**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF TEXAS**
**TYLER DIVISION**

MANHATTANLIFE INSURANCE AND ANNUITY COMPANY, PASCHALL AND ASSOCIATES, INC., and WILLIAM C. PASCHALL,

*Plaintiffs,*

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEPARTMENT OF THE TREASURY, DEPARTMENT OF LABOR, XAVIER BECERRA *in his official capacity as Secretary of Health and Human Services*, JANET YELLEN *in her official capacity as Secretary of the Treasury*, and JULIE A. SU *in her official capacity as Acting Secretary of Labor*,

*Defendants.*

Civil Action No. _____

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

## COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs ManhattanLife Insurance and Annuity Company, Paschall and Associates, Inc. d/b/a Paschall Health Insurance, and William C. Paschall bring this action for declaratory and injunctive relief against defendants the United States Department of Health and Human Services (HHS), Department of the Treasury, Department of Labor, and the current heads of those agencies in their official capacities, and allege as follows:

## INTRODUCTION

1. This action under the Administrative Procedure Act (APA) challenges certain provisions of a final rule issued by defendants in clear violation of their statutory authority and without observance of the APA's notice-and-comment requirement.

2. Federal law imposes certain requirements on most health insurance policies sold in the United States, including that they cover "essential health benefits," *i.e.*, that they qualify as comprehensive health insurance. These requirements do not apply, however, to certain insurance that qualifies as an "excepted benefit." 42 U.S.C. § 300gg-91(c). The excepted benefit at issue here—"fixed indemnity insurance," *id.* § 300gg-91(c)(3)(B)—is exempt from federal regulation if it satisfies three statutory criteria: separateness, noncoordination, and independence. *Id.* § 300gg-21(c)(2) (providing that federal requirements "shall not apply" to fixed indemnity insurance "if all of the following conditions are met"); *see infra* ¶ 28.

3. This case is about the Departments' attempt to add a fourth criterion found nowhere in the statute. Under the final rule, fixed indemnity insurance is not exempt from federal insurance requirements unless, in addition to meeting the three statutory criteria, the policy's marketing, application, and enrollment materials include a conspicuous notice stating that the product is "NOT health insurance." 89 Fed. Reg. 23,338, 23,382, 23,389 (Apr. 3, 2024) (the "Notice Rule").

4. This is not the first time the Departments have unlawfully attempted to graft new requirements onto the fixed indemnity exemption. In 2014, HHS promulgated a regulation requiring that, in addition to satisfying the three statutory criteria, fixed indemnity insurance would be exempt from otherwise applicable requirements only if purchased by an individual who also purchased minimum essential coverage, *i.e.*, comprehensive health insurance. 79 Fed. Reg. 30,240, 30,253 (May 27, 2014). Plaintiff ManhattanLife's predecessor sued HHS on the ground that it had no authority to augment Congress's exclusive list of criteria. The district court agreed. *Central United Life, Inc. v. Burwell*, 128 F. Supp. 3d 321, 329 (D.D.C. 2015). So did the D.C. Circuit, because "nothing in the [statute] suggests Congress left any leeway for HHS to tack on additional criteria." *Central United Life Ins. Co. v. Burwell*, 827 F.3d 70, 73 (D.C. Cir. 2016).

5. The Notice Rule is *Central United* redux. While Congress "exempted *all*" fixed indemnity policies that satisfy the three statutory criteria, the Departments, "with [their] additional criterion, exemp[t] *less than all*" such conforming policies. *Id.* But now, as then, the Departments "lac[k] authority to demand more of fixed indemnity providers than Congress required." *Id.* at 75. Congress commanded in clear and unambiguous terms that federal requirements "shall not apply" to fixed indemnity policies "if [three statutory] conditions are met." 42 U.S.C. § 300gg-21(c)(2). The Departments are not at liberty to countermand Congress by providing that federal requirements *shall* apply to fixed indemnity insurance that meets all of the statutory criteria unless the Departments' preferred notice is given. Nor did Congress authorize the Departments to regulate exempted benefits; that would defeat the entire purpose of the exemption, which was to leave regulation of these forms of insurance to the States. The Departments may believe that Congress should have given them this authority. But "an agency may not rewrite clear statutory terms to suit

its own sense of how the statute should operate." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 328 (2014). Because the Notice Rule exceeds the Departments' statutory authority, it must be vacated.

