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

INDEXED ANNUITY LEADERSHIP COUNCIL, LIFE INSURANCE COMPANY OF THE SOUTHWEST, AMERICAN EQUITY INVESTMENT LIFE INSURANCE CO., MIDLAND NATIONAL LIFE INSURANCE CO., and NORTH AMERICAN COMPANY FOR LIFE AND HEALTH INSURANCE, Plaintiffs, v. THOMAS E. PEREZ, SECRETARY OF LABOR, and UNITED STATES DEPARTMENT OF LABOR, Defendants.	)	Civil Action No. ____

COMPLAINT

Plaintiffs the INDEXED ANNUITY LEADERSHIP COUNCIL, LIFE INSURANCE COMPANY OF THE SOUTHWEST, AMERICAN EQUITY INVESTMENT LIFE INSURANCE COMPANY, MIDLAND NATIONAL LIFE INSURANCE COMPANY, and NORTH AMERICAN COMPANY FOR LIFE AND HEALTH INSURANCE, for their complaint against defendants, THOMAS E. PEREZ, SECRETARY OF LABOR, and UNITED STATES DEPARTMENT OF LABOR, by and through their attorneys, on knowledge as to plaintiffs, and on information and belief as to all other matters, allege as follows:

INTRODUCTION

1. Plaintiffs in this action are an association of insurance companies that offer fixed indexed annuities—the Indexed Annuity Leadership Council, or IALC—and several providers of these insurance products. Plaintiffs support reasonable and balanced regulation of the retirement savings market and believe that life insurance companies and those who sell insurance products

should further the best interest of retirement savers. Plaintiffs bring this action, however, because the sweeping new rules issued by the Department of Labor will, if upheld, (1) upend the regulatory scheme that has for decades governed the market for fixed indexed annuities, (2) necessitate an overhaul of the ways in which these valuable products are sold, and (3) threaten the availability of these products for the very people the rules are intended to benefit, *i.e.*, retirement savers for whom other sources of financial information can be too expensive. As plaintiffs explain below, this Court should vacate the rules and thereby prevent the massive costs and dislocations they will cause because, in issuing them, the Department exceeded its statutory authority, engaged in arbitrary and capricious decisionmaking, failed to provide due notice, and violated the First Amendment.

PARTIES

2. The Indexed Annuity Leadership Council is a consortium of life insurance companies that offer fixed indexed annuities. IALC was established in 2011 with a mission to educate regulators and the public about the benefits of fixed indexed annuities, which offer principal protection and a predictable, guaranteed retirement income, and can contribute balance to retirement savers' long-term financial plans.

3. Life Insurance Company of the Southwest (LSW) was incorporated as a Texas domestic life and health insurer in 1955, and has its principal place of business at 15455 Dallas Parkway, Addison, Texas 75001. LSW issues life and annuity products, including fixed indexed annuities, and is licensed to do business in all states except New York.

4. American Equity Investment Life Insurance Company is a life insurance company formed in 1996 that issues fixed annuity and life insurance products with a primary emphasis on the sale of fixed indexed and fixed rate annuities. It is licensed in all states except New York.

5. Midland National Life Insurance Company (Midland National) is a life insurance company that was founded in 1906 and that markets a comprehensive portfolio of term life, universal life, and indexed universal life insurance products, as well as a wide array of fixed annuity products, including fixed indexed annuities, in every state except New York.

6. North American Company for Life and Health Insurance (North American) is a life insurance company that was founded in 1886 and that markets a comprehensive portfolio of term life, universal life, and indexed universal life insurance products, as well as a wide array of fixed annuity products, including fixed indexed annuities, in every state except New York.

7. The Department of Labor is the federal agency that promulgated the challenged rules. Thomas E. Perez is the Secretary of Labor and is sued in his official capacity.

JURISDICTION AND VENUE

8. This Court has jurisdiction under 28 U.S.C. § 1331 over this action arising under the Administrative Procedure Act (APA), 5 U.S.C. § 500 *et seq*., ERISA, 29 U.S.C. § 1001 *et seq*., the Internal Revenue Code, 26 U.S.C. § 1 *et seq*., and the First Amendment of the U.S. Constitution. The Court is authorized to issue the relief sought under the APA, 5 U.S.C. §§ 702, 705, 706, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202.

9. Plaintiff IALC has standing to bring this suit on behalf of its members, life insurance companies that offer fixed indexed annuities and thus are directly regulated and adversely affected by the challenged rules. IALC's members have standing to sue in their own right, the interests IALC seeks to protect are germane to its purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

10. The other plaintiffs have individual standing to bring this suit. As insurance companies that offer fixed indexed annuities, they are directly regulated and adversely affected

by the challenged rules and therefore have suffered an injury in fact that is fairly traceable to the challenged rules and is redressable by a favorable ruling setting aside those rules.

11. Venue is proper in the Northern District of Texas, Dallas Division under 28 U.S.C. § 1391(e) and 28 U.S.C. § 124(a) because this is an action against an agency of the United States, no real property is involved, and plaintiff Life Insurance Company of the Southwest resides in Dallas County, Texas.

FACTUAL AND REGULATORY BACKGROUND

A. The benefits of fixed indexed annuities to retirement savers

12. Annuities are contracts between an individual and an insurance company. In exchange for principal contributed by the individual (either as a lump sum or through a series of payments), the insurance company makes payments at regular intervals or, at times, all at once. An "immediate" annuity entitles the contract owner to payments from the insurer beginning immediately, whereas a "deferred" annuity entitles the owner to payments later in life, often upon retirement. The insurer's payments can be made in a lump sum, in installments for a specified term, or in installments for the lifetime of the owner or a designee.

13. By providing retirement savers with the option of a guaranteed stream of income for life, annuities help protect against "longevity risk," *i.e.*, the risk that a person will outlive his or her retirement savings. Because Americans are living longer and an increasing number now bear primary responsibility for planning for their retirements, annuities have become a critically important financial tool to help ensure that retirees have sufficient funds to last throughout their retirement years.

14. There are two basic types of deferred annuities—fixed and variable. The critical distinction between the two is that fixed annuities shield the purchaser from "investment risk," *i.e.*, the risk of losing their principal. With a fixed annuity, the insurer bears any market risk, and

interest credited to the contract is guaranteed. Premiums paid by the owner of a fixed annuity are not placed in a separate account or invested in a specific product or market, but instead are supported by the general account of the issuing insurer. Fixed annuities thus provide an affordable and low-risk option for individuals seeking guaranteed income in retirement.

