Case No. 16-5345

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE NATIONAL ASSOCIATION FOR FIXED ANNUITIES,

Plaintiff-Appellant,

v.

THOMAS E. PEREZ, et al.,

Defendants-Appellees.

On Appeal From an Order of the United States District Court
For the District of Columbia
1:16-cv-1035-RDM

APPELLANT'S EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL

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November 29, 2016

CERTIFICATE OF PARTIES, AMICUS CURIAE, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

Plaintiff in the district court and Appellant in this appeal is The National Association for Fixed Annuities ("NAFA").

Defendants in the district court and Appellees in this appeal are the United States Department of Labor and Thomas E. Perez, in his official capacity as Secretary of the United States Department of Labor.

Amici in the district court action include the Consumer Federation of America, Americans for Financial Reform, William Michael Cunningham, Public Investors Arbitration Bar Association, Better Markets, Incorporated, and the AARP and AARP Foundation.

B. Rulings Under Review

The rulings under review are the November 4, 2016 order and memorandum opinion of the district court denying Plaintiff's application for a preliminary injunction and motion for summary judgment and granting Defendants' cross-motion for summary judgment. *NAFA v. Perez, et al.*, Case No. 1:16-cv-1035-RDM (D.D.C. Nov. 4, 2016) (Judge Randolph D. Moss). The order and opinion

are attached at APX1-93.[1]

Also under review is the district court's November 23, 2016 order denying NAFA's motion for an injunction pending appeal, attached at APX94-103.

C. Related Cases

This matter has not previously come before this Court. Counsel is aware of no other related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C). The following cases, however, involve similar issues of law and fact: *Chamber of Commerce of the United States, et al. v. Perez, et al.*, Case No. 16-cv-1476 (N.D. Tex.); *Market Synergy Grp., Inc. v. Perez, et al.*, Case No. 5:16-cv-4083 (D. Kan.); *American Council of Life Insurers, et al. v. United States Dep't of Labor, et al.*, Case No. 3:16-cv-1530 (N.D. Tex.); *Indexed Annuity Leadership Council, et al. v. Perez, et al.*, Case No. 3:16-cv-1537 (N.D. Tex.); and *Thrivent Financial for Lutherans v. Perez*, Case No. 16-cv-03289 (D. Minn.).

/s/ Philip D. Bartz
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[1] Citations to the Appendix, which includes the relevant docket entries in the district court, are referenced throughout this motion with an "APX" prefix.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
BACKGROUND AND PROCEDURAL HISTORY 2
STANDARD FOR INJUNCTION PENDING APPEAL 6
ARGUMENT 8
I. NAFA Is Likely To Succeed On The Merits. 8
A. The Rule Fails Under *Chevron* Steps 1 and 2 9
B. DOL's Treatment Of FIAs Is Arbitrary And Capricious 14
C. "Reasonable Compensation" Is Void For Vagueness. 16
II. An Injunction Is Needed To Prevent Further Irreparable Harm. 17
III. An Injunction Will Prevent Harm And Serve The Public Interest. 20

TABLE OF AUTHORITIES

Cases

Alexander v. Sandoval,
532 U.S. 275 (2001) 12-13

Am. Bioscience, Inc. v. Thompson,
269 F.3d 1077 (D.C. Cir. 2001) 6

Am. Library Ass'n v. FCC,
406 F.3d 689 (D.C. Cir. 2005) 14

Astra USA, Inc. v. Santa Clara Cnty.,
563 U.S. 110 (2011) 13

Burns v. Del. Charter Guar. & Tr. Co.,
805 F. Supp. 2d 12 (S.D.N.Y. 2011) 12

Charles Schwab v. Debickero,
593 F.3d 916 (9th Cir. 2010) 11

Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,
467 U.S. 837 (1984) 8, 9, 14

Donovan v. Bierwith,
680 F.2d 263 (2d Cir. 1982) 11

Goldstein v. SEC,
451 F.3d 873 (D.C. Cir. 2006) 14

Hearth, Patio & Barbecue Ass'n v. U.S. Dep't of Energy,
706 F.3d 499 (D.C. Cir. 2013) 10