6. Even if the Departments had statutory authority to impose a notice requirement, the Notice Rule is arbitrary, capricious, and contrary to law. The Departments claimed the Notice Rule was necessary given the purported "prevalence of aggressive and deceptive sales and marketing practices" that could cause consumers to "mistakenly enroll in … fixed indemnity excepted benefits coverage as a substitute for comprehensive coverage." 89 Fed. Reg. at 23,409. But the Departments' sweeping claims of widespread consumer deception and confusion are unfounded. They rest on isolated anecdotes, with the Departments' own source conceding the lack of a "comprehensive and data-informed view of the fixed indemnity market." Christen Linke Young & Kathleen Hannick, *Fixed Indemnity Health Coverage is a Problematic Form of "Junk Insurance"*, Brookings (Aug. 4, 2020), tinyurl.com/2x7vv6ee. And although all agree that "States play an important role in regulating fixed indemnity excepted benefits," 89 Fed. Reg. at 23,382, the Departments failed to explain why state regulators cannot be relied upon to address any abusive sales practices within their jurisdictions. While the Departments claimed they merely "aimed to support informed consumer choice," *id.* at 23,379, in reality the Notice Rule is designed to dissuade consumers from purchasing fixed indemnity insurance because the Departments disagree with Congress's decision to allow consumers the freedom to purchase such policies as they see fit.

7. Even if the Departments had statutory authority to impose a federal notice requirement and the record supported the need for one, the notice imposed by the Notice Rule is arbitrary, capricious, and contrary to law because it contradicts the statute and requires insurers to make false statements. The statute uniformly refers to and treats fixed indemnity insurance as a type of health

insurance—one exempt from the strictures placed on *comprehensive* health insurance. That treatment is also reflected in the Departments' own regulations, the preambles to their proposed and final rules, and longstanding industry practice. And it comports with common sense: like other health insurance, fixed indemnity policies pay money to an insured upon the occurrence of a health-related event, and thus fall squarely within the ordinary understanding of "health insurance." Despite all this, and without any explanation, the Notice Rule unlawfully demands that insurers falsely tell their customers that fixed indemnity insurance is "NOT health insurance."

8. Making matters worse, the Departments failed to give regulated parties the requisite notice of the final rule. The proposed rule offered two alternative notices, both of which stated merely that fixed indemnity insurance is not "*comprehensive* health insurance." The Departments never suggested that, contrary to the statute, regulations, and industry and common understanding, the Departments might decide to omit "comprehensive" from the notice entirely. Plaintiffs thus could not have reasonably anticipated that the Departments would abruptly decide to mandate a notice falsely stating that fixed indemnity insurance is "NOT health insurance" at all. The lack of legally required notice independently renders the Notice Rule unlawful.

9. Accordingly, the Court should vacate the Notice Rule as in excess of statutory authority; arbitrary, capricious, and contrary to law; and without observance of proper procedure.

## PARTIES

10. Plaintiff ManhattanLife Insurance and Annuity Company is an insurance company organized and existing under the laws of the State of Texas with its principal place of business in Houston, Texas. ManhattanLife sells fixed indemnity insurance policies in the individual and group markets.

11. Plaintiff Paschall and Associates, Inc. d/b/a Paschall Health Insurance is a corporation organized and existing under the laws of the State of Texas with its principal place of business

in Tyler, Texas. Paschall Health Insurance sells fixed indemnity health insurance policies, including those issued by ManhattanLife. Paschall Health Insurance is owned by plaintiff William C. Paschall.

12. Plaintiff William C. Paschall is an insurance agent based in Tyler, Texas. Mr. Paschall has spent his career building a small business, Paschall Health Insurance, that specializes in helping the residents of East Texas find the insurance product that fits their budget and lifestyle, which in many cases is fixed indemnity health insurance. Mr. Paschall has built a name, reputation, and livelihood through his small business.

13. Defendant HHS is an executive department of the United States headquartered in Washington, D.C.

14. Defendant Department of the Treasury is an executive department of the United States headquartered in Washington, D.C.

