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

FEDERATION OF AMERICANS FOR CONSUMER CHOICE, INC.; JAMES HOLLOWAY; JAMES JOHNSON; TX TITAN GROUP, LLC; PROVISION BROKERAGE, LLC; and V. ERIC COUCH,	§	
Plaintiffs,	§	C.A. No. 6:24-cv-00163
v.	§	
UNITED STATES DEPARTMENT OF LABOR and JULIE SU, in her official capacity as ACTING SECRETARY OF LABOR,	§	
Defendants.	§	

PLAINTIFFS' MOTION FOR STAY OF EFFECTIVE DATE AND PRELIMINARY INJUNCTION AND BRIEF IN SUPPORT THEREOF

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Plaintiffs Federation of Americans for Consumer Choice, Inc. ("FACC"), James Holloway, James Johnson, TX Titan Group, LLC, ProVision Brokerage, LLC, and V. Eric Couch (collectively, the "Agents" and, together with FACC, "Plaintiffs") move for the issuance of a preliminary injunction against Defendants United States Department of Labor ("DOL") and Julie Su, in her official capacity as Acting Secretary of the United States Department of Labor, and in support thereof, would show as follows:

I. INTRODUCTION

Separation of powers is fundamental to our system of government. Congress enacts legislation, the judiciary interprets the law, and the executive branch is supposed to enforce those laws faithfully. In this case, however, the DOL flouts these elementary Constitutional principles by reimagining the fifty-year-old Employee Retirement Income Security Act of 1974 ("ERISA") to pursue its own agenda in direct contravention of a decision rendered only six years ago by the United States Court of Appeals for the Fifth Circuit.

Propelled by its conviction that existing law does not adequately protect retirement investors, the DOL has defied Congress and the Fifth Circuit by adopting new rules virtually indistinguishable from a predecessor 2016 regulation that was emphatically struck down by the Fifth Circuit. Whereas the core holding of the Fifth Circuit decision was that not all financial salespeople are fiduciaries under ERISA, the DOL's new regulation now decrees that any insurance agent who merely complies with state insurance laws when dealing with an ERISA plan member or owner of an Individual Retirement Account ("IRA") is a fiduciary. By doing so, the DOL exceeds its authority and devises rules that are contrary to law, arbitrary, and capricious.

The DOL's campaign to turn financial professionals into fiduciaries has a long history. Most relevant to this case is the DOL's adoption in 2016 of a series of rules and related "prohibited transaction exemptions" ("PTEs")[1] designed to sweep in nearly the entire universe of financial services professionals within an expanded definition of "investment advice fiduciary" for purposes of ERISA and the Internal Revenue Code ("Code"). *See* 81 Fed. Reg. 20946 *et seq.* (April 8, 2016). Those new rules and PTEs (collectively, the "2016 Fiduciary Rule") were challenged under the Administrative Procedures Act ("APA"), and the Fifth Circuit in a sweeping repudiation of DOL's actions vacated the 2016 Fiduciary Rule *in toto*. *Chamber of Commerce of United States of Am. v. United States Dep't of Labor*, 885 F.3d 360, 388 (5th Cir. 2018). The Court held that the 2016 Fiduciary Rule was incompatible with the meaning of the term "fiduciary" as used in ERISA and the Code, which the Court explained was rooted in common law, and DOL therefore lacked authority to promulgate it. *Id*. at 379. The Court likewise held that the 2016 Fiduciary Rule was an unreasonable interpretation of statutory text and thus arbitrary and capricious within the meaning of the APA. *Id*. at 387-88.

The DOL has now promulgated a new rule that once again purports to redefine and significantly broaden who is considered an investment advice fiduciary for purposes of ERISA and the Code (the "2024 Fiduciary Rule"). 89 Fed. Reg. 32122 *et seq*. (April 25, 2024). Just as it had with the 2016 Fiduciary Rule, the DOL again amends several related PTEs, including PTE 84-24, which creates onerous conditions that insurance agents must meet to receive commission compensation if they are deemed fiduciaries under the new 2024 Fiduciary Rule. 89 Fed. Reg. 32302 *et seq*. (April 25, 2024). These new rules will become effective on September 23, 2024, 89 Fed. Reg. at 32122 and 32302, and they will have dire consequences for tens of thousands of

[1] Fiduciaries of an employee benefit plan or individual retirement account ("IRA") are generally prohibited from receiving commissions or other compensation from third parties in connection with transactions involving the plan or IRA. ERISA provides that the DOL has limited statutory authority to grant PTEs that allow fiduciaries to receive otherwise prohibited compensation in such transactions.

independent insurance agents and their clientele if not stopped.

This latest rulemaking is a brazen and transparent effort by the DOL to ignore or rewrite the holdings and rationale of *Chamber of Commerce* while professing adherence to same. Accordingly, Plaintiffs brought this action to vacate the 2024 Fiduciary Rule and the accompanying PTE-84-24 amendments under the APA on grounds that they are contrary to law and arbitrary and capricious. *See* 5 U.S.C. §§ 702, 706. Plaintiffs now seek a preliminary injunction to prevent the DOL from enforcing these unlawful regulations to protect Plaintiffs and all similarly situated persons in the insurance industry from immediate and irreparable harm.[2]

II. BACKGROUND

A. THE STATUTORY AND REGULATORY HISTORY.

1. The ERISA Statute.

Congress enacted ERISA in 1974 to regulate employee benefit plans. *Id*. at 363-64. Title I of ERISA gives the DOL regulatory authority over union and employer-sponsored retirement and welfare benefit plans. *See* 29 U.S.C. §§ 1108(a) and (b), 1135. The statute provides that a party is a fiduciary with respect to an ERISA plan to the extent that party: (a) exercises discretionary authority or control over the management of the plan or its assets; (b) renders investment advice for a fee or other compensation with respect to the assets of the plan or has the authority or responsibility to do so; or (c) has discretionary authority or control of the plan administration. *Id*. § 1002(21)(A). The second of these three subparts describes what is often referred to as an "investment advice fiduciary" and is at issue here.

Title II of ERISA amended the Code and, among other things, created IRAs and similar

[2] The evidence submitted by Plaintiffs in support of this motion and brief is included in the appendix filed contemporaneously herewith and will be cited by page numbers without initial zeros, *e.g.*, "APP 35."

tax-advantaged accounts. 26 U.S.C. § 4975(e)(1)(B). Notably, the DOL does not have supervisory or regulatory authority with respect to IRAs comparable to its authority over ERISA Title I plans, and the Code does not impose statutory duties of loyalty and prudence on IRA fiduciaries. *Chamber of Commerce*, 885 F.3d at 364. Instead, the Code allows the Internal Revenue Service to impose an excise tax on prohibited transactions involving either ERISA or IRA fiduciaries. *Id*. (citing 26 U.S.C. § 4975). The only role granted to the DOL with respect to IRAs is to define "accounting, technical and trade terms," 29 U.S.C. § 1135, and to grant exemptions from the Code's prohibited transaction provisions (*i.e.*, PTEs). *Id*. § 1108(a), 26 U.S.C. § 4975(c)(2).

