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March 13, 2017

Submitted Electronically to
ESBA.FiduciaryRuleExamination@dol.gov

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

Re: **RIN 1210-AB79**

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

Dear Acting Secretary Hugler:

We write on behalf of Market Synergy Group, Inc. ("Market Synergy") to offer comment on the Department of Labor's ("Department") above-referenced proposal ("Proposal") to extend for 60 days the applicability date defining who is a "fiduciary" under the Employee Retirement Income Security Act ("ERISA") and the Internal Revenue Code of 1986 ("Code"), and the applicability date of related prohibited transaction exemptions including the Best Interest Contract Exemption and amended prohibited transaction exemptions ("PTEs"). The Proposal expresses the Department's belief that it may take more time than is available before the April 10, 2017 applicability date of the fiduciary rule and related PTEs to complete the examination mandated by the Presidential Memorandum on the Fiduciary Duty Rule, 82 Fed. Reg. 9,675 (Feb. 3, 2017).

Market Synergy strongly supports extending the applicability date of the fiduciary rule and related PTEs for at least 60 days. Indeed, it recommends that the applicability date be extended for at least one year. In the alternative, Market Synergy recommends delaying for one year the applicability date for PTE 84-24 specifically. (Separately, Market Synergy will file a comment explaining why the Department should rescind the fiduciary rule and amendments to and partial revocation of PTE 84-24 in their entirety.)

Delay is proper for at least three reasons:

First, delay is warranted if only for the sole purpose of undertaking a meaningful examination of the fiduciary rule and related PTEs, as mandated by the President's Memorandum. An agency's view of what is in the public interest may change, either with or without a change in circumstances, and the agency may alter course on this basis so long as it supplies a reasoned analysis. Here, the Department must consider the wisdom of the fiduciary rule and related PTEs in response to the change in administration's regulatory philosophy. Several district courts – each now on appeal – have determined that the fiduciary rule and PTEs should not be preliminarily enjoined or vacated at the time of the rulings and under the particular circumstances of the legal claims presented. In addition to having been wrongly decided in the first instance, these judicial rulings are irrelevant to the Proposal. In our political system, the Department, not a court, says where the public interest lies.

Second, a delay to consider regulatory changes would avoid needless harms, especially to the independent insurance agent distribution channel. Independent agents, independent marketing organizations ("IMOs"), and others in that channel do not have a workable PTE that will allow them to continue to sell or support the sale of fixed annuity products, especially fixed indexed annuities, for third-party compensation. Absent a delay leading to regulatory relief, the independent distribution channel will be irreparably disrupted, together with the agents' relationships with their clients. Market Synergy anticipates that, beginning on April 10, 2017, between 20,000 to 50,000 independent agents will start exiting the channel. That disruption will reduce retirement investors' access to retirement savings offerings, retirement product structures, retirement savings information, and related financial advice. Delay also would avoid the potentially unnecessary costs of complying with an unsettled regulatory regime. Even a 60-day delay could save millions of dollars per IMO. And delay would avoid the costs of class actions and other litigation that will otherwise arise.

Third, any potential gains to retirement investors that supposedly would be achieved if the applicability date is not extended have been overstated. This is true with respect to the individual retirement market generally, since the Department's earlier estimates of potential investor gains as a result of the fiduciary rule and related PTEs were based on limited, outdated, and methodologically flawed data, extrapolations, and assumptions. It is also true for fixed annuities in particular. For fixed annuities, there are negligible, if any, potential gains to retirement investors. There are no widespread sales maladies associated with such products and, in any event, existing state-based regulation adequately protects consumers. Federal regulation, whether during a 60-day period or beyond, is unnecessary and inappropriate.

Market Synergy adopts and incorporates herein by reference comments submitted by the members of its IMO network.

BACKGROUND

I. Distribution Of Fixed Annuities.

A. The Independent Insurance Agent Distribution Channel.

Independent insurance agents, also known as "producers," typically sell a variety of insurance and other financial products, including life insurance and annuities. Nationwide, about 80,000 independent agents are engaged in fixed annuity sales. The hallmark of all fixed annuities, both fixed rate and fixed index, is that the purchaser is protected from downside risk. Assuming they hold the policy for a minimum period, they are guaranteed never to lose any of their principal or accumulated annual interest.