15. Defendant Department of Labor is an executive department of the United States headquartered in Washington, D.C.

16. Defendant Xavier Becerra is the Secretary of HHS. Secretary Becerra is sued in his official capacity only.

17. Defendant Janet Yellen is the Secretary of the Treasury. Secretary Yellen is sued in her official capacity only.

18. Defendant Julie A. Su is the Acting Secretary of Labor. Acting Secretary Su is sued in her official capacity only.

## JURISDICTION AND VENUE

19. The Court has jurisdiction over this APA action under 28 U.S.C. § 1331.

20. Venue is proper in this judicial district under 28 U.S.C. § 1391(e) because this is an action against officers and agencies of the United States, at least one plaintiff resides in this district, and no real property is involved in this action.

**STANDING**

21. Plaintiffs face imminent, concrete, and particularized injuries due to the Notice Rule, and those injuries would be redressed by a ruling setting the Notice Rule aside.

22. ManhattanLife sells fixed indemnity insurance policies that satisfy the statutory criteria to be exempt from federal requirements. Accordingly, these policies need not, and do not, satisfy those requirements. But if ManhattanLife does not comply with the Notice Rule, the fixed indemnity policies it sells will no longer be exempted, and therefore could not lawfully be sold. ManhattanLife will therefore be required either to stop selling its fixed indemnity policies in their current form or to alter its current application, enrollment, and marketing materials to include the new federal notice falsely stating that fixed indemnity policies are "NOT health insurance." If it does the latter, ManhattanLife will sell fewer fixed indemnity policies because some of its current and prospective customers who would otherwise have purchased such policies will be dissuaded from doing so by a notice stating, falsely, that the policy is "NOT health insurance." ManhattanLife thus faces imminent financial injury if the Notice Rule goes into effect.

23. Mr. Paschall, through his small business Paschall Health Insurance, sells fixed indemnity insurance policies to individuals in East Texas. Mr. Paschall earns a commission for each fixed indemnity policy he sells. Mr. Paschall has spent decades building a reputation for integrity and prides himself on being open and honest with his customers, including with respect to fixed indemnity policies, which lie at the core of his business. Mr. Paschall markets fixed indemnity policies as "health insurance" because he believes that, consistent with industry practice and common usage, fixed indemnity insurance is health insurance. In the normal course of his business,

Mr. Paschall uses the brochures and application forms provided by the policy's issuer, including those provided by ManhattanLife. But if the Notice Rule goes into effect, the marketing and application materials that Mr. Paschall normally uses will falsely state that fixed indemnity insurance is "NOT health insurance." As a result, Mr. Paschall will be injured in at least three ways:

i. *Reduced Sales*. Because many of Mr. Paschall's current and prospective customers understand fixed indemnity insurance to be health insurance, Mr. Paschall reasonably anticipates that some of his customers who otherwise would have purchased a fixed indemnity policy will, upon seeing the false statement compelled by the Notice Rule, decide not to do so. *See All. for Hippocratic Med. v. FDA*, 78 F.4th 210, 235 (5th Cir. 2023) ("[E]conomic harm—like damage to one's business interest—is a quintessential Article III injury.").

ii. *Wasted Business Time*. To maintain the trust of his customers and mitigate the confusion that he reasonably believes the Notice Rule will create, Mr. Paschall will be forced to spend time explaining why, despite the text of a government-imposed notice, fixed indemnity insurance is in fact health insurance. *See OCA-Greater Houston v. Texas*, 867 F.3d 604, 612 (5th Cir. 2017) (finding injury-in-fact where law caused plaintiff to "consum[e] its time and resources in a way they would not have been spent absent the … law").

iii. *Compelled Speech*. If the Notice Rule goes into effect, Mr. Paschall will be compelled to either pass out written materials bearing a government-mandated message with which he disagrees, stop using marketing and application materials in his discussions with customers, or incur the expense of creating bespoke

marketing and application materials to use in lieu of those regulated by the Notice Rule. *See Book People, Inc. v. Wong*, 91 F.4th 318, 333 (5th Cir. 2024) (finding standing where challenged law forced plaintiff to either "submit" a "compelled" message or "refuse to comply and lose customers and revenue").

