UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE NATIONAL ASSOCIATION FOR FIXED ANNUITIES, Plaintiff, v. THOMAS E. PEREZ, in his official capacity as Secretary of the United States Department of Labor, and UNITED STATES DEPARTMENT OF LABOR, Defendants.	Civil Action No. 1:16-cv-1035 (RDM)

BRIEF *AMICI CURIAE* OF BETTER MARKETS, INC., CONSUMER FEDERATION OF AMERICA, AND AMERICANS FOR FINANCIAL REFORM IN SUPPORT OF DEFENDANTS

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IDENTITY AND INTEREST OF THE *AMICI*[1]

Better Markets, Inc. ("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 lead to 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 submitted more than 175 comment letters to the SEC, CFTC, DOL, and other financial regulators, advocating for strong implementation of reforms in the securities, commodities, and credit markets. It has also filed numerous amicus briefs in federal district and circuit courts defending agency rules on legal and policy grounds. *See generally* Better Markets, http://www.bettermarkets.com (cataloguing 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 http://consumerfed.org.membership/. For three decades, CFA has been a leading voice advocating strengthened 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. CFA's advocacy for a heightened standard of care when financial professionals offer investment advice dates back to at least 2000. Key letters and documents advancing that policy goal are available at

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[1] *Amici* state that no party's counsel authored this brief in whole or in part, and further, that no party or party's counsel, and no person or entity other than *amici*, their members, or their counsel, contributed money that was intended to fund preparing or submitting this brief.

http://consumerfed.org/issues/investor-protection/investment-professionals/.

Americans for Financial Reform ("AFR") is a nonpartisan, nonprofit coalition of more than 200 consumer, investor, labor, civil rights, business, faith-based, and community groups. *See* AFR Membership List, *available at* http://ourfinancialsecurity.org/about/our-coalition/. 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. Through policy analysis, education, and outreach to our members and others, AFR seeks to build public will for substantial reform of the American financial system. AFR engages actively in policy issues relating to securities regulation and investor protections.

The *amici* have extensive expertise on the subjects of financial market regulation, investor protection, and administrative law, all topics central to this case. The *amici* are also intimately familiar with the provisions of the Rule and the exhaustive rulemaking process that DOL followed to craft it. For example, each of the *amici* filed extensive comment letters with DOL in support of the Rule. *See* DOL comment letter file on the Rule, https://www.dol.gov/ebsa/regs/cmt-1210-AB32-2.html (last visited July 15, 2016). Furthermore, each organization testified at DOL's public hearings in August of 2015. *See* U.S. Dep't of Labor, Conflict of Interest Proposed Rule Public Hr'g, https://www.dol.gov/ebsa/regs/1210-AB32-2-Hearing.html (last visited July 15, 2016). In addition, the *amici* are all co-founding and steering members of Save Our Retirement, a coalition of almost 100 public-interest, retirement, and labor organizations that fought for years to support the Rule. Save Our Retirement Membership List (Sept. 8, 2015), *available at* http://saveourretirement.com/2015/09/about-save-our-retirement/. This knowledge and expertise will enable the *amici* to assist this Court in resolving the legal and policy issues raised in this critically important case, which is the first in a series of recently filed Rule challenges to reach

the merits phase.

The *amici* share a strong interest in the outcome of this case for three reasons. First, they seek to defend the Rule and thereby ensure that Americans trying to save for a secure and dignified retirement are better protected from advisers' conflicts of interest that currently pervade much of the industry, siphoning away tens of billions of dollars every year in hard-earned savings. The Rule, even with its generous exemptions, enshrines the commonsense principle that all financial advisers who serve retirement savers must put their clients' best interest first, as Congress always intended in ERISA and the Internal Revenue Code ("Code"). A decision to invalidate or delay the Rule would restore a status quo that exacts a huge toll on retirement savers and intensifies an already serious retirement crisis in this country.

Second, the *amici* have an interest in ensuring that NAFA's profound misinterpretations of ERISA are firmly rejected. If those distorted readings of the law were to take hold, DOL's ability to implement and enforce ERISA's fiduciary duty would be impaired, not only as to the Rule but also as to future regulatory measures that DOL may deem necessary or appropriate to protect retirement savers.

Finally, the *amici* have an interest in defending the DOL's rulemaking process against NAFA's attacks predicated on the Administrative Procedure Act ("APA") and general principles of administrative law. DOL conducted one of the most thorough, thoughtful, and accommodating rulemakings in history, spanning five years, including a nearly six-month comment period and four days of public hearings. It culminated in a balanced Rule, a set of carefully crafted exemptions, a 395-page Regulatory Impact Analysis ("RIA"), and extensive commentary. The commentary shows that the DOL considered the appropriate factors, examined the relevant data, and offered rational explanations for the choices it made, all in accordance with applicable

Supreme Court and D.C. Circuit precedent. Moreover, contrary to NAFA's contention, DOL had no statutory duty to conduct the cost-benefit analysis that NAFA seeks.