Most life insurers do not recruit independent insurance agents to sell their products. Rather, independent agents are recruited by IMOs to offer, when appropriate, fixed annuities and other types of insurance products to the agents' clients. In general, an IMO works with agents and insurers, providing economies of scale for producer recruitment, product education, wholesaling, marketing, processing business, and licensing and contract support. This service model allows insurers to reduce their overhead costs while facilitating the sale of products by independent agents, as opposed to their "captive" or career insurance agent counterparts. IMOs are generally compensated for their services by the insurers with which they have relationships based upon a percentage of agent sales volume.

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

Those in the independent distribution channel are compensated almost exclusively through commissions paid by the insurers and, unlike front-end commissions paid for mutual funds, do not directly reduce the principal or account value of the premium as paid into the policy by the consumer. Commission rates for fixed indexed annuities have declined markedly over the past decade. They are on par with commission rates for other fixed annuities. According to Wink's (available at http://tinyurl.com/zwzsgdq):

> [T]he average street level compensation for indexed annuities as of 2Q2016 was 4.60%. This is the lowest this figure has been in over a decade. Moore Market Intelligence, a firm that consults on indexed insurance products, tracks product features for every indexed annuity available in the country. According to the firm's research, commissions on indexed annuities range from 2.00% to 12.00%, but the majority of products pay a commission in the 7.00% – 7.99% range. This commission is generally 50% lower for older-aged annuitants.

With a *one-time* commission of, for example, 4 or 5 percent paid by the insurer to the producer for a fixed annuity that can be expected to be held for 25 to 30 years, the total compensation paid is far less than other financial products. By way of comparison, a fee-based adviser might suggest a diversified portfolio of investments and charge 1.5 percent *annually* to manage assets. The retirement investor will pay the adviser fees each year, regardless of whether the investments decline in value and such fees directly reduce the corpus of the investments being managed.

B. Market Synergy

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

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

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

As the Department is aware, Market Synergy has taken an appeal to the United States Court of Appeals for the Tenth Circuit challenging the Department's amendment to and partial revocation of PTE 84-24. The appeal is captioned *Market Synergy Group, Inc. v. United States Department of Labor*, No. 17-3038; it was docketed on February 23, 2017.

II. State-Based Regulation Of Fixed Annuities.

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

A. Regulation Of Insurers That Offer Fixed Annuities.

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

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

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

B. Regulation Of Licensed Agents Who Sell Fixed Annuities.

Like insurers, insurance agents must be licensed in each state in which they sell fixed annuities or other insurance products. Agent licensing requirements vary from state to state, but most states require prospective agents seeking to sell life insurance or fixed annuities to complete rigorous pre-licensing classes specific to the license they seek.

After completing the required coursework, prospective agents must pass the state's licensing examination. Many states also require licensed agents to take continuing education courses after becoming licensed.

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

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

C. Regulation Of Annuity Products.

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

A significant component of state oversight of fixed annuities are nonforfeiture laws, which require a guaranteed minimum value for each annuity contract. Nonforfeiture laws remove the risk of principal loss from fixed annuities, including fixed indexed annuities. If the linked index goes up, excess interest is credited based on the participation rate. If the linked index declines, the annuity does not share in the loss, but still receives state-mandated minimum interest crediting. The Standard Nonforfeiture Law for Individual Deferred Annuities, NAIC Model Regulation 805, provides a framework that states can use to enact their own nonforfeiture laws.