## BACKGROUND

24. Federal law imposes numerous requirements on health insurance issuers offering group or individual health insurance. For example, under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936, insurers must allow policyholders to renew their coverage except in limited circumstances. 42 U.S.C. § 300gg-42.[1] Under the Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, 124 Stat. 119 (2010), insurers cannot impose preexisting condition exclusions, 42 U.S.C. § 300gg-3, and must cover all "essential health benefits," *id.* § 300gg-6.[2] These provisions reside in a subchapter of Title 42 entitled "Requirements Relating to Health Insurance Coverage." *Id.* ch. 6A, subch. XXV.

25. These requirements, however, do not apply to a health insurance policy's provision of "excepted benefits" in certain circumstances. "[F]ixed indemnity insurance" is one type of excepted benefit. *Id.* § 300gg-91(c)(3)(B). As the Departments have recognized, "fixed indemnity insurance" typically refers to health "insurance that pays a fixed amount under specified conditions without regard to other insurance." 79 Fed. Reg. 15,808, 15,818 (Mar. 21, 2014).

[1] HIPAA made materially identical amendments to the Public Health Service Act (PHSA), *see* 42 U.S.C. § 300gg-41 *et seq.*, which is enforced by HHS; the Employee Retirement Income Security Act (ERISA), *see* 29 U.S.C. § 1181 *et seq.*, which is enforced by the Department of Labor; and the Internal Revenue Code (IRC), *see* 26 U.S.C. § 9801 *et seq.*, which is enforced by the Department of the Treasury. For ease of reference, this complaint cites the PHSA provisions and implementing regulations.

[2] The ACA added provisions to ERISA, 29 U.S.C. § 1185d, and the IRC, 26 U.S.C. § 9815, that incorporate by reference the new requirements in Title 42.

26. As ManhattanLife's "Affordable Choice" policy shows, fixed indemnity insurance has all the hallmarks of health insurance. When an insured incurs costs because of a health event, the policy pays the beneficiary a fixed sum that can be used to cover those costs. An Affordable Choice plan might pay, for example, $5,000 per day for inpatient hospital confinement and $100 per doctor's office visit, depending on the benefits schedule the customer selects. These benefits pay out without the insured having to first meet a deductible. Affordable Choice beneficiaries also have access to substantial discounts through a network of healthcare providers. With cash benefits and the network discounts combined, fixed indemnity beneficiaries are often insured against the vast majority of costs for an unexpected health event. An example from ManhattanLife's brochure illustrates the point: a beneficiary of an "Elite" level Affordable Choice policy breaks his arm and incurs $2,384 in medical bills for an emergency room visit, four follow-up office visits, and five follow-up x-rays; the policy pays $925 in cash benefits to the beneficiary and provides a $596 (25%) network discount, leaving the insured to pay $863 out of pocket.

27. This kind of policy is a rational choice for some consumers, either as a supplement to or substitute for costlier comprehensive insurance. For example, "healthy peopl[e] may deliberately elect this benefit" because they "prefe[r] the lower premium and lower or absent deductible." Young & Hannick, *supra*. Indeed, although wealthy individuals likely prefer more comprehensive plans regardless of the deductible, some "young, healthy, low-income families living paycheck-to-paycheck" might rationally choose a fixed indemnity policy with a low deductible—or no deductible at all—that provides direct payments if a medical event occurs. John C. Goodman, *Alternatives to Obamacare*, Forbes (Jan. 30, 2019) https://tinyurl.com/yec73y65. Fixed indemnity insurance is not for everyone, but for some it represents a reasonable and valuable option.

28. Fixed indemnity insurance is exempt from the ACA's requirements for comprehensive health insurance when "all of the following conditions are met:" (1) "The benefits are provided under a separate policy, certificate, or contract of insurance"; (2) "There is no coordination between the provision of such benefits and any exclusion of benefits under any group health plan maintained by the same plan sponsor"; and (3) "Such benefits are paid with respect to an event without regard to whether benefits are provided with respect to such an event under any group health plan maintained by the same plan sponsor or, with respect to individual coverage, under any health insurance coverage maintained by the same health insurance issuer." 42 U.S.C. § 300gg-21(c)(2). And to be exempt from HIPAA's requirements, fixed indemnity insurance need only satisfy the first of these conditions: that "the benefits are provided under a separate policy, certificate, or contract of insurance." *Id.* § 300gg-63(b). In short, fixed indemnity insurance is exempt from otherwise applicable federal requirements for health insurance if the benefits it provides are separate from, not coordinated with, and independent of other health insurance.

