81 Fed. Reg. 21,147 (Apr. 8, 2016) ("PTE 84-24").

3. The amendment to PTE 84-24 was proposed and adopted in conjunction with the Department's recently issued final regulation addressing the definition of the term "fiduciary" under ERISA, *Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice*, 81 Fed. Reg. 20,945 (Apr. 8, 2016) ("the Rule"). While Market Synergy believes that the Department exceeded its authority and acted improperly in promulgating that Rule, this suit challenges only the Department's conduct in adopting the revisions to PTE 84-24, which contradicted the revisions announced in the Department's notice of proposed rulemaking.

4. In promulgating the final revisions to PTE 84-24, which make the exemption available to "fixed rate annuities," as defined by the Department, but not to one class of fixed annuities – specifically, "fixed indexed annuities" – the Department acted without providing adequate notice and an opportunity for comment, reflecting arbitrary and capricious conduct in excess of its statutory authority and in clear violation of its obligations to make necessary findings under applicable law. In doing so, the Department's actions have endangered the livelihood of tens of thousands of hard-working individuals and thousands of small businesses in an important segment of the insurance industry.

JURISDICTION AND VENUE

5. This lawsuit arises under the laws of the United States, including the Administrative Procedure Act and the Regulatory Flexibility Act; jurisdiction in this Court is therefore proper under 5 U.S.C. § 702 and 28 U.S.C. § 1331.

6. Venue is proper in this Court under 28 U.S.C. §§ 96 and 1391(e) because Market Synergy resides in the District of Kansas, no real property is involved in the suit, and because a substantial part of the events or omissions giving rise to the suit occurred in this District.

7. Pursuant to D. Kan. R. 40.2(a), Market Synergy designates Topeka, Kansas as the place of trial for this matter.

PARTIES

8. Plaintiff Market Synergy Group, Inc. is a for-profit corporation and licensed insurance agency organized under the laws of, and in good standing with, the State of Kansas and having its principal place of business in Topeka, Kansas.

9. Defendant United States Department of Labor is an executive department in, and agency of, the United States Government subject to the Administrative Procedure Act and Regulatory Flexibility Act. *See* 5 U.S.C. § 551(1); 29 U.S.C. § 551.

10. Defendant Thomas E. Perez is the Secretary of the United States Department of Labor. Secretary Perez is sued in his official capacity only.

11. Defendant Phyllis C. Borzi is an Assistant Secretary of the United States Department of Labor. Assistant Secretary Borzi is responsible for the final agency action at issue in this lawsuit; she is sued in her official capacity only.

FACTS COMMON TO ALL CLAIMS FOR RELIEF

I. Fixed Rate, Fixed Indexed, And Variable Annuities

12. Annuities are retirement savings and income vehicles sold by life insurance companies. The annuity's terms are set forth in a written contract between the annuity purchaser and the insurance company that issues the annuity. All annuities have one feature in common, and it distinguishes them from other financial products: with an annuity, the insurance company

promises to pay income on a regular basis for a chosen period of time. Because they can guarantee a stream of income in the future, including for the remainder of one's life, annuities can uniquely protect contract owners against the possibility of outliving their financial resources.

13. Deferred annuities (as opposed to "immediate" annuities) characteristically have two phases of operation: (i) an "accumulation" or "deferral" phase in which the contract accrues value through payment of premiums and credited interest thereon, and (ii) a "payout" phase in which the purchaser receives a stream of payments according to a selected payment option.

14. The most common types of deferred annuities are fixed (which include so-called fixed or declared rate annuities and fixed indexed annuities) and variable.

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

16. The only significant difference between fixed indexed annuities and fixed or declared rate annuities is the method for computing interest earnings credited to the policies. A fixed indexed annuity is a type of fixed annuity that earns credited interest based on changes in a market index, such as the S&P 500. The market index is a benchmark only; annuity premiums

are not invested in index funds or other securities tracking the index. The performance of the market index is simply used as a reference to determine credited interest in accordance with the specified index crediting method. The crediting rate is guaranteed to never be less than zero, even if the market goes down and the index is net negative for the crediting period. Thus, as with other fixed annuities, principal is always protected from market downturns. A typical fixed indexed annuity policy also allows the contract owner to elect to switch the chosen index or computation method from year to year or, alternatively, to select a fixed rate for the year.

17. Like other fixed annuities, the insurance company bears the entire investment risk with fixed indexed annuities and must make good on the minimum guarantees and the amounts credited to the contract, regardless of the performance of the insurance company's own investment assets backing its obligations under the annuities.

18. Fixed indexed annuities were introduced to the insurance market in 1995 and have been regulated by the states as fixed insurance products since that time. A comprehensive range of state insurance laws and regulations apply, without distinction, to sales of both fixed indexed annuities and fixed or declared rate annuities. Generally, annuity contracts and amendments must be filed with, and approved by, each state in which contracts are sold. Insurance companies and/or agents are subject to rigorous annuity suitability and disclosure regulations, many of which are derived from model regulations promulgated after years of study by the National Association of Insurance Commissioners ("NAIC"), the standard-setting and regulatory support organization created and governed by the chief insurance regulators from the fifty states, the District of Columbia, and five United States territories.

19. The NAIC Suitability in Annuity Transactions Model Regulation ("the Suitability Model") sets standards for suitable annuity recommendations and requires insurers to establish a

system to supervise annuity recommendations. At this time, nearly all states and the District of Columbia have adopted either the current version of the Suitability Model (which was adopted by the NAIC in 2010) or one of its previous versions. A handful of states have adopted suitability laws that do not follow, but are akin to, the Suitability Model.

20. Among other things, the Suitability Model requires an insurance agent, when making a recommendation to purchase or exchange an annuity, to make reasonable efforts to obtain "suitability information," such as age, annual income, financial objectives, and risk tolerance, that is "reasonably appropriate" to determine the suitability of the recommendation. It also requires the agent to have "reasonable grounds" for believing that the recommendation is suitable for the contract owner based on the suitability information and other facts provided. In addition, the agent must have a "reasonable basis" for believing that: (i) the contract owner has been "reasonably informed" of the annuity's features; (ii) the owner would benefit from certain of those features; (iii) the annuity as a whole, the underlying subaccounts to which funds are allocated at the time of purchase or exchange of the annuity, and any riders or similar product enhancements are suitable for the owner; and (iv) in the case of an exchange or replacement of an annuity, the exchange or replacement is suitable.