League of Women Voters of United States v. Newby,
838 F.3d 1 (D.C. Cir. 2016) 7

Loving v. IRS,
742 F.3d 1013 (D.C. Cir. 2014) 9, 14

Mandelbaum v. Fiserv, Inc.,
787 F. Supp. 2d 1226 (D. Colo. 2011) 12

Mass. Mut. Life Ins. Co. v. Russell,
473 U.S. 134 (1985) 13

Mertens v. Hewitt Assocs.,
508 U.S. 248 (1993) 13

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983) 14

Mova Pharm. Corp. v. Shalala,
955 F. Supp. 128 (D.D.C. 1997) 20

Nken v. Holder,
556 U.S. 418 (2009) 7

Population Inst. v. McPherson,
797 F.2d 1062 (D.C. Cir. 1986) 7

Robertson v. Cartinhour,
429 F. App'x 1 (D.C. Cir. 2011) 7

Russello v. United States,
464 U.S. 16 (1983) 12

Stovic v. R.R. Ret. Bd.,
826 F.3d 500 (D.C. Cir. 2016) 12

Washington Metro Area Transit Comm'n v. Holiday Tours, Inc.,
559 F.2d 841 (D.C. Cir. 1977) 7

Winter v. NRDC,
555 U.S. 7 (2008) 7

Statutes

5 U.S.C. § 706(2)(C) 9

5 U.S.C. § 706(a)(2) 14

26 U.S.C. § 4975(e)(3) 4, 9

26 U.S.C. § 4975(f)(8)(J)(i) 10

29 U.S.C. § 1002(21)(A) 3, 9

29 U.S.C. § 1108(g)(11)(A) 10

Rules

D.C. Cir. Rule 8(a)(1) 7

Regulations

26 C.F.R. § 54.4975-9 4

29 C.F.R. § 2510.3-21 .... 1, 4

Nearly six critical months have passed since NAFA first sought a preliminary injunction to delay enforcement of the "fiduciary rule" (the "Rule") promulgated by the United States Department of Labor ("DOL"), AR1-57 (to be codified at 29 C.F.R. § 2510.3-21), along with two related prohibited transaction exemptions, AR58-144 & 785-95. APX104-244.[1]

April 10, 2017 is the "applicability date" of the Rule (*i.e.*, the date on which compliance is required). APX350-51. Given this looming deadline, NAFA urges the Court to preserve the status quo by staying the applicability date pending appeal. Otherwise, NAFA members will be forced to accelerate irreversible, costly, and industry-altering actions in the weeks ahead to re-structure their entire distribution system, which has been in place for decades. This Court's *de novo* review of this case would be rendered meaningless by the mere passage of time.

As explained below, NAFA members face extraordinary challenges to comply with this flawed Rule, which was adopted improperly by DOL and foisted on the fixed annuity industry with a short time to comply. The Rule inherently favors the securities industry, and the adverse impact on NAFA members is much more profound. The fixed annuity industry faces prohibitive compliance costs and uncertainty, in part because DOL has dragged its feet on critical exemption

[1] This brief is constrained by the applicable page limit, but citations to the Administrative Record ("AR") and the Appendix ("APX") filed herewith will direct the Court to pertinent portions of the record.

requests. The situation is even more unsettled due to the election of a new administration, which may consider delay or repeal of a Rule purposely designed to take effect in one administration but not to become "applicable" until the next.

Accordingly, NAFA seeks a stay of the applicability date pending appeal to alleviate what can only be described as chaos in the fixed annuity industry. In addition, NAFA asks this Court to order that the Rule will not become applicable for a stipulated period after this lawsuit is resolved, thereby allowing NAFA members time to comply if the Rule is ultimately upheld. Given the Rule's profound impact, a post-litigation stay of as much as two years is warranted, but at a minimum NAFA seeks ten months. NAFA does not seek expedited review on appeal, because it would come too late absent an injunction; if an injunction is granted, expedited review would not be necessary.

BACKGROUND AND PROCEDURAL HISTORY

NAFA is a trade association for the fixed annuity industry, and its members are insurance carriers, independent marketing organizations ("IMOs"), and insurance agents; all participate in the sale of fixed annuities. APX246.