15. Fixed *indexed* annuities differ from traditional fixed annuities in only one respect—the method of calculating the amount of interest to be credited. With a traditional fixed annuity, earnings accrue at an interest rate that may be guaranteed for a term of years or periodically declared by the insurer. With a fixed indexed annuity, the interest rate is calculated using a formula tied to an established market index, such as the S&P 500 Composite Stock Price Index. The formulas typically come with a cap, so the owner will not see the value of the annuity rise as much as the index rises, but at the same time (and unlike investing in the stock market), the contract sets a "floor," so the owner will not lose any principal if the index declines.

16. The positive change of a market index is used only to calculate the interest rate and, consequently, the rate can never be less than zero; no actual investment is made in the underlying financial instruments. In this way, compared to traditional fixed annuities, fixed indexed annuities can provide greater protection against "inflation risk," *i.e.*, the risk that the owner's payments will not keep pace with rising consumer prices, while also protecting the owner's principal against loss due to investment risk.

17. Apart from the method by which interest is computed, in all other respects fixed indexed annuities and traditional fixed annuities are identical. Both may include a variety of options and riders that allow owners to customize their annuities. Both may include lifetime income benefit riders that provide income payments for life. Such riders may also include "well-being riders," which provide increased benefits if the owner can no longer perform certain

routine activities, or enhanced death benefits, which provide payments to beneficiaries upon the owner's death. Other riders may enable penalty-free withdrawals in the case of a qualifying life event, such as entering a nursing home or being diagnosed with a terminal illness.

18. Fixed annuity purchasers do not pay a commission to the insurance agent, and generally do not pay up-front fees. However, because fixed annuities are intended primarily to provide guaranteed income in retirement, contract owners pay a surrender charge if they choose to cash-in the contract early. Though surrender charges vary between insurers and among fixed annuity products, as do the applicable surrender periods, insurers may charge no more than is permitted under state insurance standards.

B. State regulation of fixed indexed annuities

19. States have regulated the sale of annuities and other insurance-based financial products for decades. State legislatures and commissioners, often operating under the auspices of the National Association of Insurance Commissioners (NAIC), have developed a detailed body of consumer protection regulations to ensure that those selling annuities act in a manner that protects the interests of retirement savers. *See, e.g.*, NAIC Comment at 1 (July 21, 2015) (explaining that state insurance commissioners have "acted to implement a robust set of consumer protection and education standards for annuity and insurance transactions").

20. One important component of this framework is the NAIC's model "suitability" regulations. Versions of these regulations have been adopted by 48 states plus the District of Columbia, and insurance companies selling fixed indexed annuities generally apply suitability standards at least as stringent as the model regulations even if domiciled in states that do not require it, in order to benefit from recent federal legislation exempting fixed indexed annuities from federal securities regulation. *See infra*, ¶ 31. Thus, virtually all fixed indexed annuity sales

are as a legal or practical matter subject to requirements that are at least as stringent as the NAIC model regulations.

21. Only state-licensed insurance agents may sell fixed indexed annuities, and they must complete an annuity-specific training course, as well as training about each specific product they wish to sell. NAIC Suitability Model §§ 6(F)(1)(b)-(c), 7(A). Each sale of a fixed indexed annuity is governed by extensive legal protections for consumers. Each type of fixed indexed annuity must be filed with, and approved by, each state in which it is sold. And an agent may not recommend even state-approved fixed indexed annuities unless the agent has "reasonable grounds for believing that the recommendation is suitable for the consumer." *Id.* § 6(A).

22. To make the required suitability determination, the agent must evaluate a host of factors, including the consumer's age, income, intended use of the fixed indexed annuity, assets and liquid net worth, financial needs and experience, financial time horizon, liquidity needs, risk tolerance, and tax status. *Id.* §§ 5(I), 6(A). But determining that a fixed indexed annuity is suitable for a consumer is only the first step; to recommend a fixed indexed annuity, an agent must also have a reasonable basis to believe that the "consumer would benefit from certain features of the annuity, such as tax-deferred growth, annuitization or death or living benefit." *Id.* § 6(A)(2). An agent also must ensure the consumer has received a reasonable explanation of the fixed indexed annuity, including the surrender period, early surrender charges, any other fees or charges, and limitations on interest returns. *Id.* § 6(A)(1). And before the annuity contract can be issued, the insurance company must review and approve the transaction as suitable. *Id.* § 6(C).

23. The consumer must also be given a written disclosure statement at the time of sale. Under the NAIC's Annuity Disclosure Model Regulation, this statement must explain, *inter alia*, the guaranteed and non-guaranteed elements of the contract, including the elements used to

determine the index-based interest, such as the participation rates, caps or spread, and an explanation of how they operate, as well as any death benefit.

24. State laws also include a wide range of enforcement mechanisms. Insurance companies in most states must resolve problems brought to their attention by consumers within a specified time period and must engage in good faith discussions. State insurance commissioners have broad powers to examine and investigate the affairs of every insurer in the state to ensure they do not engage in unfair trade practices. *See* NAIC Comment at 1 (July 21, 2015) (explaining that state insurance commissioners "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," and "states have a strong record of protecting consumers, especially seniors, from inappropriate sales practices or unsuitable products." *Id.*

C. The historical absence of federal regulation of fixed annuities

25. Consistent with the longstanding role of states as primary regulators of insurers and their products, federal law has long eschewed regulation of fixed annuities. In 1933, Congress exempted annuity contracts subject to the supervision of a state insurance commissioner from federal securities regulation. 15 U.S.C. § 77c(a)(8). In 1959, the Supreme Court concluded that *variable* annuities fell outside this exemption, because such contracts place all of the investment risk on the owner. *SEC v. Variable Annuity Life Ins. Co. of Am.*, 359 U.S. 65 (1959). As a result, variable annuities are registered securities, and are regulated by the Securities and Exchange Commission (SEC) and the Financial Industry Regulatory Authority (FINRA). Fixed annuities, however, remained subject to the exemption.