21. The Suitability Model also requires insurance companies to establish a supervisory system that is "reasonably designed" to achieve compliance with its requirements, including procedures for reviewing recommendations before issuing an annuity to ensure there is a "reasonable basis" to determine that a recommendation is suitable, as well as "reasonable procedures" for detecting recommendations that are not suitable.

22. The NAIC Annuity Disclosure Model Regulation ("the Disclosure Model") requires that contract owners be provided an "Annuity Buyer's Guide" and a disclosure

document. The Disclosure Model requires disclosure of certain information including, among other things, a description of the annuity contract and its benefits, emphasizing its long-term nature and information about the current guaranteed rate or indexed crediting rate formula. At this time, one state has adopted the latest version of the Disclosure Model (which the NAIC adopted in 2010), while most states have adopted either the previous version of the Model or annuity disclosure rules that do not follow, but are akin to, the Model.

23. Moreover, state laws comprehensively govern the organization and licensing of insurance companies, and state insurance regulators oversee insurance company operations. Insurance agents need to be licensed in each state in which they sell, solicit, or negotiate insurance. Only licensed insurance agents may sell annuity contracts. All states have adopted unfair insurance and trade practices laws. Most states have adopted advertising rules governing the marketing of annuity contracts designed to prevent misleading, deceptive, or confusing advertisements. States also require periodic "market conduct" examinations for insurance companies to ensure their compliance with unfair insurance trade practices laws and other applicable insurance laws.

24. State-based regulation governing fixed indexed annuities is as effective as it is thorough. As the NAIC stated to the Department in the NAIC's July 21, 2015 comment letter regarding the Department's proposed fiduciary rulemaking package:

> State insurance regulators share the DOL's commitment to protect, educate and empower consumers as they make important decisions to provide for their retirement security. The states have not only acted to implement a robust set of consumer protection and education standards for annuity and insurance transactions, but have extensive enforcement authority to examine companies, revoke producer and company licenses to operate, as well as collect and analyze industry data. Such authority allows state regulators to identify market issues and take the appropriate regulatory action swiftly and effectively when warranted. So much

> of protecting consumers comes down to effective enforcement. Although there will always be instances of improper conduct, the states have a strong record of protecting consumers, especially seniors, from inappropriate sales practices or unsuitable products.

25. The effectiveness of state-based regulation of fixed indexed annuities is supported by the data. An August 2015 NAIC report indicates that states have reported a total of 3,994 life insurance and annuity complaints nationwide out of a total of 68,592 total complaints reported to insurance regulators across all lines of insurance. Of those complaints reported for 2015, only 318 were attributed to annuities, with 52 of those complaints specifically tied to fixed indexed annuities – less than 0.08 percent of all complaints. Similarly, of the 6,297 complaints filed in relation to life insurance and annuity sales in 2014 out of a total of 97,546 complaints across all lines of insurance that year, 546 were attributed to annuities, with only 98 being specific to fixed indexed annuities – approximately 0.1 percent of all complaints.

26. Variable annuities are very different products. Variable annuities earn investment returns based on the performance of the investment portfolios, called "subaccounts" within the insurance company's "separate accounts," where the contract owners choose to put their money. The return earned in a variable annuity is not guaranteed. The value of the subaccounts chosen could go up or down. If they go up, the owner could make money. If the value of these subaccounts goes down, the owner could lose money and principal. Also, income payments to the owner could be less than expected if the subaccount investments do not perform as expected.

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

insolvent; in many jurisdictions, variable annuities are not. In addition, variable annuity sales are regulated both by the Securities and Exchange Commission and the Financial Industry Regulatory Authority.

II. The Role Of IMOs And Market Synergy In Distributing Fixed Indexed Annuities

28. The largest distribution channel for fixed indexed annuities are independent marketing organizations ("IMOs") and independent insurance agents recruited by and/or contracted with the IMOs. To a lesser degree, fixed indexed annuities also are sold through "career" or "captive" agents (agents that are employed by or otherwise affiliated with a single insurance company), broker-dealers, banks, and registered investment advisers.

29. Insurance companies generally do not recruit independent insurance agents to sell their products. Rather, independent insurance agents are recruited by IMOs to sell fixed indexed annuities and other types of insurance products. Although they take different forms, in general an IMO is a third-party intermediary between the agents and the insurance companies, providing economies of scale for product education, marketing, and licensing support.

30. IMOs permit the sale of insurance and annuity products from different insurance companies. This allows independent agents to identify the most suitable products for their clients, enabling the agents to offer choices across a spectrum of products and carriers.

31. As with other types of insurance policies, agents generally receive commissions for selling fixed annuity contracts. When a fixed rate annuity or fixed indexed annuity is sold, the selling agent generally receives a commission from the insurance company equal to some percentage of the premium paid.

32. Frequently, the insurance company pays commissions directly to the independent insurance agents. In other circumstances, an independent agent is paid the commission through

an IMO with which the agent is contracted. In those circumstances, the insurance company will pay the commission to the IMO, which in turn pays a predetermined percentage to the agent and retains the residual amount (sometimes called an "override") as compensation for its product education, sales, and marketing support services.

33. In either instance, the contract owner does not pay the commission out of pocket, and the commission does not reduce the amount that is credited to the annuity's initial contract or account value. Instead, for fixed and fixed indexed annuities alike, the commissions are received from insurance companies either as (most often) a one-time payment when the contract is issued or (less often) as a series of payments over a multi-year period.

34. Market Synergy's business derives from, and is dependent upon, the viability of the IMO/independent agent distribution channel for sales of fixed indexed annuities and other fixed insurance products. Incorporated in 2014, Market Synergy works with insurance companies to develop specialized, proprietary fixed indexed annuity and other products for exclusive distribution; it partners with select IMOs in distributing those proprietary products. Market Synergy also conducts market research and provides training and product support for IMO network members and the independent insurance agents whom the IMOs recruit. The network currently includes approximately 3,000 agents and other financial professionals.

35. Today, Market Synergy distributes fixed indexed annuities and other insurance products through eleven IMO network members, three of which are based in Kansas, one in Georgia, one in Nebraska, one in Texas, one in North Carolina, one in Iowa, one in Michigan, one in Massachusetts, and one in Virginia. These IMO network members are independently owned insurance wholesalers focused on helping agents and financial advisors increase their life

insurance and annuity business. Collectively, Market Synergy and these network members were responsible for approximately $15 billion of fixed indexed annuity sales in 2015.