A fixed annuity is a form of insurance that guarantees an income stream for life and protection from market risk. APX247. There are two basic types of fixed annuities: (1) declared rate annuities and (2) fixed indexed annuities ("FIAs"). *Id.* A declared rate annuity guarantees a minimum interest rate set by the insurer. *Id.*

FIA interest rates are based on the performance of an external market index (*e.g.*, the S&P 500), with a guarantee that rates will never fall below zero. APX248.[2]

The distribution system for fixed annuities is built on payment of commissions. APX342-43. Declared rate annuities and FIAs are sold by licensed insurance agents, who earn commissions paid by the insurance carrier. Roughly 60% of the $50 billion in annual FIA sales are made by independent agents, who typically represent multiple carriers. APX249. Approximately 50,000 independent agents sell fixed annuities in the U.S. *Id.* IMOs work with carriers to distribute fixed annuities through independent agents. APX250.

As DOL recognized in its rulemaking, "[a]nnuities are sold through different types of distributors," and "*all are paid by commissions*." AR447 (emphasis added); APX343. Fixed annuities do not lend themselves to non-commission compensation (*e.g.*, percentage of assets), because purchases often involve large initial deposits, and most of the agents' efforts occur up front. APX260, 343.

On April 8, 2016, after a six-year rulemaking process, DOL promulgated this elaborate Rule to expand greatly the circumstances under which providing "investment advice" gives rise to "fiduciary" status under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1002(21)(A), and the

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[2] Fixed annuities differ from variable annuities, the value of which fluctuates based on performance of investment portfolios known as subaccounts, placing all investment risk on the consumer. APX249. Variable annuities are thus regulated as securities, unlike fixed annuities. APX345.

Internal Revenue Code (the "Code"), 26 U.S.C. § 4975(e)(3). APX345-53. The Rule replaces DOL's longstanding "five-part test" for fiduciary status, which has been in place since 1975, shortly after ERISA was enacted. 29 C.F.R. § 2510.3-21 (ERISA); 26 C.F.R. § 54.4975-9 (Code).

The central purpose of the Rule is to extend ERISA fiduciary duties to individual retirement account ("IRA") providers. APX351. Classification as a "fiduciary" triggers "prohibited transaction" rules, which in turn prohibit fiduciaries from receiving commissions, absent an exemption. APX2.

Before the Rule, NAFA members generally were not deemed "fiduciaries" under the five-part test. The Rule will make NAFA members into "fiduciaries," requiring them to qualify for a prohibited transaction exemption ("PTE") to participate in the commission-based distribution system through which fixed annuities are sold. With the Rule, DOL issued revised and new PTEs. Two PTEs will allow commissioned sales of fixed annuities to IRAs, but only subject to conditions that will re-shape the fixed annuity industry. APX353-58.

PTE 84-24 was revised to exempt only transactions involving declared rate annuities; the Best Interest Contract Exemption ("BICE") exempts commissioned sales of securities, mutual funds, and variable annuities, and it was modified late in the rulemaking process to include FIAs.[3] Through PTE 84-24 and the BICE, DOL

[3] In the Notice of Proposed Rulemaking, both declared rate annuities and

extends the stringent fiduciary duties Congress imposed on ERISA pension plan fiduciaries to salespersons involved in retail IRA transactions. The BICE further requires that such duties be delineated in a Best Interest Contract ("BIC") backed by warranties of a "Financial Institution" (*e.g.*, an insurance carrier), subjecting both salesperson and Financial Institution to liability for breach of ERISA fiduciary duties. APX353-58, 461-63. These requirements force NAFA members to re-build their entire distribution system.

The Rule's effective date was June 22, 2016, but its "applicability date" is April 10, 2017. APX350-51& APX28 n.8.[4] On June 2, 2016, before the effective date and more than 10 months before the applicability date, NAFA sued to challenge the Rule and sought a preliminary injunction staying the applicability date. APX104-244. After briefing, oral argument took place on August 25, 2016.

On November 4, five months after NAFA moved for a preliminary injunction, the district court denied NAFA's motion and granted DOL's cross-motion for summary judgment. APX1-93. In its 92-page Opinion, the court did

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FIAs were placed in PTE 84-24. AR732, AR747. In the final Rule, with no warning or meaningful explanation, DOL moved FIAs into the more onerous BICE, lumping FIAs with variable annuities and other securities. APX358-60. It should be further noted that, contrary to what the district court implies (APX14, 47-48, & 68-70), PTE 84-24 did not previously apply to most insurance agents, because the sale of insurance products alone did not trigger prohibited transaction rules. *See* DOL ERISA Opinion Letter 76-36.

