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April 17, 2017

Submitted Electronically to
EBSA.FiduciaryRuleExamination@dol.gov

Attention: Fiduciary Rule Examination
Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: **RIN 1210-AB79**

Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice; Best Interest Contract Exemption (Prohibited Transaction Exemption 2016-01); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Prohibited Transaction Exemption 2016-02); Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, 84-24, and 86-128

Dear Acting Secretary Hugler:

We write on behalf of Market Synergy Group, Inc. ("Market Synergy") to offer comment on the Department of Labor's ("Department") above-referenced examination of its definition of who is a "fiduciary" under the Employee Retirement Income Security Act ("ERISA") and the Internal Revenue Code of 1986 ("Code"), and related prohibited transaction exemptions ("PTEs"), including the Best Interest Contract Exemption ("BICE") and PTE 84-24, as mandated by the Presidential Memorandum on the Fiduciary Duty Rule, 82 Fed. Reg. 9,675 (Feb. 3, 2017). Market Synergy believes that the Department's actions will adversely affect the ability of Americans to gain access to retirement information and financial advice, among other adverse effects. Market Synergy therefore urges the Department to rescind or revise its actions.

EXECUTIVE SUMMARY

The Administration, the Congress, the majority of the financial services and insurance industries, and retirement investors nationwide oppose the fiduciary rule and its related PTEs in their present form. The Administration, for example, has stated that "this is exactly the kind of government regulatory overreach the President was put into office to stop." The Department must reconsider the wisdom of the fiduciary rule and PTEs in response to this change in regulatory philosophies. As the Supreme Court has long emphasized, an agency's view of what is in the public interest may change, either with or without a change in circumstances, and the agency may alter course on this basis so long as it supplies a reasoned analysis. Rulings by several district courts – each now on appeal – have determined that the fiduciary rule and PTEs should not be preliminarily enjoined or vacated, at least at the time of the rulings and under the particular circumstances of the legal claims presented. In addition to having been wrongly decided, these judicial rulings are largely irrelevant to the examination. In our political system, the Department, not a court, says where the public's priorities lie.

The rule should be withdrawn in its entirety. It is anathema to the Administration's articulated policies of: (i) minimizing, not causing, dislocations or disruptions within the retirement services industry that may adversely affect retirement investors, especially disruptions to the independent insurance agent distribution channel; (ii) increasing, not reducing, retirement investors' access to retirement product structures (including fixed indexed annuities), retirement savings offerings, information, and related financial advice; and (iii) avoiding, not precipitating, litigation. Substantial evidence and institutional opposition not extant when the fiduciary rule was promulgated in its final form weigh strongly in favor of its wholesale rescission. Moreover, any potential gains to retirement investors that the rule supposedly would achieve have been overstated. The Department's earlier estimates of potential investor gains were based on outdated, methodologically flawed data, extrapolations, and assumptions.

Barring this, the Department should at least return fixed indexed annuities to their previously exempted status under PTE 84-24. The Department's stated justifications for treating fixed indexed annuities differently from other fixed annuities make little sense. There are no conflicts of interest that exist for fixed indexed annuities that do not exist for other fixed annuities. Although in the past the Department maligned fixed indexed annuities as "risky" and "complex," the Department is not tasked with regulating financial products for riskiness or complexity, but with ensuring fiduciary standards are met. Regardless, fixed indexed annuities are no more risky or complex than other fixed annuities. There are no widespread sales maladies associated with these products and, in any event, existing, ongoing state-based regulation adequately protects consumers. Federal regulation under the BICE is thus unnecessary and inappropriate.

BACKGROUND

I. Fixed And Variable Annuities.

Annuities are retirement savings and income vehicles sold by life insurance companies. All annuities have one feature in common that distinguishes them from other financial products: with an annuity, the insurer promises to pay income on a regular basis for a chosen period of time, including the annuitant's lifetime.

Annuities may provide for immediate or deferred payments. In contrast to immediate annuities, deferred annuities characteristically have two phases of operation: (i) an "accumulation" or "deferral" phase in which the contract accrues value through payment of premiums and credited interest, and (ii) a "payout" phase in which the purchaser receives a predetermined stream of payments. The most common types of deferred annuities are variable annuities and fixed annuities, which include fixed rate annuities and fixed indexed annuities.

Recognition should be given to the differences between state-regulated insurance products (e.g., fixed indexed annuities), on the one hand, and federally-regulated securities products (*e.g.*, variable annuities and mutual funds), on the other hand, with respect to three critical characteristics: (i) product guarantees (or lack thereof, in the case of investments like variable annuities); (ii) distribution channels associated with the respective products; and (iii) regulatory and disclosure regimes.

With a fixed rate annuity, the owner is guaranteed a minimum crediting rate during the accumulation phase. The insurer, normally on an annual basis, declares in advance a specific crediting rate, which may be above a guaranteed minimum rate. The insurer bears the investment risk associated with the declared rate, which is guaranteed for that upcoming year (or another declared period). When the annuity reaches the payout phase, the payments' amounts are based on rates guaranteed at the time of issuance (or the insurer's current rates, if higher) and are guaranteed for the payout duration.

A fixed indexed annuity is a fixed annuity that operates just like a fixed rate annuity with a minimum guaranteed interest rate. The only significant difference between fixed indexed annuities and fixed rate annuities is the method for computing interest earnings credited. A fixed indexed annuity earns credited interest based on positive changes in a market index, such as the S&P 500. Premiums, however, are not invested in index funds. The index's performance is simply used as a reference to determine the amount of credited interest in accordance with the specified index crediting method. The crediting rate is guaranteed to never be less than zero, even if the market declines and the index is net negative for the crediting period. Thus, as with all fixed annuities, principal and prior credited interest are always protected from market downturns.

Further showing just how similar they are to fixed rate annuities, fixed indexed annuities typically allow the contract owner to elect to switch the chosen reference index or computation method from year-to-year or, alternatively, to select a fixed rate for the year. Many elect this option even at the annuity's inception. In the fourth quarter of 2016, 17 percent of fixed indexed annuities were sold with the "fixed" option selected.

Fixed indexed annuities are typically sold as retirement savings and income vehicles through guaranteed lifetime income rider benefits. According to the LIMRA Secure Retirement Institute (available at http://tinyurl.com/lp7n4jc), the top three stated reasons retirement investors purchase fixed indexed annuities are to: (i) supplement Social Security or pension income (46 percent); (ii) accumulate assets for retirement (34 percent); and (iii) receive guaranteed lifetime income (27 percent). And, according to analytics firm Wink's, Inc. (available at http://tinyurl.com/z3ddbbz), and actuarial tables, in 2015, the average fixed indexed annuity consumer was 62 years old, married, and had a joint life expectancy of one of the two of them living to age 93. Therefore, most fixed indexed annuities are sold to persons who will hold them through the surrender charge period and exercise the guaranteed income privileges throughout their remaining lives.

In contrast to the principal protection and guarantees associated with fixed annuities, including fixed indexed annuities, variable annuities (like mutual funds) do not have guaranteed returns. They are securities whose investment returns vary in accordance with the value of the assets in which funds are invested. Unlike fixed annuities, variable annuities are regulated by both federal and state securities law. Variable annuities are not subject to state standard nonforfeiture laws.

II. Distribution Of Fixed Annuities.

A. The Independent Insurance Agent Distribution Channel.

Independent insurance agents, also known as "producers," typically sell a variety of insurance and other financial products, including life insurance and annuities. Nationwide, about 80,000 independent agents are engaged in fixed annuity sales.

Most life insurers do not recruit independent insurance agents to sell their products. Rather, agents are recruited by independent marketing organizations ("IMOs") to offer, when appropriate, fixed annuities and other types of insurance products to the agents' clients. Market Synergy believes that there are more than 340 IMOs operating today.

In general, an IMO works with agents and insurers, providing economies of scale for producer recruitment, product education, wholesaling, marketing, processing business, and licensing and contract support. This service model allows insurers to reduce their overhead costs while facilitating the sale of products by independent agents, as opposed to their "captive" or career insurance agent counterparts. IMOs are generally compensated for their services by the insurers with which they have relationships based upon a percentage of agent sales volume.

Not only do fixed annuities dominate a typical IMO's independent insurance agents' sales, the independent agent networks constitute fixed annuities' largest distribution channel. The great majority of fixed annuities are sold by independent agents not affiliated with a broker-dealer, with the large majority of that percentage within individual retirement accounts ("IRA"). According to LIMRA (available at http://tinyurl.com/j9shfm9), nearly two-thirds of fixed indexed annuity sales in 2015 ($34 billion) were funded through IRAs or rollovers from retirement accounts (qualified assets). Some $13 billion of fixed rate annuities were funded through IRAs or rollovers from retirement accounts during the same time. And 63 percent of all fixed indexed annuity sales were sold through the independent distribution channel. The next largest distribution channel was banks, which sold only 16 percent of fixed indexed annuities.

