UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE NATIONAL ASSOCIATION FOR FIXED ANNUITIES, *Plaintiff*, v. THOMAS E. PEREZ, *et al.*, *Defendants*.	Civil Action No. 1:16-1035 (RDM)

DEFENDANTS' OPPOSITION TO PLAINTIFF'S
MOTION FOR A STAY AND INJUNCTION PENDING APPEAL

Plaintiff's motion for an injunction pending appeal should be denied. Rule 62(c) of the Federal Rules of Civil Procedure states that the court "may . . . grant an injunction on terms . . . that secure the opposing party's rights," while an appeal is pending from a "final judgment that . . . denies an injunction."[1] A party seeking a stay or injunction pending appeal must establish four factors:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Shapiro v. U.S. Dep't of Justice, No. 13-555, 2016 WL 3023980, at *7 (D.D.C. May 25, 2016) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)). These are "stringent standards." *Greater New Orleans Fair Housing Action Ctr. v. U.S. Dep't of Housing & Urban Development*, Nos. 10-5257, 10-5269, 2010 WL 99411065, at *1 (D.C. Cir. 2010) (per curiam); *Slovenic v. Muncie*, 180

[1] While Plaintiff styles its motion an application for "stay and injunction," it does not seek a stay of judgment under Rule 62(b), but instead an injunction "staying the April 10, 2017 applicability date" of the rulemaking. Pl.'s Mot. at 1, ECF No. 49.

F. App'x 171 (D.C. Cir. 2006) (per curiam) (same). Plaintiff "bear[s] the burden 'of showing that exercise of the court's extraordinary injunctive powers is warranted.'" *Lubow v. U.S. Dep't of State*, 934 F. Supp. 2d 311, 312 (D.D.C. 2013) (quoting *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985)).

NAFA has failed to carry its burden under each of the four factors, and each factor provides an independent basis upon which NAFA's motion should be denied.

I. Plaintiff Is Unlikely to Succeed on the Merits.

First, because this Court granted summary judgment to Defendants on all grounds for reasons that are not only correct, but compelling, NAFA cannot make "a strong showing that [it] is likely to succeed on the merits." *Shapiro*, 2016 WL 3023980 at *7. Indeed, NAFA does not even attempt to meet this standard, but proposes an alternative "serious legal questions" standard that does not apply in the circumstances here. *See* Pl.'s Mem. in Supp. of Mot. for Stay and Injunction Pending Appeal at 5 ("Pl.'s Appeal Inj. Mem."), ECF No. 49 (ultimately quoting *Wash. Met. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)). The Court of Appeals has made clear that a party is "wrong" to reduce the likelihood of success prong to the "serious legal questions" standard unless "each of the other three factors 'clearly favors' granting the injunction." *Davis v. Pension Benefit Guarantee Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009) (quoting *Holiday Tours, Inc.*, 559 F.2d at 843). Accordingly, the *Holiday Tours* "serious legal questions" standard does not apply if the party merely shows that "the other three prongs are 'not contrary to' a preliminary injunction," *Davis*, 571 F.3d at 1292, let alone if one or more of the prongs point squarely against an injunction. *See, e.g.*, *In re Special Proceedings*, 840 F. Supp. 2d 370, 372 (D.D.C. 2012) ("It is only when the other three factors tip sharply in the movant's favor that the standard for success on the merits changes."). Here, as discussed below, not one of the

other factors favors an injunction, least of all the public interest. Accordingly, NAFA cannot avail itself of the lower standard, and has not carried its burden to establish that it can meet the higher standard actually required.