III. The Department's Proposed Regulatory Actions

36. Without any formal or informal directive from Congress, in April 2015, the Department published a notice of proposed rulemaking to redefine who is a "fiduciary" of an employee benefit plan under ERISA as a result of giving "investment advice" to a plan or its participants or beneficiaries. *Definition of the Term ''Fiduciary''; Conflict of Interest Rule – Retirement Investment Advice*, 80 Fed. Reg. 21,928 (Apr. 20, 2015). The proposal also applied to the definition of a fiduciary of a plan (including an individual retirement account ("IRA"), which is not subject to ERISA's fiduciary responsibility provisions) under the Internal Revenue Code of 1986, as amended ("the Code"), 26 U.S.C. § 1 *et seq*. Under ERISA and the Code, the proposal stated, a person is a fiduciary to a plan or IRA to the extent that he or she engages in specified plan activities, including rendering investment advice for a fee or other compensation, direct or indirect, with respect to any money or other property of such plan. Fiduciaries to plans and IRAs, it continued, are not permitted to receive compensation in "prohibited transactions."

37. The Department proposed to treat persons who provide certain types of advice or recommendations to an employee benefit plan, plan fiduciary, plan participant or beneficiary, IRA, or IRA owner as fiduciaries under ERISA and the Code in a wider array of advice relationships than the existing ERISA and Code regulations, which would be replaced. The proposal stated that in 1975 the Department issued regulations that "significantly narrowed" the breadth of the statutory definition of fiduciary "investment advice" by creating a five-part test that must, in each instance, be satisfied before a person can be treated as a fiduciary adviser. This regulatory definition applied to both ERISA and the Code. As a result of the five-part test,

the proposal continued, many investment professionals, consultants, and advisers have no obligation to adhere to ERISA's fiduciary standards or to the prohibited transaction rules. The Department believed it was appropriate to "revisit" its 1975 regulatory definition as well as the Code's virtually identical regulation.

38. At the same time, the Department proposed a new prohibited transaction class exemption, the Best Interest Contract exemption ("BICE"), that would provide conditional relief for common compensation, such as commissions and revenue sharing, that an Adviser (a defined term in the proposed BICE) and the Adviser's employing firm might receive in connection with investment advice to retail Retirement Investors (also a defined term in the proposed BICE). *Proposed Best Interest Contract Exemption*, 80 Fed. Reg. 21,960 (Apr. 20, 2015). The proposal stated that the BICE would require a "Financial Institution," as defined in the proposed BICE, and the Adviser to contractually acknowledge fiduciary status, to commit to adhere to basic standards of impartial conduct (the "Impartial Conduct Standards"), including to act in the customer's "best interest" and receive no more than "reasonable compensation," to adopt policies and procedures reasonably designed to minimize the impact of conflicts of interest, and to disclose basic information on their conflicts of interest and on the cost of their advice.

39. As part of this regulatory package, the Department also proposed to amend and partially revoke PTE 84-24 for certain transactions involving insurance agents and brokers, pension consultants, insurance companies, and investment company principal underwriters. *Proposed Amendment to and Proposed Partial Revocation of Prohibited Transaction Exemption (PTE) 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies and Investment Company Principal Underwriters*, 80 Fed. Reg. 22,010 (Apr. 20, 2015). The existing PTE 84-24, the proposal stated, provided an

exemption for certain prohibited transactions that occur when, among other things, plans or IRAs purchase insurance and annuity contracts. The then-current exemption had permitted insurance agents, insurance brokers, and pension consultants that are parties in interest or fiduciaries with respect to plans and IRAs to effect the purchase of an "insurance and annuity contract" for the plans or IRAs and receive a commission on the sale. The exemption was also available when the insurance company selling the insurance or annuity contract is a party in interest or disqualified person with respect to the plan or IRA. The proposal noted that, under the existing PTE 84-24, the term "insurance and annuity contract" included variable annuities.

40. The Department proposed several changes to PTE 84-24. First, the proposal stated, the amendment would increase the exemption's safeguards by requiring fiduciaries that rely on the exemption to adhere to the Impartial Conduct Standards, including acting in the best interest of the plans and IRAs when providing advice and receiving no more than "reasonable compensation," and by more precisely defining the types of payments that are permitted under the exemption and revising the exemption's disclosure and recordkeeping requirements.

41. Second, the proposal stated, the amendment would revoke relief for insurance agents, insurance brokers and pension consultants to receive a commission in connection with the purchase by plans and IRAs "of variable annuity contracts and other annuity contracts that are securities under federal securities laws." Rather than enjoying exemptive relief under PTE 84-24, participants in such transactions would be limited to seeking exemptive relief under the new BICE. The Department stated its belief that the BICE would better protect the interests of plans and IRAs with respect to investment advice "regarding securities products."

42. The proposal stated that it applied to non-security annuity products. In the proposal's own words:

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

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

43. "On the other hand," the proposal continued,

> the Department has determined that transactions involving insurance and annuity contracts that are not securities can continue to occur under this exemption, with the added protections of the Impartial Conduct Standards. In this proposal, therefore, *the Department has distinguished between transactions that involve securities and those that involve insurance products that are not securities*. The Department believes that annuity contracts that are securities and mutual fund shares are distributed through the same channels as many other investments covered by the Best Interest Contract Exemption, and such investment products all have similar disclosure requirements under existing regulations.

Id. at 22,015 (emphasis added). Thus, all fixed annuities, whether fixed declared rate annuities or fixed indexed annuities, as non-security insurance or annuity products, would remain within the exemptive scope of PTE 84-24, as amended.

44. In reliance on the Department's determination to continue to include non-security annuity products, including all forms of fixed annuities, within the scope of amended PTE 84-24, Market Synergy determined that it had no need to, and would not, submit a comment to the Department regarding its proposed regulatory package. Market Synergy instead passively adopted the views expressed by other commenters, including various trade associations.

45. Market Synergy's understanding of the limited nature of the Department's proposed rulemaking is confirmed by the industry's reaction to the proposal. During the

comment period, multiple commenters advised the Department of their belief that fixed indexed annuity transactions would continue to occur under PTE 84-24, and would not be subject to the BICE. For example, the Indexed Annuity Leadership Council's July 20, 2015 comment letter stated that the Council "appreciates the Department retaining and modifying PTE 84-24 to provide an exemption from the prohibited transaction rules for insurance agents who sell fixed annuities, including fixed indexed annuities, to plan participants and IRA holders in order to protect the traditional commission form of compensation paid by insurance companies."