29. For many years, the Departments' implementing regulations simply parroted these three statutory criteria. *See, e.g.*, 45 C.F.R. § 146.145(b)(4) (2004); 26 C.F.R. § 54.9831-1(c)(4) (2008); 29 C.F.R. § 2590.732(c)(4) (2012).

30. In 2014, however, HHS purported to "amend the criteria for fixed indemnity insurance to be treated as an excepted benefit in the individual health insurance market." 79 Fed. Reg. at 30,253. Under the 2014 rule, fixed indemnity policies sold in the individual market would not be "considered an excepted benefit" unless, in addition to meeting the statutory criteria, the benefits were "provided only to individuals who have other health coverage that" satisfied the ACA's individual mandate. *Id.* at 30,253, 30,257; *see also NFIB v. Sebelius*, 567 U.S. 519, 538–39 (2012). The 2014 rule also required fixed indemnity insurers operating in the individual market to state on

their plan materials that the plan was "a supplement to health insurance" and "not a substitute for major medical coverage." 79 Fed. Reg. at 30,253, 30,257.

31. In response, ManhattanLife's predecessor, Central United Life Insurance Company, successfully challenged the minimum-essential-coverage requirement of the 2014 rule as beyond HHS's statutory authority. As the D.C. Circuit explained:

> Nothing in the PHSA suggests Congress left any leeway for HHS to tack on additional criteria. Nor do any subsequent amendments to it. … At no point does the ACA give even the slightest indication the definition of "excepted benefit" was suddenly debatable; rather, the Act doubled down on the PHSA's existing requirements. Ever since it first carefully defined what counts as an "excepted benefit" in 1996, Congress has never changed course or put its original definition in any doubt. Where the text is as clear as it is here, "that is the end of the matter."
>
> …
>
> HHS lack[s] authority to demand more of fixed indemnity providers than Congress required … .

*Central United*, 827 F.3d at 73–75 (citations omitted).

32. On July 12, 2023, the Departments proposed to again amend the criteria for fixed indemnity insurance to be exempted from the requirements applicable to comprehensive coverage. *See* 88 Fed. Reg. 44,596. Specifically, the Departments: proposed to require fixed indemnity benefits to be paid on a strictly "per-period" basis, *id.* at 44,620–24; contemplated prohibiting fixed indemnity plans from paying benefits directly to providers, *id.* at 44,624–25; offered a new, expansive understanding of "coordination" of benefits, *id.* at 44,628–30; and—relevant here—proposed to modify the notice requirement established under the 2014 rule and make it applicable in the group market as well, *id.* at 44,625–28.

33. The Departments proposed two alternative versions of the revised notice. Both stated that fixed indemnity insurance is not "*comprehensive* health insurance." *Id.* at 44,626, 44,628 (emphasis added). That wording aligned with the statutory scheme, which is clear that

"fixed indemnity insurance" is a type of "health insurance coverage" that is exempt from the requirements applicable to comprehensive health insurance. *See, e.g.*, 42 U.S.C. §§ 300gg-63(b), 300gg-91(b)(1), (c)(3)(B). It aligned with the Departments' regulations, which include "fixed indemnity" insurance among types of exempted "health insurance coverage." 45 C.F.R. §§ 146.145(b), 148.220(b). And it aligned with the Departments' goal of "distinguishing fixed indemnity excepted benefits coverage from comprehensive coverage." 88 Fed. Reg. at 44,626.