Nothing in the Court's opinion granting summary judgment to Defendants on all grounds suggests that NAFA is likely to prevail on appeal. Even if NAFA merely had to show that it presented "serious legal questions," its motion fails because its claims are not "novel and without precedent," as NAFA suggests. *See* Pl.'s Appeal Inj. Mem. at 6. In resolving NAFA's first three claims, the Court simply applied traditional tools of statutory interpretation to conclude that the Department of Labor acted within its statutory authority. *See* Mem. Opinion at 30-61, ECF No. 46. The Court held that NAFA's Due Process Clause claim was "particularly misplaced" given the context of the challenged term, "reasonable compensation," and the reality that the insurance industry has been subject to such a standard for over forty years. *Id.* at 67, 69. The Court held that NAFA's Regulatory Flexibility Act claim failed because "there is little question that [the agency] put forth at least a 'reasonable, good-faith effort' to" meet the procedural requirements that apply. *Id.* at 92. And the Court's analysis demonstrated the fact that there can be no doubt that the rulemaking at issue in this case satisfied the "minimal level of analysis" required under the Administrative Procedure Act's arbitrary and capricious standard. *Id.* at 71-88. Accordingly, this case does not raise "issue[s] . . . of first impression" that constitute "serious and difficult legal questions." *Loving v. IRS*, 920 F. Supp. 2d 108, 110 (D.D.C. 2013). Nor is it enough to assert that the underlying issues are important. *See Comm. on the Judiciary, U.S. House of Representatives v. Miers*, 575 F. Supp. 2d 201, 204 (D.D.C. 2008) ("Simply calling an issue important . . . does not transform the [party's] weak arguments into a likelihood of success or a substantial appellate issue.").

Moreover, NAFA's irreparable harm arguments discussed below essentially depend on and recapitulate the theory that it was arbitrary and capricious for the Department of Labor to make the rulemaking applicable one year after publication of the final rules and exemptions. NAFA did not raise this theory in its complaint, and abandoned it in its summary judgment reply brief. *See* Defs.' Summ. J. Reply at 40-41, ECF No. 30. Regardless, the Department has shown that the staggered compliance approach set forth in the rulemaking, which allows the industry one year to come into compliance with only part of the rulemaking, provides sufficient time for the industry to prepare for compliance. *See* Defs.' Summ. J. Mem. at 83-84. Accordingly, if portions of the industry have voluntarily chosen to adopt a wait-and-see approach, that choice not to act in the time available cannot now justify a post-judgment injunction pending appeal. And, as NAFA acknowledges, almost five full months remain before the rulemaking becomes applicable, *see* Pl.'s Appeal Inj. Mem. at 1, and the contract provisions NAFA challenges are deferred until more than one year from now.

For all of these reasons, this factor does not weigh in favor of an injunction, and for the reasons discussed below, this is not a case where the other three factors "clearly favor" an injunction.

II. Plaintiff Has Not Established Irreparable Harm.

NAFA's renewed assertion of irreparable harm suffers from the same numerous flaws that beset its assertions in its motion for a preliminary injunction in this case, and Defendants respectfully refer the Court to Defendants' responses showing that NAFA's declarations fail to show that its members will suffer irreparable harm absent an injunction. *See* Defs.' Summ. J. Mem. 86-96; Defs.' Summ. J. Reply 41-43. The additional declarations NAFA has submitted do not change that conclusion and, indeed, reinforce it. The harms specified in the declarations

depend on speculation and mistaken assumptions about the effect of the rulemaking, attempt to rely on compliance costs that do not rise to the cognizable level under the standard, and would be triggered by the possible actions of third parties rather than being direct consequences of the rulemaking. As the Court concluded, the rulemaking does not subject insurance companies and independent agents to unworkable requirements. Mem. Opinion 79-85. Instead, Defendants established that insurers have several plausible choices that could involve a continued role for the independent distribution channel, Defs.' Summ. J. Br. 64-72, Defs.' Summ. J. Reply 33-36, which has been further clarified for the industry in the Department of Labor's recently released FAQs. *See* https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/coi-rules-and-exemptions-part-1.pdf (Oct. 27, 2016).

Economic harm—the only type of harm alleged by NAFA—is rarely sufficient for preliminary relief, *see Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1295 (D.C. Cir. 2009), and "only economic loss that threatens the survival of the movant's business amounts to irreparable harm." *Power Mobility Coal. v. Leavitt*, 404 F. Supp. 2d 190, 204 (D.D.C. 2005). Even then, economic harm warrants injunctive relief only when it is "certain to occur in the near future as a direct result of the threatened action." *Id.* NAFA's allegations of irreparable harm do not meet this threshold.

The additional declarations NAFA has submitted from Messrs. Marrion, Wong, and Foguth, demonstrate that NAFA's previous speculation that the industry would suffer irreparable harm in the form of "losses of businesses," Pl.'s Summ. J. Mem. 82, was just that—speculation. Indeed, Mr. Foguth, who earlier this year predicted that Foguth Financial Group "will likely go out of business," 1st Foguth Decl., ECF. No. 5-8, is still in business and has determined that he "will obtain a 'Series 65' securities license by the end of 2016 to ensure compliance with

the rule." 2d Foguth Decl., ECF No. 49-3.