2. The Five-Part Test.

In 1975, shortly after ERISA was enacted, the DOL promulgated a regulation that established a five-part test for determining who is deemed to be rendering investment advice under ERISA and the Code. The 1975 rule provided that a person rendering investment advice is one who (1) "renders advice...or makes recommendation[s] as to the advisability of investing in, purchasing, or selling securities or other property" (2) "on a regular basis" (3) "pursuant to a mutual agreement...between such person and the plan," (4) such advice "will serve as a primary basis for investment decisions with respect to plan assets," and that (5) "such person will render individualized investment advice to the plan based on the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments." 29 C.F.R. § 2510.3-21(c)(1).[3]

3. The 2016 Fiduciary Rule.

Beginning in 2010, the DOL set out to change the five-part test, culminating in the adoption

[3] The same definition is contained in the regulations under the Code. 26 C.F.R. § 54.4975-9(c).

of the 2016 Fiduciary Rule. The 2016 Fiduciary Rule was a "package of seven different rules that broadly reinterpret[ed] the term 'investment advice fiduciary' and redefine[d] exemptions to provisions concerning fiduciaries" for purposes of ERISA and the Code. *Chamber of Commerce*, 885 F.3d at 363. Specifically, the DOL replaced the 1975 rule and effectively sought to redefine who was an investment advice fiduciary to include anyone who renders investment advice and receives a fee or other compensation, directly or indirectly. *Id*. at 373.

Recognizing its new definition of an investment advice fiduciary would encompass "virtually all financial and insurance professionals who do business with ERISA plans and IRA holders," the DOL also promulgated as part of the 2016 Fiduciary Rule a new PTE, known as the Best Interest Contract Exemption (the "BIC Exemption"). *Id.* at 366-67. To qualify for the BIC Exemption, providers of financial services were required to "enter into contracts with clients that, *inter alia,* affirm[ed] their fiduciary status; incorporate[d] 'Impartial Conduct Standards' that include[d] the duties of loyalty and prudence; 'avoid[ed] misleading statements;' and charge[d] no more than 'reasonable compensation.'" *Id*. at 367.

4. The Chamber of Commerce Decision.

The Fifth Circuit vacated the 2016 Fiduciary Rule *in toto* in *Chamber of Commerce*. The court held that the 2016 Fiduciary Rule significantly expanded and conflicted with the statutory definition of fiduciary in ERISA and the Code, and the DOL therefore lacked the authority to promulgate it. *Id*. at 379. The Court likewise held that the 2016 Fiduciary Rule was an unreasonable interpretation of the statutory text and thus arbitrary and capricious within the meaning of the APA. *Id*. at 387-88. In short, the Court categorically rejected the DOL's effort to "fundamentally transform[ ] over fifty years of settled and hitherto legal practices in a large swath of the financial services and insurance industries" by its expansion of the definition of investment advice fiduciary. *Id*. at 363. The DOL did not appeal the decision in *Chamber of Commerce*.[4]

B. THE 2024 FIDUCIARY RULE AND AMENDED PTE 84-24.

On April 25, 2024, following a rushed notice and comment period, the DOL promulgated the 2024 Fiduciary Rule along with amendments to several PTEs. Like the 2016 Fiduciary Rule, the new rule eliminates the longstanding five-part test. In its place, the 2024 Fiduciary Rule defines fiduciary investment advice to be any recommendation made to an ERISA plan member or IRA owner by a broker or agent who "makes professional investment recommendations to investors on a regular basis as part of their business" if the recommendation is "made under circumstances that would indicate to a reasonable investor in like circumstances that the recommendation is based on a review of the retirement investor's particular needs or individual circumstances, reflects the application of professional or expert judgment to the retirement investor's particular needs or individual circumstances, and may be relied upon by the retirement investor as intended to advance the retirement investor's best interest." 89 Fed. Reg. at 32256.

In conjunction with the 2024 Fiduciary Rule, the DOL also amended PTE 84-24, which

[4] In July 2020, in response to *Chamber of Commerce*, the DOL issued a technical amendment to 29 C.F.R. 2510-3.21 to reinstate the text of the five-part test. 85 Fed. Reg. 40589 (July 7, 2020). At the same time, the DOL proposed a new PTE, which was ultimately issued in December 2020 as PTE 2020-02. PTE 2020-02 was accompanied by a 64-page preamble that set forth the DOL's new interpretation of the reinstated five-part test (the "New Interpretation"). *See* 85 Fed. Reg. 82798 *et seq*. (Dec. 18, 2020). The New Interpretation was challenged in two separate lawsuits, including one filed by FACC, alleging the DOL was seeking by subterfuge to achieve the same end-result of turning all insurance agents into fiduciaries through an impermissible reinterpretation of the five-part test in contravention of the *Chamber of Commerce* decision. The FACC case is still pending. In a separate case brought by the American Securities Association, the DOL's reinterpretation of the five-part test was vacated in part by the United States District Court for the Middle District of Florida, which held that the DOL could not conflate advice to employer plans with advice to IRAs for purposes of determining whether a financial professional met the "regular basis" component of the five-part test. *American Securities Association v. United States Department of Labor*, No. 8:22-CV-330-VMC-CPT, 2023 WL 1967573 (M.D. Fla. Feb. 13, 2023). The DOL did not appeal that decision.

had historically been available to insurance agents, although in practice it was rarely needed. In its pre-amendment form, PTE 84-24 allowed agents, by complying with relatively simple disclosure requirements, to receive commission payments from insurance companies for the sale of annuities to retirement investors, even if those agents were deemed fiduciaries under the traditional five-part test. 49 Fed. Reg. 13208, 13211-12 (April 3, 1984). Under amended PTE 84-24, however, only independent insurance agents may receive "reasonable" third-party compensation if they: adhere to new "Impartial Conduct Standards" prescribed by the DOL; make various required disclosures to the retirement investor, including an acknowledgment that they are, in fact, fiduciaries under ERISA and/or the Code; avoid misleading statements; and are under a supervisory program put in place by the insurance company that issued the annuity. 89 Fed. Reg. at 32340-41.

III. ARGUMENT AND AUTHORITIES

The 2024 Fiduciary Rule redefines an investment advice fiduciary in a manner that conflicts with the text of ERISA and flies in the face of the Fifth Circuit's decision in *Chamber of Commerce*. As with the 2016 Fiduciary Rule, the new rule jettisons the five-part test and provides in its place a standard that ensures every financial professional in every transaction will be deemed a fiduciary. Diametrically at odds with *Chamber of Commerce*, even one-time recommendations will be treated as fiduciary investment advice whenever a stockbroker or insurance agent deals with an ERISA plan member or IRA owner.