If the Court were to hold this extraordinary process inadequate, then future attempts by the DOL and many other agencies to adopt rules in the public interest will become easier targets for litigation, based fundamentally on nothing more than the regulated industry's self-serving, unfounded, and ultimately irrelevant claims of harm to their bottom line.

SUMMARY OF ARGUMENT

The DOL's Regulatory Impact Analysis was exceptionally thorough and followed a conservative methodology that substantially *underestimates* the billions of dollars in retirement savings that millions of American workers and retirees lose every year as a result of adviser conflicts of interest. *See* Regulatory Impact Analysis for Final Rule and Exemptions ("RIA") (Apr. 2016), *available at* https://www.dol.gov/ebsa/pdf/conflict-of-interest-ria.pdf. The RIA also supplied an ample basis for DOL's conclusion that fixed-indexed annuities ("FIAs") should be subject to the more protective conditions for exemptive relief from ERISA's ban on conflicted compensation. The DOL carefully considered the relevant attributes of FIAs, including the risks, conflicts of interest, and sales abuses associated with them, and it further considered the weaknesses in the state regulatory regimes to which they are already subject. In light of this analysis, DOL rationally concluded that FIAs warrant treatment under the Best Interest Contract exemption ("BIC") rather than Prohibited Transaction Exemption 84-24 ("PTE 84-24"). *See* 81 Fed. Reg. 21007, 21017 (Apr. 8, 2016). The Rule epitomizes reasoned decisionmaking.

NAFA's attempt to superimpose on DOL an obligation to conduct cost-benefit analysis under ERISA and *Michigan v. E.P.A.*, 135 S. Ct. 2699 (2015), has no basis. NAFA's argument represents a now-familiar tactic among opponents of regulatory reform to second-guess the choices Congress has made and hold an agency's rulemaking to statutory standards of economic

analysis that do not exist in its organic statute.

Finally, NAFA's claims that the Rule will have "devastating consequences" for the FIA industry are unsubstantiated and hyperbolic assertions that, even if true, could never justify the issuance of injunctive relief under the "balance of harms" or "public interest" prongs. If those predicted industry harms really were to unfold—and they will not—they would be far outweighed by the enormous benefits the Rule will confer on retirement savers and the public at large.

ARGUMENT

I. DOL'S DECISION TO BRING FIAS UNDER THE BIC WAS THE PRODUCT OF REASONED DECISIONMAKING.

The central issue on the merits in this case is whether the Rule "was the product of reasoned decisionmaking" under the APA, in accordance with the principles set forth in *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983). Clearly it was. As part of the rulemaking, the DOL published an exhaustive RIA that provided an in-depth economic assessment of the current market conditions relating to retirement-investment advice, the conflicts of interest that pervade that market, and the likely effects of the Rule and of various alternatives to the Rule. *See generally* RIA (examining a broad range of quantitative and qualitative evidence, including independent, empirical, and peer-reviewed academic research on the effects of conflicts of interest in investment-advisory relationships).

According to the RIA, the evidence demonstrated that conflicted advice is widespread, causing enormous harm to plan and IRA investors. RIA at 8. Focusing just on recommendations made to IRA owners to invest in front-end-load mutual funds, the RIA estimated that conflicts of interest could cost savers between $95 and $189 billion over the next 10 years. The actual degree of harm from conflicted advice is undoubtedly much greater, since such conflicts also heavily influence advice about other types of investments, including insurance products, and other types

of retirement accounts, including 401(k)s.

While much of the analysis concerned mutual funds, about which data are widely available, the RIA also specifically focused on the annuity market, including FIAs. According to the RIA, "public comments and other evidence demonstrate that these products are particularly complex, beset by adviser conflicts, and vulnerable to abuse." *Id.* The RIA also examined the fragmented regulatory landscape governing FIAs, concluding that it does not provide sufficient protections for retirement savers.

The RIA not only satisfied and exceeded DOL's obligation to engage in "reasoned decisionmaking," *State Farm*, 463 U.S. at 52, but also dispelled the notion, advanced by NAFA throughout its filings, that FIAs are benign financial products with a proud history of helping retirement savers achieve their goals. In reality, FIAs are complex and opaque; marked by significant risks to retirement investors; fraught with conflicts of interest arising from huge sales commissions; prone to abusive sales tactics, targeting seniors in particular; likely to perform badly relative to other investments; and poorly regulated under a weak and unevenly applied set of state insurance rules. The RIA thus refuted NAFA's contention that FIAs warrant treatment under the more relaxed provisions of PTE 84-24. In fact, FIAs are precisely the type of investment that should be subject to the more protective exemptive conditions of the BIC.