34. In full, the two proposed notices were:

> Notice to Consumers About Fixed Indemnity Insurance
>
> **IMPORTANT:** This is fixed indemnity insurance. **This isn't comprehensive health insurance** and **doesn't** have to include most Federal consumer protections for health insurance.
>
> Visit HealthCare.gov online or call 1-800-318-2596 (TTY: 1-855-889-4325) to review your options for comprehensive health insurance. If you're eligible for coverage through your employer or a family member's employer, contact the employer for more information. Contact your State department of insurance if you have questions or complaints about this policy.

> **WARNING**
>
> **This is not comprehensive health insurance.** This is fixed indemnity insurance.
>
> This may provide a cash benefit when you are sick or hospitalized. It is not intended to cover the cost of your care.
>
> Contact your State department of insurance if you have questions or complaints about this policy.
>
> For info on comprehensive health insurance coverage options:
> - Visit HealthCare.gov online or call 1-800-318-2596 (TTY: 1-855-889-4325)
> - Contact your employer or family member's employer

88 Fed. Reg. at 44,626, 44,628.

35. The proposed rule never suggested that the Departments were considering a notice that would deem fixed indemnity insurance not to be "health insurance" at all. Nor did the Departments seek comments on this particular aspect of the proposed notices. Rather, the Departments sought comments on matters such as whether to specify that the notice was legally required or whether to include state-specific contact information. *See id.* at 44,627–28.

36. The Departments sought to justify these proposed changes, including the proposed notice, as necessary to "address reports of troubling marketing and sales tactics … that mislead consumers to believe that hospital indemnity or other fixed indemnity insurance constitutes comprehensive coverage." *Id.* at 44,619. Yet the Departments offered little more than a few anecdotes to support their claim of widespread consumer confusion.

37. ManhattanLife submitted comments on several aspects of the proposed rule, including the proposed notices. *See* Comment Letter from ManhattanLife to Departments (Sept. 11, 2023), tinyurl.com/bdze2vv8. Among other things, ManhattanLife argued that the Departments lacked statutory authority to require a notice of any kind and that the Departments had not adequately supported their claims of rampant customer confusion. *Id.* at 7, 10 (citing *Central United*, 827 F.3d at 73–75). Because they could not reasonably have anticipated that the Departments would impose such a requirement, ManhattanLife had no opportunity to comment on a notice that would deem fixed indemnity insurance not to be health insurance at all.

38. The Departments issued the final rule on April 3, 2024. 89 Fed. Reg. 23,338. Although they declined (for now) to finalize any other provision of the proposed fixed indemnity rule, the Departments adopted a revised version of the proposed notices. *Id.* at 23,388–89.

39. Unlike the proposed notices, which both stated only that fixed indemnity insurance is not "comprehensive health insurance," the finalized notice requires fixed indemnity insurers to state that "a fixed indemnity policy" is "NOT health insurance." *Id.* at 23,389. It further requires fixed indemnity insurers to state that, "[s]ince this policy isn't health insurance, it doesn't have to include most Federal consumer protections that apply to health insurance." *Id.*

40. The Departments offered no explanation for this abrupt change. *See id.* at 23,387–88 (explaining other changes from proposed notices). Nor did they even attempt to justify deeming

fixed indemnity insurance "NOT health insurance" when the governing statute, the Departments own regulations, and even the preamble of the final rule all treat fixed indemnity insurance as a type of health insurance. *See supra* ¶ 33; 89 Fed. Reg. at 23,383 (including fixed indemnity insurance as part of the "Federal framework for health insurance coverage").

41. In full, the final notice states:

**IMPORTANT: This is a fixed indemnity policy, NOT health insurance**

This fixed indemnity policy may pay you a limited dollar amount if you're sick or hospitalized. You're still responsible for paying the cost of your care.

- The payment you get isn't based on the size of your medical bill.
- There might be a limit on how much this policy will pay each year.
- This policy isn't a substitute for comprehensive health insurance.
- Since this policy isn't health insurance, it doesn't have to include most Federal consumer protections that apply to health insurance.

**Looking for comprehensive health insurance?**

- **Visit HealthCare.gov** or call **1-800-318-2596** (TTY: 1-855-889-4325) to find health coverage options.
- To find out if you can get health insurance through your job, or a family member's job, contact the employer.

**Questions about this policy?**

- For questions or complaints about this policy, contact your State Department of Insurance. Find their number on the National Association of Insurance Commissioners' website (naic.org) under "Insurance Departments."
- If you have this policy through your job, or a family member's job, contact the employer.

