

Tenth Circuit Upholds DOL's Authority to Impose New Conditions for PTEs and Leaves Door Open for Changes to Fiduciary Rule

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The Tenth Circuit recently affirmed the Department of Labor's authority to impose new conditions for exemption from prohibited transaction rules with respect to the sale of annuity contracts. The case related to the Department's decision, as part of the 2016 "fiduciary rule," to make sales of fixed indexed annuities ineligible for Prohibited Transaction Exemption 84-24, requiring instead that sales of those products satisfy the more onerous requirements of the new Best Interest Contract Exemption ("BIC Exemption").

The plaintiff in the case, Market Synergy Group, alleged that the Department had not satisfied its obligation under the Administrative Procedure Act to provide advance notice of "either the terms or substance of the proposed rule or a description of the subjects and issues involved." The Department's proposed rule would have affected only "variable annuity contracts and other annuity contracts that are securities under federal securities laws." Because they are not treated as securities under federal securities laws, fixed indexed annuities would not have been affected. But the Department requested comments on whether its proposal "[struck] the appropriate balance."

The Tenth Circuit held that the Department's request for comments on whether it had struck the appropriate balance was sufficient to satisfy the Department's notice obligations. In light of the request for comments, the court reasoned that extending the new requirements to fixed indexed annuities was a "logical outgrowth" of the initial proposal.

In addition to holding that the Department had satisfied its notice obligation, the Court also ruled that:

- It was not arbitrary to treat fixed indexed annuities like variable annuities (and less favorably than traditional fixed annuities), because the record established that the Department had sufficiently considered the products' complexity and risk, and potential conflicts of interest in the sales process; and
- The Department's regulatory impact analysis sufficiently addressed the effect that the more

onerous BIC Exemption requirements would have on the insurance market before concluding that fears of increased costs were (1) overstated and (2) counteracted by the benefit to investors.

Meanwhile, the more onerous BIC Exemption requirements that were the subject of the litigation remain on hold until July 2019, pending the Department's review of the fiduciary rule. That review can still lead to a loosening of the conditions for the exemption, and possibly even a decision to put fixed indexed annuities back within the scope of PTE 84-24. The Court's decision leaves the Department leeway to make a final decision through the administrative process.

The case is *Mkt. Synergy Grp., Inc. v. United States Dep't of Labor*, No. 17-3038, 2018 WL 1279743 (10th Cir. Mar. 13, 2018).

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