<u>Complexity and Opacity.</u> The RIA shows that FIAs are exceptionally complex and opaque investments with respect to the returns they provide, the risks they pose, their fees, and their optional benefits. For example, FIA returns are reduced by a combination of obscure factors including indices that exclude dividends, participation rates, interest rate caps, and spread/margin asset fees. RIA at 155. This makes it all but certain that the vast majority of investors will find it impossible to understand the basis on which insurance companies are crediting their accounts.

Making matters worse, insurance companies generally reserve the power to unilaterally change terms and conditions to reduce an investor's effective return, leaving the investor with little or no recourse.

This complexity and opacity by itself fosters a dependence on professional advice, creating an environment in which conflicts of interest are more likely to have a severe impact. The RIA cited to academic research arguing that insurance "agents can inefficiently withhold information and distort consumer choices by providing misleading information or operating in their own self-interests." *Id.* at 155. Insurance agents may engage in this conduct without any consequences, according to these researchers, because it is exceedingly difficult for consumers to ascertain the value of insurance products even after purchase. *See id.* Based on these considerations, the DOL determined that prudent and impartial advice, important to all investors, is even more crucial in safeguarding the best interests of investors in FIAs. *See id.* at 123, 140.

Risk. In addition, the RIA detailed how annuities sold on commission are associated with other product features that pose risks, including substantial surrender charges that persist for years. Surrender charges effectively lock up a saver's money and make it costly to reverse the investment decision. An SEC Investor Alert, for example, explains:

> You can lose money buying an equity-indexed annuity, especially if you need to cancel your annuity early. Even with a guarantee, you can still lose money if your guarantee is based on an amount that's less than the full amount of your purchase payments. In many cases, it will take several years for an equity-indexed annuity's minimum guarantee to "break even."

SEC Investor Bulletin: Indexed Annuities (Apr. 2011), *available at* https://www.sec.gov/investor/alerts/secindexedannuities.pdf.

A survey of available FIAs shows products with surrender periods as long as 16 years and surrender charges as high as 20 percent of premiums. *See* American Equity Bonus Gold (Sept. 1,

2010), *available at* https://agent.american-equity.com/documents/1107-SB-09.01.10-w-disclosure.pdf. The mere fact that a product with such disadvantageous features exists proves that the insurance company creating this product and the agents selling it are not reliably acting in customers' best interests. It is not uncommon for FIAs to have surrender periods between 10 and 14 years and surrender charges between 10 and 15 percent of premiums. Indeed, market research shows that surrender fees for the ten top-selling indexed annuities averaged 11.25% in the first year, as of 2015. *See* Fidelity, Indexed annuities: Look before you leap (July 13, 2016), *available at* https://www.fidelity.com/viewpoints/retirement/considering-indexed-annuities.

Conflicts of Interest. The RIA further described how commissions in the annuity market create a misaligned incentive system and result in conflicts of interest between financial professionals and consumers. 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. *See* RIA at 132, 134 ("insurance consumers currently face a meaningful risk that traditional insurance agents will subvert their clients' interests to maximize commissions").

The RIA collected examples of such conflicts, including a financial professional who was rewarded for steering customers toward insurers approaching their production goals. *See id.* at 132. Among the broader range of investment products, a financial professional may have an incentive to recommend an annuity over other alternatives, such as mutual funds, because annuity commissions are often substantially higher than broker-dealers' mutual-fund or securities

commissions. *See id.* at 131.[2] Conflicts of interest are thus likely more pronounced in the annuity market than in the mutual-fund market.

Abuses. These intense conflicts of interest lead to high-pressure and abusive sales, as the RIA revealed. For example, a study by the Financial Planning Coalition on senior financial exploitation found that "over half of the [Certified Financial Planner] professional respondents . . . personally had worked with an older client who previously had been subject to unfair, deceptive or abusive practice. Of these, 76 percent reported financial exploitation that involved equity-indexed or variable annuities." *Id.* at 142.

There are more examples of the pervasive conflicts of interest surrounding FIAs than the DOL could possibly have chronicled. For example, in an undercover special, Dateline NBC highlighted advisers' scare tactics such as making prospective clients think their money is unsafe in FDIC-insured accounts, downplaying huge surrender charges, and claiming that annuities never lose money. *See* Dateline NBC, Tricks of the Trade (Apr. 23, 2008), *viewable at* http://www.nbcnews.com/id/24095230/ns/dateline_nbc/t/tricks-trade/; *see also Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 138 F. Supp. 3d 1191, 1199–1215 (D. Colo. 2015) (finding Dateline broadcast to be substantially true in granting motion to dismiss defamation action).