89 Fed. Reg. at 23,389.

42. This notice must be provided "in at least 14-point font" on "the first page (in either paper or electronic form, including on a website) of any marketing, application, and enrollment materials" at the time of enrollment or reenrollment. 89 Fed. Reg. at 23,418, 23,420 (to be codified at 45 C.F.R. §§ 146.145(b)(4)(ii)(D), 148.220(b)(4)(iii)(A)).

43. Under the Notice Rule, a fixed indemnity policy is not considered exempt from the requirements applicable to comprehensive health insurance if the required notice is not given. *Id.* As the Departments explained, under the Notice Rule, "fixed indemnity insurance offered without [the required] notice would not qualify as fixed indemnity excepted benefits coverage and would be subject to the Federal consumer protections and requirements applicable to comprehensive coverage." 89 Fed. Reg. at 23,383. Of course, in order to "be subject to the Federal consumer protections and requirements applicable to comprehensive coverage," fixed indemnity polices must provide "health insurance coverage" in the first place. *See, e.g.*, 42 U.S.C. § 300gg-6(a).

44. The Departments offered two sources of authority for the Notice Rule. First, they asserted that it was a permissible exercise of their "authority to interpret and implement the statutory provisions governing [excepted benefit] insurance products." 89 Fed. Reg. at 23,381 & n.237. They did not specify, however, what specific statutory text the Notice Rule could be understood to "interpret" or "implement." Second, the Departments asserted that the Notice Rule was permissible under their "authority to promulgate regulations as [they] determine may be necessary or appropriate to carry out the provisions" of the governing statutes. *Id.* at 23,381 & n.238. Again, the Departments did not point to any particular "provision" the Notice Rule was "carry[ing] out."

45. The Departments also contended that *Central United* was distinguishable because the Notice Rule "is not an impermissible requirement being added to the statutory criteria for fixed indemnity benefits coverage." *Id.* at 23,382. Two sentences later, however, the Departments stated that under the Notice Rule, "insurance offered without such a notice would not qualify as fixed indemnity excepted benefits coverage." *Id.*

46. In justifying the Notice Rule, the Departments pointed to the "prevalence of deceptive marketing practices," *id.* at 23,360, yet they offered scant evidence in support. And in the face

of comments explaining that a federal notice is unnecessary because States are more than capable of regulating deceptive marketing and addressing any consumer confusion, *see id.* at 23,382, the Departments offered no reasoned basis to find that state regulation is inadequate.

47. The Notice Rule is effective for plan years or coverage periods beginning on or after January 1, 2025. 89 Fed. Reg. at 23,418, 23,420 (to be codified at 45 C.F.R. §§ 146.145(b)(4)(ii)(D), 148.220(b)(4)(iii)(A)).

## COUNT I

### THE NOTICE RULE IS IN EXCESS OF STATUTORY AUTHORITY (5 U.S.C. § 706(2)(C))

48. The foregoing paragraphs are incorporated by reference.

49. The Notice Rule exceeds the Departments' statutory authority. Under the statute, fixed indemnity policies are exempt from the requirements applicable to comprehensive health insurance if "all of the following conditions are met:" separateness, noncoordination, and independence. 42 U.S.C. § 300gg-21(c)(2). The Departments have no authority to "tack on" to that list "additional" conditions. *Central United*, 827 F.3d at 73. The Notice Rule does just that, providing a fourth condition that a fixed indemnity policy must satisfy to qualify as an exempted benefit.

50. Because the Notice Rule exceeds the Departments' statutory authority, it should be vacated. *See* 5 U.S.C. § 706(2)(C) (providing that courts "shall" "hold unlawful and set aside agency action" that is "in excess of statutory jurisdiction, authority, or limitations").