[4] Certain requirements will be phased in on January 1, 2018, but agents and carriers must comply with all substantive requirements by the applicability date.

not "address NAFA's separate motion for a preliminary injunction." APX30.

On November 14, 2016, NAFA filed a Notice of Appeal and moved for an injunction pending appeal. APX513-35, 638. The district court denied that motion on November 23. The district court accepted "that the [FIA] industry will certainly incur substantial compliance costs; that business practices will change when the new rules take effect; and that those involved at various levels of the [FIA] industry will sustain economic losses." APX101. Although it further concluded that NAFA members "will incur significant, unrecoverable costs," the district court found that those irreparable harms were not sufficient to overcome its opinions that NAFA was not likely to succeed on the merits of its appeal and that retirement investors would be harmed by delay. APX101-02. NAFA now seeks emergency relief under FRAP Rule 8(a).

This Court has jurisdiction under 28 U.S.C. §§ 1291 and 1292. The district court's decision upholding the Rule will be subject to *de novo* review. *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083-84 (D.C. Cir. 2001).

STANDARD FOR INJUNCTION PENDING APPEAL

In determining whether to grant an injunction pending appeal, the Court considers four factors: "(1) the likelihood that the party seeking the injunction will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent an injunction; (3) the prospect that others will be

harmed if the court issues the injunction; and (4) the public interest." *Population Inst. v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986); D.C. Cir. Rule 8(a)(1).

While all factors must be considered, the first two are the most critical. *Nken v. Holder*, 556 U.S. 418, 434 (2009). "The test is a flexible one," and "[i]njunctive relief may be granted with either a high likelihood of success and some injury, or *vice versa*." *Population Inst.*, 797 F.2d at 1078.

It "will ordinarily be enough [to raise] serious legal questions going to the merits, so serious, substantial, [and] difficult as to make them a fair ground of litigation" and "more deliberative investigation." *Id.* (quoting *Washington Metro Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977)).[5]

As to the second factor, "[a]lthough the general rule has it that economic harm does not constitute an irreparable injury, the rule is based upon the presumption that 'adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation.'" *Robertson v. Cartinhour*, 429 F. App'x 1, 3 (D.C. Cir. 2011) (citations omitted). *See also Holiday Tours*, 559 F.2d at 843 & n.2; *Population Inst.*, 797 F.2d at 1081. Appeals take time, and "if a court takes the time it needs, [its] decision may in some cases come too late for the party seeking review." *Nken*, 556 U.S. at 421.

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[5] Following *Winter v. NRDC*, 555 U.S. 7 (2008), it remains unsettled in this Circuit whether the "sliding scale" approach is still viable. *League of Women Voters of United States v. Newby*, 838 F.3d 1, 7 (D.C. Cir. 2016). The Court need not decide that issue here, because NAFA can satisfy all four factors.

ARGUMENT

This case epitomizes the need for injunctive relief. First, NAFA presents serious issues that demand *de novo* appellate review, particularly because the district court side-stepped key issues. The case raises fundamental questions of statutory construction, congressional intent, and agency authority under the Administrative Procedure Act ("APA") and *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). As explained below, there is a substantial likelihood the Rule will not survive appellate scrutiny. Second, there is a dire need for equitable relief. NAFA members are being decimated by distribution changes required by the Rule and will be unable to compete in a new world of regulation created by DOL that tilts unfairly in favor of the securities industry.

I. NAFA Is Likely To Succeed On The Merits.

DOL exceeded its authority by (1) re-defining the term "fiduciary" to include insurance salespersons who are paid strictly for selling products, rather than for providing advice; (2) extending ERISA fiduciary duties to retail IRA transactions, even though Congress explicitly chose not to do so; and (3) creating a new litigation right through the BICE that allows IRA owners to sue for breach of ERISA fiduciary duties. None of these acts by DOL pass muster under *Chevron* Step 1. These three regulatory actions, whether considered individually or collectively, also far exceed the bounds of reasonableness under *Chevron* Step 2.

Beyond that, DOL's last-minute decision to switch FIAs from PTE 84-24 to the BICE was arbitrary and capricious, and the mandate that compensation be "reasonable" is unconstitutionally vague under the Due Process Clause, particularly in light of contradictory explanations offered by DOL.