Those in the independent distribution channel are compensated almost exclusively through commissions paid by the insurers. Unlike front-end commissions paid for mutual funds, insurer-paid commissions do not reduce the principal or account value of the premium as paid into the policy by the consumer. With a *one-time* commission of, for example, 6 percent paid by the insurer to the producer for a fixed annuity that can be expected to be held for 25 to 30 years, the total compensation paid is far less than other financial products. By way of comparison, a fee-based adviser might suggest a diversified portfolio of investments and charge 1.5 percent *annually* to manage assets. The retirement investor will pay the adviser fees each year, regardless of whether the investments decline in value and the fees reduce the assets under management.

Commission rates for fixed indexed annuities have declined markedly over the past decade. According to Wink's (available at http://tinyurl.com/zwzsgdq), "the average street level compensation for indexed annuities as of 2Q2016 was 4.60%. This is the lowest this figure has been in over a decade." In addition, commissions on fixed indexed annuities are "generally 50% lower for older-aged annuitants." Wink's has illustrated the decade-long downward trend:

Market Synergy expects this trend to continue at least over the next several years.

B. Market Synergy

Market Synergy is a licensed insurance agency that works with insurers to develop proprietary fixed indexed annuities and other insurance products for exclusive distribution. It partners with select IMOs in distributing those products. Market Synergy also conducts market research and provides training and product support for IMO network members and independent insurance agents. Its business derives from, and is dependent upon, the viability of the independent insurance agent distribution channel for sales of fixed indexed annuities and other insurance products.

Market Synergy distributes insurance products through eleven IMO network members located around the country. The network members are independently-owned insurance wholesalers focused on assisting agents to increase their life insurance and annuity business. Although these IMOs have partnered for some purposes with Market Synergy, they compete aggressively with each other, and with non-network IMOs.

There are approximately 20,000 agents affiliated among the IMOs in the Market Synergy network. In 2015, Market Synergy and its network members collectively were responsible for approximately $15 billion of fixed indexed annuity sales, measured by premium paid. Historically, fixed indexed annuities represent more than 90 percent of Market Synergy's total sales. Essentially all of Market Synergy's revenue is attributable in some way to developing, marketing, or distributing fixed indexed annuities.

As the Department is aware, Market Synergy has taken an appeal to the United States Court of Appeals for the Tenth Circuit challenging the Department's amendment to and partial revocation of PTE 84-24. The appeal is captioned *Market Synergy Group, Inc. v. United States Department of Labor*, No. 17-3038. It was docketed in February 2017. Briefing is scheduled to commence in that appeal in July 2017.

III. State-Based Regulation Of Fixed Annuities.

The insurance industry is one of the most heavily regulated industries in the United States. Since their introduction to the marketplace, fixed annuities have been regulated solely by the states as fixed insurance products. A comprehensive range of state insurance and consumer protection laws apply to: (i) the insurers that offer fixed annuities; (ii) the licensed insurance agents who sell them; (iii) the annuity products themselves; and (iv) the transactions in which they are sold.

A. Regulation Of Insurers That Offer Fixed Annuities.

An insurer must be licensed in any state in which it desires to conduct business, including the sale of fixed annuities. State licensing procedures are comprehensive, and include provisions regarding capital requirements, surplus requirements, and overall financial health. In addition, states scrutinize the investments insurers make in their general accounts, and often limit risky investments and prescribe other requirements to ensure solvency and overall financial health. States frequently audit insurers' financial health, and exercise broad authority to intervene to protect policyholders should an insurer become financially troubled. States also frequently conduct market conduct examinations of insurers and agents to ensure legal compliance.

Each state also maintains a guaranty association to protect policyholders if an insurer is unable to satisfy its obligations. State guaranty associations are funded by mandatory contributions from insurers, providing an additional bulwark against unexpected losses or other adverse financial conditions. In particular, if an insurer becomes insolvent or is otherwise unable to satisfy its obligations, the insured's state guaranty association will ensure full payment of the annuity claim, up to the applicable benefits cap.

According to the National Organization of Life & Health Insurance Guaranty Associations (available at http://tinyurl.com/jyzpcko), in most states, the coverage level for a fixed annuity is $250,000 in present value of annuity benefits, including net cash surrender/net withdrawal values. Coverage of fixed indexed annuities with respect to who is covered and the maximum benefit levels is, except as noted below, consistent with coverage of other fixed annuities. With respect to fixed indexed annuities particularly, most states: (i) permit the guaranty association to provide coverage through an alternative form of annuity that provides for a fixed or other means of calculating interest in lieu of the index mechanism in the original contract; (ii) exclude interest or value that has not already been credited, or which is subject to forfeiture; and (iii) adjust the amount of index-linked value or interest eligible for coverage if it exceeds specified maximum rates.

B. Regulation Of Licensed Agents Who Sell Fixed Annuities.

Like insurers, insurance agents must be licensed in each state in which they sell fixed annuities or other insurance products. Agent licensing requirements vary from state to state, but most states require prospective agents seeking to sell life insurance or fixed annuities to complete rigorous pre-licensing classes specific to the license they seek. After completing the required coursework, prospective agents must pass the state's licensing examination. Many states also require licensed agents to take continuing education courses after becoming licensed.

After obtaining a license, an agent must be appointed by an insurer to sell its products. "Captive" or career agents are contractually obligated to sell only one company's products, while independent agents often are appointed by multiple companies. Many insurers also require additional education and training, including product-specific instruction, before appointing agents.

In addition to maintaining their own mechanism for customers to submit complaints about agents, states require insurers to record and retain complaints about agent conduct. According to the most recent data collected by the National Association of Insurance Commissioners ("NAIC") (available at http://tinyurl.com/gmsnlgd), complaints about fixed indexed annuities in 2016 (totaling 142) constituted a small fraction of complaints about life insurance products (totaling 9,707), and an even tinier fraction of complaints about insurance products generally (totaling 134,369). There were only 191 complaints about fixed rate annuities during the same time.

C. Regulation Of Annuity Products.

Like other insurance products, fixed annuities must be filed with and approved by state insurance regulators in most states before being offered for sale. This review ensures that contractual terms such as guarantees, indexing methods, participation rates, annuitization options, spreads, vesting periods, free look periods and cap rates both comply with state requirements and are fair to the retirement investor. In addition, state review processes assess an annuity contract's "readability" to ensure that it is understandable by the ordinary consumer.

A significant component of state oversight of fixed annuities are nonforfeiture laws, which require a guaranteed minimum value for each annuity contract. Nonforfeiture laws remove the risk of principal loss from fixed annuities, including fixed indexed annuities. If the linked index goes up, excess interest is credited based on the participation rate. If the linked index declines, the annuity does not share in the loss, but still receives state-mandated minimum interest crediting.

D. Regulation Of Fixed Annuity Sales Transactions.

In addition to rigorous oversight of insurers, producers, and fixed annuity products, an annuity's sale is a heavily regulated transaction. Numerous states have adopted very specific regulations regarding disclosures and sales practices involving the sale of fixed index annuities. States' disclosure laws, many of which have adopted or are based on the Annuity Disclosure Model Regulation, NAIC Model Regulation 245, require that prospective purchasers be provided a suite of information including, among other things, a specific description of the death benefits and applicable charges and fees, the guaranteed and non-guaranteed elements of the contract, and explanation of how the index-based interest is determined, how to assess the value of the annuity contract, a summary of the federal tax status, including any potential penalties, of the annuity contract, and the impact of any riders. *See, e.g.*, Ala. Admin. Code R. §§ 482-1-129.01 to 482-1-129.10; Alaska Admin. Code tit. 3, §§ 26.750 to 26.769; Ariz. Rev. Stat. §§ 20-1242 to 20-1242.05; 3 Colo. Code Regs. § 702-4:4-1-12; Iowa Admin. Code r. 191-15.61 to 191-15.67; 806 Ky. Admin. Regs. 12:150; 02-031 Me. Code R. 915, §§ 1 to 11; Mo. Code Regs. tit. 20, §§ 400-5.410; Mont. Admin. R. 6.6.801 to 6.6.807; N.M. Code R. §§ 13.9.12; N.C. Gen. Stat. §§ 58-60-120 to 58-60-145; Ohio Admin. Code § 3901-6-14; Okla. Admin. Code §§ 365:25-19-1 to 25-19-9; Or. Admin. R. 836-051-0900 to 836-051-0925; Utah

Admin. Code r. 590-229. In many states, the purchaser and agent must sign disclosure statements, and insurers must deliver an NAIC-written Annuity Buyer's Guide (available at http://tinyurl.com/h583j3s), at the point of sale. States that have not yet adopted NAIC's model regulation have alternative, significant disclosure requirements. *See, e.g.*, N.Y. Ins. Law § 3209(b)(2); Cal. Ins. Code §§ 789.10, 10127.13.