46. Similarly, the National Association for Fixed Annuities's September 24, 2015 comment letter "commend[ed] the Department for recognizing that PTE 84-24 is the appropriate regulatory exemption for non-security annuities – *i.e.*, fixed annuities – under the proposed rule," and that "the Department's inclusion of non-security annuities under PTE 84-24 will encourage the purchase of fixed indexed annuities for the risk-free growth of principal and lifetime income feature these products offer."

47. During the comment period (which was extended), the Department received well over 3,000 comment letters on the proposed regulatory package. There were also over 300,000 submissions made as part of 30 separate petitions submitted on the proposal. These comments and petitions came from consumer groups, plan sponsors, financial services companies, academics, elected government officials, trade and industry associations, and others, both in support of, and in opposition to, the proposed rule and proposed related exemptions. Market Synergy is unaware of any comment or other submission that assumed that the Department would or intended to exclude fixed indexed annuities from PTE 84-24, as amended.

IV. The Department's Final Regulatory Actions

48. In April 2016, after the deadline to comment had expired, the Department issued its final amendment to, and partial revocation of, PTE 84-24. While the underlying conditions and obligations of the final amended exemption did not change appreciably from the proposed rulemaking, the scope of the annuity products covered under the exemption changed dramatically with respect to marketing and selling fixed indexed annuities.

49. In amended PTE 84-24, the Department created a new defined term that did not appear in the notice of proposed rulemaking – "Fixed Rate Annuity Contract" – which, *contrary* to the proposal issued for public comment, expressly *excludes* fixed indexed annuities from the exemptive scope of PTE 84-24. *See* 81 Fed. Reg. at 21,174 ("A Fixed Rate Annuity Contract does not include a variable annuity or *an indexed annuity* or similar annuity.") (emphasis added).

50. Recited in full, PTE 84-24 defines a "Fixed Rate Annuity Contract" as

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

Id. Thus, after defining the characteristics which would justify a product as being a "fixed rate annuity" – characteristics which are met by both declared rate and fixed indexed annuities – the Department, without analysis, justification, or sound basis, or prior notice chose to exclude fixed indexed annuities from the very definition that they meet.

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

> In this regard, some industry commenters focused on indexed annuities, in particular. These commenters asserted that fixed indexed annuities and fixed annuities are identical insurance products except for the method of calculating interest credited to the contract. They said that indexed annuities are treated the same as other fixed annuities under state insurance law and federal securities law, and stated that indexed annuities can offer the same income, insurance and contractual guarantees as fixed annuities. Moreover, some commenters noted that significant investment risk is borne by the insurer and there is no risk of principal loss, assuming that the investor does not incur surrender charges. According to some commenters, indexed annuities are no more complex than other fixed annuities, and there are no different conflicts of interest created with their sales, as compared to fixed annuities.

Id. at 21,157.

52. The Department neither disputed nor critiqued these comments. Rather, in reversing the regulatory position it expressed with respect to treatment of fixed indexed annuities in the proposed rulemaking, and announcing its new regulatory position for the first time in the final rulemaking, the Department simply stated: "Given the complexity, investment risks, and conflicted sales practices associated with" fixed indexed annuities and variable annuities, "the Department has determined that recommendations to purchase such annuities should be subject to the greater protections of the Best Interest Contract Exemption." *Id.* at 21,153. In subjecting fixed indexed annuities – but not other fixed annuities – to the BICE, the Department made the implicit judgment, apparently at some point during the intervening year between the proposed rulemaking and the final rulemaking, that state insurance regulators are inadequate or somehow ill-equipped to regulate fixed indexed annuities.

53. In a "regulatory initiative" intended "to mitigate the effects of harmful conflicts of interest associated with fiduciary investment advice," *id.* at 21,148, the Department's reasoning is a *non sequitur*. The alleged conflicts associated with commissioned sales of all fixed annuities are identical, yet fixed indexed annuities are denied access to amended PTE 84-24, while the exemption remains available to other fixed annuity products. Even accepting at face value the Department's assumption that fixed indexed annuities exhibit greater complexities, risks, or conflicted sales practices – a contested assumption – in its rulemaking the Department never demonstrated that fixed indexed annuities engender any different or greater conflicts of interest, or otherwise suffer from greater sales practice maladies, than do the remaining universe of fixed annuities, which will continue to enjoy exemptive relief under PTE 84-24, as amended. The Department's regulatory action thus arbitrarily treats similar products differently.

54. Tellingly, in PTE 84-24, the Department included an appendix "Comparing Different Types of Deferred Annuities." Rather than highlighting any greater or different conflicts of interest between fixed indexed annuities and fixed annuities, the Department's appendix only highlights the similarities between the two product types, with the exception that fixed indexed annuities use a different method for computing interest earnings credited to the contract. For example, the appendix does not describe any difference between how Advisers receive commissions or other compensation for selling the two types of fixed annuity products.

55. When issuing the final rulemaking package, the Department all but conceded that its exclusion of fixed indexed annuities from the scope of PTE 84-24 – and, by default, the need for fixed indexed annuity sellers to rely on the BICE if they want to stay in business – was a reversal of its original position:

> The proposed amendment to PTE 84-24 stated that the proposed Best Interest Contract Exemption was designed for IRA owners

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

81 Fed. Reg. at 21,156 (emphasis added). The Department understood "that like Fixed Rate Annuity Contracts, indexed annuities are generally not regulated as registered securities under federal securities laws" and that the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 989J, 124 Stat. 1376 (2010), "calls for certain annuity contracts to be considered exempt securities by the SEC if the conditions of that section are met." *Id.*

56. Thus, notwithstanding the absence of any notice, analysis, justification, or sound basis on the part of the Department, exemptive relief for fixed indexed annuity sellers was entirely revoked in the final amendment to PTE 84-24. Due to this drastic, unanticipated change from the proposed to the final amended PTE 84-24, insurance agents and other sellers of fixed indexed annuities to ERISA plans and IRA customers can no longer receive sales commissions – in most cases, the agents' sole compensation as insurance sales professionals – without violating the prohibited transaction provisions of ERISA and the Code. The only possible recourse affected insurance agents and IMOs will have under the Department's new rules will be to attempt what may prove impossible: to operate under – including having to find a sponsoring and qualifying "Financial Institution" willing to operate with them under – the BICE.