The DOL acknowledges that sales made by such brokers and agents are already subject to sales conduct requirements promulgated by their functional regulators, *i.e.*, the Securities Exchange Commission ("SEC") and state insurance departments, respectively, and that those requirements have been strengthened in recent years. 89 Fed. Reg. at 32128-31. Specifically, the SEC promulgated Regulation Best Interest and the National Association of Insurance

Commissioners ("NAIC") updated its Model Regulation No. 275 (copy available at https://content.naic.org/sites/default/files/inline-files/MDL-275.pdf) to include best interest obligations.[5] Consistent with established common law, however, those regulators expressly recognize that compliance with their prescribed standards and procedures does not turn brokers or insurance agents into fiduciaries. As discussed below, however, the DOL has now taken those same standards and used them to define when a broker or agent is acting as an investment advice fiduciary. As a result, brokers' and agents' compliance with applicable sales conduct requirements will render them investment advice fiduciaries under ERISA and the Code whenever they deal with retirement investors. Painting all financial salespeople with a broad fiduciary brush in this way openly defies the Fifth Circuit's central holding in *Chamber of Commerce*. Both the 2024 Fiduciary Rule and amended PTE 84-24 should therefore be vacated and a preliminary injunction should be entered to prevent them from going into effect.

A. **PRELIMINARY INJUNCTION STANDARD.**

The standards for preliminary injunction are well established:

> In deciding a motion for a preliminary injunction, a court must consider four factors: (1) a substantial threat of irreparable harm to the movant absent the injunction, (2) the likelihood of the movant's ultimate success on the merits, (3) the balance of harms to the parties, and (4) the public interest. The "first two factors of the traditional standard are the most critical." And "[t]here is authority" that "likelihood of success on the merits ... is the most important of the preliminary injunction factors."

Career Colleges & Sch. of Texas v. United States Dep't of Educ., 98 F.4th 220, 233 (5th Cir. 2024) (cleaned up).[6] The APA also expressly authorizes "the reviewing court ... [to] issue all necessary

[5] As of today, forty-five states have adopted the NAIC model regulation updates, including Texas, and other states are in the process of doing so as well.

[6] This brief uses "(cleaned up)" to indicate that internal quotation marks, alterations, and citations have been omitted from quotations. *See* Jack Metzler, *Cleaning Up Quotations*, 18

and appropriate process to postpone the effective date of an agency action." 5 U.S.C. § 705.

B. PLAINTIFFS HAVE STANDING AND WILL BE IRREPARABLY HARMED.

1. Standing.

Plaintiffs unquestionably have standing to sue. The Agents are all licensed independent insurance agents in the State of Texas. APP 1, 13, 25. They are actively engaged in assisting clients with, among other things, the purchase of financial products in connection with retirement planning. APP 2, 13-14, 27-28. As part of their business, the Agents oftentimes make rollover recommendations for the purchase of annuities to IRA owners and participants in employer-sponsored 401k and similar benefit plans, for which they receive commissions or other compensation from annuity issuers. APP 2-3, 14-15, 28-29. The Agents are therefore directly and adversely affected by the 2024 Fiduciary Rule, which will now deem them investment advice fiduciaries under ERISA or the Code, as applicable. As such, they will be subjected to burdensome regulation and new potential liability under the 2024 Fiduciary Rule. In addition, to continue offering IRA products, whether in rollover transactions or otherwise, the Agents will have no choice but to utilize amended PTE 84-24 in order to receive commissions and other common forms of agent compensation. Doing so will force them to, among other things, (1) adopt new procedures, documentation, and disclosures entailing significant expense, and (2) declare themselves to be fiduciaries and thereby expose themselves to DOL jurisdiction and liabilities under ERISA and other applicable law. APP 4-10, 16-21, 29-38 (Plaintiff Agents); see also APP 33-38, 41-45, 48-49, 59-62 (third-party agents).

There is no serious question that this type of "increased regulatory burden typically satisfies

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Journal of Appellate Practice and Process (2017). Unless otherwise stated, all emphases are supplied by counsel.

the injury in fact requirement." *Texas v. EEOC*, 933 F.3d 433, 446 (5th Cir. 2019) (cleaned up). In the 2024 Fiduciary Rule and amended PTE 84-24, the DOL itself acknowledges that these new regulations will require "some degree of preparatory analysis, staff training, and reviews of existing compliance protocols," which "are precisely the types of concrete injuries that [the Fifth Circuit] has consistently deemed adequate to provide standing in regulatory challenges." *Career Colleges*, 98 F.4th at 233. *See also Texas Med. Ass'n v. United States Dep't of Health & Hum. Servs.*, 587 F.Supp.3d 528, 538 (E.D. Tex. 2022) (standing in an APA action "is usually self-evident when the plaintiff is a regulated party or an organization representing regulated parties") (quoting *Am. Petroleum Inst. v. Johnson*, 541 F. Supp. 2d 165, 176 (D.D.C. 2008)).

In addition, FACC has associational standing to bring this suit on behalf of its members. FACC is a trade organization whose members are independent marketing organizations, insurance agents, and agencies that market fixed insurance products including traditional fixed rate annuities and fixed indexed annuities. APP 56-57. The interests FACC seeks to protect are germane to its corporate purposes, and neither the claims asserted, nor the relief requested herein, require an individual member to participate in this suit. *See, e.g., Ass'n of Am. Physicians & Surgeons, Inc. v. Tex. Med. Bd.*, 627 F.3d 547, 550 (5th Cir. 2010).

2. Irreparable Harm.

Plaintiffs will suffer irreparable harm absent a preliminary injunction that prevents the 2024 Fiduciary Rule and amended PTE 84-24 from going into effect. "[C]omplying with a regulation later held invalid almost *always* produces …irreparable harm." *Texas* v. *United States Env't Prot. Agency*, 829 F.3d 405, 433 (5th Cir. 2016) (cleaned up) (emphasis original). Plaintiffs need not prove the exact dollar amount of the injury they will incur; instead, irreparable harm "requires only that alleged compliance costs must be 'more than *de minimis*.'" *Restaurant Law*

Ctr. v. *United States Dep't of Labor*, 66 F.4th 593, 600 (5th Cir. 2023).