States also regulate the materials used to advertise annuity contracts. The Advertisements of Life Insurance and Annuities Model Regulation, NAIC Model Regulation 570, sets forth "minimum standards and guidelines to assure a full and truthful disclosure to the public of all material and relevant information in the advertising of ... annuity contracts." This model regulation, which either has been adopted or serves as the basis for most state-specific advertisement regulation, requires that advertisements be truthful and not misleading, sufficiently complete and clear so that they are not deceptive, and give the state regulator discretion to determine whether an advertisement has "the capacity or tendency to mislead or deceive." Advertisements must not refer to fixed annuities as "investments," or use similar terms that would suggest the possibility of investment gains.

State suitability requirements require insurers, in the words of the Suitability in Annuity Transactions Model Regulation, NAIC Model Regulation 275, to "establish a system to supervise recommendations and to set forth standards and procedures for recommendations to consumers that result in transactions involving annuity products so that the insurance needs and financial objectives of consumers at the time of the transaction are appropriately addressed." In addition, an insurer is prohibited from issuing an annuity recommended to a customer "unless there is a reasonable basis to believe that the annuity is suitable based on the customer's suitability information." The model regulation also requires that producers be trained before selling annuities, and has been adopted by the majority of states.

Other state laws and regulations designed to protect consumers in annuity transactions include regulations requiring a "free-look" period, whereby an annuity purchaser has the right to cancel an annuity contract for any reason and receive a full refund within a defined period from the date of purchase (often 30 days); regulations governing the replacement of existing annuities with other annuities; limitations and requirements governing the sale of annuities to senior citizens; and state unfair insurance practices laws, which generally regulate unfair and deceptive practices in connection with the sale of insurance products, including annuity contracts.

IV. Deference To The States On Insurance Regulation.

Before the Department's regulatory actions, the states, not the federal government, had exclusively regulated fixed annuities. Congress has affirmed state regulators' supremacy in regulating the business of insurance through legislative acts, including the McCarran-Ferguson Act, and the Harkin Amendment to the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 989J, 124 Stat. 1376 (2010).

In the McCarran-Ferguson Act, Congress "declare[d] that the continued regulation and taxation by the several States of the business of insurance is in the public interest." 15 U.S.C. § 1011. "Certainly," the Supreme Court has stated, the "selling and advertising of policies" is "part of this business." *SEC v. Nat'l Secs., Inc.*, 393 U.S. 453, 460 (1969). And while "Congress did not order the unqualified deferral to state law" in the McCarran-Ferguson Act and "ERISA leaves room for complementary or dual federal and state regulation," *John Hancock Mut. Life Ins. Co. v. Harris Trust & Savs. Bank*, 510 U.S. 86, 98 (1993), Congress nonetheless communicated a strong *preference* for existing state regulation over new federal regulation.

> Obviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance. This was done in two ways. One was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation. The other was by declaring expressly and affirmatively that continued state regulation and taxation of this business is in the public interest and that the business and all who engage in it "shall be subject to" the laws of the several states in these respects.

Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 429-30 (1946).

> Moreover, in taking this action Congress must have had full knowledge of the nation-wide existence of state systems of regulation and taxation; of the fact that they differ greatly in the scope and character of the regulations imposed and of the taxes exacted; and of the further fact that many, if not all, include features which, to some extent, have not been applied generally to other interstate business. Congress

> could not have been unacquainted with these facts and its purpose was evidently to throw the whole weight of its power behind the state systems, notwithstanding these variations.

Id. at 430. In this way, "Congress intended to declare, and in effect declared, that uniformity of regulation, and of state taxation, are not required in reference to the business of insurance, by the national public interest, except in the specific respects otherwise expressly provided for." *Id.* at 431.

The Harkin Amendment confirms this "hands-off" approach to federal regulation of fixed indexed annuities specifically. The Amendment conditions the eligibility of fixed indexed annuities to be treated as insurance on their compliance with state insurance laws or their model regulation equivalent. In enacting the Amendment, Congress confirmed that fixed indexed annuities should not be federally regulated as securities, in contrast to variable annuities and other products. Senator Harkin, the Amendment's sponsor, made several statements during congressional debate confirming that intent (available at http://tinyurl.com/jocc7xy) (comments begin at the 3:41:50 mark).

V. The Independent Distribution Channel's Dilemma.

Since their introduction to the marketplace in 1995, fixed indexed annuities have helped enable and protect the retirements of millions of Americans. As explained above, these products, including their sale, are extensively regulated by state insurance departments and are primarily offered through independent life insurance agents, who perform an essential role in educating clients about their choices in retirement savings vehicles and in evaluating whether an annuity might be a suitable choice given each client's unique financial circumstances. Independent agents often have longstanding relationships with their clients and familiarity with clients' retirement goals and resources.

The fiduciary rule and its PTEs, however, threaten to obliterate these relationships and the independent insurance agent business and service model. Citing concerns over supposed conflicts of interest associated with the sale of retail financial products in the individual retirement market, the Department issued the fiduciary rule to redefine the activities it deems to be fiduciary "investment advice" under ERISA and the Code. In most instances, this rule will make independent agents and other sellers of retail financial products fiduciaries to the products' purchasers. At the same time, the Department amended and partially revoked PTE 84-24, which provides exemptive relief to insurance agents and others who, under the Department's new definition, would become fiduciaries in connection with transactions involving ERISA plans or IRAs. Absent an exemption like PTE 84-24, ERISA and the Code prohibit fiduciaries from receiving third-party compensation, *e.g.*, commissions.

Unexpectedly reversing course from what it had proposed, the Department revoked PTE 84-24 as it applies to ERISA plan and IRA purchases of annuities that do not satisfy the Department's new definition of a "Fixed Rate Annuity Contract," thereby excluding fixed indexed annuities from PTE 84-24's scope. That exclusion leaves independent agents without a workable exemption under which to sell fixed indexed annuities. Because PTE 84-24 is now unavailable to fixed indexed annuity sellers, to continue receiving third-party compensation, they must attempt to operate under the BICE, the only available PTE. To do that, they need a qualifying sponsoring Financial Institution. Neither Market Synergy nor IMOs themselves qualify as Financial Institutions under the BICE. In promulgating that PTE, the Department specifically declined to expand the categories of Financial Institutions to "marketing or distribution affiliates or intermediaries." The Department instead limited the definition of Financial Institution to entities which are subject to "well-established" regulatory conditions and oversight, *viz.*, registered securities broker-dealers, registered investment advisers, banks, and, if certain conditions are met, insurers.

Although the Department allowed that it might grant individual exemptions to IMOs, it indicated that any such exemption would depend upon the IMO's ability to "effectively supervise" individual advisers' compliance with the BICE. Because they serve *independent* agents, however, Market Synergy and IMOs are not configured to "effectively supervise" individual BICE compliance without significantly expanding their operations at an impractical cost. IMOs are not structured to, and do not: (i) control the type or degree of interaction independent agents have with their clients; or (ii) direct agents' day-to-day activities. Moreover, independent insurance-only agents do not and cannot legally work with securities broker-dealers and registered investment advisers. Many do not want to become securities-licensed; they are uninterested in selling securities. The customary relationships with securities brokerage and advisory firms are incompatible with the independent nature of these insurance professionals' businesses.

It is also doubtful whether any insurers will agree to serve as Financial Institutions for purposes of supervising independent insurance agents under the BICE. As of today, to Market Synergy's knowledge, no fixed indexed annuity carrier has publicly affirmed that it is willing to serve as an agent's approved Financial Institution. And in litigation with the Department, the carriers, through their trade associations, have confirmed that they will not sponsor independent agents. The reason is obvious: *independent* sales forces exist to avoid having insurers assume responsibility for, or control of, *independent* agents. Insurers must consider the risk of being held legally liable under the Best Interest Contract for the agents' acts and omissions, as well as having to establish the supervisory apparatus required under the BICE. And insurers cannot reasonably know what recommendations agents make using other insurers' products, yet the BICE presumes that they must. An insurer cannot guarantee that the incentives for the sale of its products do not create conflicts of interest when the insurer does not know what other products the agent sells or commissions its competitors are paying.

In January 2017, the Department proposed a Best Interest Contract Exemption for Insurance Intermediaries, effectively conceding that its original rulemaking had consigned insurance intermediaries like IMOs to a regulatory void. In its February 2017 comment to the Department (available at http://tinyurl.com/zzc5o8q), Market Synergy explained that this proposed exemption would not meaningfully or feasibly remedy the independent distribution channel's dilemma. Market Synergy incorporates its prior comment herein by reference. Among other things, Market Synergy explained that the proposed exemption's $1.5 billion premium threshold excludes most insurance intermediaries and that even the few intermediaries meeting the premium threshold will be unable or unwilling to satisfy the proposal's other onerous conditions, including maintaining reserving/fiduciary liability insurance, conducting and making public independent annual financial audits, and agreeing to undertake prior approval of all written marketing materials, in addition to the other conditions of the original BICE.

