ORAL ARGUMENT NOT YET SCHEDULED
Case No. 16-5345

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

THE NATIONAL ASSOCIATION FOR FIXED ANNUITIES,
Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF LABOR, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia
Case No. 1:11-cv-1035-RDM (Moss, J.)

BRIEF OF AMICI CURIAE AARP, AARP FOUNDATION, AMERICANS FOR FINANCIAL REFORM, BETTER MARKETS, CONSUMER FEDERATION OF AMERICA, NATIONAL EMPLOYMENT LAW PROJECT AND PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION URGING AFFIRMANCE OF THE DISTRICT COURT'S DECISION IN ITS ENTIRETY

Mary Ellen Signorille*
William Alvarado Rivera
AARP Foundation Litigation
601 E Street, NW
Washington, DC 20049
(202) 434-2060
msignorille@aarp.org
**Counsel of Record*

Counsel for *Amici Curiae*

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties and Amici

Plaintiff-Appellant is the National Association for Fixed Annuities. Defendants-Appellees are the United States Department of Labor and R. Alexander Acosta in his official capacity as Secretary of the United States Department of Labor.

The MV Group and the Fidelity & Guaranty Life Insurance Company have filed an amicus curiae brief in support of appellant.

AARP, AARP Foundation, Americans for Financial Reform, Better Markets, Consumer Federation of America, National Employment Law Project and Public Investors Arbitration Bar Association are filing an amici curiae brief in support of appellees.

B. Rulings Under Review

Plaintiff-Appellant seeks review of the district court's order entering summary judgment for the government. See JA401.

C. Related Cases

This case has not previously been before this Court. Challenges to the agency actions at issue in this appeal are currently pending in three other courts.

See *Chamber of Commerce of the U.S.A. v. U.S. Dep't. of Labor*, No. 17-10238 (5th Cir.); *Market Synergy Grp., Inc. v. U.S. Dep't of Labor*, No. 17-3038 (10th Cir.); *Thrivent Financial for Lutherans v. U.S. Dep't of Labor*, No. 0:16-cv-03289 (D. Minn).

Dated: September 22, 2017

/s/ Mary Ellen Signorille
Mary Ellen Signorille

Counsel for *Amici Curiae*

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Rules of the United States Court of Appeals for the D.C. Circuit,

AARP and AARP FOUNDATION hereby certify that the Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) of the Internal Revenue Code and is exempt from income tax. The Internal Revenue Service has determined that AARP Foundation is organized and operated exclusively for charitable purposes pursuant to Section 501(c)(3) of the Internal Revenue Code and is exempt from income tax. AARP and AARP Foundation are also organized and operated as nonprofit corporations under the District of Columbia Nonprofit Corporation Act. Other legal entities related to AARP and AARP Foundation includes AARP Services, Inc. and Legal Counsel for the Elderly. Neither AARP nor AARP Foundation has a parent corporation nor issued share or securities.

AMERICANS FOR FINANCIAL REFORM (AFR) hereby certifies that it operates as a project of the Leadership Conference on Civil and Human Rights, a 501(c)(4) organization, and the Leadership Conference Education Fund, a 501(c)(3) organization; neither organization has a parent company nor stock.

BETTER MARKETS hereby certifies that it is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets has no parent corporation and there is no publicly held corporation that owns 10% or more of the stock of Better Markets.

CONSUMER FEDERATION OF AMERICA (CFA) hereby certifies that it is a nonprofit association that operates as a tax-exempt organization under the provisions of Section 501(c)(3) of the Internal Revenue Code. CFA has no parent corporation, nor has it issued shares or securities.

NATIONAL EMPLOYMENT LAW PROJECT (NELP) hereby certifies that it is a Section-501(c)(3) non-stock corporation. No corporations or other organizations are affiliated with it or have any other interest in it.

PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION (PIABA) hereby certifies that it is a nonprofit association that operates as a tax-exempt organization under the provisions of Section 501(c)(6) of the Internal Revenue Code. PIABA has no parent corporations, subsidiaries, or affiliates that have any ownership interest in it.

Dated: September 22, 2017

/s/ Mary Ellen Signorille
Mary Ellen Signorille

STATEMENT REGARDING CONSENT TO FILE, SEPARATE BRIEFING, AUTHORSHIP AND MONETARY CONTRIBUTIONS

Amici certify that no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund the brief's preparation or submission, and further certifies that no person, other than amici, contributed money intended to prepare or submit this brief. FED. R. APP. P. 29(c)(5). Counsel for the parties have consented to the filing of this brief.

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GLOSSARY

AFR	Americans for Financial Reform
APA	Administrative Procedure Act
BICE	Best Interest Contract Exemption
CFA	Consumer Federation of America
CODE	Internal Revenue Code
DOL	Department of Labor
ERISA	Employee Retirement Income Security Act of 1974
FIA	Fixed Indexed Annuity
FINRA	Financial Industry Regulatory Authority
FSA	Financial Securities of America
IMO	Independent Marketing Organization
IRA	Individual Retirement Account
NAFA	National Association of Fixed Annuities
NELP	National Employment Law Project
PIABA	Public Investors Arbitration Bar Association
PTE	Prohibited Transaction Exemption
RIA	Regulatory Impact Analysis
SEC	Securities and Exchange Commission

STATUTES AND REGULATIONS AT ISSUE

Pertinent statutes, regulations, and administrative materials are reproduced in the addendum or contained in the addendum of the Brief for Appellees.