A. The Rule Fails Under *Chevron* Steps 1 and 2.

The Rule fails under the APA, 5 U.S.C. § 706(2)(C), and *Chevron*, because DOL trespassed far beyond its authority in asserting vast new regulatory powers over IRAs, as the "text, purpose, and legislative history" of ERISA make clear. *Loving v. IRS*, 742 F.3d 1013, 1016-21 (D.C. Cir. 2014). Courts "should not lightly presume congressional intent to implicitly delegate" authority to enact a Rule of such enormous "economic or political significance." *Id.* The district court ignored *Loving*, which is central to NAFA's case. Congress never intended for an agency responsible for labor and employment issues to use its limited powers to regulate America's financial services industry, particularly retail IRA transactions.

First, DOL lacks authority to impose fiduciary status on any insurance agent who makes any recommendation to purchase an annuity. APX363-74, 441-57. DOL ignores that it is defining who is a *fiduciary*, and salespersons lack the special relationship of trust and confidence that is the hallmark of fiduciary status. Also, ERISA extends fiduciary status to those who offer "investment advice *for a fee or other compensation*." 29 U.S.C. § 1002(21)(A); 26 U.S.C. § 4975(e)(3) (emphasis

added). Consumers pay salespersons for products – not for *investment advice*. The DOL and district court ignored the plain meaning of these words, which are found in the title and text of the statute. APX31-46.

Further, when Congress enacted ERISA and DOL promulgated the five-part test, both did so against the backdrop of decades of regulatory experience concerning the dichotomy between advisers and salespersons, embodied in the Investment Advisers Act of 1940. That Act recognizes that fiduciary advisors have a relationship of trust and confidence with their clients and are paid for advice, while brokers sell products for commissions and give advice only incidental to the sale of products. APX368-69, 450-52. By basing fiduciary status on the mere recommendation of products, DOL upsets a longstanding regulatory, judicial, and common sense understanding of the term "fiduciary," which has even been ratified by Congress.[6] APX370-74, 452-56.

DOL's overreach is underscored by its attempt to "gerrymander[] its definition" of fiduciary. *Hearth, Patio & Barbecue Ass'n v. U.S. Dep't of Energy*, 706 F.3d 499, 508 (D.C. Cir. 2013). DOL admitted that its new definition is a "broad test [that] could sweep in some relationships that . . . [DOL] does not believe Congress intended to cover as fiduciary relationships." AR3; APX363-64,

[6] Congress ratified the five-part test via the Pension Protection Act of 2006, which defines "fiduciary adviser" as "a person who is a fiduciary of the plan by reason of the provision of investment advice," building upon the definition established in 29 U.S.C. § 1108(g)(11)(A) and 26 U.S.C. §§ 4975(f)(8)(J)(i).

442. Thus, DOL concedes that its definition violates congressional intent.

Second, DOL lacks authority to impose the "highest [fiduciary duties] known to the law" on agents selling annuities to IRAs. *See Donovan v. Bierwith*, 680 F.2d 263, 272 n.8 (2d Cir. 1982) (Friendly, J.). The purpose of PTE 84-24 and the BICE is to force agents selling to IRAs to take on ERISA fiduciary duties intended to govern fiduciaries of employer pension plans. APX378-83, 457-66.[7]

It is undisputed that the fiduciary duties established in ERISA title I, which governs employer-sponsored pension plans, were deliberately withheld by Congress in ERISA title II, which relates to IRAs. APX48. Title I creates extraordinary protections for employees, who lack any control over investments in employer-sponsored plans; but Congress saw no need to extend such protections to IRA owners who control their own investments. *See Charles Schwab v. Debickero*, 593 F.3d 916, 919 (9th Cir. 2010) (IRAs have "no employer oversight, no ongoing employer commitment, nor any potential for employer abuse").

In requiring annuity sellers in the IRA market to take on the same ERISA fiduciary duties set forth in title I, DOL relies on its limited authority to issue exemptions to prohibited transaction rules in title II.[8] But Congress created IRAs

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[7] Fixed annuity sellers cannot escape these exemptions. As DOL acknowledged, "all are paid by commissions." AR447.