57. As a condition of receiving compensation that would otherwise be prohibited under ERISA and the Code, the BICE requires "Financial Institutions" to contractually acknowledge their fiduciary status and the fiduciary status of their "Advisers," including independent insurance agents, in writing. Among other things, the Financial Institution and

Advisers must adhere to enforceable standards of fiduciary conduct and fair dealing with respect to their advice – such as acting solely in the customers' "best interest," avoiding misleading statements, and receiving no more than reasonable compensation – and provide full disclosure of conflicts of interest, compensation practices, and financial arrangements with third parties. Financial Institutions, but not Advisers, must be parties to the best interest contract. The Financial Institution's role in adopting and enforcing specified written policies and procedures, supervising individual Advisers, and assuming legal responsibility for their adherence to the Impartial Conduct Standards is, according to the Department, a "key" component of the BICE.

V. The Public's And Industry's Shock At The Department's Conduct

58. The fixed indexed annuity industry and the public at large were blindsided by the Department's reversal of its original position, which had included fixed indexed annuities within amended PTE 84-24's scope. It is one of the few components of the regulatory package that became *more* restrictive, prejudicial, and onerous in the final rulemaking than in the proposal.

59. The national and trade press reported extensively on the surprise expressed by the industry about the Department's treatment of fixed indexed annuities. An article in the *Wall Street Journal*, entitled "Rules for Indexed Annuities Face an Unexpected Tightening," stated:

> Observers had anticipated that [PTE 84-24] would continue to apply to the indexed annuities under the new Labor Department rule – and they suggested that would lead some annuity sellers to switch their focus from variable to indexed annuities. Instead, materials distributed by the White House on Tuesday indicated that indexed annuities would no longer be exempt under the same standards as other types of fixed annuities. Rather, like variable annuities, advisers who want to sell indexed annuities will need to follow the requirements under the best-interest-contract exemption.

60. Numerous other press articles reported on the Department's flip-flop and the consequent surprise felt by the fixed indexed annuity industry. By way of example:

- An article in the *Retirement Income Journal*, a trade publication, entitled "Surprise: DOL Rule Targets Indexed Annuities" stated that the Department "gave no direct warning that a BIC requirement for [fixed indexed annuity] sales would be included in the final rule; it wasn't in the proposal" and quoted a broker-deal executive who said he "was told repeatedly by the annuity companies that they did not believe this would happen because the DOL never gave them an opportunity to comment on this possibility";

- An article from *InsuranceNewsNet*, another trade publication, entitled "Annuity Industry Caught Off-Guard by DOL Rule" stated that fixed indexed annuities "had originally been left out of a draft proposal of the Department of Labor's new fiduciary rule" and that, as a result, "the annuity industry was caught off-guard";

- An article from *Investment News*, another trade publication, entitled "Variable and Fixed-Indexed Annuities Feel Sting of DOL Fiduciary Rule" stated that the Department "dealt a bit of a surprise blow to fixed indexed annuities in the final iteration of its rule," a move "representing an about-face from the department's original proposal."

61. Industry analysts also were caught unprepared. For example, on March 31, 2016, just days before the Department announced its final regulatory actions, Fitch Ratings, Inc., a credit rating and research organization, prognosticated that because the "new DOL proposal would effectively limit insurance product sales to IRAs to fixed annuity contracts as variable annuity contracts are considered a security under federal securities law and would no longer be exempt under PTE 84-24," variable annuities would be subject to "the more onerous requirements" of the BICE. "This proposed change," Fitch wrote, "would have significant implications for annuity writers as it could negatively affect sales of variable annuities into qualified plans and could positively affect sales of fixed annuities and fixed indexed annuities (FIA)." After the actions were announced, however, Fitch wrote that the Department's "inclusion of FIAs under the more onerous requirements of the Best Interest Contract was

unexpected" and that "Fitch believes FIA writers are not as prepared as VA writers, who have already spent considerable time and effort preparing for the new standards."

62. Another industry analyst, Keefe, Bruyette & Woods, Inc., concurred. "We most recently heard from industry players that it wasn't expected," it wrote shortly after the Department's announcement, noting further that it expected "indexed annuity sales to be negatively impacted as a result."

63. Congress, too, pointed out that "unlike the 2015 [notice of proposed rulemaking], under the final rule, all variable and fixed-index annuities will need to comply with the new requirements." S. Rep. No. 114-527, at 17 (2016). Because of this and other reasons, on May 24, 2016, Congress passed a resolution, H.J. Res. 88, disapproving the Rule pursuant to the Congressional Review Act of 1996, 5 U.S.C. § 801 *et seq.*

VI. The Department's Actions Are Now Inflicting Severe, Irreparable Harm

64. The Department's decision to exclude fixed indexed annuities from the scope of amended PTE 84-24 and to instead require fixed indexed annuity sellers to utilize the BICE was thus unexpected and illogical. In addition, the Department failed to consider and analyze important aspects of its action's marketplace implications, especially the disproportionate economic impact on both the individual insurance agents and the IMOs and other insurance agencies and businesses that support independent agent distribution channels. Among other things, the Department did not produce a cost-benefit analysis of the impact its actions would have on all components of the fixed indexed annuity industry. IMOs not affiliated with a Financial Institution or insurance company will be disenfranchised by the new regime, which will prompt a shift in distribution to registered investment advisers, banks, and broker-dealers.

65. To sell fixed indexed annuities and receive transaction-based compensation such as commissions, independent insurance agents can no longer rely on PTE 84-24. According to the Department, they must now rely on the BICE. But unlike for broker-dealers and other alternative channels operating under the business and supervisory model that the Department contemplated when formulating the rulemaking package, the BICE is uniquely unworkable for independent insurance agent distribution of fixed indexed annuities. The BICE requires that a Financial Institution execute a best interest contract with the financial product purchaser, supervise each individual Adviser, and in that way assume direct legal liability for the Adviser's conduct. The Financial Institution exercising supervisory authority must adhere to the conditions of the BICE, including the policies and procedures requirements and the obligation to insulate the Adviser from incentives to violate the Impartial Conduct Standards, even if those incentives are created by third-party product providers whose products the independent Adviser may offer.