While Mr. Marrion continues to assert that "many . . . IMOs [will] go out of business," that assertion depends on the unsupported estimate that "IMOs unable to qualify as … Financial Institution[s]" will see a drop in revenue of "50% to 60%." 2d Marrion Decl. ¶ 23, ECF No. 49-1. His declaration acknowledges that numerous independent marketing organizations ("IMOs") have applied to the Department of Labor for exemptions to serve as financial institutions for purposes of the Best Interest Contract Exemption.[2] *Id.* ¶ 21. And it ignores the possibility, explained in Defendants' motion for summary judgment, *see* Defs.' Summ. J. Mem. 26, that IMOs may continue to contract with insurance companies to take on the supervisory responsibilities under the rulemaking. The harm Mr. Marrion alleges is thus far from certain and, therefore, insufficient to demonstrate irreparable harm. *Power Mobility Coal.*, 404 F. Supp. 2d at 204.[3] Moreover, his bare allegation, based on the unsupported estimates of decreased revenue by unidentified IMOs with whom he has allegedly spoken, *see* 2d Marrion Decl. ¶ 23, falls short of the requisite *proof* necessary to establish irreparable harm. *See Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (movant "must provide proof . . . indicating that the harm is certain to occur in the future").

NAFA's revised declarations from Messrs. Marrion, Wong, and Foguth otherwise allege only that parts of the insurance industry will suffer unrecoverable compliance costs. As

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[2] The undersigned represent that as of the date of the filing of this brief, the number of those applications totals 20.

[3] Moreover, Mr. Marrion's declaration cites an article on CNO's costs of compliance, *see* 2d Marrion Decl. ¶ 18, but that article also reports that CNO's third quarter 2017 earnings beat Wall Street earnings estimates. *See* https://insurancenewsnet.com/innarticle/cno-financial-dol-rule-to-cost-us-8m-10m-in-2017. And while Mr. Marrion asserts that the Department has not provided clear guidance on how IMOs can become financial institutions, 2d Marrion Decl. ¶ 10, Americans for Annuity Protection recently said that the Department's recently issued FAQs, which address, *inter alia*, how IMOs may continue to function in the market even without qualifying as a financial institutions, were" good news for independent distribution and annuity customers." *See* http://insurancenewsnet.com/innarticle/1062313.

Defendants have shown, however, *see* Defs.' Summ. J. Mem. 91-92, the compliance costs of those in a heavily regulated industry are ordinarily insufficient to establish irreparable harm. And even if compliance costs could be sufficient, they are not here. Mr. Marrion's own declaration demonstrates that there are various alternatives for the industry to come into compliance with the rulemaking, *see* 2d Marrion Decl. ¶¶ 8-10, and that, as a result, actual compliance costs are largely uncertain. *Id.* ¶ 17.[4] In any event, with regard to the compliance costs of insurance carriers and IMOs, Mr. Marrion again provides only unsupported ballpark estimates based on conversations with unidentified entities. *See id.* ¶¶ 17-18, 24. Mr. Wong likewise provides no basis for his bare allegation that his company "reasonably anticipate[s] that [it] will expend $1.5 million before April 10, 2017" coming into compliance with the rulemaking. 2d Wong Decl., ECF No. 49-2. Even crediting these estimates, they do not rise to the level of economic harm sufficient to establish irreparable harm. *See Power Mobility Coal.*, 404 F. Supp. 2d at 204. The compliance costs to independent agents are similarly neither great enough to constitute irreparable harm, *see* 2d Marrion Decl. ¶¶ 30-31 (alleging independent agents will: "see a significant decline in their earnings" if they wish to remain independent, "become quasi-captive agents," or take exams to become Investment Adviser Representatives); 2d Foguth Decl. ¶¶ 8-10 (same), nor the direct result of the rulemaking but are due to the independent decisions of third parties. *See id.* ¶¶ 9, 12 (alleging insurance carriers have indicated they will sell FIAs through registered broker-dealers or "quasi-captive agents"). *See* Defs.' Summ. J. Mem. 95; *Safari Club Int'l v. Jewell*, 47 F. Supp. 3d 29, 32-33 (D.D.C. 2014); *Am. Meat Inst. v. USDA*, 968 F. Supp. 2d 38, 80-81 (D.D.C. 2013); *Power Mobility Coal.,* 404 F. Supp. 2d at 204.