26. In 1974, Congress enacted ERISA and parallel provisions of the Internal Revenue Code. Among other things, ERISA requires fiduciaries of an ERISA plan to act prudently and "solely in the interest of the participants and beneficiaries," 29 U.S.C. § 1104(a), and prohibits certain transactions absent an exemption, *id.* § 1106. Under the Tax Code, fiduciaries of individual retirement accounts (IRAs) and plans not covered by ERISA are also subject to prohibited transaction rules. 26 U.S.C. § 4975. The Department may grant exemptions from the prohibited transaction rules if it makes certain findings. 29 U.S.C. § 1108.[1]

27. Under both ERISA and the Tax Code, a person is a fiduciary "to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. § 1002(21)(a); 26 U.S.C. § 4975(e)(3).

28. Shortly after the statute was enacted, the Department confirmed that those who sell fixed annuities are ordinarily not fiduciaries. Specifically, a person who lacked discretionary authority or control with respect to the investment of plan assets did not "render investment advice for a fee"—and thus was not a fiduciary—unless, among other things, he or she provided advice to a plan or plan fiduciary "on a regular basis." 40 Fed. Reg. 50840, 50840 (Oct. 31, 1975). Advice incidental to the sale of a financial product therefore has not generally qualified as fiduciary investment advice, and persons making such sales have generally not been fiduciaries subject to the prohibited transaction rules.

[1] Reorganization Plan No. 4 of 1978, 92 Stat. 3790, 3790 (codified at 5 U.S.C. App.), transferred the Secretary of the Treasury's authority to issue regulations, rulings, opinions, and exemptions under section 4975 of the Code to the Secretary of Labor.

29. Even a person who meets the definition of a fiduciary may engage in prohibited transactions with respect to a plan or IRA if any of multiple exemptions applies. One such exemption, originally promulgated in 1977 and amended several times over the years, covers "certain prohibited transactions that occur when plans or IRAs purchase insurance and annuity contracts." 80 Fed. Reg. 22010, 22011 (Apr. 20, 2015). Known today as Prohibited Transaction Exemption 84-24, this exemption has long 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 the insurance or annuity contracts for the plans or IRAs and receive a commission on the sale." *Id*. at 22012.

30. In 2009, the SEC proposed a rule that would have treated many fixed indexed annuities as securities subject to registration and the full panoply of accompanying federal supervision. 74 Fed Reg. 3138, 3161–63 (Jan. 16, 2009). The D.C. Circuit rejected this proposed rule in *American Equity Investment Life Insurance Co. v. SEC*, 613 F.3d 166 (D.C. Cir. 2010), because the SEC failed to account for the existence and utility of the extensive state regulatory regime that addressed the problems the SEC purported to solve in its rule. The SEC justified its new rule on the basis that it would lead to enhanced disclosures to consumers and would "enable sellers to promote more suitable recommendations to investors," thus increasing competition, efficiency, and capital formation. *Id.* at 178–79. The court rejected the SEC's analysis as arbitrary and capricious because it "fail[ed] to determine whether, under the existing [state-law] regime, sufficient protections existed to enable investors to make informed investment decisions and sellers to make suitable recommendations to investors." *Id.* at 179; *see id.* at 178 ("the SEC could not accurately assess any potential increase or decrease in competition … because it did not assess the baseline level of price transparency and information disclosure under state law").

31. Shortly thereafter, Congress concluded that nationwide federal regulation of fixed indexed annuity sales was unwarranted in light of existing state-law protections. The Harkin Amendment to the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 989J, 124 Stat. 1376, 1949–50 (2010), provides that fixed annuities sold in states that have adopted the NAIC suitability regulation (Model 275) or by companies following the NAIC model regulation shall be treated as exempt securities not subject to federal regulation. *Id.*

D. The compensation and distribution schemes developed under the existing regulatory systems

32. The regulatory regime governing the sale of fixed indexed annuities has shaped the compensation arrangements and distribution mechanisms for these products. These products are sold through a variety of channels, including by banks, broker-dealers, and so-called "career" or "captive" agents, who work predominantly for only one insurance company. But the vast majority of such sales are made by independent insurance agents, who work for multiple insurance companies. These agents are compensated through commissions. This commission-based compensation system has benefited both insurance agents and annuity purchasers.

33. As noted, in order to sell fixed indexed annuities, insurance agents must not only be licensed by the states in which they operate, they must also be sufficiently well-versed in available insurance options so that they can comply with "suitability" requirements and help prospective buyers assess which kind of annuity best fits their financial circumstances and risk tolerance, as well as to understand the various optional benefits they may wish to consider. Insurance agents thus perform a critical educational function, providing valuable information to retirement savers, who are often unfamiliar with annuities and may not understand the benefits of guaranteed income, how annuities address financial risks, or how to customize their annuity to best fit their particular needs and circumstances. Commissions—which are paid by the insurance

company and not deducted from the annuity buyer's principal—compensate agents for the substantial investment of time and effort needed to analyze the products and provide the information necessary for their customers to make informed decisions.

34. The primary alternative compensation arrangement is a fee for advice. In such an arrangement, a consumer pays an advisor to manage his or her money, placing funds in various investments and shifting assets over time in accordance with an investment strategy worked out by the consumer and advisor. For this ongoing service, consumers are charged, and are willing to pay, ongoing, usually annual, fees. The sale of a fixed indexed annuity, however, represents a one-time "buy and hold" transaction. The predicate for a fee-for-advice arrangement—ongoing investment advice—does not exist.

35. Adopting a fee-for-advice compensation model for such transactions, moreover, would be more expensive for many annuity buyers than a commission-based model, and would likely deprive many lower-income individuals of valuable financial assistance. Many advisory firms have minimum "assets under management" requirements that exclude the less wealthy. Those firms charge an annual fee that is often at least 2%. Over time, the management of $100,000 in assets would generate much larger fees under a fee-based system than the one-time commission the insurance company would pay to an agent on a $100,000 fixed annuity. *See*, *e.g.*, NAFA Comment at 14–15 (July 21, 2015).

E. The proposed rulemaking

36. In 2010, the Department proposed a regulation that would have broadened the test for determining when a person "renders investment advice for a fee" and is thus a fiduciary. 75 Fed. Reg. 65263 (Oct. 22, 2010). Even under this proposed test, the Department recognized that advice that is incidental to the sale of a financial product "ordinarily should not result in fiduciary status … if the purchaser knows of the person's status as a seller whose interests are

adverse to those of the purchaser, and that the person is not undertaking to provide impartial investment advice." *Id.* at 65267. After receiving numerous comments and holding a hearing on the proposal, the Department withdrew it.