D. Regulation Of Fixed Annuity Sales Transactions.

In addition to rigorous oversight of insurers, producers, and fixed annuity products, the sale of an annuity is a heavily regulated transaction. Numerous states have adopted very specific regulations regarding disclosures and sales practices involving the sale of fixed index annuities. States' disclosure laws, many of which have adopted or are based on the Annuity Disclosure Model Regulation, NAIC Model Regulation 245, require that prospective purchasers be provided a suite of information including, among other things, a specific description of the death benefits and applicable charges and fees, the guaranteed and non-guaranteed elements of the contract, and explanation of how the index-based interest is determined, how to assess the value of the annuity contract, a summary of the federal tax status, including any potential penalties, of the annuity contract, and the impact of any riders. *See, e.g.*, Ala. Admin. Code R. §§ 482-1-129.01 to 482-1-129.10; Alaska Admin. Code tit. 3, §§ 26.750 to 26.769; Ariz. Rev. Stat. §§ 20-1242 to 20-1242.05; 3 Colo. Code Regs. § 702-4:4-1-12; Iowa Admin. Code r. 191-15.61 to 191-15.67; 806 Ky. Admin. Regs. 12:150; 02-031 Me. Code R. 915, §§ 1 to 11; Mo. Code Regs. tit. 20, §§ 400-5.410; Mont. Admin. R. 6.6.801 to 6.6.807; N.M. Code R. §§ 13.9.12; N.C. Gen. Stat. §§ 58-60-120 to 58-60-145; Ohio Admin. Code § 3901-6-14; Okla. Admin. Code §§ 365:25-19-1 to 25-19-9; Or. Admin. R. 836-051-0900 to 836-051-0925; Utah Admin. Code r. 590-229. In many states, the purchaser and agent must sign disclosure statements as a condition of policy issuance, and the insurers must deliver an Annuity Buyer's Guide, written by the NAIC (available at http://tinyurl.com/h583j3s), at the point of sale. States that have not yet adopted NAIC's model regulation have alternative, significant disclosure requirements. *See, e.g.,* N.Y. Ins. Law § 3209(b)(2); Cal. Ins. Code §§ 789.10, 10127.13.

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

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

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

III. Deference To The States On Insurance Regulation.

Before the Department's regulatory actions, the states, not the federal government, had exclusively regulated fixed annuities, an important and thriving segment of the life insurance industry. Congress has repeatedly affirmed the primary role of state regulators over the business of insurance through various legislative acts, including the McCarran-Ferguson Act, the Harkin Amendment to the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 989J, 124 Stat. 1376 (2010), and a (vetoed) Joint Resolution of Disapproval (H.J. Res. 88).

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

enacted to ensure "the supremacy of the States in the realm of insurance regulation." *Dep't of Treasury v. Fabe*, 508 U.S. 491, 500 (1993).

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

Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 429-30 (1946); *see also Fabe*, 508 U.S. at 500.

> Moreover, in taking this action Congress must have had full knowledge of the nation-wide existence of state systems of regulation and taxation; of the fact that they differ greatly in the scope and character of the regulations imposed and of the taxes exacted; and of the further fact that many, if not all, include features which, to some extent, have not been applied generally to other interstate business. Congress could not have been unacquainted with these facts and its purpose was evidently to throw the whole weight of its power behind the state systems, notwithstanding these variations.

Benjamin, 328 U.S. at 430. In this way, "Congress intended to declare, and in effect declared, that uniformity of regulation, and of state taxation, are not required in reference to the business of insurance, by the national public interest, except in the specific respects otherwise expressly provided for." *Id.* at 431.

The Harkin Amendment confirms this "hands-off" approach to federal regulation of fixed indexed annuities specifically. The Harkin Amendment conditions the eligibility of fixed indexed annuities to be treated as insurance on their compliance with state insurance laws or their model regulation equivalent. In enacting that Amendment,

Congress confirmed that fixed indexed annuities should not be federally regulated as securities, in contrast to variable annuities and other products. Senator Harkin, the Amendment's sponsor, made several statements during congressional debate confirming that intent. *See* C-Span Video Library, Conference Committee on Financial Regulatory Reform: Financial Regulations Bill, Day 5, Part 2 (June 22, 2010) (comments begin at the 3:41:50 mark), *at* http://tinyurl.com/jocc7xy.

And, invoking the Congressional Review Act, Congress enacted a Joint Resolution of Disapproval (H.J. Res. 88) stating that "Congress disapproves the rule submitted by the Department" and urging that "such rule shall have no force or effect." (The prior administration vetoed this Joint Resolution.)

IV. The Independent Distribution Channel's Dilemma.

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

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

Unexpectedly reversing course from what it had proposed, the Department revoked PTE 84-24 as it applies to ERISA plan and IRA purchases of annuities that do not satisfy the Department's new definition of a "Fixed Rate Annuity Contract," thereby excluding fixed

indexed annuities from PTE 84-24's scope. That exclusion leaves independent agents without a workable exemption under which to sell fixed indexed annuities. Because PTE 84-24 is now unavailable to fixed indexed annuity sellers, to continue receiving third-party compensation, they must attempt to operate under the Best Interest Contract Exemption ("BICE"), the only available PTE. To do that, they need a qualifying sponsoring Financial Institution. Neither Market Synergy nor IMOs themselves qualify as Financial Institutions under the BICE. In promulgating that PTE, the Department specifically declined to expand the categories of Financial Institutions to "marketing or distribution affiliates or intermediaries." The Department instead limited the definition of Financial Institution to entities which are subject to "well-established" regulatory conditions and oversight, *viz.*, registered securities broker-dealers, registered investment advisers, banks, and, if certain conditions are met, insurers.