66. Organizations that qualify as Financial Institutions are registered investment advisers, banks, broker-dealers and, provided that they meet certain conditions, insurance companies. IMOs do not categorically qualify as Financial Institutions under the BICE. Indeed, in promulgating the BICE, the Department specifically declined to expand the categories of Financial Institutions to IMOs, essentially intermediaries between insurance companies and independent agents. The Department instead limited the definition of Financial Institution to certain types of regulated entities "which are subject to well-established regulatory conditions and oversight." 81 Fed. Reg. at 21,067. The Department allowed for the possibility that it might in the future consider applications for an individual exemption from other, unenumerated entities, but cautioned that any such individual exemption would depend upon "the regulatory

oversight of such entities, and their ability to effectively supervise individual Advisers' compliance with the terms of this exemption." *Id.*

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

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

69. In addition, the BICE is expressly designed to provide a private right of action allowing contract owners to sue the Financial Institution if they believe the Adviser violated the Impartial Conduct Standards, exposing the Financial Institution to unquantifiable legal risk.

70. Historically, IMOs and the independent insurance agents with whom they have relationships have been the major distribution channel for fixed indexed annuities; unsurprisingly, fixed indexed annuities represent a significant portion – if not the great majority – of a typical IMO's sales. For those in Market Synergy's network of IMOs, fixed indexed annuities represent more than 90% of total sales. Around six in ten fixed indexed annuities sold in the fourth quarter of 2015 were via independent agents, with the majority of that percentage within qualified retirement accounts. By contrast, during the same period, banks represented less than 17% of sales and broker-dealers had a 13.5% share.

71. Rather than attempt to continue to market and sell fixed indexed annuities through an independent agent distribution channel despite the unique regulatory challenges that the channel and issuing carriers would face under the BICE, insurance companies will likely shift their distribution to career agents, banks, registered investment advisers, and broker-dealers.

72. Several large providers of fixed indexed annuities have already publicly signaled their intention to do just that. For example, in an open letter to its sales force dated May 2, 2016, American Equity Investment Life Insurance Company (a large fixed indexed annuity provider) observed "that there are numerous obstacles to complying with BICE for the independent agent distribution channel and that BICE was not drafted to be workable for independent agent distribution of FIAs." The letter explained:

> BICE requires that a Financial Institution sign a Best Interest Contract with the policyholder. Organizations that qualify as a Financial Institution are banks, broker-dealers, registered investment advisors and insurance companies. National marketing organizations (NMOs) do not qualify as a Financial Institution although BICE permits them to apply to the DOL for an individual exemption. The DOL limited Financial Institutions to "regulated entities … which are subject to well-established regulatory conditions and oversight." This means that the insurance carrier

> must function as the Financial Institution for sales of FIAs by independent agents to qualified accounts.
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> *****
>
> If an independent agent represents more than one insurance carrier, neither carrier can meet its supervisory obligation under BICE and still allow the insurance agent to maintain his "independent" status. Additionally, BICE includes a private right of action that allows policyholders, individually and as part of a class action, to sue the Financial Institution if they believe the independent agent violated the Best Interest Standard. The DOL has not created any safe harbors that if met, would prohibit policyholders from bringing suit. This exposes the Financial Institution to potentially unlimited and unquantifiable legal risk.

The "bottom line," the letter concluded, was that there "are significant challenges to the sale of FIAs to qualified accounts under BICE by companies like American Equity Life that utilize the independent agent channel. The potential legal exposure to the insurance company cannot be reasonably assessed or quantified."

73. An executive of American Financial Group, another fixed indexed annuity provider, stated in a May 3, 2016 earnings call that the Department's actions would "have by far the greatest impact as it's written today on the IMOs that have life-only agents. I think there is going to be an adjustment period for banks, for broker-dealers, for registered investment advisers, but I think they're going to figure out how to deal with the new regs. So I think the impact is going to be significantly lower." The executive opined that the Department's actions were "going to have an impact for some period of time on every segment of distribution. I think some of the companies that are impacted in a major way are going to lose those premiums, but I don't think those premiums are going away. I think some of those are going to be channeled through other distribution."

74. Insurance companies have indicated that they intend to finalize plans to comply with the Department's new regulatory regime as soon as practicable. If insurance companies

begin developing and investing in business operations, strategies, and contractual arrangements designed to shift distribution of fixed indexed annuities away from IMOs and independent insurance agents to alternative channels, it will be difficult for them to reverse or rescind those operations, strategies, and arrangements even if the Department's actions are vacated or otherwise altered at a future point in time.

75. Even with an April 10, 2017 applicability date of amended PTE 84-24, IMOs and independent insurance agents are at imminent risk of being irretrievably left behind by their product suppliers which will, in turn, result in the loss of the IMOs' and agents' livelihoods.

76. The Department's actions will substantially harm, and already have harmed, the recruiting efforts of IMOs and others like Market Synergy and its members. Fixed indexed annuities comprise a substantial portion of sales for independent insurance agents, a portion that has steadily increased since the introduction of fixed indexed annuities in the mid-1990s. If fixed indexed annuity sales through alternative distribution channels are increased, and fixed indexed annuity sales through the independent agent distribution channel are decreased, it will become increasingly difficult to recruit agents to the latter channel.

77. As a result of the Department's actions, for the reasons stated above, independent insurance agents and IMOs are likely to exit the annuity marketplace, whether voluntarily or not. There is already anecdotal evidence that agents are exiting the marketplace and industry analysts are forecasting that tens of thousands more may eventually exit.

78. Those independent insurance agents and IMOs that remain in the annuity marketplace now face substantial additional costs and risks in attempting to comply with the BICE. For example, because of the legal risk associated with the BICE, it is anticipated that premiums for errors and omissions insurance covering the agents will increase substantially.

79. Without proper notice to all potentially affected parties, the Department's arbitrary about-face regarding the treatment of fixed indexed annuities in the final rulemaking poses an imminent, existential threat to Market Synergy and the independent insurance sales and marketing channels that act as the primary distributors of these guaranteed retirement savings and income products. The Department's actions not only irreparably harm the primarily small entities and individual insurance professionals engaged in the business, they also negatively affect the very retirement savings consumers who the Department ostensibly sought to protect in promulgating the Rule, the BICE, and amended PTE 84-24.