INTERESTS OF AMICI CURIAE[1]

This brief is filed on behalf of seven nonprofit organizations that are deeply committed to enhancing the quality of advice that millions of Americans receive concerning investments in their retirement accounts.[2] Amici believe that the Department of Labor's ("DOL") Fiduciary Rule ("Rule") protects individuals' retirement accounts and thus promotes retirement security. Amici are intimately familiar with the Rule's provisions and the exhaustive rulemaking process DOL followed to craft it.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The regulation of investment advice concerning tax-preferred retirement savings is a straightforward exercise of DOL's core delegated authority under the Employee Retirement Income Security Act ("ERISA") and the Internal Revenue Code ("Code"). Congress authorized DOL to define certain statutory terms related to the statutes' coverage, including the definition of "investment advice." It also permitted DOL to create conditional exemptions from statutorily prohibited transactions. Over the years, DOL has repeatedly exercised its authority to define

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[1] Amici certify that no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund the brief's preparation or submission, and further certifies that no person, other than amici, contributed money intended to prepare or submit this brief. Counsel for the parties have consented to the filing of this brief.

[2] A more detailed description of the Amici Curiae is attached as Addendum A.

terms and create exemptions. The Rule is nothing more than a long-overdue update of these definitions and exemptions to account for changes in retirement planning and to better advance the statutes' remedial purposes.

Having thus been provided broad discretion to define "investment advice," DOL did so reasonably. The imposition of fiduciary duties on investment-advisory relationships is central to Congress's goal in ERISA of increasing protections for plan participants and beneficiaries. However, DOL's overly narrow 1975 definition of "investment advice" "erect[ed] a multi-part series of technical impediments" that allowed many advisers to provide what any reasonable investor would expect and rely on as investment advice, while evading their fiduciary duty and defeating investors' legitimate expectation. NAFA's own declarants' practices demonstrate that they routinely hold themselves out as advisers providing expert, unbiased advice, not as salespeople moving product. Their practices create the reasonable belief and expectation on the part of retirement savers that they are receiving investment advice, not sales recommendations. Moreover, major changes in the structure of employee retirement plans and the market for investment advice created a situation in which retirement savers are responsible as never before for the management of their own retirement savings and increasingly reliant on investment advice. These factors allowed advisers to exploit the old regulation, which undermined, rather than promoted, ERISA's purposes. The definition of

"investment advice" contained in the Rule restores fiduciary protections to the vast bulk of plan assets, and thereby realigns the regulation with Congress's language and intent.

DOL's interpretation of the Prohibited Transaction Exemption ("PTE") provisions of ERISA and Code is, if anything, an even more straightforward application of delegated authority. In shaping the contours of fiduciary standards of care and loyalty under ERISA and the Code, Congress identified certain "prohibited transactions," each of which constitutes a per se breach of fiduciary duty. *See* 29 U.S.C. §1106; 26 U.S.C. § 4975. But, Congress also delegated to the Secretary of Labor the authority to grant conditional or unconditional exemptions to the prohibited transactions. *See* 29 U.S.C § 1108; 26 U.S.C § 4975. Here, DOL created a conditional exemption known as the Best Interest Contract Exemption (the "BICE"), precisely as authorized by Congress.

Appellant fails to provide any valid legal or policy basis for their contention that something in ERISA or the Code prevents DOL from conditioning the BICE on adherence to Impartial Conduct Standards simply because Congress imposed these standards directly elsewhere on a subset of fiduciaries. The same is true with respect to the BICE's other conditions, all of which—like the Impartial Conduct Standards—are entirely voluntary. If Appellant or its members do not wish to

comply with the BICE conditions, they may simply refrain from utilizing the exemption.

Appellant suggests that these voluntary conditions include the creation of a new federal cause of action—which must exceed Congress's delegation—because access to the BICE entails use of a contract. But, the BICE creates no new cause of action, federal or otherwise. Financial service contracts with IRA-holders are creatures of state law and have existed since Congress established these accounts. To be sure, eligibility for the BICE is conditioned on reducing such contracts to writing and the inclusion of certain terms. But enforcement of the contract against a financial institution does not compel its compliance with, or remedy a violation of, federal law—the essence of a federal cause of action.

Appellant also second-guesses DOL's decision to condition PTEs involving fixed-index annuities ("FIA") on the terms of the BICE, as opposed to those of a less-rigorously conditioned exemption available for fixed-rate annuities. DOL performed a thorough study of the FIA market and determined that conflicts of interest there posed a severe risk to plan participants and beneficiaries, which existing state regulation failed to mitigate.[3]

[3] NAFA raises two issues that amici's argument does not address because the response seems obvious. First, not only did DOL provide ample notice that it was evaluating which PTE would be most appropriate for FIAs—the BICE or PTE 84-24— on its proposed rulemaking, but NAFA explicitly supported the proposal to exempt FIAs under PTE 84-24, but not under the BICE. *E.g.*, NAFA, Comment

ARGUMENT

I. THE FIDUCIARY RULE IS CONSISTENT WITH ERISA.

A. DOL's Interpretation Of "Fiduciary" And "Investment Advice" Is Entitled To *Chevron* Deference.

As the district court ruled,[4] DOL has broad statutory authority under ERISA to define "fiduciary" and "investment advice." The district court also held that the Rule is reasonable because it is consistent with ERISA's text, purpose, and legislative history. DOL's interpretations, as reflected in the Rule, are entitled to *Chevron* deference. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

1. ERISA expressly authorizes DOL to define the term "investment advice," and DOL stayed well within the boundaries of that authority.

DOL's statutory authority to "prescribe such regulations as [it] finds necessary or appropriate to carry out the provisions" of ERISA, 29 U.S.C. § 1135, is notably broad. *See Johnson v. Buckley*, 356 F.3d 1067, 1074 (9th Cir. 2004); *Guidry v. Sheet Metal Workers Int'l Ass'n*, 10 F.3d 700, 708 (10th Cir. 1993). It

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Letter on Proposed Conflict of Interest Rule at 20 (July 21, 2015), goo.gl/YgUp7P. Second, in 1974, Congress used the term "reasonable compensation" in ERISA. 29 U.S.C. § 1108(b)(2), (c)(2) (regarding exempted transactions). There have been no requests from insurers or the financial services industry asking for guidance on that term.