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

It is also doubtful whether any insurers will agree to serve as Financial Institutions for purposes of supervising independent insurance agents under the BICE. As of today, to Market Synergy's knowledge, no fixed indexed annuity carrier has publicly affirmed that they are willing to serve as the agent's approved Financial Institution. And in litigation with the Department, the carriers, through their trade associations, have confirmed that they will not sponsor independent agents. The reason is obvious: *independent* sales forces exist to avoid having insurers assume responsibility for, or control of, *independent* agents. Insurers must consider the risk of being held legally liable under the Best Interest Contract for the agents' acts and omissions, as well as having to establish the supervisory apparatus required under the BICE. And insurers cannot reasonably know what recommendations agents make using other insurers' products, yet the BICE presumes that they must. Rather than distributing fixed indexed annuities through independent channels, insurers will attempt to shift their distribution to career

or captive agents, banks, registered investment advisers, and broker-dealers, or simply exit the fixed indexed annuity space completely.

On January 19, 2017, the Department proposed a Best Interest Contract Exemption for Insurance Intermediaries, effectively conceding that its original rulemaking had consigned insurance intermediaries like IMOs to a regulatory void. In a February 17, 2017 comment to the Department (available at http://tinyurl.com/zzc5o8q), Market Synergy explained that this proposed exemption would not meaningfully or feasibly remedy that dilemma. Market Synergy incorporates its prior comment herein by reference. Among other things, Market Synergy explained that the proposed exemption's $1.5 billion premium threshold excludes most insurance intermediaries and that even the few intermediaries meeting the premium threshold will be unable or unwilling to satisfy the proposal's other onerous conditions, including maintaining reserving/fiduciary liability insurance, conducting and making public independent annual financial audits, and agreeing to undertake prior approval of all written marketing materials, in addition to the other conditions of the original BICE.

This Department-created predicament has sent shockwaves through the independent distribution channel. According to a survey of 126 insurance intermediaries conducted by the LIMRA Secure Retirement Institute just prior to the 2016 presidential election (available at http://tinyurl.com/zotf5fd), 3 in 4 respondents expect a serious impact on their business. Almost 7 in 10 anticipate that their organization's fixed indexed annuity sales will decrease. In 2017, also according to LIMRA (available at http://tinyurl.com/hj7cnva), sales of fixed indexed annuities are expected to drop 25 percent to 30 percent as a result of the Department's actions.

THE APPLICABILITY DATE SHOULD BE EXTENDED

The Proposal should be adopted with the proposed extension period enlarged. Market Synergy recommends that the applicability date for the fiduciary rule and related PTEs be delayed for one year. In the alternative, Market Synergy recommends delaying only PTE 84-24's applicability date for one year. Delay is appropriate for three reasons: (i) delay is justified if only to facilitate the examination mandated by the President's Memorandum; (ii) aside from permitting the mandated examination, delay will forestall severe economic harm and disruption, especially harm and disruption to the independent insurance agent distribution channel; and (iii) by contrast, delay (especially delay of only PTE 84-24) would not harm retirement investors.

I. Delay Is Needed To Reevaluate The Department's Position.

A. The Department Must Examine Its Prior Actions In Light Of The New Administration's Regulatory Philosophy.

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

The Department must account for this regulatory philosophy. After all, "an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely on the incumbent administration's views of wise policy to inform its judgments." *Chevron USA Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 865 (1984). "A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration." *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1043 (D.C. Cir. 2012) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part)). Indeed, an agency "must" consider "the wisdom of its policy on a continuing basis, for example, in response to changed factual circumstances, or a change in administrations." *Nat'l Cable & Telecommc'ns Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005).