[8] Reorganization Plan No. 4 of 1978 gave DOL narrow authority to interpret the definition of "fiduciary" in title II (*i.e.*, the Code). *See* APX350.

with the enactment of ERISA, and it deliberately chose not to extend fiduciary duties to IRA transactions. APX458-61. "[W]hen 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Stovic v. R.R. Ret. Bd.*, 826 F.3d 500, 503 (D.C. Cir. 2016) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). DOL and the district court ignored this clear expression of congressional intent.

Third, DOL exceeds its authority by using the BICE to create a new private right of action for IRA owners to sue for breach of ERISA fiduciary duties. APX384-88, 466-71.[9] DOL admits it has no such authority. APX468-69. At present, an excise tax is the sole penalty for violating the Code's prohibited transaction rules. In its own words, DOL found a "creative" way to make ERISA fiduciary duties "enforceable in the IRA context" by creating private litigation rights. *Id.* As a result, insurance carriers and agents selling FIAs to IRAs must enter into a BIC containing fiduciary duties copied and pasted from ERISA title I, exposing themselves to a wave of lawsuits – including class actions – asserting previously non-existent claims for breach of fiduciary duty. APX461-63.

This contravenes principles set forth in *Alexander v. Sandoval*, 532 U.S.

[9] Numerous courts have held that ERISA title II does not create a private right of action to sue IRA "fiduciaries." *E.g., Burns v. Del. Charter Guar. & Tr. Co.*, 805 F. Supp. 2d 12, 19-21 (S.D.N.Y. 2011); *Mandelbaum v. Fiserv, Inc.*, 787 F. Supp. 2d 1226, 1237 (D. Colo. 2011).

275, 286-91 (2001), which holds that "private rights of action to enforce federal law must be created by Congress." That concept is critical here, as Congress "carefully crafted" ERISA's limited civil enforcement mechanisms, none of which allow IRA owners or DOL to sue for breach of fiduciary duty. *See Mertens v. Hewitt Assocs.*, 508 U.S. 248, 254 (1993) (ERISA's "carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.'"); *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985) (same).

Without addressing these cases, the district court reasoned that the BICE "does not create a private cause of action," as DOL merely "condition[ed] the grant of an exemption on an enforceable written contract," and "any action . . . to enforce the terms of the written contract would be brought under state law." APX56-57.

The district court's conclusion elevates form over substance. DOL plainly grafted federal statutory standards onto state-law claims, creating a new right to sue IRA "fiduciaries" for breach of ERISA title I fiduciary duties. The district court's conclusion that an agency may use state contract law to confer new federal rights is novel and threatens to create a loophole for agencies that will eviscerate the holding in *Sandoval*. *See Astra USA, Inc. v. Santa Clara Cnty.*, 563 U.S. 110, 117-18 (2011). The district court glossed over these issues, which require reversal.

For all the same reasons, DOL's actions are not reasonable under *Chevron*

Step 2. *Am. Library Ass'n v. FCC*, 406 F.3d 689, 698-99 (D.C. Cir. 2005). Whether viewed individually or collectively, DOL's actions – its new definition of "fiduciary," the use of exemptions to extend fiduciary duties to IRA transactions, and the creation of a new private right of action through the BICE – far exceed the authority granted to DOL and the bounds of reasonableness. *Goldstein v. SEC*, 451 F.3d 873, 876-81 (D.C. Cir. 2006). Congress never intended DOL to impose fiduciary status on salespersons, let alone to impose ERISA fiduciary duties in transactions involving IRAs that are enforceable through a private right of action. APX374-78, 472-75. Put simply, "Congress did not intend to grow such a large elephant in such a small mousehole." *Loving*, 742 F.3d at 1021.

Although the district court found that DOL has taken "a step of great economic and political significance," it failed to consider whether the challenged regulatory actions are collectively unreasonable. APX41-46, 55.

B. DOL's Treatment Of FIAs Is Arbitrary And Capricious.

DOL's last-minute decision to shift FIAs to the BICE was plainly "arbitrary and capricious" and not the product of "reasoned decisionmaking." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983); 5 U.S.C. § 706(a)(2). DOL originally placed FIAs in PTE 84-24, because DOL was "not certain" that "the distribution methods and channels of insurance products that are not securities would fit within the [BICE]." APX393-96, 475-80. But DOL then

switched FIAs to the BICE without addressing the very distribution concerns it had raised as a critical consideration. Consequently, it "entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs.*, 463 U.S. at 43.