[4] JA341; *accord Mkt. Synergy Grp. v. U.S. Dep't of Labor*, No. 16-CV-4083, 2016 U.S. Dist. LEXIS 163663, at *2 (D. Kan. Nov. 28, 2016), *and Chamber of Commerce v. Hugler*, 231 F. Supp. 3d 152, 168 (N.D. Tex. 2017).

unquestionably includes the power to define the term "renders investment advice." Appellant concedes as much by touting DOL's previous regulation which established an outdated and thoroughly discredited five-part test for determining when a person's "investment advice" gave rise to fiduciary status under 29 U.S.C. § 1002(21)(A)(ii) of ERISA.

Appellant nevertheless maintains that it is outside the scope of DOL's delegated authority to define "investment advice" in the manner it did because "fiduciary" as used in ERISA tracks the narrower common-law meaning of the term. Appellant's Brief ("App. Br.") at 27-32. Appellant's argument is baseless. As the court below concluded, *see* JA339-44, Congress did not intend, nor does the plain language of ERISA limit itself to the common-law definition of "fiduciary."[5]

In enacting ERISA, Congress took an "express statutory departure" from the common law of trusts when it defined the term "fiduciary" not "in terms of formal trusteeship, but in functional terms of control and authority over the plan *". . . thus expanding the universe of persons subject to fiduciary duties*." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262-64 (1993) (emphasis added). While ERISA does not define the circumstances by which a person "renders investment advice," nothing in the plain language of the statute limits that definition to the common-law understanding of who is a "fiduciary." Moreover, nothing in the plain language of

[5] *Accord*, *Chamber*, 231 F.Supp. 3d at 169-70.

ERISA suggests that the advice must be rendered on a "regular basis" or be based on a "mutual agreement" that the advice will serve as the "primary basis" for the investment decision. Nor does the plain language of ERISA confine the advice to special relationships of trust and confidence; and nothing in the plain language of ERISA suggests advice that is "solely incidental to" sales recommendations is outside the scope of the definition. Rather, the statute says "to the extent" a person "renders investment advice," he is a fiduciary.

2. DOL's definition of "fiduciary" is reasonable because it aligns with Congress's intent to provide broad protections for retirement investors in ERISA.

Under *Chevron* step two, the Rule is reasonable in light of ERISA's text, purpose, and legislative history. In enacting ERISA, Congress expressly stated that its purpose was to "protect . . . participants in employee benefit plans and their beneficiaries." 29 U.S.C. § 1001(b); *see Nichols v. Board of Trustees,* 835 F.2d 881, 894 (D.C. Cir. 1987) (remedial statutory provisions like in ERISA should be liberally construed).

DOL reasonably applied these broad remedial purposes to current market realities when it revised its previous five-part test through the Rule. In its preamble to the Rule, DOL explained that the five-part test, which was promulgated in 1975, "significantly narrowed the breadth of the statutory definition of fiduciary investment advice." JA323-324. As the marketplace for financial services

developed, the five-part test worked to "undermine, rather than promote, the statute's text and purposes." JA522. Even when retirement investors clearly relied on paid advisers for impartial guidance, the overly narrow regulation allowed many advisers to avoid fiduciary status and disregard ERISA's fiduciary obligations of care and prohibitions on disloyal and conflicted transactions. *Id.*

In addition, DOL found that the market for retirement advice has changed dramatically since DOL promulgated the 1975 regulation. JA348. "The 1975 regulation was adopted prior to the existence of participant-directed 401(k) plans, the widespread use of IRAs, and the now commonplace rollover of plan assets from ERISA-protected plans to IRAs." JA24. In this new landscape, retirement savers are increasingly responsible for their own retirement security, which has left retirement investors more dependent on expert advice and more exposed to advice that is tainted by conflicts of interest. JA350-51 (quoting Final Fiduciary Definition, 81 Fed. Reg. 20,949 (Apr. 8, 2016)).

DOL replaced the 1975 regulations with a reasonable definition of "investment advice" that better reflects the broad scope of the statutory text and its purposes and better protects plans, participants, beneficiaries, and IRA owners from conflicts of interest, imprudence, and disloyalty. JA24-25. As the court below recognized, "[t]he Department's interpretation of 'investment advice' all but replicates" dictionary definitions of "investment" and "advice." The court further

explained that, "as a matter of ordinary usage, moreover, there can be no serious dispute that someone who provides "[a] recommendation as to the advisability of acquiring, holding, disposing of, or exchanging, securities or other investment property," 29 C.F.R. § 2510.3-21(a), is providing "investment advice." Not only did the court below find DOL's revised definition reasonable, it also found that, given today's market realities, "the five-part test is the more difficult interpretation to reconcile with who is a fiduciary under ERISA." JA340; *accord*, *Chamber,* 231 F. Supp. 3d at 173.

Appellant claims that the revised definition of "investment advice" covers purely sales relationships, which Appellant claims its members are engaged in. But NAFA's own statements as well as those of its declarants' demonstrate that those in the fixed-annuity business are not merely salespeople engaged in arm's length commercial transactions. Rather, they act as advisors and provide what any reasonable investor would believe and expect to be investment advice. *See, e.g.*, Letter from Executive Director Charles "Chip" Anderson, NAFA, to DOL at 5 (April 17, 2017), goo.gl/UVf29r ("[F]ixed annuities offered through independent agents and IMOs provide lower and middle-income Americans with financial and retirement planning assistance…"); JA100 (Engels decl. ¶ 18) ("I know to diversify my clients' assets and teach them about risks, fees, 'safe' versus 'risky' money, and probate and non-probate issues."); JA111 (James decl. ¶ 28) ("All of

our clients rely on [us] . . . to help them navigate the financial market, answer all of their questions, and benefit from affiliates."); JA119 (Rafferty decl. ¶ 8) ("We meet individually with our clients, and, after discussing our client's financial goals and needs, . . . we research the annuity market and recommend the best guaranteed fixed annuity plan available to meet each client's objectives."); JA458 (Tripses Declaration ¶ 16) ("Another benefit of the independent channel is that it provides access to financial and retirement planning services to an underserved segment of the population..."); JA481 (Cousinet Declaration at ¶ 10) ("[O]ur customer base is made up of low and middle income clients needing assistance with retirement and insurance planning…").