As detailed in the declarations supporting this motion, complying with the 2024 Fiduciary Rule and PTE 84-24 will subject the Agents to significant compliance burdens, including additional disclosures and documentation for all tax-qualified annuity sales, potential liability under ERISA, and potential enforcement actions by the DOL. APP 4-10, 16-21, 29-38. Moreover, to receive commissions, the Agents will be required by amended PTE 84-24 to declare that they are, in fact, fiduciaries, which is a bell that cannot be un-rung if these new regulations are later vacated. APP 5-6, 17-18, 34. The Agents will also be compelled to work with up-line agencies and insurance companies to implement new and burdensome procedures under amended PTE 84-24 that will affect how they conduct their business and how they are compensated for tax-qualified annuity sales. APP 6-10, 19-23, 30-38. These additional compliance requirements will entail significant expense and likely diminish their sales of tax-qualified annuities. *Id*. Indeed, even the DOL's own analysis acknowledges that insurance agents will incur additional costs to comply with PTE 84-24, which is measured in thousands of dollars. 89 Fed. Reg. at 32246, 32253. While Plaintiffs submit the DOL's cost analysis is incomplete and understated, there is no dispute that the 2024 Fiduciary Rule and amended PTE 84-24 will directly harm the Agents' financial interests if not restrained by the Court. *Id.*

FACC's members will also be required, as a result of the 2024 Fiduciary Rule, to adopt these new requirements to comply with amended PTE 84-24 if they wish to continue serving retirement investors. Indeed, some of FACC's members have already stated that they will stop selling tax-qualified annuity products altogether because of the new rule. APP 63. These "increased costs of compliance" and "necessary alterations in operating procedures" are specific, irreparable injuries that support the entry of a preliminary injunction. *Career Colleges*, 98 F.4th at 235.

Importantly, the 2024 Fiduciary Rule and amended PTE 84-24 first take effect on September 23, 2024. Revised PTE 84-24 contains a phase-in period of one year during which certain supervisory requirements imposed on insurers do not apply. However, during the phase-in period, the Agents must still comply with onerous requirements that include acknowledging to clients that they are fiduciaries. They must also satisfy the exemption's "Impartial Conduct Standards," which includes compliance with a "Care Obligation" and "Loyalty Obligation" applicable to ERISA fiduciaries, and receive no more than "reasonable compensation." The Agents must immediately begin incurring the time and expense of preparing for the phase-in period requirements that take effect in just four months. APP 8-9, 21, 37-38. Accordingly, preliminary injunctive relief is needed to avoid irreparable harm during the pendency of this lawsuit.

C. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.

1. The 2024 Fiduciary Rule conflicts with the text of ERISA.

In *Chamber of Commerce*, the Fifth Circuit catalogued numerous ways in which the 2016 Fiduciary Rule ran afoul of DOL's statutory authority under ERISA. The first and most important of these was the rule's failure to adhere to the presumptive common-law meaning of fiduciary. Specifically, the Fifth Circuit began its analysis with the recognition that "Congress's use of the word 'fiduciary' triggers the settled principle of interpretation that, absent other indication, Congress intends to incorporate the well-settled meaning of the common-law terms it uses." *Chamber of Commerce*, 885 F.3d at 369-70 (cleaned up). The court went on to observe that fiduciary status at common law turns on the existence of a special relationship of trust and confidence between the parties, which "is the *sine qua non*" of a fiduciary relationship. *Id*. at 370-71.

The Fifth Circuit summarily rejected the DOL's argument that this common law presumptive meaning of fiduciary had been displaced by the statutory text or structure of ERISA. *Id*. at 371-72. To the contrary, the court concluded that the language of the statute undermined the DOL's broad brush approach of labeling financial salespeople as fiduciaries. *Id*. at 372. In this regard, ERISA and the Code provide that a person is a plan fiduciary if "he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so." 29 U.S.C. § 1002(21)(A)(ii); 26 U.S.C. § 4975(e)(3)(B). As the Fifth Circuit explained:

> Properly considered, the statutory text equating the "rendering" of "investment advice for a fee" with fiduciary status comports with common law and the structure of the financial services industry. When enacting ERISA, Congress was well aware of the distinction, explained further below, between investment advisers, who were considered fiduciaries, and stockbrokers and insurance agents, who generally assumed no such status in selling products to their clients. The [2016] Fiduciary Rule improperly dispenses with this distinction.

Chamber of Commerce, 885 F.3d at 372-73.

The failure to honor the distinction between fiduciary investment advisers and financial salespeople was the fundamental flaw of the 2016 Fiduciary Rule:

> Congress does not "hide elephants in mouseholes." Had Congress intended to abrogate both the cornerstone of fiduciary status—the relationship of trust and confidence—and the widely shared understanding that financial salespeople are not fiduciaries absent that special relationship, one would reasonably expect Congress to say so. This is particularly true where such abrogation portends consequences that "are undeniably significant." Accordingly, the [2016] Fiduciary Rule's interpretation of "investment advice fiduciary" ***fatally conflicts with the statutory text and contemporary understandings***.

Id. at 376 (cleaned up).

The DOL's new definition of an investment advice fiduciary is functionally the same as the 2016 Fiduciary Rule and similarly sweeps within its scope all financial salespeople. The DOL has thus perpetuated the central flaw in the 2016 Fiduciary Rule by completely ignoring the historically recognized distinction between fiduciary investment advisers and financial salespeople and failing to distinguish between those financial professionals who undertake a "special relationship of trust and confidence" with clients and those who do not. Indeed, in its notice of the proposed rulemaking on October 31, 2023, the DOL candidly admitted that, "[m]ore fundamentally, the [DOL] rejects the purported dichotomy between a mere 'sales' recommendation to a counterparty, on the one hand, and advice, on the other, in the context of the retail market for investment products." 88 Fed. Reg. 75890, 75907 (Nov. 3, 2023). Not surprisingly, therefore, the 2024 Fiduciary Rule studiously avoids any consideration of whether a special relationship of trust and confidence—as described in *Chamber of Commerce*—actually exists between adviser and client in the circumstances described in the new rule.[7]

It is the province of the courts to say what the law is, and the Fifth Circuit has clearly and authoritatively spoken on the issue of Congress's intent when it used the term fiduciary in ERISA. If the DOL disagrees or believes the statutory scheme is outdated in the current retirement investment marketplace, it may turn to Congress. But it may not simply take matters into its own hands. *Chamber of Commerce*, 885 F.3d at 378-79 ("That times have changed, the financial market has become more complex, and IRA accounts have assumed enormous importance ***are arguments for Congress to make adjustments in the law***, or for other appropriate federal or state regulators to act within their authority. ***A perceived ''need'' does not empower DOL to craft de facto statutory amendments or to act beyond its expressly defined authority***.") Despite this pointed admonition by the Fifth Circuit in 2018, the DOL has done the same thing again.

[7] The 2024 Fiduciary Rule contains nothing but a passing reference, buried in a footnote, in which the DOL superficially and erroneously asserts that "the final rule appropriately defines an investment advice fiduciary to comport with reasonable investor expectations of trust and confidence which is the special relationship described in the *Chamber* opinion." 89 Fed. Reg. at 32142, n. 164. As discussed further below, whether an investor has reason to trust a financial salesperson is not the searching inquiry courts undertake to determine if a fiduciary relationship exists.