FIAs are not regulated as securities under federal law. APX 391-92, 480-81. The BICE was crafted with the securities industry in mind and is plainly unworkable with the existing distribution system for fixed annuities. Insurance carriers cannot supervise an independent agent's sales as a broker-dealer would supervise its registered representatives. Thus, DOL's decision to put FIAs in the BICE requires the industry to re-make its distribution system by an impractical deadline of April 10, 2017. APX396-407, 481-87. DOL considered none of this.

DOL and the district court offer illusory *post hoc* solutions to address unworkability, saying insurers need not supervise sales of other companies' products. APX82-83. But that is wrong; insurers face the impossible task of warranting that annuity recommendations are made "without regard to the financial or other interests" of the agent, but they have no control over how other companies compensate the same agent. APX397-99, 541. They also say insurance agents need not register to sell securities, and it would be imprudent to sell something for which one is not licensed. APX84-85. But that does not address the problem; under the BICE, insurance agents are subject to the same fiduciary standards as investment advisers and as such will be forced to become investment advisers

under securities laws. AR84 n.51; APX403-07, 483-86.

The net effect is a huge competitive advantage for the securities industry, which already has a largely compliant distribution system in place. APX397-403, 481-87. That advantage is compounded by the fact that the BICE now allows for waiver of liability for punitive damages or rescission in securities arbitration, but state insurance regulators will never permit such restrictions on remedies in fixed annuity contracts. APX482-83. DOL and the district court say NAFA had adequate notice of the securities industry's request to limit arbitration remedies; but it is absurd to say that NAFA should have read thousands of comment letters and known which requests DOL would adopt. APX76-77, 399-403, 482-83.

DOL completely ignored the impact of the Rule on fixed annuity distribution systems, which is the epitome of arbitrary and capricious action.

C. "Reasonable Compensation" Is Void For Vagueness.

In addition, the BICE is void for vagueness under the Due Process Clause. APX388-90, 490-500. The BICE requires that the Financial Institution (*i.e.*, an insurance carrier) warrant in a BIC that it paid no more than "reasonable compensation" to the agent. If the compensation is not "reasonable," by even a penny, the carrier is subject to heavy excise taxes and litigation exposure on a class-wide basis, which could include devastating remedies such as rescission.

Despite these severe consequences, DOL left the reasonable compensation

standard undefined and provides contradictory guidance. DOL inexplicably says "customary" compensation does not evidence reasonableness, even though reasonable compensation supposedly is "market based." DOL also cites common law principles related to trustee compensation for services provided on a case-by-case basis, but it knows annuity commissions are set by product rather than individual level of services. This and an array of other conflicting "guidance" from DOL puts insurers in an impossible quandary when deciding how to compensate agents. Even the district court acknowledged that DOL's "guidance is, admittedly, imprecise." APX62-72.

II. An Injunction Is Needed To Prevent Further Irreparable Harm.

Without an injunction, great irreparable harm (beyond harm already incurred) will occur before this Court can hear NAFA's appeal. NAFA has provided 20 affidavits to support its motions for injunctive relief, including 2 from its Director of Research, Dr. Jack Marrion, and 8 from a related case. *See* APX245-322, 536-635. DOL has offered no evidence to counter these affidavits.

As the uncontroverted affidavits amply show, insurance carriers, IMOs, and agents are being forced now to make irreversible and costly changes that will inalterably impact business models, careers, and lives. The resulting harm is accelerating every day as April 10, 2017 draws closer.

Insurance Carriers. As Dr. Marrion explains, carriers already are in the

process of irreversibly altering their distribution systems. APX270-72, 538. Some carriers are exiting the independent agent channel. Some are preparing to sell fixed annuities through securities firms. APX262-63, 538-39, 540-41. Some might work with IMOs but are unable to make definite plans, because DOL has yet to rule on IMO applications to serve as Financial Institutions, some of which have been pending for over five months. APX264-65, 540-42. Even if DOL approved the applications tomorrow, it would be too late absent an injunction. Carriers also need to re-file products with state regulators, which can take 12 to 18 months. *Id.*

Carriers have already incurred enormous unrecoverable costs in efforts to comply – in the range of $8-10 million each, not accounting for “thousands of personnel hours” – and those costs “are expected to grow exponentially as the applicability date draws closer.” APX542.