In addition, several state regulators have expressed particular concern after observing an increase in aggressive and misleading advertising by producers and third-party marketing entities, known as independent marketing organizations ("IMOs"). Iowa's Insurance Division observed some IMOs "aggressively promoting indexed annuities in potentially deceptive manners." Nick

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[2] Jim Poolman, executive director of the Indexed Annuity Leadership Council, testified at the DOL's public hearing on the Rule proposal that commissions on fixed-indexed annuities are "6 to 8 percent, give or take." In re: Conflict of Interest Proposed Rule, Related Exemptions and Regulatory Impact Analysis Public Hr'g Tr. 937 (Aug. 12, 2015), *available at* https://www.dol.gov/ebsa/pdf/1210-AB32-2-HearingTranscript3.pdf.

Gerhart, Iowa Ins. Comm'r, Bulletin No. 14-02 (Sept. 15, 2014), *available at* http://www.iid.state.ia.us/sites/default/files/commissioners_bulletins/2014/09/15/insurance_marketing_organizations_pdf_14661.pdf. And statistics compiled by the North American Securities Administrators Association ("NASAA") indicate that annuities are involved in a third of all cases in which senior citizens were subjected to securities fraud or abuse. *See* NASAA Comment Letter to SEC (Sept. 10, 2008), *available at* http://www.nasaa.org/wp-content/uploads/2011/07/29-NASAA_Comment_Letter_on_SEC_Proposed_Rule_151A.pdf.

<u>Poor performance.</u> Several studies have compared the returns on FIAs with the returns that an investor could have received elsewhere. For example, an illustration by Fidelity shows that an investor would be considerably worse off purchasing an FIA as compared with a portfolio that is 90 percent invested in ten-year zero-coupon Treasuries and ten percent invested in the S&P 500 index. *See* Fidelity, Indexed annuities: Look before you leap. Starting with $100,000, the average ending balance of the Treasury/S&P 500 portfolio would be about $10,000 higher over 56 simulated rolling 10-year periods beginning with 1951-1960 and ending with 2006-2015. *See id.*

Another analysis examined the historical returns of four types of FIAs and 13 specific contracts for the period from 1957 (the beginning of the S&P 500 Index) to 2008. *See generally* William Reichenstein, *Financial Analysis of Equity-Indexed Annuities*, 18 FIN. SERVS. REV. 291 (2009), *available at* http://www.cfapubs.org/doi/full/10.2469/dig.v40.n4.21 (FIAs underperformed the market on a risk-adjusted basis by at least 1.73 percent per year, with an average underperformance of about 2.9 percent per year). The analysis concluded that by virtue of contract design, FIAs will inevitably fail to match the returns available on competitive market-based assets of comparable risk.

Dr. Craig McCann of the Securities Litigation and Consulting Group has extensively researched FIAs, and he has arrived at similar conclusions:

> [T]he equity-indexed annuities produce lower returns than US Treasury securities despite being illiquid and exposing investors to stock and bond market risk. This is a recurring theme in equity-indexed annuities. There is an enormous amount of complexity designed into the product but ultimately the complexity is a smoke screen designed and managed to provide investors with substantially the same miniscule returns regardless of which index option is chosen. The resulting investor returns equal the returns on a bond portfolio less a 2.5%-3.0% annual expense ratio.

Craig J. McCann, *An Economic Analysis of Equity-Indexed Annuities* (Sept. 10, 2008), *available at* http://slcg.com/pdf/workingpapers/EIA%20White%20Paper.pdf.

<u>Inadequate state insurance regulation.</u> The RIA also included a close examination of the regulatory landscape affecting the distribution of annuities. For example, it reviewed the lack of uniformity with regard to state insurance suitability regulations. *See* RIA at 39, 42, 111. Even in states that have adopted the Model Suitability Regulation of the National Association of Insurance Commissioners, the regulations do not adequately protect retirement investors against sales-driven conflicts of interest. State insurance suitability rules resemble FINRA's suitability rules, which apply to broker-dealers. There is compelling evidence that such standards provide inadequate protections for retirement investors from sales-driven conflicts of interest in both contexts. *See id.* at 36–42, 111, 138, 140, 285. Suitability rules allow the sale of the least-suitable among a wide range of "suitable" investments and function more like a "do not defraud" standard than a best-interest standard. This helps to explain why products with such highly disadvantageous features can be sold as "suitable" even though they clearly are not in the investor's best interest.