2. *Unlike the five-part test, the new criteria adopted in the 2024 Fiduciary Rule do not capture the essence of a fiduciary relationship under common law.*

In *Chamber of Commerce*, the Fifth Circuit explained that the five-part test captured the essence of the common-law definition of a fiduciary that Congress intended to incorporate when enacting ERISA. *Id*. at 365. By establishing a multi-prong, conjunctive test, the 1975 regulation "echoed the then thirty-five-year old distinction drawn between an 'investment adviser,' who is a fiduciary regulated under the Investment Advisers Act, and a 'broker or dealer' whose advice is 'solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor.'" *Id*. at 364-65 (quoting 15 U.S.C. § 80b-2(a)(11)(C) (specifically excluding from the definition of investment adviser a broker or dealer whose advice regarding purchase or sale of securities "is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation" for such advice)).

The five-part test thus "contemplated an intimate relationship between adviser and client beyond ordinary buyer-seller interactions," reflecting a settled understanding of what the term "investment advice for a fee" means as used in ERISA, which was in turn consistent with the "[s]ubstantial case law" that recognized the same "dichotomy between mere sales conduct, which does not usually create a fiduciary relationship under ERISA, and investment advice for a fee, which does." *Id*. at 374. *See*, *e.g.*, *Am. Fed'n of Unions Local 102 Health & Welfare Plan v. Equitable Life Assurance Soc'y of the U.S.*, 841 F.2d 658, 664 (5th Cir. 1988) ("Simply urging the purchase of its products does not make an insurance company an ERISA fiduciary with respect to those products."); *Cotton v. Mass. Mut. Life Ins. Co.,* 402 F.3d 1267, 1278-79 (11th Cir. 2005) (insurance company's sale of life policies to an ERISA plan, without more, was insufficient to create fiduciary duty to the plan).

Disputing the Fifth Circuit's conclusion and analysis, the 2024 Fiduciary Rule repeatedly asserts that the five-part test erected too high a bar for determining who is an investment advice fiduciary under ERISA. *See*, *e.g.*, 89 Fed. Reg. at 32132 (asserting that 1975 rule "is underinclusive in assigning fiduciary status because it fails to capture many circumstances in which an investor would reasonably expect that they can place their trust and confidence in the advice provider as acting in their best interest" and "in particular," the regular basis, mutual agreement, and primary basis prongs of the five-part test "too often works to defeat legitimate retirement investor expectations"). In the DOL's view, the five-part test is a self-imposed constraint not, as the Fifth Circuit held, a correct implementation of the standard Congress articulated. 89 Fed. Reg. at 32124 (asserting that the five-part test "significantly narrowed the plain and expansive language of ERISA" regarding who will be treated as an investment advice fiduciary"). This fundamental disconnect permeates the 2024 Fiduciary Rule. The DOL believes stockbrokers and insurance agents should be regulated more strictly in their dealings with retirement investors. *See*, *e.g.*, *id*. at 3216 (new rule reflects DOL's "continued view" that "fiduciary protections" under ERISA are "necessary and appropriate to protect [] retirement investors from conflicts of interest"); *id*. at 32139 (discussing claimed conflicts and imprudent advice in annuity sales market and alleged inadequacy of the NAIC model regulations). However, the DOL has no authority to impose such regulations as a policy choice—that is the role of the SEC and state insurance commissioners.

Faced with this obstacle, the DOL has again attempted to rewrite the definition of fiduciary in a way that cannot be reconciled with the text of ERISA and *Chamber of Commerce*. Specifically, the 2024 Fiduciary Rule now comprises a four-element test that imposes the duties of a fiduciary on any insurance agent who recommends an annuity to a retirement investor if the agent "[1] makes professional investment recommendations to investors on a regular basis as part of their business and [2] the recommendation is made under circumstances that would indicate to a reasonable investor in like circumstances that the recommendation is based on review of the retirement investor's particular needs or individual circumstances, [3] reflects the application of professional or expert judgment to the retirement investor's particular needs or individual circumstances, and [4] may be relied upon by the retirement investor as intended to advance the retirement investor's best interest." 89 Fed. Reg. at 32256. However, the elements that DOL now says will make one an ERISA fiduciary mirror the standards agents must minimally comply with under the NAIC's model regulations adopted by almost every state. In this regard, the first element is mandatory because agents selling annuities must be licensed as such; the second element is required by the NAIC Model Regulation's requirement that agents gather consumer profile information from a client before making any recommendation; the third element is specified in the care obligation imposed by the Model Regulation, which requires agents to consider the product options that are available and recommend the product that effectively meets the needs of the client; and the fourth element is captured in the Model Regulation's requirement that the recommendation is intended to advance the investor's best interest. *See* NAIC Model Regulation 275, Sections 1, 6.A.

Importantly, the NAIC and the states that have adopted the Model Regulation explicitly recognize that these sales conduct standards do ***not*** impose a fiduciary obligation.[8] The DOL now proclaims, however, that they are sufficient to create a fiduciary relationship under ERISA. When it was called on this regulatory sleight of hand by many commenters on the proposed rule, the DOL disingenuously responded that "[t]o the extent that a financial professional satisfies the

[8] *See XY Planning Network, LLC v. SEC*, 963 F.3d 244, 255 (2nd Cir. 2020) ("The SEC carefully considered and rejected a fiduciary rule based on its findings that the fiduciary duties owed by investment advisers are 'not appropriately tailored to the structure and characteristics of the broker-dealer business model'"); NAIC Model Regulation 275, Section 2.B. (regulation shall not be construed as subjecting a party to liability as a fiduciary) and Section 6.A.(1)(d) ("The requirements under this subsection do not create a fiduciary obligation or relationship and only create a regulatory obligation as established in this regulation.").

conditions [of the 2024 Fiduciary Rule], in part, based on compliance with other regulators' conduct standards, that would merely be a consequence of independent decisions made by other regulators." Id. at 32137. However, it is the DOL, not the SEC or state insurance departments, that is trying to transform sales conduct standards that were adopted by the appropriate regulatory bodies into a fiduciary obligation that ERISA does not impose.