<u>IMOs.</u> The escalating harm facing IMOs is described in Dr. Marrion’s affidavits and in six affidavits from IMOs. APX255-76, 285-94, 308-12, 536-96, 603-10. IMOs account for billions of dollars in annual FIA sales. APX266. Because the BICE does not permit IMOs to serve as Financial Institutions, it is not clear what role, if any, IMOs will play in the FIA distribution system. DOL’s failure to decide IMO applications to serve as Financial Institutions injects chaos into compliance efforts. APX266-67, 543.

IMOs are poised for “massive layoffs and the closing of many firms.”

APX266, 543-44. Even those that may remain in business expect to lay off personnel, beginning in January 2017, as a result of revenue decline and escalating costs caused by the Rule. *Id.* IMOs are spending roughly $500,000 each to comply, and those that may remain expect to face 100-300% increases in errors and omissions insurance premiums. APX267-68, 543-44.

Agents. The mounting irreparable harm to insurance agents is potentially the most severe, as described in Dr. Marrion's affidavits and in seven affidavits from agents. APX255-84, 295-307, 313-22, 550-53, 611-35. Because of the Rule, "independent agents offering a wide range of fixed annuity products from many different insurance carriers will cease to exist in the IRA market." APX544. As carriers move away from selling through independent agents, Dr. Marrion projects tens of thousands of agents will leave the business. APX268.

Many agents make a living by selling FIAs to IRAs, including many "insurance-only" agents not registered to sell securities or give investment advice. *See* APX296-97, 300-01, 306, 316. Those agents who remain in the business face an immediate choice to stop offering FIAs to IRAs and prepare for a significant decline in income, or to become "quasi-captive agents" offering only limited products to their customers. APX544.

Consumers. Perhaps most disturbingly, the Rule also "reduc[es] the availability and value of guaranteed retirement income products for millions of

consumers," APX538, including low or middle-income savers who cannot afford to pay advisory fees. APX280, 282-83, 293-94, 303, 319, 321-22.

III. An Injunction Will Prevent Harm And Serve The Public Interest.

In stark contrast to the concrete harm facing the annuity industry, no real harm will result from delaying the applicability date. All fixed annuities are competently regulated under state law, and consumers are protected. APX343. After DOL took six years to adopt the Rule, it cannot credibly contend that significant harm will be caused by a short delay pending appeal.

Finally, an injunction pending appeal serves the public interest. The public has a strong interest in ensuring agencies act within limits of statutory authority. *See Mova Pharm. Corp. v. Shalala*, 955 F. Supp. 128, 131 (D.D.C. 1997). An injunction pending appeal would serve the public interest by allowing for meaningful appellate review, which will otherwise be foreclosed to NAFA. If the applicability date stands, NAFA members will be forced to carry out a massive overhaul to their distribution systems, resulting in permanent changes, great unrecoverable expense, and the prospect of only a Pyrrhic victory on appeal.

Respectfully Submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

The National Association for Fixed Annuities, Plaintiff-Appellant, vs. Thomas E. Perez, *et al.*, Defendants-Appellees.	Case No. 16-5345

APPELLANT NAFA'S DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Appellant The National Association for Fixed Annuities ("NAFA") makes the following disclosures:

There are no parent companies, subsidiaries, or affiliates of NAFA which have any outstanding securities in the hands of the public.

NAFA is a trade association dedicated to educating and informing the public, including consumers and policymakers, about the value of fixed annuities and their benefits in financial and retirement planning. NAFA's membership includes insurance companies, independent marketing organizations, and individual insurance agents, representing every aspect of the fixed annuity industry and covering 85 percent of fixed annuity sales.

Respectfully submitted,

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Dated: November 29, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of November 2016, I filed the foregoing Emergency Motion for an Injunction Pending Appeal (the "Motion"); Certificate of Parties, Amicus Curiae, and Related Cases; Disclosure Statement; and Appendix with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system and by hand delivering the original and four paper copies.

Service was accomplished on the following by hand delivery and through the CM/ECF system:

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Counsel for Appellees

On November 28, 2016, pursuant to D.C. Cir. Rule 8(a)(2), NAFA's counsel notified counsel for Appellees via email of NAFA's intent to file the Motion.

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