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

80. By excluding fixed indexed annuities from the defined scope of PTE 84-24, as amended, and instead including them within the scope of the BICE, the Department has acted in a manner that is in violation of the applicable law, is without observance of the procedures required by law, is arbitrary, capricious, and an abuse of discretion, and is unsupported by substantial evidence. In particular, the Department's legal violations under the Administrative Procedure Act and the Regulatory Flexibility Act are at least threefold:

81. ***First***, in its notice of proposed rulemaking, the Department was required yet failed to give notice that, in the final rulemaking, it would (and ultimately did) drastically alter the proposed exemptive regulatory treatment of fixed indexed annuities, by excluding fixed indexed annuities from PTE 84-24 and instead including them within the BICE.

82. Notice of proposed rulemaking must be published in the Federal Register and include a statement of the time, place, and nature of public rulemaking proceedings; reference to the legal authority under which the rule is proposed; and either the terms or substance of the proposed rule or a description of the subjects and issues involved. *See* 5 U.S.C. § 553(b). While

an agency is permitted to make changes in a proposed rule after the comment period without a new round of commentary, the changes must be in character with the original scheme and be foreshadowed in proposals and comments advanced during the rulemaking.

83. Neither the term "fixed indexed annuity" nor its alternative appellation, "equity indexed annuity," or their respective cognates appear anywhere in the Department's April 20, 2015 notices of proposed rulemaking regarding the Rule, PTE 84-24, or the BICE. The notices stated that the Department would revoke relief under PTE 84-24 for insurance agents, insurance brokers, and pension consultants to receive transaction-based compensation *only* in connection with the purchase of variable annuity contracts and any other annuity contracts that are securities under federal securities law.

84. At the same time, the Department confirmed that recommended transactions involving insurance and annuity contracts that are *not* securities under federal securities law would continue to be covered under PTE 84-24, as they always had. Unregistered fixed indexed annuities are not variable annuities and are not regulated as securities under federal securities law. They are considered to be non-security insurance products. In fact, in the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 989J, 124 Stat. 1376 (2010) (codified in a note at 15 U.S.C. § 77c), Congress expressly directed that, provided three basic criteria were met, fixed indexed annuities must be treated as exempt from federal securities law and thus regulated solely as insurance products under state law. This congressional directive is popularly known as the "Harkin Amendment."

85. As was widely reported in the trade and national press, the fixed indexed annuity industry and other interested parties and analysts were surprised by the Department's unexpected regulatory change.

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

87. The Department's stated purpose was to create a regulatory regime that protects plans, participants, beneficiaries, and IRA owners from potential conflicts of interest and divided loyalties. As compared to "fixed rate annuities," however, there are no different or greater potential conflicts of interest associated with the sale of fixed indexed annuities. Except for the method of calculating interest credited to the contract – a distinction having no bearing on the Department's concerns regarding "conflicted" compensation – "fixed rate annuities" and fixed indexed annuities are materially identical products and are regulated in the same manner under state insurance law and likewise exempt from regulation under federal securities laws.

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

89. ***Third***, while required to do so as an element of its regulatory impact analysis, the Department failed to consider and analyze important aspects of its action's marketplace consequences, especially the disproportionate, disruptive economic impact the action will have on IMOs and other businesses like Market Synergy that support or comprise independent agent distribution channels.

90. The great majority of fixed indexed annuities are marketed and sold through independent insurance agents, especially agents contracted with or through IMOs; only a minority of fixed indexed annuities are marketed and sold through broker-dealers and other channels. Unless the Department's action is preliminarily enjoined and ultimately set aside, that will quickly change, with the likely effect being reduced consumer access to traditional retirement planning sources and reduced choice and availability of guaranteed retirement income products. Independent insurance agents will no longer qualify for exemptive relief under PTE 84-24 and will be unable to qualify under the BICE. Because independent insurance agents and IMOs are just that – independent – they are neither employed nor supervised by qualifying Financial Institutions capable of entering into a best interest contract with a person to whom the agent wishes to sell a fixed indexed annuity.

91. Nor is it certain that an entity such as an insurance company that might qualify as a Financial Institution would in fact be willing or able to sign a best interest contract in such a situation. More probably, a Financial Institution will be: (i) unwilling to shoulder the legal risk associated with the BICE; and (ii) unable to represent or ensure that the independent agent is insulated from incentives to violate the Impartial Conduct Standards, including incentives created by other insurance companies or investment providers. Regardless, even if some companies choose to become Financial Institutions, the additional costs and burdens to any company establishing and assuming this risk is likely to adversely affect growth, compensation, and ultimate survival for the independent insurance agents in this market. Independent agent distribution channels are thus put to a competitive disadvantage relative to other channels, if not disenfranchised, under the Department's new regulatory regime.

92. Under ERISA, the Department may not grant an exemption to prohibited transactions like the BICE unless the exemption is "administratively feasible." 29 U.S.C. § 1108(a)(1). For the foregoing reasons, the BICE is not administratively feasible for Market Synergy, IMOs, or others in independent agent distribution channels.

93. The Department's exclusion of fixed indexed annuities from PTE 84-24 is already causing immediate, severe, widespread, and irreparable economic harm and disruption to Market Synergy and the broader non-securities, agent-based fixed indexed annuity distribution industry. The great majority of Market Synergy's revenue is attributable to fixed indexed annuity sales. Rather than continue to market and sell fixed indexed annuities through the independent agent distribution channel – which would raise potentially insurmountable compliance issues and legal risks for themselves and IMOs under the BICE – insurance companies may choose to shift their fixed indexed annuity distribution to broker-dealers, banks, and captive or career agent sales forces. Such a result would be catastrophic for Market Synergy and other businesses substantially engaged in the marketing and sale of fixed indexed annuities within the independent agent distribution channel.

94. In addition, because fixed indexed annuities constitute a significant percentage of underlying agent sales, IMOs, insurance agencies, and other businesses that support independent agent distribution channels are now experiencing difficulty in retaining and recruiting independent insurance agents. The trade press coverage of the Department's bait-and-switch on fixed indexed annuities, and the Department's unprecedented fiduciary rulemaking package generally, has been substantial. Indeed, there is mounting evidence that the Department's regulatory action will cause tens of thousands of agents to exit the annuity marketplace.

95. The stakes are enormous. In 2015 alone, fixed indexed annuity sales reached a record-breaking $54.5 billion, an increase of 13 percent from 2014. Of these fixed indexed annuity sales, Market Synergy and the eleven IMOs with which it partners were associated with approximately $15 billion of this sales revenue. In 2016's first quarter, fixed indexed annuity sales were approximately $15.7 billion. Most fixed indexed annuities are sold to IRA holders.