37. In April 2015, the Department issued a series of notices of proposed rulemakings pertaining to fiduciary status and the scope of the prohibited transaction rules under ERISA and the Tax Code. Although the Department proposed to bring commission-based sales of fixed annuities within the scope of ERISA's fiduciary rules, it initially proposed that such sales would fall within the scope of the 84-24 exemption, as modified by the new rule. In the final rule, however, the Department, without notice, excluded fixed indexed annuities from the 84-24 exemption, subjecting them to an entirely new and far more onerous regulatory scheme.

1. Proposed fiduciary rule

38. The Department proposed to replace its 1975 regulation with a dramatically expanded definition of fiduciary investment advice. 80 Fed. Reg. 21928, 21929 (Apr. 20, 2015). The proposal listed multiple types of advice that, when provided in exchange for a fee or other compensation, would qualify as "investment advice," including a recommendation as to the advisability of acquiring a financial product. *Id.* at 21938. "Investment advice" would include advice pursuant to an agreement or understanding that the advice is individualized or specifically directed to the recipient for consideration in making investment or management decisions with respect to securities or other property of an ERISA plan or IRA, even if not provided on a regular basis as part of an ongoing advisory relationship. *Id.* at 21934, 21940. One-time advice could thus render a person a fiduciary and trigger the prohibited transaction provisions.

39. As the Department recognized, its expanded definition would sweep in a wide variety of communications that "Congress did not intend to cover as fiduciary 'investment advice' and that parties would not ordinarily view as communications characterized by a

relationship of trust or impartiality." *Id.* at 21941. The Department accordingly proposed to adopt a number of "carve-outs" for specified categories of communications to which fiduciary status would not attach "notwithstanding the [proposal's] general definition." *Id.*

40. One of these proposed "carve-outs" exempted "incidental advice provided in connection with an arm's length sale" of a financial product. *Id.* Unlike in the 2010 proposal, the Department did not extend this "seller's carve-out" generally to sales transactions in which the buyer should reasonably understand that the seller has adverse interests and is not rendering impartial investment advice. Rather, the Department proposed to limit the carve-out to transactions involving an independent fiduciary of large employee benefit plans. *Id.*

2. Proposed "Best Interest Contract" exemption

41. Having expanded the definition of "fiduciary" to capture a host of ordinary sales transactions that have never been subject to regulation under ERISA or the Tax Code, the Department proposed a new exemption, entitled the "Best Interest Contract" (BIC) exemption, which the Department said would allow these transactions to continue, but only if they complied with onerous new conditions. 80 Fed. Reg. 21960 (Apr. 20, 2015).

42. Among other things, to qualify for the BIC exemption, the adviser and the financial institution would be required to enter into a contract with the customer in which they "acknowledge fiduciary status, commit to adhere to basic standards of impartial conduct, warrant that they have adopted policies and procedures reasonably designed to mitigate any harmful impact of conflicts of interest, and disclose basic information on their conflicts of interest and on the cost of their advice." *Id.* at 21961. Pursuant to this contract, the adviser and financial institution would be required to abide by new standards, including a requirement to act only in the customer's "best interest," "without regard to the financial or other interests" of the adviser

or financial institution, *id.* at 21970, to disclose any "material conflicts of interest," *id.* at 21972, and to receive no more than "reasonable compensation," *id.* at 21970.

43. To enforce these vague new standards, the Department proposed to rely on the class action plaintiffs' bar. Despite Congress's decision not to create a private right of action for IRA owners, and to rely instead on enforcement by the IRS, and despite the Department's own lack of authority to enforce the provisions of the Tax Code, the Department conditioned the availability of the BIC exemption on advisers' and financial institutions' agreement to submit to enforcement through private class action litigation. *Id.* at 21972–73.

3. Proposed amendment to and partial revocation of the 84-24 exemption

44. The Department also proposed to significantly limit the 84-24 exemption by revoking relief for insurance agents who "receive a commission in connection with the purchase by IRAs of variable annuity contracts and other annuity contracts that are securities under federal securities laws." 80 Fed. Reg. at 22012. The Department believed "the provisions in the [BIC] Exemption better protect the interests of IRAs with respect to investment advice regarding securities products." *Id.* Under the proposal, the 84-24 exemption would remain available for sales to IRAs of annuities that are not treated as securities—including fixed indexed annuities—and for sales of all annuities (fixed and variable) to ERISA plans. *Id.* at 22015.

45. In addition, the Department proposed to amend the 84-24 exemption in order to "increase the safeguards of the exemption." *Id.* at 22012. Most significantly, to rely on the 84-24 exemption, fiduciaries would now have to "adhere to certain 'Impartial Conduct Standards,' including acting in the best interest of the plans and IRAs when providing advice." *Id.* Unlike the proposed BIC exemption, however, the proposed amendments to the 84-24 exemption would "not require fiduciaries to contractually warrant compliance." *Id.* at 22014.

46. Plaintiff IALC participated extensively in the rulemaking, submitting comment letters and testimony. In particular, IALC expressed support for the Department's decision to retain the 84-24 exemption for fixed annuities, including fixed indexed annuities.

F. The final rules

47. The final rule adopted the vastly broadened fiduciary definition set forth in the proposed rule, with some adjustments. Under the final rule, as under the proposal, no ongoing advisory relationship is required for a person to be considered as "rendering investment advice for a fee" and thus be deemed a fiduciary; one-time provision of the enumerated types of advice suffices to render a person a fiduciary. 81 Fed. Reg. 20946, 20948 (Apr. 8, 2016). The Department also declined to extend the "seller's carve-out" to sales to IRAs and small plans. *Id.* at 20980–84. Thus, under the new rule, commission-based sellers of fixed annuities qualify as "fiduciaries."

48. The final BIC exemption also "retains the core" provisions of the proposal. 81 Fed. Reg. 21002, 21007 (Apr. 8, 2016). It requires financial institutions to acknowledge their fiduciary status and that of their advisers in writing and adhere to "Impartial Conduct Standards" requiring them to give advice in the customer's "best interest," charge no more than "reasonable" compensation, and disclose all "[m]aterial" conflicts of interest. *Id.* The financial institution must also adopt anti-conflict policies and procedures and oversee advisers' recommendations. *Id.* With regard to IRAs and non-ERISA plans, the financial institution must commit to the Impartial Conduct Standards in an enforceable contract. *Id.* at 21008. For ERISA plans, the financial institution must acknowledge its fiduciary status and that of its advisers. *Id.* For both IRAs and ERISA plans, the exemption is not available if the financial institution includes provisions in any contract with the customer disclaiming liability for compensatory remedies or waiving or qualifying the customer's rights to bring or participate in a class action lawsuit. *Id.* at 21020–21.