Furthermore, NAFA declarants' public websites demonstrated that they routinely hold themselves out as advisors— not salespeople. *See, e.g.*, Declarant Fritz Engels' website, THE ENGELS FINANCIAL GROUP, goo.gl/WfDgbo (last visited September 14, 2017) ("We are a full Retirement planning services company.") & ("[Fritz] utilizes his team of advisors and professionals to coordinate and ensure a completely customized plan for all of his client's affairs."); About Our Firm Page ("Retirement planning is a complex field, so it is wise to consult with experts."); *see also* Declarant James' website, FINANCIAL SERVICES OF AMERICA, goo.gl/frpcqA (last visited September 14, 2017) ("Once FSA has established your goals, we will customize an appropriate strategy to fit your vision and your objectives.");

Declarant Dan White's website, DAN WHITE AND ASSOCIATES, goo.gl/VqbPKA (last visited September 14, 2017) ("[W]e offer unbiased retirement income planning information to help you make the right decisions.").

These practices demonstrate that NAFA's own declarants routinely hold themselves out as advisors providing expert, unbiased advice, and are not sales people merely moving product. Their practices create the reasonable belief and expectation on the part of retirement savers that they are receiving investment advice, not sales recommendations.

DOL's revised definition of investment advice appropriately captures those recommendations that a reasonable investor would view as investment advice and reasonably believe and expect to be advisory in nature. Therefore, DOL's revised definition of investment advice was reasonable and subject to *Chevron* deference.

B. When It Adopted The BICE, DOL Stayed Within Its Broad Statutory Authority To Establish Conditions For Exemptions.

1. DOL has broad authority over IRAs.

DOL has extensive authority over numerous aspects of IRAs, including authority to determine who is a fiduciary subject to the prohibited transactions set forth in the Code, and relevant here, authority to create exemptions from those prohibitions relating to IRAs as well as employer-sponsored plans. DOL's broad statutory authority to create exemptions for IRAs disposes of Appellant's core contention that DOL acted "without clear congressional authorization" when it

promulgated the BICE. App. Br. at 44. And, it sets this case apart from the authorities Appellant relies on, in which agency rules did or would *conflict* with the statutory language. The district court explained Congress's regulatory scheme through which DOL has explicit and broad authority to regulate IRAs and employee benefit plans by granting conditional or unconditional exemptions from otherwise prohibited transactions. JA315-19.

Congress gave the Secretary of Labor broad statutory authority to grant administrative exemptions to prohibited transactions under Title I. 29 U.S.C. § 1108. Because of the parallel provisions in Title I of ERISA and § 4975 of the Code, which governs IRAs, President Carter issued Reorganization Plan No. 4 in 1978. The Reorganization Plan expressly gave DOL authority over the fiduciary definition and prohibited transaction provisions in § 4975—authority to interpret, issue rules, and make exemptions to the prohibited transaction provision for IRAs. *See* Reorganization Plan No. 4 § 102. Congress ratified the plan in 1984. *See* Pub. L. No. 98-532, 98 Stat. 2705 (codified at 5 U.S.C. App. 1, 29 U.S.C. § 1001 note). Thus, DOL has ample authority to create exemptions such as the BICE covering advisers to IRAs.

2. DOL stayed within the ambit of its authority when it crafted the BICE.

All of the BICE provisions, including the conditional duties of prudence and loyalty, fall within the clear scope of DOL's statutory authority to establish exemptions. Indeed, the law *required* DOL to impose them to the extent they were necessary to ensure that the BICE protects plan participants as ERISA and the Code requires. *See* 29 U.S.C. § 1108(a); 26 U.S.C. § 4975(c)(2). Accordingly, as the district court correctly found, DOL did not exceed its statutory authority when it conditioned the BICE on adherence to the duties of loyalty and prudence. JA355. This exemption is at heart no different from the many other conditional exemptions that DOL has granted.[6]

DOL adopted the BICE after an extensive notice-and-comment period that led it to conclude that conflicts of interest in the market for retirement investment advice were widespread and could cost retirement investors billions of dollars over the next ten years. Based on these findings, DOL determined that it was necessary to require that fiduciaries adhere to Impartial Conduct Standards if they wished to engage in otherwise prohibited transactions. JA437. That basic conflict of interest

[6] *See, e.g.*, PTE 91-55, 56 Fed Reg. 49,209 (Sept. 27, 1991), as corrected at 56 Fed. Reg. 50,729 (Oct. 8, 1991); PTE 93-33, 58 Fed. Reg. 31,053 (May 28, 1993), as amended at 59 Fed. Reg. 22,686 (May 2, 1994) and 64 Fed. Reg. 11,044 (Mar. 18, 1999); and PTE 97-11, 62 Fed. Reg. 5855 (Feb. 7, 1997), as amended at 64 Fed. Reg. 11,042 (Mar. 8, 1999).

applies with no less force to advisers to IRAs, including those rollover IRAs, than it does to advisers to 401(k)s and other types of plans.

The substance of the BICE is also reasonable. It provides that advisers electing to receive commission compensation—something the statutes otherwise prohibit—must make a legally enforceable commitment to give advice in the client's best interest; charge no more than reasonable compensation; avoid misleading statements; implement policies and procedures; and fairly disclose fees, compensation, and material conflicts of interest. JA1543. The BICE also provides for a written contract between adviser and client, allowing the adviser to impose mandatory arbitration on the client and limits the client's right to punitive damages and rescission. JA1467. These protective conditions are all reasonable, and the district court correctly so held. JA385-87.

There is nothing in the statute that prohibits DOL from conditioning the BICE on compliance with rules that Congress directly imposed on plan fiduciaries but left open with respect to IRA advisers. It would be nonsensical to hold that the very safeguards Congress included in Title I as essential to protect the interests of participants may not be used by DOL as conditions for an exemption under Title II designed to protect those very same interests.