96. For these reasons, and others to be provided in briefs to be filed, Market Synergy respectfully requests that the Court enter an order preliminarily enjoining the Department from implementing or enforcing the amendment to and partial revocation of PTE 84-24. In addition, Market Synergy respectfully requests that the Court enter a final order and judgment declaring and holding unlawful, and setting aside, the amendment to and partial revocation of PTE 84-24, remanding the matter to the Department for further review and relief consistent with such order and judgment.

CLAIMS FOR RELIEF

Count I: Violation Of The Administrative Procedure Act By Failure To Give Adequate Notice Of The Challenged Action

97. Market Synergy incorporates by reference the allegations contained in the preceding paragraphs of this Complaint, as though fully set forth below.

98. The amendment to and partial revocation of PTE 84-24 constitutes a final agency action for purposes of 5 U.S.C. § 706(2).

99. In its notice of proposed rulemaking, the Department failed to give the public, including Market Synergy, adequate notice that it might exclude fixed indexed annuities from the scope of PTE 84-24 and instead include them in the scope of the BICE.

100. The failure to give adequate notice of the Department's contemplated final action, which was fundamentally inconsistent with its proposed action, prevented commenters, and

potential commenters like Market Synergy, from offering relevant views, data, and alternatives, and prevented the Department from considering or meaningfully responding to the same.

101. The Department's exclusion of fixed indexed annuities from the scope of PTE 84-24 and resulting inclusion of fixed indexed annuities in the scope of the BICE was not a logical outgrowth of the Department's proposal. To the contrary, the Department adopted a position diametrically opposed to its proposal. Market Synergy and other affected parties could not have reasonably anticipated this *volte-face*.

102. Accordingly, the Department's exclusion of fixed indexed annuities from the scope of PTE 84-24 and inclusion of fixed indexed annuities in the scope of the BICE is arbitrary, capricious, an abuse of discretion, not in accordance with law, without observance of the procedure required by law, and unsupported by substantial evidence.

103. Market Synergy is suffering legal wrong because of the Department's action and is adversely affected or aggrieved by that action. Market Synergy is therefore entitled to relief under 5 U.S.C. §§ 702, 705, and 706.

Count II: Violation Of The Administrative Procedure Act By Failure To Offer A Reasoned Basis For The Challenged Action

104. Market Synergy incorporates by reference the allegations contained in the preceding paragraphs of this Complaint, as though fully set forth below.

105. The Department's exclusion of fixed indexed annuities from the scope of PTE 84-24 and inclusion of fixed indexed annuities in the scope of the BICE is neither reasoned nor supported by substantial evidence.

106. The Department failed to identify any potential or greater conflicts of interest that would meaningfully distinguish fixed indexed annuities from all other types of fixed annuities,

even though the latter class of annuities will continue to enjoy exemptive status under PTE 84-24, while the former will not. This distinction arbitrarily treats similar products differently.

107. The Department failed to identify any studies, reports, or supporting data tending to suggest that sales of fixed indexed annuities produce any more, or different, conflicts of interest than sales of other types of fixed annuities.

108. Accordingly, the Department's exclusion of fixed indexed annuities from the scope of PTE 84-24 and inclusion of fixed indexed annuities in the scope of the BICE is arbitrary, capricious, an abuse of discretion, not in accordance with law, without observance of the procedure required by law, and unsupported by substantial evidence.

109. Market Synergy is suffering legal wrong because of the Department's action and is adversely affected or aggrieved by that action. Market Synergy is therefore entitled to relief under 5 U.S.C. §§ 702, 705, and 706.

Count III: Violation Of The Administrative Procedure Act And The Regulatory Flexibility Act By Failure To Properly Consider The Challenged Action's Economic Impact

110. Market Synergy incorporates by reference the allegations contained in the preceding paragraphs of this Complaint, as though fully set forth below.

111. The Department's exclusion of fixed indexed annuities from the scope of PTE 84-24 and inclusion of fixed indexed annuities in the scope of the BICE failed to address or account for the severe, irreparable economic harm and disruption the change would inflict on IMOs and others engaged within independent agent distribution channels, many of which are small businesses. Although the Department's requirement that independent agents selling fixed indexed annuities use the BICE to receive commissions and other transaction-based compensation from third parties is unworkable, threatening a well-established, well-functioning

business model in which sales are well-regulated at the state level, the Department failed to consider the costs or benefits, if any, of its actions.

112. Although exemptions to prohibited transactions like the BICE must be "administratively feasible," 29 U.S.C. § 1108(a)(1), the BICE is not administratively feasible for Market Synergy, IMOs, or others in independent agent distribution channels.

113. Accordingly, the Department's exclusion of fixed indexed annuities from the scope of PTE 84-24 and inclusion of fixed indexed annuities in the scope of the BICE is arbitrary, capricious, an abuse of discretion, not in accordance with law, without observance of the procedure required by law, and unsupported by substantial evidence.

114. Market Synergy is suffering legal wrong because of the Department's action and is adversely affected or aggrieved by that action. Market Synergy is therefore entitled to relief under 5 U.S.C. §§ 702, 705, and 706.

PRAYER FOR RELIEF

115. Wherefore, Market Synergy prays for relief as follows:

(a) For entry of an order preliminarily enjoining the Department and the Department's officers, agents, servants, employees, attorneys, and all others in active concert or participation with them, from implementing or enforcing the amendment to and partial revocation of PTE 84-24;

(b) For entry of an order excusing Market Synergy from any obligation to give security for the requested preliminary injunction;

(c) For all process necessary and appropriate to postpone the effective date or "applicability date" of the amendment to and partial revocation of PTE 84-24 to maintain the status quo pending the lawsuit's conclusion;

(d) For entry of a final order and judgment declaring and holding unlawful, and setting aside, the amendment to and partial revocation of PTE 84-24 and remanding the matter to the Department for further review and relief consistent with such order and judgment;

(e) For an award of Market Synergy's reasonable attorneys' fees and costs of litigation; and

(f) For such other and further relief as the Court deems just and proper.

DESIGNATION OF PLACE OF TRIAL

Pursuant to D. Kan. R. 40.2(a), Market Synergy designates Topeka, Kansas as the place of trial for this matter.

Respectfully submitted,

WALTERS BENDER STROHBEHN
& VAUGHAN, P.C.

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*Motion for leave to appear *pro hac vice* filed herewith
**Motion for leave to appear *pro hac vice* to be filed by June 10, 2016