There remains less than one month until the applicability date of the fiduciary rule and the PTEs, however. As the Proposal suggests, it will take more time than that to complete the examination mandated by the President's Memorandum. By way of comparison, during the comment period for the then-proposed fiduciary rule and PTEs, the Department received over 3,000 comment letters on the proposed regulatory package. There were also over 300,000 submissions made as part of 30 separate

petitions submitted on the proposal. These comments and petitions came from consumer groups, plan sponsors, financial services companies, academics, government officials, trade associations, and others, both in support of, and in opposition to, the proposed rule and related exemptions. If past is prologue, the Department will receive an equal number of submissions – perhaps more – in connection with its current rulemaking. Moreover, the Department's Secretary has not been confirmed, and may not be confirmed by April 10, 2017. The Department needs far more time than is currently available to reevaluate the wisdom of the fiduciary rule and PTEs.

Contrary to certain commenters, reevaluation of extant policy is not an indicator of arbitrariness and caprice; to the contrary, it can evidence reasoned decisionmaking. Because it is lawful to reappraise the costs and benefits of regulations in light of a change in administrations, and because the time remaining to do so is plainly inadequate, delay of the applicability date is necessary and proper for this reason alone.

B. Prior Judicial Decisions Are Irrelevant To The Analysis.

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

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

More fundamentally, these prior judicial rulings cannot constrain the Department's future judgments. "An agency's view of what is in the public interest may change, *either with or without a change in circumstances*," and the agency may change course on this basis so long as it "suppl[ies] a reasoned analysis." *Motor Vehicle Mfrs.*, 463 U.S. at 43 (emphasis added). An agency's judgments are not themselves facts; they are conclusions reached after interpreting facts in light of the agency's values and priorities. And when an agency decisionmaker, considering identical facts as a predecessor, reaches a different judgment, the only real explanation the agency can offer is that it balanced the relevant concerns differently. While there must be a reasoned explanation for a policy change, "'a court is not to substitute its judgment for that of the agency' and should 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513-14 (2009) (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)). An agency therefore need not "demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one" or satisfy more searching judicial review. *Id.* at 515.

By the same token, "federal judges – who have no constituency – have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones." *Chevron*, 467 U.S. at 866. An essential aspect of this judicial deference is permitting the agency discretion to implement policy changes that reflect the new administration's philosophy. After all, "[i]t is hostile to a democratic system to involve the judiciary in the politics of the people. And it is not less pernicious if such judicial intervention in an essentially political contest be dressed up in the abstract phrases of the law." *Colegrove v. Green*, 328 U.S. 549, 553-54 (1946), *overruled on other grounds by Baker v. Carr*, 369 U.S. 186 (1962).

II. Delay Is Needed To Avoid Severe, Irreparable Economic Harm.

A. Without A Delay, The Independent Distribution Channel Will Experience Widespread, Irreversible Disruptions.

The fast-approaching shift in how fixed annuities are sold, and *who* will sell them, will radically alter the life insurance industry, to the detriment of independent agents, IMOs, Market Synergy, and retirement investors. As explained above, the independent distribution channel lacks a workable PTE, and the proposed Best Interest Contract Exemption for Insurance Intermediaries does not bridge this regulatory gap.

Because their businesses are so heavily dependent upon their ability to receive compensation from the marketing and sale of fixed indexed annuities, it is expected that, beginning on April 10, 2017, Market Synergy, its member IMOs, and their independent agents will experience revenue decreases easily exceeding 50 percent. Market Synergy itself could experience a revenue drop approaching 80 percent. This will result in thousands of layoffs for both Market Synergy and its member IMOs.

It is also expected that, beginning on April 10, 2017, between 20,000 to 50,000 independent agents will exit the channel. Few will have the financial wherewithal or mental stamina to endure a potentially lengthy rulemaking process simply to know whether, at the end of the day, their business model will remain viable. Many thousands of agents are at risk of losing their hard-earned careers, professional autonomy, and financial livelihoods. And, in this hostile environment, it will become exceedingly difficult to attract and recruit new independent agents – the lifeblood of any IMO. Without a delay, these toxic effects may become permanent.

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

B. Any Contraction Of The Independent Distribution Channel Will Adversely Affect Retirement Investors.

This irreversible impact will reduce retirement investors' access to retirement savings offerings, product structures, information, and financial advice. Retirement investors will be adversely affected because independent agents currently offer, at no expense, financial advice tailored to each client's needs, goals, and financial resources. For example, agents are required by law and good business practice to ascertain whether a fixed indexed or other annuity is a suitable choice for the customer. By effectively eliminating third-party compensation for them, agents will be unable to offer financial advice to less-affluent retirement investors. Many of their mass-market clients will go unserved because the modest assets of these would-be retirement investors are

undesirable to large brokerage and investment advisory firms, who rely upon investment portfolios sufficiently large to support annual fee-based portfolio charges. In addition, most of of these firms are not contracted with the various insurers.