C. The BICE's Written Contract Requirement Does Not Create A Private Right Of Action And Is Reasonable.

As the district court correctly held, the BICE does not create a private right of action to enforce federal law in violation of *Alexander v. Sandoval*, 532 U.S. 275 (2001). JA363-69. The BICE does *not* give IRA owners the right to sue for violations of ERISA's or the Code's fiduciary provisions or to enforce the prohibited transaction rules. The BICE "merely dictates terms that otherwise conflicted financial institutions must include in written contracts with IRA and other non-title I owners in order to qualify for the exemption." JA363. Any action brought to enforce the terms of the written contract would have to be brought under state law, and the enforceability of the required contractual terms would ultimately be controlled by state law. As the district court found, the BICE "does not change any of this" (referring to "common law enforcement of IRA contracts"). JA365. In fact, annuities held in IRAs have historically been subject to state breach of contract claims. *See, e.g.*, *Jacobs v. Mazzei*, 977 N.Y.S.2d 123 (N.Y. App. Div. 2013); *McGrogan v. First Commonwealth Bank*, 74 A.3d 1063 (Pa. Super. Ct. 2013); *Azbill v. UMB Scout Brokerage Servs., Inc.*, 129 S.W. 3d 480 (Mo. Ct. App. 2004). If a court concludes that the contract terms are not enforceable, the IRA owner has no federal cause of action.

Suits to enforce terms required by the BICE would not "turn on the construction of the meaning and scope of fiduciary duties created by federal law."

App. Br. at 55. As shown above, the duties of loyalty and prudence have their roots in common law duties that have been in existence for centuries. But, even if a suit to enforce contractual terms relies on the construction of federal law, it does not follow that DOL has summarily created a private right of action to the Code. *See Lowe v. Gen. Motors Corp*., 624 F.2d 1373, 1379 (5th Cir. 1980) (stating that even though federal law might have significance or bearing on the case, the suit was not to enforce federal law and did not create a private right of action).

Finally, the Rule is not the first example of federal agency regulations requiring private contracts with mandatory provisions. As the district court below recognized, there are many examples where federal agencies, including DOL, require regulated entities to enter into contracts—often requiring specific provisions or promises. *See, e.g.*, JA365-66 (citing examples of contractual terms mandated by other federal agencies; PTE 84-14, 49 Fed. Reg. 9494, 9503 (Mar. 13, 1984) (requiring "written management agreement" for "Qualified Professional Asset Managers" to state they are fiduciaries); and PTE 06-16, 71 Fed. Reg. 63,786, 63,797 (Oct. 31, 2006)). Like the contracts required by the BICE, these contracts are all enforceable by the private contracting parties. Appellant's argument, if credited, would invalidate all these contracts under *Sandoval*. Here, DOL's use of private contracts to regulate is not new and does not result in a new cause of action through creation of the BICE.

II. DOL FULFILLED ITS DUTIES UNDER THE ADMINISTRATIVE PROCEDURE ACT BY ITS THOROUGH ANALYSIS AND DECISION-MAKING REGARDING THE TREATMENT OF FIXED-INDEXED ANNUITIES (FIAS).

A. DOL Reasonably Found That FIAs Have Conflicts Similar To Variable Annuities.

The APA's core requirement is that an agency must "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, *2125 (U.S. June 20, 2016) (internal quotation marks omitted). The extraordinarily thorough and well-supported Regulatory Impact Analysis ("RIA") and extensive accompanying analysis removes any doubt that DOL satisfied its obligations under the APA regarding the Rule's treatment of FIAs. This fully satisfied DOL's obligation to engage in "reasoned decision-making." *United States Telecom Ass'n v. FCC*, 825 F.3d 674, 706 (D.C. Cir. 2016).

The RIA provided an extensive analysis of the annuity market. *See* JA777, 869-872, 885-887, 890-894, 898-900, 902-903, 906-908. This included a review of the various products and their features, the distribution of various annuity products, the conflicts of interest that exist in the annuity market, and the harms to retirement savers that can result from those conflicts. According to the RIA, "these products are particularly complex, beset by adviser conflicts, and vulnerable to abuse." JA776. While data limitations impeded the specific quantification of the losses that

affect retirement savers who invest in annuities, DOL found nonetheless that there is "ample qualitative and in some cases empirical evidence that they occur and are large both in instance and on aggregate." JA777. Thus, DOL provided direct evidence, as well as evidence related to mutual funds (which present analogous issues), that conflicts in the annuity market result in material harm to retirement investors and therefore demand the enhanced protections that the Rule provides.

The RIA demonstrated that sales-based incentives, across the financial services and insurance industries, drive behavior, and encourage and reward advisers for acting in ways that are detrimental to investors. *See* JA890, 899-900. Those incentives and conflicts exist to the same, or even a greater, extent in the annuities market as they do in the mutual fund market. DOL found that:

> various annuity products…involve similar or larger adviser conflicts [as compared to mutual funds], and these conflicts are often equally or degrees of complexity, magnifying both investors' need for good advice and their vulnerability to biased advice. As with mutual funds, advisers may steer investors to products that are inferior to, or costlier than, similar available products, or to excessively complex or costly product types when simpler, more affordable product types would be appropriate.