It is, of course, conceivable that the DOL could come up with a new definition of what constitutes fiduciary investment advice that would be consistent with the statutory text. But that is not what it has done. Instead, it has taken the standards and practices that stockbrokers and insurance agents must adhere to in any transaction and declared that those "define[] an investment advice fiduciary to comport with reasonable investor expectations of trust and confidence." 89 Fed. Reg. at 32123.[9] Focusing solely on whether a reasonable retirement investor expects that he or she can trust an insurance agent, however, is a far cry from the rigorous standards the common law demands before the mantel of a fiduciary can be imposed. The common law has long recognized that the vast majority of commercial relationships are ***not*** fiduciary in nature. Apart from historically recognized, "formal" fiduciary relationships (*e.g.*, trustee-beneficiary), it is the rare case in which one party in a commercial setting binds itself to act solely for the benefit of the other party as a fiduciary. *See Chamber of Commerce*, 885 F.3d at 370-71 (development of

[9] The DOL has tried to add a veneer of reasonableness to the new rule by including a so-called "seller's exception" for recommendations that are made in circumstances that would not indicate to a reasonable investor that they are based on review of the retirement investor's particular needs or individual circumstances, reflect the application of professional or expert judgment to the retirement investor's particular needs or individual circumstances, and may be relied upon by the retirement investor as intended to advance the retirement investor's best interest. Of course, this is nothing more than the converse of the criteria that the new rule says describe fiduciary investment advice. 89 Fed. Reg. at 32275. The "exception" thus adds nothing and, for the reasons discussed above, insurance agents who satisfy basic state compliance requirements would never be able to avail themselves of it. It is a null set as to insurance agents.

common law concept of fiduciary reflected "a situation wherein a person assumed the character of a trustee, or an analogous relationship," where a party has accepted "an obligation to act in a position of trust or confidence for the benefit of another"). The fact that parties have had prior dealings over a long period of time or subjectively "trust" each other does not, in itself, evidence the special relationship of trust and confidence that makes one a fiduciary. *Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 594-95 (Tex. 1992) (that franchise agreement had been in place for 42 years and parties trusted each other was no evidence of existence of fiduciary relationship); *see also Schlumberger Tech. Corp. v. Swanson,* 959 S.W.2d 171, 177 (Tex. 1997) ("mere subjective trust does not, as a matter of law, transform arm's-length dealing into a fiduciary relationship"). The DOL's repeated references to investors' reasonable expectation of trust in advisers who make individualized recommendations under their applicable conduct standards simply are not the same as the special relationship of trust and confidence the Fifth Circuit held is the mark of a fiduciary.[10]

3. *The 2024 Fiduciary Rule Impermissibly Equates Sales Commissions with a Fee for the Provision of Investment Advice.*

In *Chamber of Commerce*, the Fifth Circuit also took aim at another fatal flaw in the DOL's approach to redefining a fiduciary, namely its failure to recognize the significance of how the

[10] Ignoring *Chamber of Commerce* and similar authorities cited above, the DOL feebly asserts that other courts have agreed with it that the meaning of fiduciary in ERISA is "broader than the more restrictive approach" of the five-part test, citing *Eaves v. Penn*, 587 F.2d 453 (10th Cir. 1978), and *Farm King Supply, Inc. v. Edward D. Jones & Co.*, 884 F.2d 288 (7th Cir. 1989). 89 Fed. Reg. at 32136. However, neither case says anything of the kind. *Eaves* was a suit against the trustee of an ERISA plan, who the court held would be responsible as a fiduciary for his actions in "recommending, designing and implementing [an] amendment" of the plan. *Eaves*, 587 F.2d at 459. In *Farm King*, the Seventh Circuit rejected the plaintiffs' argument that a broker was a fiduciary, explaining "[t]he only 'agreement' between the parties was that the trustees would listen to Jones' sales pitch and if the trustees liked the pitch, the Plan would purchase from among the suggested investments, the very cornerstone of a typical broker-client relationship." *Farm King*, 884 F.2d at 293.

purported fiduciary is compensated. As part of its analysis tying the five-part test to the definition of fiduciary at common law (as Congress intended), the court emphasized that the distinction between sales agents and fiduciary advisers is customarily reflected in how each is compensated. *Chamber of Commerce*, 885 F.3d at 373. The 2024 Fiduciary Rule defies this aspect of the Fifth Circuit's ruling as well.

To be an investment advice fiduciary under ERISA a person must provide such advice "for a fee." 29 U.S.C. § 1002(21)(A). Unlike registered investment advisers, stockbrokers and insurance agents generally receive their compensation in the form of commissions for completed sales, not for advice they may provide in making those sales. The Fifth Circuit broadly condemned the DOL's failure to recognize the important distinctions between these two models of compensation in the 2016 Fiduciary Rule:

> DOL's interpretation conjoins "advice" with a "fee or other compensation, direct or indirect," but it ignores the preposition "for," which indicates that the purpose of the fee is not "sales" but "advice." . . . Stockbrokers and insurance agents are compensated only for completed sales ("directly or indirectly"), not on the basis of their pitch to the client. Investment advisers, on the other hand, are paid fees because they "render advice." The statutory language preserves this important distinction.

Chamber of Commerce, 885 F.3d at 372-73 (cleaned up).

The 2024 Fiduciary Rule carries forward the same misguided approach, as it provides that any form of compensation received in connection with a sale transaction is a "fee for investment advice," regardless of its source or purpose. 89 Fed. Reg. at 32257 ("a person provides investment advice 'for a fee or other compensation, direct or indirect,' if the person (or any affiliate) receives any explicit fee or compensation, from any source, ***for the investment advice or*** the person (or any affiliate) receives any other fee or other compensation, from any source, ***in connection with or as a result of the recommended purchase***, sale, or holding of a security or other investment property or the provision of investment advice").

Attempting to justify its disregard for the Fifth Circuit's decision on this point, the DOL argues that the text of ERISA does not distinguish between fees and other forms of compensation. *Id*. at 32138. This completely misses the point. The relevant inquiry is what the fee or other compensation is for. The Fifth Circuit did not hold that only particular fee-based models of investment advice could be fiduciary. What it did say, however, was that the 2016 Fiduciary Rule improperly erased the line between a fee or other compensation that is paid "***for the advice***" and commissions or other compensation that are paid for a completed sale. *Chamber of Commerce*, 885 F.3d at 372-73. So, too, does the 2024 Fiduciary Rule.[11]

4. *The 2024 Fiduciary Rule and Amended PTE 84-24 Improperly Conflate ERISA Title I Plans and IRAs in an Attempt to Expand the DOL's Regulatory Authority.*

The DOL possesses "far-reaching regulatory authority" over Title I employer benefit plans. *Id*. at 364. Title II does not, however, grant the DOL similar authority with respect to IRAs. *Id*. Instead, the DOL's role is limited to granting exemptions from prohibited transactions and defining "accounting, technical and trade terms" for purposes of the Code. IRA fiduciaries are not subject to the statutory duties of loyalty and prudence imposed on ERISA plan fiduciaries, and Title II did not create any federal cause of action for IRA owners like those available under ERISA. *Id*.