Given these inadequacies in the state regulatory framework and the problematic features, sales practices, and compensation incentives associated with FIAs described above, the DOL

acted reasonably in concluding that FIAs should be subject to the BIC, incorporating the conditions it deemed necessary to protect investors from conflicts of interest arising from continued commission-based sales.

II. DOL AMPLY FULFILLED ITS DUTY TO EVALUATE THE ECONOMIC IMPACT OF THE RULE, AND NEITHER ERISA NOR *MICHIGAN V. EPA* REQUIRED ANYTHING MORE OF THE AGENCY.

DOL more than satisfied its duty under various executive orders to evaluate the impact of the Rule, including its costs and benefits. But because those executive orders were never intended to be, and are not, enforceable in court by any private party,[3] NAFA struggles to find a statutory basis for complaining that the DOL's RIA was inadequate. *See* NAFA Br. 70–71. NAFA's strategy exemplifies the unfortunate ritual that has become standard among industry opponents of financial regulation: inventing a duty to conduct cost-benefit analysis found nowhere in enforceable law and then attacking the agency's effort—no matter how thorough—as deficient. NAFA's effort fails in this case, as there is no statutory predicate for NAFA's claim.

First, under the APA, DOL was required only to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' " *State Farm*, 463 U.S. at 43. In fact, this Circuit has expressly rejected the notion that the APA's arbitrary-and-capricious standard of review imposes a general cost-benefit

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[3] Executive Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993), explicitly provides that "This Executive Order is intended only to improve the internal management of the Federal Government and *does not create any right or benefit, substantive or procedural, enforceable at law or in equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person*." (emphasis added). In any event, the proposed and final versions of the Rule were each thoroughly reviewed and approved for release by the Office of Information and Regulatory Affairs, the agency within the Office of Management and Budget responsible for ensuring that agencies comply with the principles set forth in executive orders, including cost-benefit provisions. *See, e.g.*, Conclusion of EO 12866 Regulatory Review, Office of Information and Regulatory Affairs, http://www.reginfo.gov/public/do/eoDetails?rrid=125915 (last visited Jul. 15, 2016).

obligation on agencies. *See Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 670–71 (D.C. Cir. 2011) ("Nor does Canadian National cite to any authority—and we are aware of none—for the proposition that the APA's arbitrary and capricious standard alone requires an agency to engage in cost-benefit analysis."). Furthermore, in conducting its review of the relevant data, "[t]he APA imposes no general obligation on agencies to produce empirical evidence." *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009). The extraordinarily thorough and well-supported RIA removes any doubt that DOL satisfied its obligations under the APA.

Ultimately, it is an agency's organic statute that determines whether a court may hold an agency accountable for conducting cost-benefit or economic-impact analysis and the rigor of that analysis. The Supreme Court has cautioned that an agency's duty to conduct cost-benefit analysis is not to be inferred lightly or without a clear indication from Congress. *See Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 510–12 & n.30 (1981) ("Congress uses specific language when intending that an agency engage in cost-benefit analysis."); *see also Inv. Co. Inst. v. CFTC*, 720 F.3d 370, 379 (D.C. Cir. 2013) ("Where Congress has required 'rigorous, quantitative economic analysis,' it has made that requirement clear in the agency's statute, but it imposed no such requirement here.").

Congress knows how to require cost-benefit analysis when it considers such a requirement to be appropriate. *See, e.g.*, 42 U.S.C. § 7545(c)(2)(B) ("No fuel or fuel additive may be controlled or prohibited . . . except after consideration of available scientific and economic data, including a cost benefit analysis . . . ."). Sometimes Congress simply identifies certain factors that an agency must consider. *See, e.g.*, 12 U.S.C. § 5323(a)(2)(A)–(K) (requiring the Financial Stability Oversight Council to consider ten specific factors related to systemic risk and "any other risk-related factor that the Council deems appropriate"). Often, Congress declines to impose any cost-

benefit or economic-impact analysis obligation whatsoever.[4] That is the decision Congress made in ERISA, and that choice should be respected.[5]

Finding no explicit requirement in ERISA, NAFA turns to *Michigan v. EPA* for the proposition that a duty to conduct cost-benefit analysis springs from Congress's general delegation of rulemaking authority to DOL. In *Michigan*, the Supreme Court held that the EPA was required to consider costs when determining whether regulation of power plant emissions was "appropriate and necessary," 42 U.S.C. § 7412(n)(1)(A), a phrase superficially similar to DOL's delegation provision. But *Michigan* is inapplicable here for several reasons.

