

## [Securities Regulation Daily Wrap Up, FIDUCIARY DUTIES—NAFA challenges DOL’s fiduciary rule as applied to FIAs, \(Jun. 3, 2016\)](#)

Securities Regulation Daily Wrap Up

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By [Pamela Wolf, J.D.](#)

On the heels of a suit filed in federal court in Texas by the U.S. Chamber of Commerce and other industry associations, the National Association for Fixed Annuities (NAFA) filed its own lawsuit in the District of Columbia challenging the Labor Department’s controversial [fiduciary rule](#), asking the court to vacate the rule and issue an injunction that would block the rule from taking effect as scheduled on April 10, 2017. The new regulations are unworkable for insurance companies, independent marketing organizations, and individual agents, largely because the DOL rule and its related exemptions are designed for the securities industry, NAFA contends ([National Association for Fixed Annuities v. Perez](#), June 2, 2016).

The complaint challenges the Labor Department’s authority to promulgate regulations that redefine “investment advice” and “fiduciary” under ERISA and the Internal Revenue Code. NAFA disagrees, among other things, with the DOL’s decision to make fixed annuities, including fixed indexed annuities (FIAs), subject to the rulemaking’s [best interest contract exemption](#) (BICE).

That exemption would permit fiduciary advisers and their firms to collect fees not typically permitted to them under existing laws provided they have acknowledged their fiduciary status. The Labor Department, in developing the final rule, has sought to eliminate what it viewed as conflicts of interest in retirement financial planning advice, stressing the importance of serving the best interests of clients.

**Rule invalid.** According to NAFA, the DOL’s fiduciary rule is invalid because the agency exceeded its authority to regulate IRAs and improperly categorizes insurance agents as “fiduciaries.” It also creates a private right of action, which only Congress can do. Moreover, Congress has determined that fixed annuities, including fixed indexed annuities (FIAs), should be regulated by the states, NAFA asserts, instead of under federal securities laws. Moreover, the DOL’s decision to include FIAs under the BICE, rather than under the less-onerous prohibited transaction exemption “PTE 84-24,” as originally proposed, without an “opportunity for meaningful comment and without adequate justification was arbitrary and capricious,” the complaint asserts.

**Impact of switch to BICE.** NAFA alleges that the FIA industry was “blindsided by the last-minute switch” that made FIAs subject to the BICE, which will be “highly detrimental” to both the FIA industry and its clients. “Insurance carriers will need to restructure their distribution models, because they will not be able to guarantee in a [best interest contract] that independent agents selling insurance products from different carriers have acted in the best interest of purchasers. To avoid this problem, insurers may need to work only with agents who are registered as broker-dealers,” according to the complaint.

“As fixed insurance products and not securities, FIAs and those who create, distribute and sell them stand to be uniquely harmed by this rule,” NAFA contends. In its [application for a preliminary injunction](#) to stay the applicability date of the DOL’s fiduciary rule, NAFA warns that if the rule is not stayed, “in the weeks and months ahead, jobs will be lost, careers will be altered, firms will close, and vast resources will be invested in what will likely prove to be an unnecessary effort to comply with a Rule that should not be allowed to stand.”

**Five-prong case against the rule.** In its [memorandum](#) in support of its request for injunctive relief, NAFA says that the case, at bottom, is a simple one, built on these five propositions:

1. Insurance agents selling annuity products were never intended by Congress to be fiduciaries.
2. Fiduciary duties applicable to ERISA advisers were never intended to apply to IRA advisers.

3. No federal agency on its own has authority to create a private cause of action.
4. Mandating compensation be “reasonable” with nothing more is a regulatory trap that is void for vagueness.
5. Placing FIAs within the BICE is flawed because it is contrary to federal securities law and no consideration was given to the effect it would have on the fixed annuity industry.

For all of these reasons, the DOL’s fiduciary rule must be vacated, and in the interim, to avoid the immediate and irreparable harm fleshed out in its court filings, NAFA is asking the court to issue a preliminary injunction during the pendency of the litigation.

“NAFA believes this action is necessary, not only to defend the interests of our members, but to protect consumers against excessive government regulation that will only hurt average working Americans trying to save for retirement,” Chip Anderson, Executive Director of NAFA, said in a [statement](#).

“The inherent problems with this rule are vast and far-reaching,” Anderson continues. “This rule is administratively unworkable, especially for the fixed annuity industry, and that means quality products and advice currently available to middle-income Americans will be harder to access and more expensive.”

Companies: National Association for Fixed Annuities

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