## COUNT II

### THE NOTICE RULE IS ARBITRARY, CAPRICIOUS, AND CONTRARY TO LAW (5 U.S.C. § 706(2)(A))

51. The foregoing paragraphs are incorporated by reference.

52. Even if the Departments had statutory authority to impose a notice requirement, the Notice Rule is unlawful because it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

53. The Departments premised the need for a federally mandated notice on the purported prevalence of deceptive marketing of fixed indemnity policies. But that premise is unfounded, resting primarily on anecdotes and speculation. Further, the Departments did not adequately explain why state regulation could not address problematic sales practices. The Notice Rule is thus unlawful because the Departments "failed to consider an important aspect of the problem" they set out to regulate and "offered an explanation for [the] decision that runs counter to the evidence." *Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1013 (5th Cir. 2019).

54. The Notice Rule is also arbitrary and capricious because it requires insurers to falsely tell prospective customers that fixed indemnity insurance is "NOT health insurance," despite the statute, common usage, and industry practice all treating fixed indemnity insurance as a type of health insurance. Because the Notice Rule contradicts the statute's express terms, as well as the statute's "design and structure," it is unlawful. *Util. Air. Regul. Grp.*, 573 U.S. at 321. And even if it were not substantively unlawful, the Notice Rule is arbitrary and capricious because the Departments "g[ave] no explanation whatsoever," *Clarke v. CFTC*, 74 F.4th 627, 641 (5th Cir. 2023), for their decision to deem fixed indemnity insurance "NOT health insurance."

55. For these reasons as well, the Notice Rule should be vacated.

## COUNT III

## THE NOTICE RULE WAS PROMULGATED WITHOUT PROPER PROCEDURE (5 U.S.C. § 706(2)(D))

56. The foregoing paragraphs are incorporated by reference.

57. The APA requires agencies to publish a "notice of proposed rule making" setting forth "the terms or substance of the proposed rule," then provide the public with "an opportunity to participate in the rule making" by providing comments. 5 U.S.C. § 553(b)(3), (c).

58. The agency's notice must "adequately frame the subjects for discussion such that the affected party should have anticipated the agency's final course in light of the initial notice." *Mock v. Garland*, 75 F.4th 563, 583 (5th Cir. 2023). If the final rule is not a "logical outgrowth of the rule proposed," then "a court must set aside the agency action found to be 'without observance of procedure required by law.'" *Id.* (quoting 5 U.S.C. § 706(2)(D)).

59. The Notice Rule is not a logical outgrowth of the proposed rule. Both of the Departments' proposed notices—consistent with the statutory scheme, the Departments' regulations, the Departments' stated rationale, and longstanding industry understanding—contemplated that fixed indemnity insurance is health insurance, just not "comprehensive" health insurance. 88 Fed. Reg. at 44,626, 44,628. Nowhere in the proposed rule did the Departments suggest they were considering a notice that would deem fixed indemnity insurance not to be "health insurance" at all. Rather, the Departments sought comments on other, unrelated aspects of the proposed notices. *See id.* at 44,627–28. "Commentators reading the proposed Rule's language could not have reasonably foreseen that the Final Rule would" abruptly shift from treating fixed indemnity insurance as a type of excepted health insurance to requiring insurers to state, falsely, that fixed indemnity insurance is "NOT health insurance." *Mock*, 75 F.4th at 584.

60. Because plaintiffs "could not comment on the specifics of" the Notice Rule, they were prejudiced by the Departments failure to provide sufficient notice. *Id.* at 586. If the Departments had complied with their notice obligations, plaintiffs could and would have explained to the Departments that fixed indemnity health insurance is precisely that: health insurance.

61. The Notice Rule therefore "must be set aside as unlawful." *Id.*

**PRAYER FOR RELIEF**

Plaintiffs respectfully request that the Court enter judgment in their favor and grant the following relief:

(1) A declaration that the Departments acted unlawfully in promulgating the Notice Rule;

(2) An order vacating:

a. 26 C.F.R. § 54.9831-1(c)(4)(ii)(D);

b. 29 C.F.R. § 2590.732(c)(4)(ii)(D);

c. 45 C.F.R. § 146.145(b)(4)(ii)(D); and

d. 45 C.F.R. § 148.220(b)(4)(iii)(A);

(3) An injunction barring the Departments from enforcing the foregoing provisions;

(4) Attorneys' fees and costs pursuant to 28 U.S.C. § 2412; and

(5) Any other just and proper relief.

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Respectfully submitted,

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