Recent studies confirm the probability of this outcome. A November 2016 report by CoreData Research (available at http://tinyurl.com/jbj8tpw), surveying 552 financial advisers, found a strong majority (71%) plan to disengage from some mass-market investors because of the fiduciary rule and its PTEs. These advisers estimate they will no longer service a quarter (25%) of their mass-market clients, creating a potential advice gap for low-balance investors.

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

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

C. Significant, Potentially Unnecessary Start-Up And Compliance Costs Can Be Avoided With A Delay.

As the Proposal states, an extension of the applicability date would spare advisers, investors, and other stakeholders "the risk and expenses of facing two major changes in the regulatory environment." As the Department noted in its Regulatory Impact Analysis of the fiduciary rule, start-up and compliance costs within the first year alone will reach $5 billion. One study by the American Action Forum (available at http://tinyurl.com/hyce254) found reported compliance costs of at least $106 million in 2016, likely representing up-front costs from just *four* companies.

If the Department ultimately rescinds or materially alters the fiduciary rule and its related PTEs, as its Proposal suggests it might do, these start-up and compliance costs will have been expended in vain. Market Synergy agrees with the Department that a delay of 60-day (or longer) could greatly defer or reduce start-up and compliance costs, particularly because more gradual steps toward compliance are less expensive.

Most IMOs have been awaiting the outcome of litigation or a change in the Department's rules (including a workable version of the Best Interest Contract Exemption for Insurance Intermediaries) and, accordingly, have not yet begun executing a plan to comply with the fiduciary rule or the PTEs. IMOs face an existential threat because of the Department's actions but, because they have no choice otherwise, many IMOs are attempting or will attempt to comply in whatever manner they can. This process will involve, among other things, drafting and approving new client documents and business contracts between intermediaries, sub-intermediaries, and advisers; internal education and development of new procedures at the institution and adviser levels; and then implementation of the new requirements at all levels, *e.g.*, web and transaction disclosures, policies and procedures.

Insurance intermediaries like IMOs and brokerage general agencies thus illustrate the compliance cost-savings that could be achieved by a 60-day delay. Consider:

- Many IMOs have yet to hire and/or compensate compliance and other operational officers, human resource specialists, and related staff. Of those IMOs willing to attempt compliance, Market Synergy estimates that the typical IMO could save between $300,000 and $350,000 on this category of costs if the applicability date is extended.

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

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

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

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

- IMOs will have to create, manage, and mail disclosures and Best Interest Contracts. Of those IMOs willing to attempt compliance, Market Synergy estimates that the typical IMO could save between $60,000 and $80,000 on this category of costs if the applicability date is extended.

Market Synergy believes that there are more than 340 IMOs operating today, most of which will undertake compliance efforts. And there are other ancillary, unexpended costs (*e.g.*, agent and staff training, printing, increased insurance premiums) too numerous to recount here.

D. Absent Delay, The BICE Will Impose Significant Litigation Costs.

Delay will forestall costs associated with BICE-related litigation. As stated in the President's Memorandum, the Administration is concerned with whether the BICE is likely to cause an increase in litigation. The BICE was *specifically designed* to do just

that, because it is intended to be privately enforceable by imposing contract- and fiduciary-based liability via the Best Interest Contract. It is a classic example of regulation through litigation. After the BICE was announced, Congress passed Joint Resolution of Disapproval (H.J. Res. 88), finding in connection with that resolution that "the BIC exemption continues to envision class action litigation under state law. The costs associated with this litigation will drive costs up for those least able to bear it, namely low- and middle-income retirement savers." H.R. Rep. No. 114-527, at 17.

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

Delay of any period of time would correspondingly reduce the costs of litigation associated with the BICE. Especially given the Administration's stated concern that the BICE are likely to cause an increase in litigation, delay is proper for this reason too.