First, binding post-*Michigan* decisions of the D.C. Circuit show that the bedrock principles governing cost-benefit analysis remain intact. *See Lindeen v. SEC*, No. 15-1149, 2016 WL 3254610, *9 (D.C. Cir. June 14, 2016) ("We do not require the Commission 'to measure the immeasurable' and we do not require it to 'conduct a rigorous, quantitative economic analysis unless the statute explicitly directs it to do so.' "); *but see MetLife, Inc. v. Financial Stability*

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[4] ERISA and the Code require that DOL make certain findings before creating exemptions, including a finding that the exemptions are "administratively feasible." 29 U.S.C. § 1108; 26 U.S.C. § 4975(c)(2). That phrase does not require cost-benefit analysis. Instead, it refers to the agency's capacity to administer the rule, not an assessment of whether the rule is too burdensome, costly, or otherwise "workable" for industry. *See, e.g.*, Bill Schmidheiser, *ERISA's Prohibited Transaction Restrictions: Policies and Problems*, 4 J. CORP. L. 377, 405 (1978) (" 'Administratively feasible' means feasible for the Departments to administer, given the Departments' resources and the nature of the transaction sought to be exempted."). Canons of statutory construction support this reading. Two of the three criteria for exemptions set forth in §1108 aim to protect the plans and their participants and beneficiaries. It would be anomalous to read the third criterion, "administratively feasible," as a sudden expression of Congressional concern about the burdens an *exemption* might impose on the regulated industry. Such a reading would offend "[t]he commonsense canon of *noscitur a sociis,* which counsels that a word is given more precise content by the neighboring words with which it is associated." *United States v. Williams*, 553 U.S. 285, 294 (2008).

[5] To the extent DOL is exercising the authority transferred from the Secretary of the Treasury to develop exemptions under § 4975 of the Internal Revenue Code, Treasury is also under no statutory obligation to conduct cost-benefit analysis. *See* 26 U.S.C. § 7805(a).

Oversight Council, No. 15-cv-45, 2016 WL 1391569, *16 (D.D.C. Mar. 30, 2016) (holding that the mere "textual hook" of "appropriate" in the Dodd-Frank Act bound the agency to evaluate certain costs in light of *Michigan*).[6]

Furthermore, the statute at issue in *Michigan* is entirely different from ERISA in its scope and purpose. ERISA's rulemaking delegation is a general grant of authority applicable to an entire title of the United States Code, a regulatory and legal world so vast that it has its own treatises and specialized practitioners. It broadly provides, in relevant part, that "the Secretary *may* prescribe such regulations as he finds necessary *or* appropriate to carry out the provisions of this subchapter." 29 U.S.C. § 1135 (emphases added).

By stark contrast, the delegation of rulemaking to the EPA in *Michigan* was specific to a single decision that followed a single study mandated by Congress regarding a single type of polluter:

> The Administrator *shall* regulate electric utility steam generating units under this section, if the Administrator finds such regulation is appropriate *and* necessary after considering the results of the study required by this subparagraph.

42 U.S.C. § 7412(n)(1)(A) (emphases added).

That unique rulemaking was the "context" in which the Court held that EPA should have considered cost. *Michigan*, 135 S. Ct. at 2707. Yet, as the Court made clear, "[t]here are undoubtedly settings in which the phrase 'appropriate and necessary' does not encompass costs." *Id.* ERISA's general grant is surely one such setting. Nothing in *Michigan* holds that mere use of

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[6] *MetLife* is deeply flawed on multiple grounds, including its treatment of *Michigan. See* Br. *Amicus Curiae* of Better Markets, Inc. in Support of the Defendant-Appellant 24–27, *MetLife, Inc. v. Financial Stability Oversight Council*, No. 16-5086 (D.C. Cir. filed June 23, 2016), *available at* http://www.bettermarkets.com/resources/better-markets-amicus-brief-metlife-v-fsoc.

the words "necessary" or "appropriate" in a general grant of rulemaking authority, divorced from any context, requires an agency to always conduct cost-benefit analysis before any rulemaking.

Finally, the Court expressly tied its holding to the nature of the decision confronting the EPA, which involved a threshold determination about whether to regulate at all. The Court observed that: "Agencies have long treated cost as a centrally relevant factor when deciding *whether to regulate*." *Id.* (emphasis added). But the general grant of rulemaking authority invoked by NAFA has nothing to do with *whether* DOL should regulate; rather, it confers on DOL the customary authority to decide *how* to regulate, within Congress's statutory framework—how "to carry out" the statute. 29 U.S.C. § 1135.