RIA at 9 (relying on Daniel Schwarcz & Peter Siegelman, *Insurance Agents in the 21st Century: The Problem of Biased Advice, in* RES. HANDBOOK ON THE ECON. OF INS. LAW 36 (Daniel Schwarcz & Peter Siegelman eds. (2015) ("*Insurance Agents in the 21st Century*")).These authors also consider it appropriate to analogize conflicts in the mutual fund space to conflicts in the

insurance space, stating, "[w]hile not exactly on point, this literature is comparatively well developed and involves many of the same basic considerations as are at play in insurance markets." *Insurance Agents in the 21st Century* at 11.[7]

In its analysis, DOL compellingly showed that FIAs share critical features with variable annuities, including the allocation of investment risk, fees, and guaranteed optional benefits that make them susceptible to similar conflicts and abuses, features that are not shared by fixed-rate annuities. JA891-892. DOL found FIAs "are as complex as variable annuities, if not more complex." For example, it found that insurers can transfer investment risks to FIA investors in complex ways such as subaccounts that resemble the transfer of risk to variable annuity investors. *See id*. Similarly, FIAs expose clients to investment risk by crediting investors' accounts based on changes in a market index, excluding dividends. They also may foist risk onto investors by combining complex and obscure factors such as participation rates, interest-rate caps, and spread/margin asset fees. *See* JA891–892. Worse, insurance companies generally reserve the power to unilaterally change terms and conditions to lower an FIA investor's effective return, leaving

[7] The performance of an investment product is reduced by the amount of commission, fees, and administrative expenses that are charged for that product. *See* Stan Garrison Haithcock, *What Levels of Commission Do Agents Earn on Annuities?*, THE BALANCE (June 25, 2017), goo.gl/Pnj7mj; Patrick J. Collins, *Annuities and Retirement Income Planning* 2 (Feb. 2016), goo.gl/fio6jM. Thus, the higher an annuity's commission, the worse the annuity product is likely to be for the investor and, simultaneously, the stronger the incentive will be for the adviser to recommend the higher cost, lower value annuity product.

the investor with little or no recourse. These investment-oriented features differentiate FIAs from fixed-rate annuities, which provide guaranteed, specified rates of interest on premiums paid and whose terms and conditions regarding crediting criteria do not vary based on the self-interest of the insurance company.

The shared complexity and opacity of these products fosters a dependence on professional advice, creating an environment in which conflicts of interest are more likely to thrive. The RIA cited to academic research contending that insurance "agents can inefficiently withhold information and distort consumer choices by providing misleading information or operating in their own self-interests." JA923 (citing *Insurance Agents in the 21st Century*). Based on these considerations, DOL rightly determined that prudent and impartial advice, important to all investors, is even more crucial in safeguarding the best interests of investors in variable annuities and FIAs. *See* JA891, 908.

Commenters provided unequivocal feedback that, if variable annuities were subject to the more protective conditions under the BICE and FIAs were subject to the less protective conditions of PTE 84-24, there would be an incentive to shift sales to FIAs without regard to the best interests of the customer. Based on these considerations, DOL properly determined that these products should be subject to similar treatment, and that treatment should be under the more protective conditions of the BICE. *See* JA1052. Indeed, DOL found that:

> If anything the potential harm from conflicts of interest would be larger in the annuity market because purchasers of annuities are often older individuals who are less sophisticated in financial matters than purchasers of commercial property-casualty insurance.

JA890.

The RIA collected specific examples of conflicts in the FIA context *See* JA900. For example, the RIA detailed how annuities sold on commission, and specifically FIAs, are associated with other product features that are detrimental to retirement savers, including substantial surrender charges that persist for years.[8] The RIA highlighted that, because many financial professionals are compensated entirely or primarily by commissions resulting from annuity sales, this creates an incentive to aggressively maximize sales of the highest-commission products. *See* JA900, 902. Such disadvantageous features of these products exacerbate conflicts of interest, encouraging and rewarding agents for recommending annuity products that are in the financial interest of agents, independent marketing organizations ("IMOs"), and insurance companies—not the best interest of retirement savers.

[8] Surrender charges effectively lock up a saver's money and make it costly to reverse the investment decision. *See* SEC Investor Bulletin: Indexed Annuities (Apr. 2011), goo.gl/JtKTVR. A survey of available FIAs shows products with surrender periods as long as 16 years and surrender charges as high as 20% of premiums. *See* American Equity Bonus Gold (July 14, 2016), goo.gl/bZzRzo. Surrender fees for the 10 top-selling indexed annuities in 2015 averaged 11% in the first year. *See* Fidelity Viewpoints, *Indexed annuities: Look before you leap* (Sept. 15, 2017), goo.gl/1pLe6K.

Given these factors, it was entirely reasonable for DOL to conclude that FIAs should be subject to the more protective exemptive conditions under the BICE and that IMOs should not be treated as financial institutions without first demonstrating they have an adequate supervisory mechanism in place to ensure compliance with the Rule.

B. DOL Reasonably Determined The Need To Protect Consumers From Conflicted Investment Advice Outweighed Any Possible Effects On The FIA Distribution Network.

Although Appellant claims that DOL failed to consider the Rule's effects on the distribution network for FIAs, App. Br. at 43-46, in fact, DOL did exactly that, but reasonably rejected such effects as a justification for a lighter regulatory approach to FIAs. *See* JA947, 1075-1092. The district court recognized that DOL acknowledged the cost of insurers' restructuring of their distribution systems, but concluded that "the risk that retirement investors would suffer significant losses due to conflicted investment advice raised even greater concerns." JA395. The court found this to be reasonable. *Id*.; *accord*, *Mkt. Synergy Grp. Inc.*, 2016 U.S. Dist. LEXIS 163663, at *90; *Chamber*, 231 F. Supp. 3d at 192-193. DOL analyzed both the Rule's effects on various market participants, the products they sell, and how these effects, in turn, would affect consumers. *See, e.g.*, JA806, 869–873, 899, 912, 1006 & n.519, 1022, 1078–1079. This fully satisfied DOL's obligation to engage in reasoned decision making and to consider the relevant factors and the

important aspects of the problem. On balance, DOL determined that the industry's claims were overblown and that, while the Rule "may pose a particular challenge" to those businesses, including some insurers and mutual fund companies, "whose commission and other compensation structures have been highly variable and laden with more acute conflicts of interest," any temporary frictions in these markets "would be justified by the Rule's intended long-term effects of greater market efficiency and a distributional outcome that favors retirement investors over the financial industry." JA1076-1077. DOL further explained that, "the same frictions that present challenges for some businesses may enhance opportunities for others," as new market competition would promote innovation in both product lines and business models.[9] JA1077.