III. Retirement Investors Will Lose Little Or Nothing By A Delay.

A. Any Losses That Might Be Occasioned By A Delay Are Overstated.

The Department requested comment on the costs of a 60-day delay, including potential losses to affected retirement investors, including those estimated in the February 2015 Council of Economic Advisers ("CEA") study and the Department's earlier Regulatory Impact Analysis. Though the CEA study concluded that the fiduciary rule could save retirement investors $17 billion a year, the Department cannot reliably extrapolate the delay's costs from that figure. Reliance on the CEA's figures or those in the Regulatory Impact Analysis would lead to drastic overestimation of the proposed delay's actual costs, to the extent any such "costs" would occur at all.

The CEA and Department reached the $17 billion figure by estimating that $1.7 trillion of IRA assets were invested in products providing payments that supposedly generate

conflicts of interest. Relying largely on studies addressed separately below, the CEA and Department concluded that such "conflicted" advice leads to investment underperformance of roughly 100 basis points per year. The CEA multiplied that amount by the $1.7 trillion estimate to reach the $17 billion annual savings figure. As Congress has since noted, however, both figures used to reach this conclusion – the $1.7 trillion in affected assets and the 100 basis point underperformance – have come "under intense scrutiny" exposing a plethora of faulty assumptions, omitted factors, and overall unreliability. H.R. Rep. No. 114-527, at 14.

1. The Department's $1.7 trillion estimate of "conflicted" assets is overstated by at least $600 billion, and likely more than that.

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

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

2. The claim that front-load funds underperform by 100 basis points has been debunked and is inapplicable to many products.

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

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

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

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

These are not quibbles with the Department's data – they are serious defects that exaggerate supposed underperformance. The Department's evidence was so unreliable that underperformance may not exist at all. Because it appears that the Department drastically overstated the fiduciary rule's savings, the proposed 60-day delay would cause only a negligible loss to investors, if any at all.

3. Other cost savings estimates are similarly unreliable.

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

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

Moreover, as demonstrated above, the statistics relied upon by the Department to conclude that "conflicted" funds underperformed were based on data limited only to the first year following the front load funds' purchase. To fully understand the overall

cost to investors, the Department should have considered whether subsequent overperformance offset all or some of those costs. The Department assumed that the rule would have no such costs, but that is plainly untrue and, in the very least, rigorous analysis would have demanded consideration of whether such costs exist.

4. The fiduciary rule has already prompted salutary market changes.

Even if its prior savings estimates were sound, the Department could not reliably use those figures now to extrapolate the costs of a delay. The Proposal acknowledges that if market changes in anticipation of the fiduciary rule have already diminished the conflicts of interest it earlier hypothesized, including the negative effect of load-sharing on mutual fund selection, then any adverse impact of the proposed delay would be mitigated. The rule has already effected many of the market changes that the Department predicted would produce savings. In a recent interview (available at http://tinyurl.com/j9tceaz), former Assistant Secretary Phyllis Borzi stated that the "customer-first principle that's embodied in the rule has already taken hold in the marketplace and companies are not going back." Ms. Borzi reiterated this sentiment in another interview (available at http://tinyurl.com/ja5lqzc), observing that even if efforts to modify or delay the fiduciary rule succeed, "there is no going back" or "stepping back from a best-interest standard." Senator Elizabeth Warren echoed that sentiment in a February 2017 letter to the Department (available at http://tinyurl.com/zvytkzq) providing examples of how, even though the fiduciary rule is not yet applicable, it is already "reshaping the retirement industry."

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

Because, even in the rule's absence, significant change has already taken place to the market practices the Department blamed for ostensible investor underperformance, it follows that a 60-day delay will cause little or no harm to investors. Regardless, even if

the Department's estimated savings were correct at the time made – which they were not – most of the perceived benefits have already been permanently realized.

B. State-Based Regulation Of Fixed Annuities Is Adequate.

Insofar as it relates to fixed annuities, any delay would not cause retirement investor losses because such annuities are already adequately regulated at the state level. Any delay, and especially a delay of only PTE 84-24, would not adversely affect investors.

As discussed above, *all* fixed annuity transactions, including those involving fixed indexed annuities, are subject to state laws designed to ensure that insurance agents are adequately trained and licensed; that the agents recommend only annuities that are suitable given a purchaser's individual circumstances; that insurers establish a system to supervise annuity recommendations; that the annuities are readable and disclose material features; and that they offer a "free-look" provision allowing the purchaser to return the annuity within a period of time for a full refund. This state-based regulation works. Hardly anybody complains to state regulators about fixed annuities.