49. The final 84-24 exemption retained the enhanced requirements of the proposal, including the requirement to adhere to "Impartial Conduct Standards." But in sharp contrast to the proposed rule, the Department abruptly changed course with regard to the partial revocation of the 84-24 exemption. Abandoning the securities-based distinction in the proposal, the final rule revoked the 84-24 exemption for sales of one type of annuity not regulated as a security—fixed indexed annuities—and revoked the exemption for sales both to IRAs and to ERISA plans. 81 Fed. Reg. 21147, 21148 (Apr. 8, 2016). As a result, the only annuities that continue to qualify for the 84-24 exemption are "Fixed Rate Annuity Contracts"—a new term introduced for the first time in the final rule. *Id.* Sales of all other annuities, including fixed indexed annuities and variable annuities, are limited to relief under the BIC exemption. *Id.*

COUNT ONE:

THE FIDUCIARY RULE EXCEEDS THE DEPARTMENT'S STATUTORY AUTHORITY AND IS, IN ALL EVENTS, ARBITRARY AND CAPRICIOUS

50. The prior paragraphs of the complaint are incorporated by reference.

A. The Department exceeded its statutory authority and thus failed to act in accordance with law by expanding the definition of "fiduciary" to include sellers of fixed indexed annuities.

51. ERISA provides that a person is a fiduciary with respect to a plan to the extent

> (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets,
>
> (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or
>
> (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A). The Tax Code contains an identical definition. 26 U.S.C. § 4975(e)(3).

52. The Department interpreted the second prong of the definition—*i.e.*, persons who "rende[r] investment advice for a fee or other compensation"—to include those who provide one-time advice incidental to the sale of an insurance product. That interpretation is inconsistent with the plain meaning of the statute.

53. In enacting ERISA, Congress legislated against a legal backdrop that tied fiduciary status to an ongoing relationship of significant trust and confidence, and that recognized that sellers of insurance products were not acting as fiduciaries. The second prong of ERISA's definition of a fiduciary does not reflect an intent to override these aspects of the common law. To the contrary, the phrase "render[ing] investment advice for a fee or other compensation … *with respect to any moneys or other property of [a] plan*" is naturally read to refer to compensation for advice on how to manage the assets and funds of an existing trust, not to the advice or recommendation an insurance agent provides in connection with a one-time sale of a "buy and hold" insurance product like a fixed indexed annuity. In the latter context, any advice is incidental to, and not the underlying basis of, the transaction, which is why the agent receives a commission only if a sale is made. As the Department itself recognized elsewhere in its final rules, the commission such an agent receives is "paid by the insurance company to the insurance agent or broker … *for the service of effecting the purchase of* a[n] … insurance contract." 81 Fed. Reg. at 21176 (emphasis added).

54. That the second prong of the definition of a fiduciary does not include an insurance agent who is compensated for advice incidental to a one-time purchase of an annuity is confirmed by a wealth of evidence of congressional intent. Textually, the "render[ing] investment advice" prong of the fiduciary definition is sandwiched between two other prongs that make clear that a fiduciary is a person who must adhere to heightened duties, generally as

part of an ongoing relationship, and in all events as part of a relationship of substantial trust and confidence—*i.e.*, a person who has "discretionary authority or discretionary control respecting *management*" of a plan or "*management or disposition* of its assets," or a person with "discretionary authority or discretionary responsibility in the *administration* of such plan." 29 U.S.C. § 1002(21)(A)(i), (iii) (emphases added). "Management" or "administration" of an ERISA plan or its assets is not a one-time arm's-length transaction, or an activity that is incidental to the sale of a financial product.

55. The first and third prongs of the statutory definition of a fiduciary also confirm that the "render[ing] investment advice" prong requires not only an ongoing relationship, but one of trust and confidence. A person afforded "authority," "control," or "responsibility" with respect to plan assets or the administration of a plan is necessarily one in whom significant trust has been reposed. Read in conjunction with the first and third prongs, therefore, the second prong likewise requires that the person "render[ing] investment advice" be a person in whom the recipient has placed trust and confidence—not a party to an arm's-length, one-time sales transaction.

56. The requirement that a fiduciary be a person in an ongoing relationship of trust is further confirmed by ERISA's legislative history and context. Congress drafted the statute against the background of the Investment Advisers Act of 1940, which defines an "investment adviser" as "any person who, for compensation, engages in the business of advising others … as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities." 15 U.S.C. § 80b-2(a)(11). Congress chose to regulate investment advisers from a desire to preserve the personalized character of the services of investment

advisers and in recognition of the delicate fiduciary nature of an investment advisory relationship.

57. Congress explicitly excepted from the definition of "investment adviser" "any broker or dealer whose performance of such services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor." *Id.* § 80b-2(a)(11)(C). This provision was designed to ensure that broker-dealers who charged only traditional commissions (earning a certain amount for each securities transaction completed)—and who thus functioned simply as salesmen of securities rather than advisers in whom investors reposed trust and confidence—would not be classified as investment advisers.

58. When Congress defined a "fiduciary" in ERISA as a person who "renders investment advice for a fee or other compensation," it was plainly drawing on and incorporating the same concept as an "investment adviser" under the Investment Advisers Act, and thus including advisers who are paid in exchange for an ongoing advisory relationship of trust and confidence. That concept excludes a seller of financial products who makes a profit by selling his or her product and whom a buyer reasonably understands to be acting as a salesperson.

59. This same distinction is confirmed by longstanding principles of trust law, on which Congress drew when it enacted ERISA. ERISA's fiduciary responsibility provisions codify and make applicable to ERISA fiduciaries certain principles developed in the evolution of the law of trusts. Accordingly, principles of trust law have long guided judicial interpretation of ERISA. One of the foundations of trust law is that a fiduciary relationship arises only where special intimacy or trust and confidence exists between the parties. Such intimacy or trust and confidence do not arise from a one-time, arm's-length sale.

60. For all of the foregoing reasons, the Department's redefinition of the term "fiduciary" is inconsistent with the plain meaning of the statute the Department purported to interpret. Indeed, the Department *admits* that the regulation's "broad test" for fiduciary status "could sweep in some relationships that are not appropriately regarded as fiduciary in nature and that the Department does not believe Congress intended to cover as fiduciary relationships." 81 Fed. Reg. at 20948. The new definition should therefore be vacated as it is "not in accordance with law" and "in excess of statutory … authority." 5 U.S.C. § 706(2)(A), (C).