This is a critical distinction between *Michigan* and this case. Congress had already made the threshold decisions about whether to regulate advisers who serve retirement savers, whether to hold them to a fiduciary standard, and whether to ban compensation arrangements that create conflicts of interest. In 1974, Congress decided that retirement assets were so critical to the "well-being and security of millions of employees and their dependents," 29 U.S.C. § 1001(a), that they had to be protected against conflicts of interest under the strongest possible standards of loyalty and prudence. Satisfied with its own assessments regarding the costs and benefits of this approach, Congress established those protections in unmistakably broad terms in ERISA. Since the decision whether to regulate was taken out of DOL's hands, *Michigan* provides no basis for the contention that DOL had to supply a cost-benefit analysis.[7]

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[7] Even if *Michigan* were somehow read to require DOL to consider the costs and benefits of its Rule, DOL more than fulfilled that task in the RIA. The obligation simply to "consider" factors confers wide discretion upon an agency. *Cf. Sec'y of Agric. v. Cent. Roig Refining Co.*, 338 U.S. 604, 611 (1950). The Court in *Michigan* affirmed this principle by recognizing the EPA's own broad discretion. *See Michigan*, 135 S. Ct. at 2707 (it is for EPA to decide how to account for cost, and assigning monetary values is not required).

III. <u>INJUNCTIVE RELIEF CANNOT BE JUSTIFIED UNDER THE BALANCE-OF-EQUITIES OR PUBLIC-INTEREST PRONGS.</u>

The RIA presents an overwhelming case against the issuance of injunctive relief. Such an extraordinary remedy is appropriate only if the movant carries the burden of persuasion on the requisite elements "by a clear showing." *Chaplaincy of Full Gospel Churches v. England*, 454 F. 3d 290, 297 (D.C. Cir. 2006); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (four-pronged test). NAFA cannot meet that burden as to any of the four requirements for a preliminary injunction. Of greatest concern to the *amici,* NAFA cannot satisfy the balance-of-equities test. The harm to retirement savers resulting from an injunction against the Rule would far outweigh any harm to NAFA's constituents resulting from implementation of the Rule—even if NAFA's dire predictions were actually valid. And the public interest would suffer a terrible blow, since the Rule is necessary not only to protect savers but also to help mitigate the retirement crisis that is already unfolding in this country.

NAFA insists that if an injunction is issued, consumers will nevertheless continue to be protected under state insurance regulation. But NAFA ignores the wealth of data in the RIA showing that state insurance regulation is inadequate and that an additional layer of protection against adviser conflicts of interest is necessary specifically as to FIAs. NAFA then offers up a classic series of histrionic predictions, warning that, unless enjoined, the Rule "could" inflict massive losses and marketing disruptions on participants in the FIA industry. For support, NAFA cites to a handful of affidavits from insurance agents who rely heavily on FIA sales in their businesses and who fear a precipitous loss of income if the Rule goes into effect.

These dire predictions from NAFA and its affiants are wholly unpersuasive. Their estimates of harm are not credible on their face, as they are the epitome of biased and unsubstantiated projections, lacking the authority of independent experts. In fact, NAFA's claims

are precisely the type of sky-is-falling exaggerations that the financial-services industry has launched against new regulation for almost a century.

The pattern has been repeated with each new effort to strengthen financial regulation, including the federal securities laws, deposit insurance, the Glass-Steagall Act, mutual-fund reform, and others. *See, e.g.*, Marcus Baram, *The Bankers Who Cried Wolf: Wall Street's History of Hyperbole About Regulation*, THE HUFFINGTON POST (June 21, 2011, 6:56 PM), http://www.huffingtonpost.com/2011/06/21/wall-street-history-hyperbole-regulation_n_881775.html; Paul G. Mahoney, *The Origins of the Blue-Sky Laws: A Test of Competing Hypotheses*, 46 J.L. & ECON. 229, 249 (2003) ("In the 5 years following adoption of [the most stringent type of blue sky law statute], bank profits increased on average by nearly 5 percentage points . . ."); *see also* John Heltman, *Mortgage Rules Not Chilling Market as Feared, Data Shows*, AMERICAN BANKER (Sept. 24, 2015), *available at* http://www.americanbanker.com/news/law-regulation/mortgage-rules-not-chilling-market-as-feared-data-shows-1076899-1.html (belying claims that new mortgage underwriting standards would "cripple credit availability" and spur banks to "quit the business entirely."); Comment Letter to the SEC from the Fin. Planning Coal., Re: SEC Request for Data and Other Information, Duties of Brokers, Dealers and Investment Advisers, File No. 4-606 (July 5, 2013) (application of fiduciary standard to fee-based accounts did not cause predicted "parade of horribles"), *available at* https://www.sec.gov/comments/4-606/4606-3126.pdf. In each case, the imagined harm from regulation failed to materialize. NAFA's claims must be similarly discounted.