Rather than distributing fixed indexed annuities through independent channels, insurers will attempt to shift their distribution to career or captive agents, banks, registered investment advisers, and broker-dealers, or simply exit the fixed indexed annuity space. A March 2017 comment by Fitch Ratings (available at http://tinyurl.com/mb6y5oa) confirms that the migration of fixed indexed annuity sales to the bank channel is already underway. If, after the regulatory dust settles, the independent distribution channel remains without a workable PTE, it will quickly become unable to compete at all.

This Department-created predicament has sent shockwaves through the independent distribution channel. According to a survey of 126 insurance intermediaries conducted by LIMRA just prior to the 2016 election (available at http://tinyurl.com/zotf5fd), 3 in 4 respondents expect a serious impact on their business. Almost 7 in 10 anticipate that their organization's fixed indexed annuity sales will decrease. In 2017, also according to LIMRA (available at http://tinyurl.com/hj7cnva), sales of fixed indexed annuities are expected to drop 25 percent to 30 percent as a result of the Department's actions. Diana Furchtgott-Roth, the Department's former chief economist, has opined (available at http://tinyurl.com/l4pw6my), that, under the fiduciary rule, "carriers and insurance marketing organizations that sell fixed-rate annuities and fixed-indexed annuities (whose return varies with markets)" will "face a loss of revenues as insurance sales shrink due to regulation."

Removing fixed indexed annuities from PTE 84-24 has already harmed these annuities' sales. In a February 2017 presentation (available at http://tinyurl.com/kgqoqal), LIMRA stated that, notwithstanding a record first half of 2016 (largely before the Department's actions were made public), sales of fixed indexed annuities declined on a quarter over quarter basis in the second half. Sales in the fourth quarter of 2016 were 13 percent off the prior year. LIMRA attributes this decline to the Department's actions. In March 2017, Wink's reported a similarly dramatic post-rule decline in sales of fixed indexed annuities during the fourth quarter of 2016 (available at http://tinyurl.com/kgnwwos). Wink's reported that fourth quarter sales were down nearly 7 percent when compared to the prior quarter, and over 14 percent when compared with the same period in 2015.

THE DEPARTMENT SHOULD RESCIND ITS FINAL ACTIONS, IN WHOLE OR IN PART

I. The Department Must Examine Its Actions In Light Of The New Administration's Regulatory Philosophy, Without Regard To Prior Judicial Decisions.

The Administration has expressed its view (available at http://tinyurl.com/jfltzhw) that the fiduciary rule and related PTEs are "a solution in search of a problem." The rule's "intent may be to have provided retirees and others with better financial advice, but in reality, its effect has been to limit the financial services that are available to them." In the Administration's view, the Department "exceeded its authority with this rule, and this is exactly the kind of government regulatory overreach the President was put into office to stop." Congress, too, agrees that the fiduciary rule and PTEs "will have a detrimental impact on low- and middle-income Americans and small businesses." H.R. Rep. No. 114-527, at 19 (2016). And the Acting Chairman of the Securities and Exchange Commission ("SEC") recently agreed that the fiduciary rule is "a terrible, horrible, no-good, very bad rule" (as reported at http://tinyurl.com/gpzkpon).

The Department must account for this new regulatory philosophy. Contrary to certain commenters, reevaluation of extant policy is not an indicator of arbitrariness or caprice; to the contrary, it can evidence reasoned decisionmaking. After all, "an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely on the incumbent administration's views of wise policy to inform its judgments." *Chevron USA Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 865

(1984). "'A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.'" *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1043 (D.C. Cir. 2012) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part)). Indeed, an agency "must" consider "the wisdom of its policy on a continuing basis, for example, in response to changed factual circumstances, or a change in administrations." *Nat'l Cable & Telecommc'ns Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (internal quotation marks omitted).

Some district courts have ruled that the fiduciary rule and related PTEs, including PTE 84-24, should not be enjoined, stayed, or vacated. Market Synergy anticipates that many comments will fixate on these rulings as being somehow determinative. That brand of legal fatalism is unwarranted.

Each of these rulings was heavily influenced by the district courts' limited role in deciding whether the fiduciary rule and related PTEs complied with the applicable specific procedural requirements, and whether it was "arbitrary and capricious." The courts were not tasked with determining whether the rulemaking was good policy. Substantial deference was afforded the Department's limited analysis of both benefits and costs – no court held that a different analysis was impossible. For the most part, each court accepted at face value the Department's assertions and conclusions. For example, to support the application of PTE 84-24 to fixed indexed annuities, the Department relied almost exclusively on three conclusory bulletins – one issued by the SEC, one by the Financial Industry Regulatory Authority ("FINRA"), and one by the North American Securities Administrators Association ("NASAA"). None of these bulletins pointed to any studies or findings of abuse in the sale of fixed indexed annuities. None suggested that federal regulation was warranted. And none of the district courts challenged the significance or content of these source materials upon which the Department so heavily relied. Each of the district courts' rulings are on appeal.

More fundamentally, these prior judicial rulings cannot constrain the Department's future judgments. "An agency's view of what is in the public interest may change, *either with or without a change in circumstances*," and the agency may change course on this basis so long as it "suppl[ies] a reasoned analysis." *Motor Vehicle Mfrs.*, 463 U.S. at 43 (emphasis added). An agency's judgments are not themselves facts; they are conclusions reached after interpreting facts in light of the agency's values and priorities.

And when an agency decisionmaker, considering identical facts as a predecessor, reaches a different judgment, the only real explanation is that the agency balanced the relevant concerns differently. While there must be a reasoned explanation for a policy change, "'a court is not to substitute its judgment for that of the agency' and should 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513-14 (2009) (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)). The Administrative Procedure Act "makes no distinction" between "initial agency action and subsequent agency action undoing or revising that action." *Id.* at 15. An agency therefore need not "demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one" or satisfy "more searching" judicial review; "it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *Id.* at 515.

By the same token, "federal judges – who have no constituency – have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones." *Chevron*, 467 U.S. at 866. An essential aspect of this judicial deference is permitting the agency discretion to implement policy changes that reflect a new administration's philosophy.

II. The Fiduciary Rule Conflicts With The Administration's Articulated Policies.

The fiduciary rule and its related PTEs should be rescinded if they do not advance the policies enumerated in the President's Memorandum. Market Synergy believes that the troubles facing the independent insurance agent distribution channel are emblematic of why these regulations contradict the Administration's regulatory philosophy. The Department's actions threatens that channel's very survival, depriving retirement investors of access to no-cost advice and insurers of a sales force capable of servicing millions of in-force insurance contracts. Rescinding these actions would avoid these adverse consequences, the tsunami of litigation the BICE is expected to generate, and the remaining start-up and compliance that could be avoided.

A. The Rule Will Disrupt And Dislocate The Independent Insurance Agent Distribution Channel.

Market Synergy anticipates that consumer demand for retirement products will grow in the next few years. Independent agents remain focused on offering a wide variety of products most suited to each retirement investor's goals. Offering the lowest-cost products does not guarantee that they are most suitable.

As of today, there has been relatively little change in the mix of products being sold by the independent distribution channel. There have, however, been perceptible changes in the manner in which fixed annuities are being distributed. These changes are expected to rapidly accelerate if, after the Department concludes its examination, the independent distribution channel remains without a workable PTE. The coming shift in how fixed annuities are sold, and *who* will sell them, will radically alter the life insurance industry, to the detriment of independent agents, IMOs, and retirement investors.

Because their businesses are so heavily dependent upon their ability to receive compensation from the marketing and sale of fixed indexed annuities, it is expected that, beginning on the applicability date, Market Synergy, its member IMOs, and their independent agents will experience revenue decreases easily exceeding 50 percent. Market Synergy itself could experience a revenue drop approaching 80 percent. This will result in thousands of layoffs for both Market Synergy and its member IMOs. It is also expected that, beginning on the applicability date, between 20,000 to 50,000 independent agents will exit the channel. Many thousands of agents are at risk of losing their hard-earned careers, professional autonomy, and financial livelihoods. Diana Furchtgott-Roth, the Department's former chief economist, has opined (available at http://tinyurl.com/l4pw6my) that the fiduciary rule "would put hundreds of thousands of small brokers and insurance agents out of business." And in this hostile environment, it will become exceedingly difficult to attract and recruit new independent agents – the lifeblood of any IMO.

The new regulatory regime will prompt a shift in distribution to captive agents, broker-dealers, registered investment advisers, and banks, disenfranchising IMOs, independent agents, and Market Synergy. Insurance-licensed-only agents do not and cannot legally work with securities broker-dealers and registered investment advisers. Many do not want to become securities-licensed because they are not interested in selling securities. All this will cost insurance intermediaries and independent agents their customers, market share, goodwill, and competitive position relative to broker-dealers, banks, registered investment advisers, and captive agent sales forces.

Those few IMOs which remain able to operate in this new regulatory environment may be forced to reduce their carrier platform. Many smaller insurers will be unable to meet these IMOs' heightened technology requirements. One Market Synergy member IMO, for example, has advised that it would eliminate approximately one-quarter of the insurers on its platform in 2018 because those insurers are not expected to meet the IMO's technology demands.