B. The Department's redefinition of the term "fiduciary" is arbitrary and capricious.

61. Even if the term "fiduciary" were ambiguous and afforded the Department the discretion to extend the concept beyond ongoing advisory relationships of substantial trust and confidence, the Department's interpretation is arbitrary and capricious insofar as it reaches sales of fixed annuities.

62. Even if Congress did not incorporate into ERISA the distinction the Investment Advisers Act draws between investment advice and incidental recommendations made in connection with one-time transactions, that distinction is nevertheless relevant evidence of Congress's views as to when federal law should alter the ordinary dynamics of commercial transactions. Thus, even if ERISA affords the Department any discretion to expand the scope of fiduciary relationships, it is unreasonable to exercise that discretion in order to reach the kind of one-time arm's-length transactions that Congress concluded do not warrant special protections.

63. This is especially true in view of the Department's failure adequately (1) to demonstrate the existence of harms sufficient to justify imposing ERISA's fiduciary standards on insurance agents who sell fixed annuities, (2) to consider the extent to which state suitability standards already prevent whatever harms the Department seeks to prevent by imposing

fiduciary standards, or (3) to consider whether disclosure requirements, in conjunction with state insurance law standards, would prevent any such harms. These failures prevented the Department from assessing the relevant burdens and benefits of extending fiduciary standards to sales of fixed indexed annuities, and thus render its extension of "fiduciary" duties to such sales unreasonable, and arbitrary and capricious. 5 U.S.C. § 706(2).

64. The foregoing defects in the Department's interpretation are compounded by its unjustified conclusion that adequate protections could not be achieved by means of disclosures. *See* 81 Fed. Reg. at 20981. The Department cited a few studies that it claimed support its view, *see* Dep't of Labor, Regulating Advice Markets, Regulatory Impact Analysis for Final Rule and Exemptions (Apr. 2016) (RIA) at 269–71, but none establishes that, for sales of fixed indexed annuities in the United States, disclosure would be insufficient to eliminate any harms not already adequately addressed by the suitability standards of state insurance law.

COUNT TWO:

THE BIC EXEMPTION EXCEEDS THE DEPARTMENT'S STATUTORY AUTHORITY AND IS ARBITRARY AND CAPRICIOUS

65. The prior paragraphs of the complaint are incorporated by reference.

A. The Department unlawfully created a private cause of action.

66. The Department also exceeded its authority and failed to act in accordance with law by designing the BIC exemption to create a cause of action. The Department stated that "it is generally critical that [injured IRA] investors have a remedy to address the injury." 81 Fed. Reg. at 21008. But as the Department conceded, "IRA owners and participants and beneficiaries in non-ERISA plans do not have an independent statutory right to bring suit against fiduciaries for violation of the prohibited transaction rules," and the Department itself also may not sue to enforce these provisions. *Id.* at 21021. By requiring sellers, as a condition of the BIC exemption,

to enter into a contract giving IRA owners a private right of action against the sellers, the Department decided to grant what Congress had withheld. *Id.* at 21008. But only Congress, not agencies, may create private rights of action. And agencies may not use their existing powers to bootstrap themselves into regulating areas that are the domain of Congress.

67. Such a reworking of the congressional scheme is especially inappropriate here, where it effectively shifts the focus of regulatory enforcement from the Treasury Department—which has enforcement power through the use of excise taxes, 26 U.S.C. § 4975(a), (f)(8)(E)—to private plaintiffs and the class action bar. Congress selected Treasury to oversee compliance with the prohibited transaction rules for IRA owners. *See id.* Indeed, the Executive endorsed that decision in 1978, when President Carter maintained Treasury's enforcement authority on the basis that Treasury possesses the "special expertise" to administer the excise tax mechanism that Congress chose to enforce compliance in the IRA context. *See* Message of the President, 1978 Pub. Papers 1402, (Aug. 10, 1978). The Department now deems "the possible imposition of an excise tax" to be an "inadequat[e] incentive to ensure compliance." 81 Fed. Reg. at 21022. But Congress decided otherwise, and the Department is not free to alter Congress's decision.

B. The BIC exemption is arbitrary and capricious.

68. In addition to exceeding the Department's statutory authority, the BIC exemption (and the rule as a whole) is arbitrary and capricious because, among other reasons, the Department (1) conducted a deeply flawed cost-benefit analysis, relying principally on obsolete studies of unrepresentative mutual funds, that caused it to vastly overstate the rule's benefits; (2) failed to adequately understand or calculate the costs insurers face under the BIC exemption, including the cost of upending the existing distribution channels for fixed indexed annuities; (3) did not adequately account for the burden of the regulatory uncertainty resulting from vesting the interpretation and enforcement of the Department's vague new standards with courts and juries

across the country; (4) arbitrarily rejected less burdensome alternatives, such as disclosure by sales agents that they are not acting as fiduciaries; and (5) dismissed credible evidence that the rule will harm the very people it was intended to help by limiting the availability and raising the cost of financial information and beneficial financial products like fixed indexed annuities.

COUNT THREE:

THE REVOCATION OF THE 84-24 EXEMPTION FOR FIXED INDEXED ANNUITIES IS ARBITRARY AND CAPRICIOUS

69. The prior paragraphs of the complaint are incorporated by reference.

70. The Department's decision to revoke the 84-24 exemption for fixed indexed annuities was arbitrary and capricious, in violation of the APA's requirement that final agency action be the product of reasoned decisionmaking.

A. The Department drew an arbitrary and unjustified distinction between fixed indexed annuities and other fixed annuities.

71. The Department failed to give a reasoned explanation for the distinction it drew between fixed indexed annuities, for which it revoked the 84-24 exemption, and other fixed annuities, for which it retained the 84-24 exemption. The *only* difference between these fixed annuities is the manner in which interest is credited to the contract. The Department failed to account for this or to explain why this difference alone warrants disparate regulatory treatment.