Under the five-part test, this line of demarcation was clear. Typically, a retail stockbroker's

[11] The DOL's reliance on its own prior Advisory Opinion 83-60A (Nov. 21, 1983), *see* 89 Fed. Reg. at 32158, n. 215, is misplaced. That advisory opinion merely allowed for the possibility that "if, under the particular facts and circumstances," a broker otherwise provided "individualized advice on a regular basis pursuant to a mutual agreement with the client," it was possible that, "even in the absence of a distinct and identifiable fee for such advice, a portion of the commissions paid to the broker-dealer would represent compensation for the provision of such investment advice." Nobody disputes parties can agree that part of the broker's commission is intended as compensation for an ongoing advisory relationship that otherwise meets the five-part test. However, the DOL cannot extrapolate that limited exception into a general rule that all commissions in every sales transaction shall be deemed as a fee for investment advice.

or insurance agent's only involvement with a Title I plan would be in the context of a rollover transaction. And years ago the DOL issued its Advisory Opinion 2005-23A, dated December 7, 2005 (copy at APP 65-68), commonly referred to as the "Deseret Letter," which straightforwardly explained that "merely advising a [Title I] plan participant to take an otherwise permissible plan distribution, even when that advice is combined with a recommendation as to how the distribution should be invested, does not constitute 'investment advice' within the meaning of the [1975 rule]" and "[a]ny investment recommendation regarding the proceeds of a distribution would be advice with respect to funds that are no longer assets of the plan." APP 66. *See also Beeson v. Fireman's Fund Ins. Co.*, No. C-09-2776 SC, 2009 WL 2761469, at *7 (N.D. Cal. Aug. 31, 2009) (financial advisers' advice to employees to withdraw funds from employer plan to invest in entities promoted by advisers did not constitute investment advice regarding plan assets or implicate duties owed under ERISA). Courts have consistently rejected prior efforts by litigants, and the DOL when it promulgated the New Interpretation,[12] to rely on a salesperson's recommendation of a post-rollover IRA investment when determining whether that salesperson has provided investment advice to the ERISA plan on a regular basis for purposes of the five-part test. *See Carfora v. Teachers Ins. Annuity Ass'n of America*, 631 F.Supp.3d 125, 149 (S.D.N.Y. 2022) (holding that, under ERSIA and the five-part test, "only advice given while the assets are, in fact, plan assets" will be taken into account when deciding whether a party provided "investment advice" on a "regular basis"); *American Securities Ass'n v. United States Department of Labor,* Case No. 8:22-cv-330-VMC-CPT, 2023 WL 1967573, at *16 (M.D. Fla. Feb. 13, 2023) (holding that the text of ERISA cannot reasonably be interpreted to mean that "the future provision of advice pertaining to

[12] At the time it issued the New Interpretation, the DOL summarily withdrew the Deseret Letter, deeming it "incorrect." 85 Fed. Reg. at 82803.

an IRA would fall within the definition of 'render[ing] investment advice' to an employee benefit plan"); *Fed'n of Americans for Consumer Choice, Inc. v. United States Dep't of Lab.*, No. 3:22-CV-00243-K-BT, 2023 WL 5682411, at *19 (N.D. Tex. June 30, 2023) (Magistrate Judge's recommendation to vacate the New Interpretation in part because it allows for the aggregation of a financial professional's dealings with investor under Title I and Title II plans in determining whether the regular basis prong of five-part test is met).

The failure to distinguish between DOL's authority over employer-sponsored ERISA plans and individual IRAs was yet another ground on which the Fifth Circuit rejected the 2016 Fiduciary Rule. *Chamber of Commerce*, 885 F.3d at 381. Nevertheless, the DOL once again attempts to erase the line between Title I and II plans in the 2024 Fiduciary Rule in several ways. First, the new rule provides that even a one-time recommendation to roll over assets from an employee benefit plan will constitute fiduciary investment advice to the plan. 89 Fed. Reg. at 32141-42. Second, the DOL asserts that any recommendation as to the investment of IRA assets following a rollover carries with it at least an implied recommendation to liquidate the investor's assets in the employer plan and is therefore also fiduciary investment advice to the Title I plan. *Id*. at 32146. Third, the DOL takes the position a retirement investor cannot even explicitly agree with a financial professional that any advice given will only concern the investment of assets that have been withdrawn from a Title I plan and that "no advice will be given regarding whether to remove the assets from the plan." *Id*. And fourth, amended PTE 84-24 imposes the loyalty and prudence obligations contained in Title I on insurance agents in IRA transactions, despite the fact Congress specifically did not include those same obligations in Title II. 89 Fed. Reg. at 32340-41.[13]

[13] As the DOL itself asserts, the ERISA fiduciary obligations it now seeks to impose on insurance agents "are the 'highest known to the law.'" *Id*. at 32136 (quoting *Donovan v. Bierwirth*, 680 F.2d 263, 272 n. 8 (2nd Cir.), *cert. denied*, 459 U.S. 1069 (1982)). *See generally* 29 U.S.C. §

Thus, it is clear the DOL is again claiming supervisory authority over post-rollover transactions, and any broker or insurance agent involved in a rollover is now subject to the statutory duties of loyalty and prudence under Title I even with respect to a client's IRA investments. For example, if an insurance agent meets with a longstanding client who separated from employment years earlier and is interested in cashing out of an older 401k account to purchase an annuity product in an IRA, the agent—who had no pre-existing relationship whatsoever with the employer plan—will be an ERISA fiduciary to that plan under the 2024 Fiduciary Rule. This result cannot be squared with *Chamber of Commerce* and the other authorities cited above.

D. THE 2024 FIDUCIARY RULE AND AMENDED PTE 84-24 ARE UNREASONABLE, ARBITRARY, AND CAPRICIOUS.

In reviewing an agency's construction of a statute, the Court must first decide whether Congress has directly spoken to the issue and, if Congress' intent is clear, nothing further is required: the Court must give effect to the statute as written. *City of Arlington v. F.C.C.*, 133 S.Ct. 1863, 1868 (2013). Under the *Chevron* doctrine,[14] however, if the statute is silent or ambiguous, the Court will defer to the agency's interpretation if it is reasonable. *Id*. For all the reasons described above, the intent of Congress, as confirmed by the Fifth Circuit in *Chamber of Commerce*, is clear and promulgation of the 2024 Fiduciary Rule in an attempt to vary it was beyond the authority of the DOL. For this reason alone, it should be vacated. However, even if there were any remaining gaps in the relevant statutory language that could be filled by DOL

1104(a)(1) (ERISA fiduciary must discharge his duties "with respect to a plan solely in the interest of the participants and beneficiaries" and for the "exclusive purpose" of providing benefits to participants). The DOL dismissed arguments by commenters that this sole interest standard will be unworkable for salespeople and has thus created an imagined world in which an insurance agent selling insurance products is held to the same standards as the designated fiduciaries of a corporate pension plan.

[14] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984).

regulation, the 2024 Fiduciary Rule and amended PTE 84-24 would still constitute an arbitrary and capricious exercise of the DOL's power in violation of the APA.

1. The Major Questions Doctrine Applies and the DOL Lacks a Clear Congressional Authorization for the Vast New Regulatory Authority it Asserts.

As an initial matter, the "major questions doctrine" should be applied here. Under that doctrine:

> [I]n certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us "reluctant to read into ambiguous statutory text" the delegation claimed to be lurking there. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to "clear congressional authorization" for the power it claims.