B. The Rule Will Reduce Access To Retirement Products, Information, And Advice, While Raising Prices For Retirement Investors.

These irreversible impacts will reduce retirement investors' access to retirement savings offerings, product structures, information, and financial advice. Retirement investors will be adversely affected because independent agents currently offer, at no cost, financial advice tailored to each client's needs, goals, and financial resources. For example, agents are required by law and good business practice to ascertain whether a fixed indexed or other annuity is a suitable choice for the customer. By effectively eliminating third-party compensation for them, agents will be unable to offer financial advice to less-affluent retirement investors. Many agents' mass-market clients will go unserved because the modest assets of these would-be retirement investors are undesirable to large brokerage and investment advisory firms, who rely upon investment portfolios sufficiently large to support annual fee-based portfolio charges. Mass-market clients will be relegated to purely "robo-advice" or receive no advice at all.

Recent studies confirm the probability of this outcome. On the advice-supply side of the equation, a November 2016 report by CoreData Research (available at http://tinyurl.com/jbj8tpw), surveying 552 financial advisers, found a strong majority (71 percent) plan to disengage from some mass-market investors because of the fiduciary rule and its PTEs. These advisers estimate they will no longer service a quarter of their mass-market clients, creating a potential advice gap for less-affluent investors.

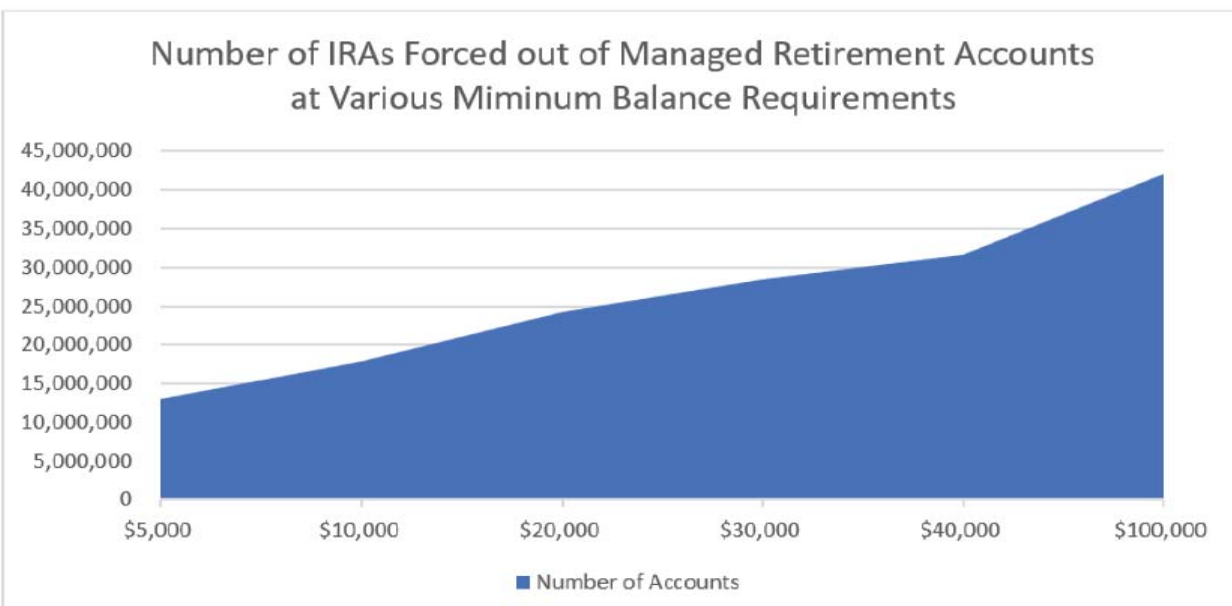
The CoreData report followed a September 2016 survey by the National Association of Insurance and Financial Advisors ("NAIFA") of 1,167 NAIFA members (available at http://tinyurl.com/lujj3c7). More than 62 percent of the respondents said that the fiduciary rule will or probably will force them to stop serving some or all of their clients. The rule is likely to spark an exodus from the market, NAIFA said, as 16 percent said they will no longer provide any retirement plan products or services to individual or business clients. Mass-market clients could be particularly hard hit by rule's implementation. Nearly a quarter of the NAIFA advisors (24.2 percent) said they will lose all of their lower- and middle-income clients, while 41.3 percent said they will lose some. Market Synergy's member IMOs report similar apprehensions among their affiliated agents.

On the advice-demand side of the equation, among retirement investors, there is significant resistance to the sort of fee-based compensation models favored by the

PTEs. Many investors strongly prefer commission-based compensation models. According to a February 2017 survey of more than 1,000 investors conducted by J.D. Power (available at http://tinyurl.com/kbdkmoy), more than half (59 percent) who pay commissions now say they either "probably will not" (40 percent) or "definitely will not" (19 percent) be willing to stay with their current firm if it meant being forced to move to fee-based retirement accounts. So-called "validators" – a younger, fast-growing segment of the market – are also highly resistant to moving, with 61 percent saying they "probably would not" (35 percent) or "definitely would not" (26 percent) switch.

As a result of the high risks and costs associated with the fiduciary rule and its related PTEs, many advisers will require higher minimum IRA balances. Ms. Furchtgott-Roth, the Department's former chief economist, predicts (available at http://tinyurl.com/l4pw6my) that "[s]mall savers may not be able to afford the up-front fees that fee-based, non-commission insurance carriers and advisers will charge. The result will be that many of those most in need of advice will go without."

In an April 2017 report (available at http://tinyurl.com/mjxu6fj), the American Action Forum similarly found that, based on a minimum balance requirement of $30,000, the rule could force 28 million retirement investors out of managed IRAs completely. Even with a minimum balance of $5,000, over 13 million would lose access to such accounts. The report illustrated this impact:



The American Action Forum also reported that the fiduciary rule has the potential to increase consumer costs by $46.6 billion, or $813 annually per account, in addition to approximately $1,500 in duplicative fees for retirement investors that have already paid a fee on their commission-based accounts.

That is not all. The fiduciary rule and its related PTEs will reduce access to product offerings and structures. The rule is expected to greatly compress independent agents' offerings – perhaps by as much as 70 percent. Fee-based insurance products, including fixed annuity products, are another example of the adverse product changes prompted by the rule. These products have already arrived in the marketplace, and not necessarily for retirement investors' benefit. Because they are intended to provide lifetime income, many insurance products, including annuities, are held for the duration of retirement. An annuity product that charges a fee of 1 percent for 20 or 30 years, and which is deducted from the premium, will end up costing a retirement investor much more than a single upfront commission of 6 percent, which is not deducted from the premium. Fee-based products can be more expensive for the investor, more complicated for the adviser, and serve no purpose other than to comply with the fiduciary rule and BICE.

And the Department's actions are harmful in other ways. Millions of fixed annuities have been sold over the past decade, most of which of which remain in force today. Once independent agents have exited the marketplace, there will be a massive consumer servicing gap since the original annuity salesperson will no longer be licensed, authorized, or in business. Unlike other financial products, new advisers cannot readily assume annuity accounts or clients, nor would insurers permit such activity due to privacy laws, business reasons, and contractual relations with the original salesperson. This will cause massive service disruptions and costs borne by insurers to handle the many issues that would materialize without an agent field force.

In these and countless other ways, the fiduciary rule and its related PTEs will raise the prices retirement investors must pay to access retirement services. Congress and state insurance officials share this view. In connection with its Joint Resolution of Disapproval (H.J. Res. 88), Congress found that the rulemaking "disrupts advisory relationships, contains a multitude of technical shortcomings, and brings about a number of unacceptable consequences. The final rule restricts access to affordable financial advice for lower- and middle-income Americans and makes it harder for employers – especially small businesses – to set up retirement plans." H.R. Rep. No. 114-527, at 15. "The final regulation will have the net effect of locking lower- and middle-income investors out of the advice market." *Id.* And, as it resolved in November 2016 (available at http://tinyurl.com/hdtxk53), the National Conference of Insurance Legislators ("NCOIL") "believes in protecting the interests of consumers against excessive government regulation that will only hurt average working Americans trying to save for retirement." NCOIL resolved that "the Rule will prevent consumer access to crucial retirement education and services, ultimately harming the very people it seeks to aid."

C. The BICE Was Intended To Increase Litigation.

The Administration is concerned with whether the BICE is likely to cause an increase in litigation. The BICE was *specifically designed* to do just that, because it is intended to be privately enforceable by imposing contract- and fiduciary-based liability via the Best Interest Contract. It is a classic example of regulation through litigation. After the BICE was unveiled, former Assistant Secretary Phyllis Borzi publicly acknowledged (available at http://tinyurl.com/kjmvnn5) that the BICE would have to be enforced through private legal action or, as Borzi put it, "the consumer has to enforce the rules through state contract actions." Acknowledging that "the DOL does not have direct enforcement authority" over IRAs, Ms. Borzi explained that the Department "had to be creative to try to find a way to make the responsibility for acting in your client's best interest – the fiduciary responsibility – enforceable in the IRA context." In 2016, Congress passed Joint Resolution of Disapproval (H.J. Res. 88), finding in connection with that resolution that "the BIC exemption continues to envision class action litigation under state law. The costs associated with this litigation will drive costs up for those least able to bear it, namely low- and middle-income retirement savers." H.R. Rep. No. 114-527, at 17.