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[4] The Department's FAQs supports this conclusion, and provide guidance as to how the BIC Exemption can work for the insurance industry. *See* https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/coi-rules-and-exemptions-part-1.pdf, at Q21-Q23.

Lastly, NAFA also relies for its claim of irreparable harm on declarations that were submitted in support of a motion for a preliminary injunction in *Market Synergy Group, Inc. v. United States Department of Labor*, Civ. No. 16-4083, which is pending in the U.S. District Court for the District of Kansas. Pl.'s Appeal. Inj. Mem. Exs. D-K (ECF Nos. 49-4 through 49-11). As set forth in Defendants' opposition to Market Synergy's preliminary injunction motion, *see* Defs.' Corrected Opp'n to Pl.'s Mot. for Prelim. Inj. ("Defs.' Market Synergy Opp'n") at 54-59, *Market Synergy Group v. Perez*, No. 16-4083 (D. Kan.), ECF No. 41-1 (attached as Exhibit A), those declarations likewise fail to establish that the annuity industry will suffer irreparable harm for many of the same reasons NAFA's members' declarations are insufficient to do so. Namely, the Market Synergy declarants' allegations of irreparable harm, that IMOs and independent agents will be "irretrievably left behind by their product suppliers," are based on their speculation as to the likely actions of third parties and would not be the direct result of the rulemaking even if they were to occur. Such allegations are not grounds for an injunction that could not bind such third parties in any event. *See id.* at 56-57. In addition, the declarants' dire predictions for the annuity industry are based on pure speculation, *see id.* at 57-58, and are further undermined by the second Marrion Declaration, which demonstrates that the industry has several viable alternatives to come into compliance with the rulemaking, *see* 2d Marrion Decl. ¶¶ 8-10, 30-31, and the fact that a number of IMOs have now applied to DOL for individual exemptions to be able to serve as Financial Institutions under the rulemaking. Further, the Market Synergy declarants, like NAFA's, have simply not shown that their claims of irreparable harm are actual. *See* Defs.' Market Synergy Opp'n at 57-58. They provide no specific bases for their projections and their projections are entirely conclusory. *See id.* at 58. Such bare, unsupported allegations are simply insufficient to establish irreparable harm. *Nat'l Mining Assoc. v. Jackson*, 768 F. Supp. 2d 34, 54 (D.D.C. 2011).

And these declarations, like NAFA's, do not establish a likelihood of imminent harm that would justify an injunction, given that the contract provision, the more extensive disclosure provisions, and the provisions related to representations to retirement investors, do not go into effect until January 2018.

For all of these reasons, NAFA has not shown that its members will suffer irreparable harm absent an injunction pending appeal, and NAFA is therefore not entitled to one.

III. The Balance of Interests Weighs Strongly Against an Injunction.

This is not a case "when little if any harm will befall other interested persons or the public." *In re Special Proceedings*, 840 F. Supp. 2d at 372 (quoting *Wash. Met. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977)). As Defendants have shown, retirement investors are currently subject to substantial economic harm from the conflicts of interest in this market, and the Department concluded that those harms should not continue unabated. *See* Defs.' Summ. J. Mem. at 14, 17. Suspending the April 10, 2017 applicability date—and thus the financial industry's preparation to comply with the rulemaking—would sow confusion in the market and potentially delay the needed reforms to the harm of investors and the public interest. *See id.* at 96-98; Defs.' Summ. J. Reply at 44-46. NAFA's proposed injunction could potentially save the annuity industry from further compliance costs, but this is meaningful only if the rulemaking is ultimately struck down. To make it plausible for the industry to cease preparations now, NAFA asks that the Court to guarantee a lengthy compliance period if, as is likely, NAFA loses on appeal. This comfort for the industry would come at great expense to the investors who will continue to be harmed in the interim. Accordingly, neither the public interest nor the balance of harms tips in favor of an injunction.

NAFA's only counterargument is that there is a public interest in "ensuring that agencies

act within the limits of statutory authority." Pl.'s Appeal Inj. Mem. at 18. But where the Court has concluded that the Department *has* acted within its statutory authority, that theory cannot provide a sufficient ground to disregard the many non-parties who would be injured by delaying continued implementation of the rulemaking.

CONCLUSION

For the foregoing reasons, Plaintiff's motion for a stay and injunction pending appeal should be denied.

Date: November 21, 2016

Respectfully requested,

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