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

Likewise, in litigation between Market Synergy and the Department, Kansas Insurance Commissioner Ken Selzer stated that he was "having some difficulty understanding the rationale" behind the Department's regulatory actions. Commissioner Selzer, like other state officials, finds it "difficult to justify the Department of Labor's differing regulatory treatment of substantially similar (and, for these purposes, materially indistinguishable) fixed insurance products, largely sold through the same distribution channels, that are already regulated from a consumer protection standpoint at the state level."

Some commenters have maligned fixed indexed annuities as uniquely risky, complex, and conflict-laden financial products. These commenters cite no studies or data to support their misguided views. That is unsurprising – there is simply no evidence of an epidemic of sales abuses or product maladies associated with fixed indexed annuities. Hardly anybody complains to state insurance regulators about them, and Congress and state officials have long recognized their value and suitability for many retirement investors. Unfortunately, in amending PTE 84-24 to exclude fixed indexed annuities from its scope, the Department uncritically accepted these commenters' views.

Fixed indexed annuities and fixed rate annuities are identical insurance products except for the method of calculating interest credited to the contract. Fixed indexed annuities are treated the same as other fixed annuities under state insurance law and federal securities law. They can offer the same income, insurance, and contractual guarantees as other fixed annuities; significant investment risk is borne by the insurer and there is no risk of principal loss; and they are no more complex than other fixed annuities. Moreover, commission rates for fixed indexed annuities are on par with rates for fixed rate annuities. Finally, the NAIC and NCOIL have jointly denied the charge of "abuse" associated with fixed indexed annuity sales (available at http://tinyurl.com/ju7a6ye).

In the context of a rule addressing purportedly conflicted sales advice, the only salient distinction between fixed indexed annuities and other fixed annuities – the different method for computing interest credited to policies accounts – is immaterial. That difference does not affect the manner in which fixed indexed annuities are sold, nor the incentives to sell them. Nor does it make fixed indexed annuities any riskier. To the contrary, as NCOIL emphasized (available at http://tinyurl.com/gt7hgge), "the investment risks associated with fixed indexed annuities are borne by the insurance company, not the consumer" and "the primary feature of fixed indexed annuities is the safety of principal, not the allure of investments inherent with variable products, mutual funds, and other securities products." The NAIC has made the same point in letters to Congress (available at http://tinyurl.com/zs8p7mb) and to the SEC (available at http://tinyurl.com/hvnpalo). As Commissioner Selzer attested, "fixed indexed annuities, like other types of fixed annuities, have none of the risk characteristics of those non-guaranteed investment products for which purchasers assume all investment risk and risk of loss of principal."

As discussed above, in amending PTE 84-24, the Department relied largely, if not exclusively, on earlier publications from the SEC, FINRA, and NASAA, none of which profess or maintain expertise in or experience regulating fixed indexed annuities. The

SEC and FINRA described fixed indexed annuities as "complex" and "risky" (if they are surrendered prematurely), not that their sale involves purported conflicts of interest. Any such supposed inherent complexity or risk can and has been mitigated through disclosure and suitability requirements that already exist at the state level. State-mandated disclosure requirements, for example, already respond to the SEC's concern that retirement investors may have to pay surrender charges or tax penalties if they prematurely cancel the annuity contract. Subjecting sales transactions to a fiduciary standard is an unnecessary "solution." For its part, NASAA's tendentious, barebones statement that fixed indexed annuities are "instruments of fraud and abuse" is unaccompanied by any study or data supporting that charge and, in light of the NAIC's and NCOIL's vigorous defense against this charge, also should be rejected as faulty.

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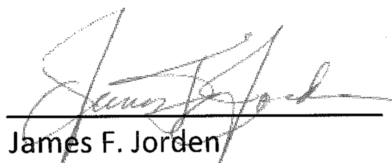
On behalf of Market Synergy, we thank the Department for its consideration of these comments.

Respectfully submitted,

CARLTON FIELDS JORDEN BURT, P.A.

By: 
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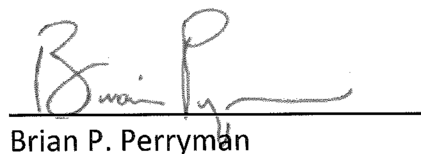
By: 
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