Nor is there any question that the litigation costs the BICE will inflict upon the financial industry will be enormous. A February 2017 stock analyst note from analytics firm Morningstar (available at http://tinyurl.com/hgu6rrs) estimated a long-term *annual* range from resulting class action settlements alone of $70 million to $150 million. (Morningstar did not estimate the costs of non-class individual litigation.) In a bearish scenario, Morningstar wrote, the cost of class action settlements alone could decrease the operating margin on the advised, commission-based IRA assets of affected firms by 24 percent to 36 percent. Further, it warned, in the near-term, these cost could be exceeded by a multiple. Notably, Morningstar also stated that the Department's earlier Regulatory Impact Analysis for individual large firms is likely "off by a multiple" or, at a minimum, not representative of the largest wealth management firms.

In an April 2017 report (available at http://tinyurl.com/mjxu6fj), the American Action Forum concurred in Morningstar's analysis, adding that the annual litigation costs and operating margins reductions "will ultimately either be passed on to consumers or force firms out of the market, decreasing the supply of advice, and the fiduciary rule will end up doing a lot more harm than good." The report also noted that, in 2016, nearly 4,000 FINRA arbitration cases were filed by consumers alleging some wrongdoing by their broker-dealers, yet only 158 cases were decided in the consumer's favor, meaning that many broker-dealers spent significant time and money unnecessarily defending themselves. "One could expect BIC litigation to fall along the same lines," the report concluded, "but with the added threat of class action lawsuits and, at times, their resulting settlements."

D. Significant, Potentially Unnecessary Costs Can Be Avoided.

The Department expects start-up and compliance costs within the first year alone to reach $5 billion. One recent study by the American Action Forum (available at http://tinyurl.com/hyce254) found reported compliance costs of at least $106 million in 2016, representing up-front costs from just *four* companies.

Although affected companies have expended significant resources attempting to come into compliance with the fiduciary rule and its related PTEs, many near-term costs could be avoided by rescinding or substantially revising the rule. Most affected persons have invested in staff, technology, and procedures which can be implemented no matter how the fiduciary rule or PTE are ultimately crafted. The lion's share of the associated costs, however, have not been expended due to the continually moving regulatory target.

Take, for example, IMOs, brokerage general agencies, and other insurance intermediaries. Most IMOs operate on extremely thin profit margins and, accordingly, have been awaiting the outcome of litigation or a change in the Department's rules, including a workable version of the Best Interest Contract Exemption for Insurance Intermediaries. This process will involve, among other things, drafting and approving new client documents and business contracts between intermediaries, sub-intermediaries, and advisers; internal education and development of new procedures at the institutional and adviser levels; and implementation of the new requirements, *e.g.*, web and transaction disclosures, policies and procedures.

Insurance intermediaries thus illustrate the cost savings that could be achieved simply by withdrawing the rule. Among the 300 to 400 IMOs operating today, consider:

- Many IMOs have yet to hire and/or compensate compliance and other operational officers, human resource specialists, and related staff. Of those IMOs willing to attempt compliance, Market Synergy estimates that the typical IMO could save at least between $300,000 and $350,000 annually on this category of costs. A larger IMO would be expected to save as much $700,000 annually on this category of costs. This does not include the costs associated with additional office space and equipment for this staff.

- Many IMOs have yet to undertake the required information technology buildout and re-design (*e.g.*, product information and valuation systems), including obtaining software licenses and retaining computer specialists to design and implement the architecture. Of those IMOs willing to attempt compliance, Market Synergy estimates that the typical IMO could save at least between $750,000 and $1,000,000 on this category of costs.

- Many IMOs have yet to build a customer relationship management system. Of those IMOs willing to attempt compliance, Market Synergy estimates that the typical IMO could save at least between $750,000 and $1,000,000 on this category of costs.

- Many IMOs have yet to retain the outside vendors (*e.g.*, accountants, attorneys, management consultants) needed to assist in compliance efforts. Of those IMOs willing to attempt compliance, Market Synergy estimates that the typical IMO could save at least between $200,000 and $250,000 on this category of costs.

- IMOs have yet to obtain and pay premiums for fiduciary liability insurance. Of those IMOs willing to attempt compliance, Market Synergy estimates that the typical IMO could save at least between $500,000 and $1,000,000 annually on this category of costs.

- IMOs will have to create, manage, and mail disclosures and Best Interest Contracts. Of those IMOs willing to attempt compliance, Market Synergy estimates that the typical IMO

> could save at least between $350,000 and $475,000 on this category of costs.

And there are other ancillary, unexpended costs (*e.g.*, agent and staff training, compliance-related travel expenses, printing, increased errors and omissions insurance premiums) too numerous to recount here.

III. Retirement Investors Will Lose Little Or Nothing By Rescission.

Because the advice market is extraordinarily competitive, every quality adviser wants to act in his or her clients' best interests. That is the best means of securing future business and referrals. The fiduciary rule and its related PTEs, however, were premised on the cynical, economically misguided view that *all* advisers' actions are tainted by their own short-term self-interest, as though advisers operate with the sole objective of making a sale and never with the objective of retaining clients. Ms. Furchtgott-Roth, the Department's former chief economist, has warned (available at http://tinyurl.com/l4pw6my) of the flaws inherent in assuming "that lower returns in retirement portfolios might be due to self-interested financial advisers." This is "not always the case," she advises. "Lower returns could be due to advisers' recommendations for a more conservative portfolio, one that places a greater share of the assets in low-performing, but less volatile, Treasury bills or bonds. Returns are positively correlated with risk and variance, and some people prefer lower returns and less risk, especially as they approach retirement." While Market Synergy does not doubt that there are bad actors providing investment advice, the Department's assumption that all advisers will succumb to their supposed "conflicts," or that those supposed "conflicts" lie at the root of lower returns, is unrealistic.

The Department's earlier estimates of consumer benefit are equally unrealistic. As discussed below, those estimates: (i) overstate the volume of supposedly "conflicted" qualified assets; (ii) overstate the purported underperformance of "conflicted" investments; (iii) ignored the countervailing benefits of financial advice, and (iv) are in any event outmoded because of intervening market changes.

A. The $1.7 Trillion Estimate Of "Conflicted" Assets Is Overstated.

The Department requested comment on the costs of rescinding the fiduciary rule, including potential losses to affected retirement investors, including those estimated in the February 2015 Council of Economic Advisers ("CEA") study and the Department's earlier Regulatory Impact Analysis. Though the CEA study concluded that the fiduciary rule could save retirement investors $17 billion a year, reliance on the CEA's figures (or those in the Regulatory Impact Analysis) would lead to drastic overestimation of the actual costs, if such costs indeed exist.

The CEA and Department reached the $17 billion figure by estimating that $1.7 trillion of IRA assets were invested in products providing payments that supposedly generate "conflicted" advice. Relying on studies addressed below, the CEA and Department concluded that such advice leads to investment underperformance of roughly 100 basis points per year. The CEA multiplied that amount by the $1.7 trillion estimate to reach the $17 billion annual savings figure. As Congress has since noted, however, both figures used to reach this conclusion – the $1.7 trillion in affected assets and the 100 basis point underperformance – have come "under intense scrutiny" exposing faulty assumptions, omitted factors, and overall unreliability. H.R. Rep. No. 114-527, at 14. For example, Ms. Furchtgott-Roth has observed (available at http://tinyurl.com/l4pw6my) that the "the CEA staff did not analyze data" in suggesting that retirement investors can receive commission-based advice earn returns that are roughly 1 percentage point lower each year.

According to a February 2017 analysis by the American Action Forum (available at http://tinyurl.com/guf3hvv), it is unclear how CEA found that $1.7 trillion of IRA assets imvolved conflicts of interest. Total affected IRA assets are significantly less. Retirement account assets were $7.3 trillion in 2013, 86.2 percent of which, by the CEA's own definition, were not "conflicted." That leaves less than $1 trillion in so-called "conflicted" assets. And even that amount is too large because it represents total "conflicted" assets across *all* retirement accounts, while the CEA's analysis was limited to IRA assets *only*. Total "conflicted" IRA assets are some amount less than $1 trillion.

Also, as the CEA stated, the $1.7 trillion figure is some combination of front-load funds and variable annuity in IRAs. By including the annuity market, the CEA increased total affected assets by approximately $600 billion, or about 50 percent. The National Economic Research Association ("NERA") published a study in March 2015 (available at http://tinyurl.com/hsllymy), criticizing the CEA for providing only "an *ipse dixit* one-line statement for the inclusion of annuities." This is a troubling failure given that *none* of the investment performance research CEA relied upon analyzed funds held in annuities. There is no statistical or logical justification for extending findings regarding front-load funds to annuity funds. The two investment structures are entirely different, both as to the existence and timing of sales loads, if any. Because inclusion of the annuity market allowed the CEA to bloat by 50 percent the total assets affected by ostensible "under" performance – taken together with the separate basis for doubting the CEA's calculation of affected assets – the $1.7 trillion figure is overstated by at least 100 percent.