NAFA's grim predictions already ring hollow. Mounting evidence indicates that the FIA industry will adapt to the Rule. Insurance companies and IMOs are fashioning solutions to the challenges of operating under the BIC, including the development of new distribution networks:

- NAFA member Annexus, an independent insurance-product design and distribution company, which comprises a network of 17 IMOs and accounts for more than $4 billion in FIA sales, plans to establish an affiliated broker-dealer through which to sell FIAs. David Rauch, COO and General Counsel at Annexus, stated that it is "full speed ahead" for the firm and that he expects "there are more independent industry players like us who are contemplating the same thing." Greg Iacurci, *Indexed annuity distributors weigh launching B-Ds due to DOL fiduciary rule*, INVETSMENT NEWS (June 23, 2016), *available at* http://www.investmentnews.com/article/20160623/FREE/160629957/indexed-annuity-distributors-weigh-launching-b-ds-due-to-dol.

- NAFA member Voya Financial has created a line of FIAs with lower surrender fees, designed with flexibility to make them a more attractive product to their distributors. Carolyn Johnson, president of annuities at Voya, stated that the firm "plans to adjust its 'business model as new trends and the regulatory landscape evolves.' " Nick Thorton, *Voya rolls out new, less expensive FIAs*, BENEFITS PRO (June 15, 2016), *available at* http://www.benefitspro.com/2016/06/15/voya-rolls-out-new-less-expensive-fias.

- NAFA member Allianz Life has stated that its sales of FIAs could grow with the current version of the BIC and that they did not see themselves as disadvantaged in the annuity market. Dieter Wemmer, CFO of Allianz, believes that "overall the fixed-index annuity market will not get smaller." Cyril Touhy, *Allianz: DOL Might Pull FIAs Out Of BICE*, INSURANCE NEWS NET (May 12, 2016), available at http://insurancenewsnet.com/innarticle/allianz-exec-holds-hope-fias.

- American Financial Group, which provides insurance products through NAFA member Great American Insurance Group, believes their "products have a simpler product design with shorter surrender charge periods, lower commissions and trail commission options . . . our distribution channels include banks, broker-dealers, registered investment advisors, and large national marketing organizations that will be best positioned to comply with the more rigorous compliance requirements." Thompson Reuters, *Edited Transcript of AFG earnings conference call or presentation* (May 3, 2016), *available at* http://finance.yahoo.com/news/edited-transcript-afg-earnings-conference-190725496.html.

- Additionally, industry analysts and experts confirm that the FIA industry will not be irreparably harmed. Sheryl Moore, CEO of Moore Market Intelligence, which specializes in providing competitive intelligence tools to the insurance industry, particularly the indexed life and annuity markets, states that while she believes "there is a possibility" for an initial decline in indexed annuity sales as a result of the BIC, it will be temporary and that "once the industry has had time to adjust to the 'new normal,' sales will pick up again." Arthur Postal, *Industry insiders react cautiously to DOL fiduciary rule*, LIFEHEALTHPRO.COM, (Apr. 7, 2016), *available at* http://www.lifehealthpro.com/2016/04/07/industry-insiders-react-cautiously-to-dol-fiduciar.

- Other commentators predict that the Rule will actually strengthen the market for annuities by incentivizing the industry to make them better for investors. *See* Michael Kitces, Why The DoL Fiduciary Rule Won't Kill Annuities, It Will Make Them Stronger!, KITCES.COM (Apr. 21, 2016), *available at* https://www.kitces.com/blog/why-dol-fiduciary-wont-kill-annuities-it-will-make-them-stronger/.

These examples refute NAFA's claim that the balance of equities favors injunctive relief.

An even larger public interest is at stake in this case. The dispute over the Rule is unfolding in the context of an acute retirement crisis in America, as millions of Americans have far too little saved for retirement. *See* U.S. Gov't Accountability Office, *GAO-15-419*, *Retirement Security: Most Households Approaching Retirement Have Low Retirement Savings* 9 (2015). The Rule is therefore all the more critical: Retirement savers must at least be able to protect and preserve what savings they have managed to set aside. But if financial advisers are allowed to continue siphoning off their clients' retirement savings, then the prospects for a secure and independent retirement will continue to fade for millions of Americans.

CONCLUSION

For the foregoing reasons, the Court should deny the injunctive and other relief requested by NAFA and grant summary judgment to the defendants.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this *Brief Amici Curiae of Better Markets, Inc., Consumer Federation of America, and Americans for Financial Reform in Support of the Defendants* was served this 15th day of July 2016 upon counsel for all parties via the Court's CM/ECF electronic filing system.

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