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[9] This innovation has already begun. Many companies that offer FIAs have or will supplement their existing menu of commission-based products with new fee-based alternatives. *E.g*., Cyril Tuohy, *DOL Rule Will Lead To Simplification Of Many Retirement Products*, INSURANCENEWSNET (Sept. 27, 2016), goo.gl/yCUgBx; Press Release, Allianz, *Allianz Life Launches New Retirement Foundation ADV Annuity* (Feb.7, 2017), goo.gl/N9ryPp; Press Release, Lincoln Financial Group, *Lincoln Financial Group Broadens Its Suite of Guaranteed Lifetime Income Solutions with New Fee-Based Options* (Feb.13, 2017), goo.gl/UFgVoz; Press Release, Great American Life Insurance Company, *Great American Life's Fee-Based Annuity Now Available Through Commonwealth Financial Network* (Mar. 1, 2017), goo.gl/gJEJFG; Press Release, Nationwide, *Nationwide Announces Its First Fee-based Fixed Indexed Annuity* (July 11, 2017), goo.gl/P7r2ic; Press Release, Pacific Life, *Pacific Life's New Fixed Indexed Annuity with Simple Interest-Crediting Options and Shorter Withdrawal Charge Schedules* (July 17, 2017), goo.gl/qTv5VY; Press Release, Symetra, *Symetra Introduces New Fee-Based Fixed Indexed Annuities—Symetra Advisory Edge and Symetra Advisory Income Edge* (July 24, 2017), goo.gl/cHnbT2.

Appellant's real grievance here is that DOL failed to guarantee the continued viability and profitability of Appellant's preferred distribution model. But DOL has no duty to ensure that a particular business model survives regulation if that business model violates ERISA and cannot meet the exemptive conditions that are necessary for the protection of retirement savers. On the contrary, DOL has an affirmative duty to implement Congress's statutory mandates by eliminating such business practices or conditioning them on compliance with sufficiently protective conditions.

In reality, DOL made very generous accommodations to the FIA industry by allowing commission-based compensation in the sale of FIAs to continue notwithstanding ERISA's prohibitions. Although the BICE requires a Financial Institution[10] to take on a critical supervisory role to ensure advisers are complying with the exemption's conditions, and the Rule does not deem IMOs as Financial Institutions, DOL did provide several paths for IMOs and other insurance intermediaries to satisfy the conditions of the BICE. For example, they can seek to become Financial Institutions after providing evidence to DOL that they are willing and able to effectively exercise supervisory authority over their advisers or the

[10] A "Financial Institution" is defined as an entity that employs or retains the Adviser and is registered as an investment adviser under the Investment Advisers Act of 1940 or under the state laws in which the adviser maintains its principal office and place of business; or is a bank or similar financial institution supervised by federal or state laws or a savings association. Best Interest Contract Exemption; Correction, 81 Fed. Reg. 44,773, 44,783 (July 11, 2016), goo.gl/VzyQ2C.

advisers they contract with, thus ensuring their adherence to the Impartial Conduct Standards.[11] Alternatively, they can acquire or contract with an entity that already qualifies as a Financial Institution and is willing to take on that critical supervisory role to ensure compliance with the exemption's conditions. Several IMOs have done just that. Annexus launched a Broker-Dealer. *See* Greg Iacurci, *Indexed annuity distributors weigh launching B-Ds due to DOL fiduciary Rule,* INVESTMENT NEWS (June 23, 2016), goo.gl/UBSUi2. Similarly, AmeriLife launched a Registered Investment Adviser, "so that producers would have another qualified financial institution to do business through." *See* Warren S. Hersch, *AmeriLife Faces DOL Rule With Two-Track Strategy,* THINKADVISOR (Apr. 14, 2017), goo.gl/qgtD8X. And, the Ohlson Group has "engaged one of the leading Financial Institutions in the industry" to take on a supervisory role. Press Release, *Ohlson Group to introduce AssessBest, the advisor's answer to DOL/Fiduciary Rule,* INSURANCENEWSNET.COM (Jan. 9, 2017), goo.gl/iC6YQA. Indeed, the most innovative and compliance-minded firms are demonstrating that compliance is, in fact, possible. Consequently, DOL was not required to go to further extremes to protect the FIA industry.

[11] Impartial Conduct Standards are "fundamental obligations of fair dealing and fiduciary conduct, and include obligations to act in the customer's best interest, avoid misleading statements, and receive no more than reasonable compensation." Definition of the Term ''Fiduciary;'' Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20,946, 20,991 (Apr. 8, 2016), goo.gl/aifpbV.

C. The BICE Requirements Are Not Unworkable.

The BICE applies to all investments that advisers recommend to participants for their retirement accounts. Appellant wrongly asserts that the BICE is only workable for the securities industry. Instead, the BICE represents an accommodation to those advisers who desire to preserve commission-based compensation, offering an entirely optional way to do so, subject to compliance with the conditions. As the district court stated, "the BIC Exemption itself requires only that the financial institution adopt 'policies and procedures reasonably and prudently designed to ensure that its [a]dvisers adhere to the Impartial Conduct Standards.'" JA390.

Firms and advisers can still give conflict-free advice according to a variety of compensation models. The fact that many prominent firms have announced that they plan to continue to offer their customers a choice between fee and commission-based IRAs, *see* Cyril Tuohy, *Rise in Shorter-Term Surrender FIAs Means Commission Declines*, INSURANCENEWSNET.COM (June 20, 2017), goo.gl/pbgsLC ("Companies have been rolling out annuity products with shorter surrender periods [that pay lower commissions] for more than a year."), shows that firms are not being forced to comply with one compensation model over another. In addition, many companies that offer FIAs are supplementing their existing menu of commission-based products with new fee-based alternatives. *See supra* note 9.