B. The Claim That Front-Load Funds Underperform By 100 Basis Points Has Been Debunked And Is Inapplicable To Many Products.

In reaching their $17 billion annual savings to investors, the CEA and Department relied on studies suggesting that "conflicted" investment vehicles underperform by about 100 basis points per year. That conclusion and the studies upon which it relies are flawed. Even the CEA report's authors stated that their analysis "is subject to uncertainty."

In a July 2015 study (available at http://tinyurl.com/hfwj83h), Economists Incorporated pointed out that the 100 basis points figure was limited to investment returns in the first year only, during which the investor actually paid the load. NERA's March 2015 study made a similar observation. The CEA and Department statistics did not examine side-by-side returns over time to determine whether front-load funds outperformed others to make up for the load, or even outperformed competitors afterwards. This is significant given that most investors hold funds longer than one year. Moreover, as to fixed annuities, there are no front-end loads charged to the retirement investor, who is expected to (and ordinarily does) hold their contract through the surrender charge period. The commission is paid by the insurer, so the entire premium invested is credited to the investor. Although the Department has alluded to studies of European countries that analyzed the impact of the insurer's cost and the resulting lower interest resulting from the insurer's payment of commissions, there has been no credible analysis to support comparing such features to a front-end load investment product.

Nor is this the only basis for disregarding the 100 basis points claim. As former SEC chief economist Craig Lewis argued in December 2015 (available at http://tinyurl.com/jrtj2zt), nearly all data relied upon by the CEA and Department failed to account for the asset-weighted performance of broker-sold funds. Professor Jonathan Reuter – author of one of the studies cited by the CEA and Department – conceded that his initial findings gave equal weight to each fund even though some funds had more assets under management than others. Professor Lewis demonstrates the skewing effect of ignoring asset weight. According to Lewis, "a non-asset weighted study examining nine funds each with $1 million invested yielding a 1% return and one fund with $10 million invested yielding a 10% return would show an average return of 1.8% But, an asset-weighted study looking at the same 10 funds would show an average return of 5.7%." Professor Reuter acknowledged this weakness of his initial findings in a subsequent study (available at http://tinyurl.com/jrbeuhp), concluding that any underperformance was as low as 18 basis points, *five times less* than the figures the Department used to calculate the rule's savings to retirement investors.

Both NERA and Economists Incorporated also point out that the CEA and Department's figures inexplicably focus on *fund* rather than *investor* performance. That is faulty methodology because "the returns of any particular fund may or may not reflect the returns earned by investors in that fund, who can trade in and out of funds." Moreover, no percentage of fund statistics reflects that *investors* are disproportionately invested in better-performing funds. Because the figures underpinning the 100 basis points figure pertain to fund performance, there is no basis for using that number to extrapolate individual investor returns.

These are not quibbles with the Department's data – they are serious defects that exaggerate supposed underperformance. The Department's evidence was so unreliable that underperformance may not exist at all.

C. Other Cost Savings Estimates Are Similarly Unreliable.

The Department also relied upon the faulty 100 base point figure for its separate savings estimate of $33 billion to $36 billion over the first ten years. That conclusion suffers the same defects described above. Moreover, the Department calculated only a "gross" benefit, with no effort to identify and offset the potential costs of the rule to investors. As NERA explained, the Department's methodology "treats the reduction in investor returns-after-fees [only] as a cost, which implies that investors are paying fees for no reason." But that is not the case.

The Department ignored the tangible benefits that a financial professional often brings. One September 2016 study (available at http://tinyurl.com/hltyan2) by Vanguard explained that because "investing invokes emotion, advisors need to help their clients maintain a long-term perspective and a disciplined approach – *the amount of potential value an advisor can add here is huge*." Advisers provide invaluable benefits that remind investors to rebalance, diversify, and avoid the pitfalls of market timing. With regard to rebalancing, Vanguard explained that whether "in bull or bear markets, reallocating assets from the better-performing asset classes to the worse-performing ones feels counterintuitive to the 'average' investor." Vanguard also "concluded that behavior coaching alone can add 1% to 2% in net return."

Moreover, as shown above, the statistics relied upon by the Department to conclude that "conflicted" funds underperformed were based on data limited only to the first year following the front-load funds' purchase. To fully understand the overall cost to investors, the Department should have considered whether later overperformance offset all or some of those costs. The Department assumed that the rule would have no such costs, but that is plainly untrue and, in the very least, rigorous analysis would have demanded consideration of whether such costs exist. And, in the case of fixed annuities, the Department should have considered the benefits of guarantees which makes it particularly difficult to apply a mutual fund-based analysis to fixed annuities.

D. The Fiduciary Rule Has Already Ensconced Market Changes.

Even if its prior savings estimates were sound, the Department could not reliably use those figures now to bolster the fiduciary rule. As the Department acknowledges, if market changes in anticipation of the fiduciary rule have already diminished the conflicts of interest it earlier hypothesized, including the negative effect of load-sharing on mutual fund selection, then any adverse impact would be mitigated. In fact, the rule has already permanently effected many of the market evolutions that the Department predicted would produce savings. In extending the rule's applicability date, the Department observed that comments it had received, together with media reports,

> indicate that many financial institutions already had completed or largely completed work to establish policies and procedures necessary to make the business structure and practice shifts required by the Impartial Conduct Standards earlier this year (*e.g.*, drafting and implementing training for staff, drafting client correspondence and explanations of revised product and service offerings, negotiating changes to agreements with product manufacturers as part of their approach to compliance with the PTEs, changing employee and agent compensation structures, and designing conflict-free product offerings)[.]

"Because many firms have already taken steps towards honoring fiduciary standards," the Department continued, "some investor gains from the Fiduciary Rule are already being realized and are likely to continue." The Department further opined that if advisers "fully adhere to these requirements [*i.e.*, the Impartial Conduct Standards], affected investors will generally receive the full gains due to the fiduciary rulemaking."

Similarly, former Assistant Secretary Phyllis Borzi has stated (available at http://tinyurl.com/j9tceaz) that the "customer-first principle that's embodied in the rule has already taken hold in the marketplace and companies are not going back." Ms. Borzi reiterated this sentiment elsewhere (available at http://tinyurl.com/ja5lqzc), observing that even if efforts to modify the fiduciary rule succeed, "there is no going back" or "stepping back from a best-interest standard."

A February 2017 regulatory brief by professional services firm PwC (available at http://tinyurl.com/jldzjz3) provides specific examples of how the fiduciary rule has already been implemented in a manner that the Department would consider beneficial to investors. One example is a "streamlining of mutual funds and annuities that are offered to clients, with some firms removing up to a third of the over 3,000 distinct mutual funds typically available." Many firms "have also been reevaluating their due diligence procedures in order to make sure that advisers recommend products that meet defined price and performance criteria." PwC observed a simplification of price schedules and "lower effective pricing across mutual funds as firms introduce new share classes, reduce fund pricing, and make changes to revenue share arrangements." PwC does not expect these widespread trends to be reversed even if the rule is modified.

Regarding the life insurance space, a March 2017 comment by Fitch Ratings (available at http://tinyurl.com/mb6y5oa) indicated that, during the past year, insurers have invested meaningful resources in anticipation of the fiduciary rule's applicability date. Insurers selling affected products have made various changes to their distribution strategies and compensation structures (*e.g.*, fees and commissions) and have developed new products that comply with new rules. Fitch believes that some of the changes made by insurers selling affected products will remain in place *regardless of whether the fiduciary rule or its related PTEs are rescinded or modified*.

In short, even if the Department's estimated savings were correct at the time made – which they were not – most of the market changes intended have already been realized, rendering the fiduciary rule itself unnecessary.

IV. The Department Should At Least Undo Its Changes To PTE 84-24.

If the Department does not rollback its entire regulatory package, it should amend PTE 84-24 so that it no longer excludes fixed indexed annuities. This could be accomplished by, in Section VI of PTE 84-24, revising the defined term "Fixed Rate Annuity Contract" to "Fixed Annuity Contract," deleting the words "or an indexed annuity" in the final sentence of that definition, and substituting the newly revised defined term as appropriate throughout the PTE. This would put fixed indexed annuities on equal footing with other fixed annuities.

There are no valid reasons to distinguish between fixed indexed annuities and other fixed annuities in PTE 84-24. Some commenters have maligned fixed indexed annuities as uniquely risky, complex, and conflict-laden financial products. These commenters cite no studies or data to support their views. That is unsurprising – there is simply no evidence of an epidemic of sales abuses or product maladies associated with fixed indexed annuities. Hardly anybody complains to state insurance regulators about them, and Congress and state officials have long recognized their value and suitability for many retirement investors. Unfortunately, in amending PTE 84-24, the Department first cherrypicked and then uncritically accepted these commenters' views. The Department should take this opportunity to correct its error.