72. Fixed indexed annuities are identical to traditional fixed annuities in almost all respects. Most importantly, both protect the owner against loss of principal due to investment risk—the contract's premium is not invested in a separate account or specific investment, but rather is supported by the general account of the insurance company, and the insurance company assumes the market risk. In addition, neither fixed indexed annuities nor traditional fixed annuities generally have express fees. Both can offer the same kinds of death benefits and other optional benefits. Both are covered by state guarantee funds. Both can be sold only by state-

licensed insurance agents who typically receive a commission for the sale. And both are regulated as insurance products by state insurance regulators rather than as securities by the SEC and FINRA.

73. In singling out fixed indexed annuities for disparate treatment based on their "complexity," the Department cited numerous characteristics of fixed indexed annuities that are equally true of other fixed annuities, including the need to understand "surrender terms and charges," "the scope of any downside risk," "administrative and other charges," "the insurer's authority to revise terms and charges," and "optional benefits." 81 Fed. Reg. at 21154. In basing its disparate treatment of fixed indexed annuities largely on characteristics shared by all fixed annuities, the Department acted arbitrarily and capriciously.

74. The Department also failed to account for the fact that the only difference among fixed annuity products is the method for determining the interest that is credited to the contract. For fixed indexed annuities the interest rate moves within a specified range based on a market index, whereas for other fixed annuities the rate may move above a minimum rate based on the insurer's discretion. Thus, compared to other fixed annuities, fixed indexed annuities can offer retirement savers greater protection against inflation risk, while at the same time protecting them from losses due to investment risk. The Department never explained why this factor alone makes fixed indexed annuities uniquely "dangerous." *Id.* at 21158.

75. The disparate regulatory treatment of fixed indexed annuities will create unjustified competitive advantages and disadvantages among competing fixed annuity products. The Department claimed its "uniform approach" of subjecting fixed indexed annuities and variable annuities to the BIC exemption "avoids creating a regulatory incentive to preferentially recommend indexed annuities." *Id.* But it does so only by creating a regulatory incentive to

preferentially recommend fixed rate over fixed indexed annuities. The Department neither acknowledged this nor explained why the latter distortion is less problematic.

B. The Department failed to provide adequate support for its claim that fixed indexed annuity sales practices cause harms that justify imposing the requirements of the BIC exemption, particularly in light of the extensive consumer protections provided by state law and the 84-24 exemption.

76. The Department's decision to revoke the 84-24 exemption for fixed indexed annuities rests centrally on its claim that "the greater protections" of the BIC exemption are necessary to prevent harm from the "sales practices associated with these products." 81 Fed. Reg. at 21153. But the Department offered flawed or otherwise inadequate evidence that sales practices associated with fixed indexed annuities have caused harms to retirement savers that justify imposing the requirements of the BIC exemption, particularly in light of the protections afforded by state insurance laws, as well as by the newly enhanced 84-24 exemption.

77. The sale of annuities is subject to a comprehensive set of state insurance laws designed to ensure that insurance agents are adequately trained and supervised, that they recommend only those annuities that are suitable in light of the customer's circumstances, and that all material information regarding the annuity's terms and risks is reasonably disclosed and explained. And state law affords consumers and regulators alike ample remedies against agents or insurers who transgress these requirements. *See supra* ¶¶ 19–24.

78. In deciding to revoke the 84-24 exemption for fixed indexed annuities, however, the Department failed to adequately address the sufficiency of existing consumer protections under state law. In so doing, the Department shirked its obligations to consider each important aspect of the problem and to respond to relevant and significant comments. It also committed the same error the D.C. Circuit identified when it invalidated the SEC's similar attempt to regulate fixed indexed annuities in *American Equity*. Here, as in *American Equity*, the agency's analysis

was "incomplete because it fail[ed] to determine whether, under the existing regime, sufficient protections existed to enable investors to make informed investment decisions and sellers to make suitable recommendations to investors." 613 F.3d at 179.

79. The Department likewise gave no weight to Congress's recent determination in the Harkin Amendment that fixed indexed annuities should be exempt from federal securities regulation because of appropriate oversight at the state level. 124 Stat. at 1949–50. At a minimum, the tension between the Department's approach and Congress's most recent and relevant action on the subject demands a more thorough explanation than the Department provided.

80. Finally, the Department's failure to consider the adequacy of state regulation was compounded by its failure to explain why the protections of the newly enhanced 84-24 exemption, together with state-law consumer protections, are insufficient to address the Department's concerns about conflicts of interest.

C. The Department failed to show that the costs of subjecting fixed indexed annuities to the BIC exemption are justified by countervailing benefits.

81. The Department's revocation of the 84-24 exemption for fixed indexed annuities is arbitrary and capricious for another reason as well: The Department failed to show that the substantial costs and burdens of the BIC exemption are justified by countervailing benefits.

82. The Department estimated that revoking the 84-24 exemption for fixed indexed annuities would impose between $34 million and $37.8 million in additional costs on insurance companies over ten years. RIA at 285–86. This estimate, however, accounts for only a fraction of the cost insurance companies will incur under the BIC exemption. Among other things, the Department failed to consider that the BIC exemption is unworkable for fixed indexed annuities in light of the distribution channels for these products, which rely heavily on independent

insurance agents working through independent marketing organizations (IMOs) rather than insurance companies. Under the BIC exemption, only insurance companies, and not IMOs, are eligible to assume supervisory responsibilities.

83. The Department's cost estimate also improperly dismissed the substantial costs to retirement savers—particularly lower-income savers—that will result from the Department's revocation of the 84-24 exemption for fixed indexed annuities. The Department's rules will limit the availability and raise the cost of fixed indexed annuities, to the detriment of retirement savers who would otherwise benefit from these valuable financial products.

84. In addition to underestimating its costs, the Department failed to show that revoking the 84-24 exemption for fixed indexed annuities would produce commensurate benefits. To do so, the Department needed to demonstrate why the incremental benefits of additional regulation under the BIC exemption—over and above the protections already provided by state law and the newly enhanced 84-24 exemption—would justify its substantial costs. Because the Department failed to show that existing regulatory protections have proved insufficient to prevent abusive sales practices, there is no basis to conclude that revoking the 84-24 exemption for fixed indexed annuities will yield *any* marginal benefits, let alone benefits sufficient to outweigh the substantial costs and burdens of the BIC exemption.

D. The Department imposed a condition that makes insurance companies ineligible to sell fixed indexed annuities under the BIC exemption.

85. The Department premised its revocation of the 84-24 exemption for fixed indexed annuities on the availability of the BIC exemption. *See* 81 Fed. Reg. at 21148 (the BIC exemption "provides relief for … transactions involving … indexed annuities").