Appellant's attack on the BICE misses a fundamental point. Neither ERISA nor the Code requires DOL to provide exemptive relief to a regulated industry. If some in that industry do not want to take advantage of the exemption, they are free not to do so. They can always structure their business practices in a way that complies with Congress's flat prohibitions, thus avoiding altogether the PTEs and the BICE.

Appellant would have this court believe that the BICE is somehow unworkable. But actual evidence of market developments since the Rule was finalized belies this claim. In reality, investors will have more and better options to receive high-quality, affordable advice and to be able to pay for that advice in a variety of ways. Indeed, evidence from firms' public announcements makes clear that retirement investment advice will continue to be available through various business models under the Rule. *See* Scott Stolz, *Do Fee-Based Annuities Have a Future?*, THINKADVISOR (July 3, 2017), goo.gl/5hBVpH (stating while annuity sales will drop in the short term, advisors will "adjust to the new paradigm."). And, the fact that different firms are deciding to comply with the Rule in different ways proves that the Rule provides sufficient flexibility to enable firms to choose an approach that best fits their preferred business model.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's decision in all respects.

Dated: September 22, 2017

Sincerely,

/s/ Mary Ellen Signorille *
Mary Ellen Signorille
William Alvarado Rivera
AARP Foundation Litigation
601 E Street, NW
Washington, DC 20049
(202) 434-2060
msignorille@aarp.org
**Counsel of Record*

Counsel for *Amici Curiae*

ADDENDUM A

AARP—with approximately 38 million members—is a nonprofit, nonpartisan organization dedicated to fulfilling the needs and representing the interests of people age fifty and older. AARP fights to protect older people's financial security, health, and well-being. AARP's charitable affiliate, AARP Foundation, creates and advances effective solutions that help low-income individuals fifty and older secure the essentials so that they do not fall into poverty during retirement. Through, among other things, participation as amici curiae in state and federal courts, AARP and AARP Foundation seek to increase the availability, security, equity, and adequacy of pension, health, and other employee benefits that countless members and older individuals receive or may be eligible to receive. A major priority has been to assist Americans in accumulating and effectively managing the assets they will need to supplement Social Security, so that they can maintain an adequate standard of living in retirement.

Americans for Financial Reform ("AFR") is a nonpartisan, nonprofit coalition of more than 200 consumers, investor, labor, civil rights, business, faith-based, and community groups. *See* AFR, *Coalition Members*, goo.gl/dxAYKT (last visited Sept. 12, 2017). AFR works to lay the foundation for a strong, stable, and ethical financial system—one that serves the economy and the nation as a whole.

AFR engages actively in policy issues relating to securities regulation and investor protections.

Better Markets is a nonprofit, nonpartisan organization that promotes the public interest in the financial markets through comment letters, litigation, independent research, and public advocacy. It fights for reforms that create a stronger, safer financial system; promote the economic prosperity of all Americans; and protect individual investors from fraud, abuse, and conflicts of interest. Better Markets has filed hundreds of comment letters with the financial regulators and numerous briefs in federal court advocating for strong implementation of reforms in the securities, commodities, and credit markets. See generally Better Markets, goo.gl/sAHdpN (last visited Sept. 12, 2017) (including archive of comment letters and briefs).

Consumer Federation of America ("CFA") is a nonprofit association of more than 250 state, local, and national pro-consumer organizations, founded in 1968 to represent the consumer interest through research, advocacy, and education. More information about CFA's membership is available at goo.gl/ST7e6W (last visited Sept. 12, 2017). For three decades, CFA has been a leading voice in advocating for stronger protections for individual investors. CFA policy in this area is focused on ensuring that investors have a choice of appropriate investments and service

providers, the information necessary to make informed choices, protection against fraud and abuse, and effective recourse when they are the victims of wrongdoing.

The National Employment Law Project ("NELP") is a national nonprofit organization that for more than 45 years has advocated for policies and practices that promote economic opportunity and security for low-wage and unemployed workers. NELP's advocacy includes research, policy development, and litigation, including filing amicus curiae briefs in federal and state courts. To the extent low wageworkers have retirement savings that supplement social security at all, they have small-defined contribution plans or IRAs. These retirement vehicles require low-wage workers to make complex investment decisions that directly affect their quality of life in retirement. For that reason, many seek expert financial advice. Loopholes in prior regulations allowed important categories of financial advisers to operate with damaging conflicts of interest. No group of investors has been hurt more than low-wage workers, who—with their small savings—can least afford to absorb the losses. NELP has a deep understanding of the Rule, having closely followed its development and having participated in the rulemaking proceedings.

The Public Investors Arbitration Bar Association ("PIABA") is an international bar association whose members represent investors in disputes with the securities industry. The mission of PIABA is to promote the interests of the public investor in securities and commodities arbitration by protecting public

investors from abuses in the arbitration process; making securities and commodities arbitration as just and fair as systematically possible; and creating a level playing field for the public investor in securities and commodities arbitration. PIABA members represent investors in court and arbitration who have received conflicted advice from investment advisers, securities brokers, and insurance brokers, oftentimes in connection with their retirement accounts, observing firsthand the harm that has resulted from the conflicted advice.

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7) and Circuit Rule 32(a)(2) because: this brief contains 6,417 words, (excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii)) as determined by the word counting feature of Microsoft Office Word 2010).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 14 point Times New Roman font.

Dated: September 22, 2017

/s/ Mary Ellen Signorille
Mary Ellen Signorille
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2017, the foregoing Brief of Amici Curiae AARP, AARP Foundation, Americans for Financial Reform, Better Markets, Consumer Federation of America, National Employment Law Project and Public Investors Arbitration Bar Association in Support of Defendants-Appellees was electronically filed with the Clerk of the Court for the United States Court of Appeals for the DC Circuit using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: September 22, 2017

/s/ Mary Ellen Signorille
Mary Ellen Signorille
Counsel for Amici Curiae