A. The Department Arbitrarily Treated Fixed Indexed Annuities Differently From Other Fixed Annuities.

As discussed above, fixed indexed annuities and fixed rate annuities are identical insurance products except for the method of calculating interest credited to the contract. Fixed indexed annuities are treated the same as other fixed annuities under state insurance law and federal securities law. They can offer the same income, insurance, and contractual guarantees as other fixed annuities; significant investment risk is borne by the insurer and there is no risk of principal loss; and they are no more complex than other fixed annuities. Indeed, the typical FIA is essentially convertible into a fixed rate annuity because it allows the contract owner to elect to switch the chosen reference index or computation method from year to year or, alternatively, to select a fixed rate for the year. Indeed, a substantial percentage of fixed indexed annuities are sold with the "fixed" option selected.

In the context of a rule addressing purportedly conflicted sales advice, the only salient distinction between fixed indexed annuities and other fixed annuities – the different method for computing interest credited to policies accounts – is immaterial. That difference does not affect the manner in which fixed indexed annuities are sold, nor the incentives to sell them. Nor does it make them any riskier as a product class. To the contrary, as NCOIL has emphasized (available at http://tinyurl.com/gt7hgge), "the investment risks associated with fixed indexed annuities are borne by the insurance company, not the consumer" and "the primary feature of fixed indexed annuities is the safety of principal, not the allure of investments inherent with variable products, mutual funds, and other securities products." The NAIC has made the same point in letters to Congress (available at http://tinyurl.com/zs8p7mb) and to the SEC (available at http://tinyurl.com/hvnpalo). Likewise, in litigation between Market Synergy and the

Department, Kansas Insurance Commissioner Ken Selzer attested that "fixed indexed annuities, like other types of fixed annuities, have none of the risk characteristics of those non-guaranteed investment products for which purchasers assume all investment risk and risk of loss of principal."

In the past, the Department has relied on *American Equity Investment Life Insurance Co. v. SEC*, and various bulletins from the SEC and FINRA, for the proposition that "[i]n FIAs, as in securities, there is a variability in the potential return that results in a risk to the purchaser." 613 F.3d 166, 174 (D.C. Cir. 2009). Even if true, this "variability" has nothing to do with conflicted sales advice. Moreover, this approach to "risk" gives short shrift to the guarantees that are a hallmark of fixed indexed annuities. Any "variability in the potential return" is purely "upside risk" – the potential to earn *more* than a zero return. There is no "downside risk" – the potential to lose principal. As with other fixed annuities, but unlike variable annuities, principal is protected from loss.

The Department has attempted, unsuccessfully, to distinguish fixed indexed annuities from other fixed annuities in other respects. These "distinctions" are either nonexistent or immaterial. The Department stated that, for fixed indexed annuities, principal can be lost if the annuity is cancelled early, due to surrender charges and tax consequences. The same is equally true for fixed annuities. Moreover, most fixed annuities sold today (whether indexed or declared-rate) have a surrender charge period of 10 years or less and a surrender charge of 10 percent or less. Fixed indexed annuities can have surrender charge periods as short as five years. And, in practice, surrender charges are often waived. The Department next stated that, for fixed indexed annuities, commissions and other agent compensation are factored into the pricing. The same is equally true for fixed annuities. Moreover, commission rates for fixed indexed annuities have steeply decline over the past decade. The Department also stated that, for fixed indexed annuities, the insurer can recoup commissions and agent compensation by subtracting these expenses via a "spread." For fixed annuities, the insurer recoups agent compensation in the same manner. And, of course, there is no conflict of interest involved in providing an investment product, whether an annuity or any other, which inherently reflects the producer's need to incur and recover its expenses.

B. State-Based Regulation Neutralizes The Department's Concerns.

1. Existing State Regulation Of Fixed Indexed Annuities Is Adequate.

In ERISA, Congress directed the Department to prescribe only those regulations "necessary or appropriate" to carry out that Act's relevant provisions. 29 U.S.C. § 1135.

A federal regulation is neither "necessary" nor "appropriate" if it duplicates or intrudes upon adequate state-based regulation. That is precisely what the fiduciary rule, the BICE, and PTE 84-24 do.

As discussed above, all fixed indexed annuity transactions, manufacturers, sellers, and products are heavily regulated at the state level. State laws are designed to ensure that insurance agents are adequately trained and licensed; that the agents recommend only annuities that are suitable given a purchaser's individual circumstances; that insurers establish a system to supervise annuity recommendations; that the annuities are readable and disclose material features; and that they offer a "free-look" provision allowing the purchaser to return the annuity within a period of time for a full refund. The typical fixed indexed annuity sale today requires about 40 pages of paperwork.

This state-based regulation works. Hardly anybody complains to state insurance officials about fixed annuities.

The Department has never denied that state-based regulation of fixed indexed annuity transactions is comprehensive. Instead, in amending and partially revoking PTE 84-24, it made an implicit judgment that state insurance regulators are inadequate to regulate these transactions. The Department reasoned that suitability rules vary by state, necessitating its intervention. To qualify for exemptive relief under the Harkin Amendment, however, insurers must (and do) apply suitability standards that meet or exceed *all* state standards. Moreover, the Department never explained why uniformity for uniformity's sake is necessary. Its rationale – which could justify federal regulation of anything – does not show why state-based regulation is inadequate.

The Department also asserted that IRA owners need greater protections when investing in fixed indexed annuities because such products are not regulated as securities. This, too, is just question-begging, not an explanation for why uniform federal regulation is in the public interest if state-based protection is otherwise adequate. If anything, the Department is causing *dis*uniformity by layering superfluous requirements atop the existing regulatory burden.

Because it is unnecessary, inefficient, and contravenes longstanding public policy preferring state-based regulation, state insurance officials have condemned the Department's attempts to regulate transactions involving fixed indexed annuities and those who market and sell them. In its November 2016 resolution (again, available at http://tinyurl.com/hdtxk53), NCOIL stated that the "state-based regulatory structure governing the manufacture, distribution, and sale of retirement related financial products is effective and proven" and "has in place on-going substantive procedures, processes and protocols to license, regulate and supervise insurance agents of retirement related financial products." NCOIL "strongly supports the States' rights to regulate their own insurance markets and products, including retirement related financial products" and decries the Department's actions, which "threaten the proven State-based legislative and regulatory structure by imposing a vague and burdensome fiduciary standard on non-fiduciary sales relationships, thereby upending the retirement savings marketplace."

In removing fixed indexed annuities from PTE 84-24's scope, the Department relied largely, if not exclusively, on publications from the SEC, FINRA, and NASAA. Unlike NCOIL and the NAIC, none of those organizations maintain expertise or experience regulating fixed indexed annuities. Nor are their opinions relevant here. The SEC and FINRA described fixed indexed annuities as "complex" and "risky" (if they are surrendered prematurely), not that their sale involves purported conflicts of interest. The Department has no business regulating any class of financial products for their perceived complexity or riskiness. In any event, any such complexity or risk can and has been mitigated through disclosure and suitability requirements that exist at the state level. State-mandated disclosure requirements, for example, already respond to the SEC's concern that retirement investors may have to pay surrender charges or tax penalties if they prematurely cancel the annuity contract.

For its part, NASAA's tendentious, barebones statement that fixed indexed annuities are "instruments of fraud and abuse" is unaccompanied by any study or data supporting that charge. Moreover, the NAIC and NCOIL have jointly denied the charge of "abuse" associated with fixed indexed annuity sales (available at http://tinyurl.com/ju7a6ye). In light of the NAIC's and NCOIL's vigorous defense against this charge (and others) concerning fixed indexed annuities, the NASAA position likewise should be rejected as faulty, as well as unauthoritative.

2. The States' Regulation Of Fixed Indexed Annuities Is Ongoing.

Insurance regulators are actively examining and improving fixed annuity regulation. In early 2017, for example, the NAIC appointed a working group to review and revise, as necessary, Suitability in Annuity Transactions Model Regulation, NAIC Model Regulation 275, and to consider how to promote greater uniformity across NAIC member jurisdictions. This working group held its inaugural meeting in April 2017. The working group will consider whether changes, such as a "best practices" standard of care, should be incorporated into the model regulation. Dean Cameron, director of the Idaho

Department of Insurance and head of the working group, was quoted in April 2017 (available at http://tinyurl.com/kb4sy4b) as saying that it is "the NAIC's intent to take into consideration what is in the client's best interests," that the "model act needs to be strengthened in that respect," that there "will be a strong element of disclosure," and "a strong element of oversight to make sure the best interest of the consumer is taken into account." The Department must account for whatever state-based measures are produced, or expected to be produced, by the NAIC before the Department presses forward with its current version of PTE 84-24.

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On behalf of Market Synergy, we thank the Department for its consideration of these comments.

Respectfully submitted,

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