86. Under the BIC exemption, an insurance company can qualify as a covered "financial institution" only if it "[i]s domiciled in a state whose law requires that actuarial review

of reserves be conducted annually by an Independent firm of actuaries and reported to the appropriate regulatory authority." 81 Fed. Reg. at 21083.

87. Because no state requires insurers to undertake an annual actuarial review that must be reported to the appropriate regulatory authority, the Department's inclusion of this limit prevents insurance companies from selling fixed indexed annuities under the BIC exemption.[2]

88. The unavailability of the BIC exemption negates the premise for, and thus renders arbitrary and capricious, the revocation of the 84-24 exemption for fixed indexed annuities.

COUNT FOUR:

THE DEPARTMENT FAILED TO PROVIDE ADEQUATE NOTICE OF THE REVOCATION OF THE 84-24 EXEMPTION

89. The prior paragraphs of the complaint are incorporated by reference.

90. In violation of the APA, the Department failed to provide interested parties the required notice of, and opportunity to comment on, its revocation of the 84-24 exemption with regard to sales of fixed indexed annuities to plans and IRAs.

91. An agency must provide parties with notice and an opportunity to comment on proposed regulations. 5 U.S.C. § 553. The notice-and-comment provisions of the APA enable the agency promulgating a rule to educate itself before establishing rules and procedures which have a substantial impact on those regulated. These provisions are designed to ensure that agency regulations are tested via exposure to diverse public comment, to ensure fairness to affected parties, and to give affected parties an opportunity to develop evidence in the record to support their objections to the rule. The agency's notice of proposed rulemaking must describe the range of alternatives being considered with reasonable specificity and set out the agency's thinking. If

[2] Plaintiffs understand that Department staff have indicated this was a mistake and that the Department will adjust the definition so as not to exclude insurance companies from the BIC exemption. As of the date of this complaint, however, the Department has not done so.

the alterations in the final rule are not a "logical outgrowth" of the proposal, the agency must provide notice and a new comment period.

92. The Department proposed to revoke the 84-24 exemption only for sales of *variable* annuities and other annuities that are securities, 80 Fed. Reg. at 22014, and to *retain* the 84-24 exemption for sales of annuities—including fixed indexed annuities—that are not treated as securities, *id*. at 22015. The proposal's criterion for determining whether the 84-24 exemption applied was whether the annuity is treated as a security. *Id.* The Department explained that annuities that are treated as "securities" are distributed through the same channels, and subject to similar disclosure requirements, as many other investments that would be covered by the BIC exemption. *Id.*

93. The final rule, however, departed dramatically from the proposal—both with regard to the scope of the revocation and the Department's asserted rationale—without any new or supplemental notice of proposed rulemaking and without any new comment period. The final rule revoked the exemption not only for annuities that are treated as securities, but also for fixed indexed annuities. In so doing, the Department severed fixed indexed annuities from other fixed annuities and singled them out for different treatment. And rather than focusing on whether the annuities are regulated as securities (and their distribution channels and disclosure regimes), the final rule for the first time announced a new defining rationale that instead distinguished among products based on their supposed "complexity." 81 Fed. Reg. at 21157–58.

94. In addition, the Department had proposed to revoke the 84-24 exemption for sales of certain products to IRAs only. *See* 80 Fed. Reg. at 22012, 22014. The proposal explained that the rule would revoke the exemption for IRAs because they lack the protections provided in

ERISA plans. *Id.* at 22014. But in the final rule, the Department revoked the 84-24 exemption for sales to *both* IRAs and ERISA plans. 81 Fed. Reg. at 21148.

95. The final rule is therefore not a "logical outgrowth" of the proposed rule. The Department was required to provide notice of and opportunity for parties to comment on the new approach. Because it failed to do so, the rule must be vacated.

COUNT FIVE:

THE RULES VIOLATE THE FIRST AMENDMENT

96. The prior paragraphs of the complaint are incorporated by reference.

97. The rules severely burden commercial speech between sellers of fixed indexed annuities and consumers in violation of the First Amendment.

98. The rules restrict commercial speech on the basis of its content and, therefore, are subject to strict scrutiny. The rules are content-based because they define regulated speech by its subject matter, namely "recommendations," *i.e.*, speech that "would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action." 81 Fed. Reg. at 20971. Based on such content, the rules subject the speaker to fiduciary duties and related enforcement mechanisms under ERISA and the Tax Code. The rules further define the regulated speech by its subject matter in that they impose different restrictions on speech based on the product recommended. For example, speech about fixed indexed annuities is subject to more burdensome restrictions than speech about other fixed annuities.

99. Because the rules regulate speech on the basis of its content, they are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve a compelling state interest. The Department must specifically identify an actual problem in need of solving, and the curtailment of free speech must be actually

necessary to the solution. Moreover, to withstand strict scrutiny, the Department's approach must be the least restrictive alternative that would serve the Department's purpose.

100. The Department has not identified an actual problem in need of solving with regard to recommendations related to fixed indexed annuities. Nor has it shown that the rules' restrictions on speech are actually necessary to the solution. In any event, the Department's approach—requiring that sales of fixed indexed annuities meet the onerous requirements of the BIC exemption—is not the least restrictive alternative that would serve the Department's purpose. The Department could have adopted multiple less restrictive alternatives, such as relying on the existing consumer protections under state law, allowing sales of fixed indexed annuities to continue to qualify for the less burdensome 84-24 exemption (with its newly enhanced standards), or requiring more extensive disclosures.

101. Even if the rules were not content-based, they would still violate the First Amendment. Truthful, non-misleading commercial speech is protected by the First Amendment, and any regulation of such speech must serve a substantial governmental interest, must directly advance that interest, and must not be more extensive than is necessary to serve that interest. Here again, the Department lacks a substantial interest that is directly advanced by regulating speech related to fixed indexed annuities. And the restrictions the Department has imposed are more extensive than necessary to serve any such interest.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray for an order and judgment:

a. Declaring that the Department's fiduciary rule and exemptions are unlawful;

b. Vacating and setting aside the rules;

c. Enjoining the Department of Labor and its officers, employees, and agents from implementing or enforcing the rules;

d. Awarding plaintiffs their reasonable costs, including attorney's fees, incurred in bringing this action; and

e. Granting any other appropriate relief.

Dated: June 8, 2016

Respectfully submitted,

s/ Yvette Ostolaza

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* Application for admission *pro hac vice* to be submitted