See W. Virginia v. Env't Prot. Agency, 597 U.S. 697, 723 (2022) (cleaned up). Among the factors that identify a major questions case are where an agency asserts a power to (1) substantially restructure a significant portion of the economy, (2) which it claims to have discovered "in a long-extant statute," and (3) which represents a "transformative expansion" of its own regulatory authority. *Id*.

Each of these factors is plainly present in this case. The DOL estimates that the rollovers will move $4.5 trillion from Title I ERISA plans to IRAs from 2022 through 2027 alone. 89 Fed. Reg. at 32179. The DOL's assertion of broad regulatory authority over that market, and the brokers and insurance agents who operate in it with no other connection to Title I plans, is both transformative and inconsistent with its own longstanding understanding of its mandate. Turning virtually all these financial salespeople into fiduciaries in the employer plan and IRA marketplaces clearly entails a substantial restructuring of a significant portion of the economy. Under the major questions doctrine, therefore, the DOL should be required to show a clear Congressional authorization for the power it now wishes to assert. It plainly cannot; indeed, it has already been told that directly by the Fifth Circuit. Accordingly, the 2024 Fiduciary Rule cannot stand.

2. The 2024 Fiduciary Rule and Amended PTE 84-24 are Unreasonable Under Any Standard.

Even without the obstacle presented by the major questions doctrine, the 2024 Fiduciary Rule cannot pass the more deferential *Chevron* standard of review either. As the Fifth Circuit explained in *Chamber of Commerce*, the DOL's effort to rewrite the meaning of "investment advice fiduciary" without reference to the common law trust and confidence standard not only exceeds its statutory authority but is unreasonable in the context of the other prongs of ERISA's fiduciary definition. *Chamber of Commerce*, 885 F.3d at 380. The 2024 Fiduciary Rule is also unreasonable because it fails to recognize and respect the line Congress has drawn between the DOL's authority to regulate and supervise Title I plans versus its role with respect to IRAs, which is limited to defining technical and accounting terms, and granting exemptions from the prohibited transactions provisions of the Code. *Id.* at 381. Like the 2016 Fiduciary Rule before it, the 2024 Fiduciary Rule is largely focused on (and motivated by) the perceived need to regulate rollover transactions from ERISA Title I plans to individual IRAs. 89 Fed. Reg. at 32124, 32177-82. But Congress did not grant the DOL broad authority to regulate standards of conduct for financial salespeople when they venture into the retirement savings marketplace. The DOL's relentless attempts to usurp that authority by serially amending or reinterpreting the definition of an investment advice fiduciary, even in the face of repeated judicial rebukes, is the epitome of unreasonable agency rulemaking.

3. The DOL acted arbitrarily and capriciously in amending PTE 84-24.

PTE 84-24 has long permitted insurance agents to receive commissions and other compensation in prohibited transactions. In practice, it was rarely used in retail sales because, as the DOL itself acknowledges, agents selling annuities to retirement investors typically would not be deemed fiduciaries under the five-part test. 89 Fed. Reg. at 32136. Nevertheless, if an agent did meet the criteria of the five-part test, PTE 84-24 would protect his or her ability to receive reasonable compensation and required only that the transaction be on terms as favorable as an arms-length transaction, certain disclosures be made by the agent, and approval in writing by the investor be obtained. 49 Fed. Reg. at 13211-12. Agents could also use PTE 84-24 in a prophylactic manner to obtain exemptive relief as applicable without declaring themselves to be fiduciaries.

The amendments DOL has made to PTE 84-24 in conjunction with the 2024 Fiduciary Rule are far more onerous and unreasonable. Although the DOL has the power to grant PTEs, the Fifth Circuit held that the DOL had abused that power when the court invalidated the BIC Exemption that was part of the 2016 Fiduciary Rule. *Chamber of Commerce*, 885 F.3d at 381. Perhaps the most egregious factor demonstrating that the DOL has done so again is amended PTE 84-24's requirement that, in order to invoke its protection, insurance agents must first declare they are in fact ERISA fiduciaries. This echoes the requirement of the BIC Exemption that financial professionals contractually agree they were fiduciaries, which the Fifth Circuit roundly and rightly held was unreasonable. *Chamber of Commerce*, 886 F.3d at 382 (BIC Exemption improperly required "brokers and insurance salespeople assume obligations of loyalty and prudence only statutorily required of ERISA plan fiduciaries" and expose themselves "to private claims of IRA investors" and "potential liability *beyond* the tax penalties provided for in ERISA Title II").

In the preamble to amended PTE 84-24, the DOL tries to distinguish this situation from *Chamber of Commerce*, feebly arguing that requiring insurance agents to declare themselves fiduciaries in order to utilize the amended exemption does not create any new obligations on them or subject them to other potential liabilities as the BIC Exemption did. This is absurd on its face. Amended PTE 84-24 forces agents, in order to receive commissions, to agree they are fiduciaries under ERISA and/or the Code subject to all the new conditions and standards now set forth in the exemption. Thus, the agent winds up in the same place as under the contractual obligations forced upon them in the now-discredited BIC Exemption.

The DOL tries to sidestep one aspect of this problem, saying that agents can "expressly disclaim any enforcement rights other than those specifically provided by Title I of ERISA or the Code, without violating any of the exemption's conditions." In the real world, however, a self-declared fiduciary is unlikely to find protection from a disappointed client's breach of fiduciary duty claim via this type of hairsplitting.[15] But even more significantly, the DOL's position on this point proves that it is not requiring agents to declare themselves fiduciaries because they actually are fiduciaries as that term is understood under common law and incorporated into ERISA. Instead, the DOL's only goal is to make every financial professional who deals with a retirement plan investor a fiduciary, regardless of whether they would be so characterized in any other setting. Once again, this is the definition of an arbitrary and capricious agency action.

The amendments to PTE 84-24 also echo another strong concern expressed by the Fifth Circuit regarding the 2016 Fiduciary Rule, namely the "DOL's regulatory strategy" of forcing sellers of fixed-indexed annuities ("FIAs") into compliance with the stringent BIC Exemption as opposed to the pre-amendment PTE 84-24. *Id*. at 385-86. The Court explained that this operated as an end-run around Congress, which in adopting the Dodd-Frank legislation had rejected an SEC initiative to regulate FIAs, choosing instead to defer to state insurance regulation. *Id*. Moreover, the court explained that the DOL was subjecting insurance agents to "stark alternatives" that

[15] The DOL's suggestion that agents should be permitted to protect themselves in this way is particularly disingenuous given its insistence in the 2024 Fiduciary Rule that they may ***not*** effectively disclaim fiduciary status under ERISA or the Code in sales to a retirement investor. *See* 89 Fed. Reg. at 32155.

threatened to create "entirely new compensation schemes" or be faced with "withdrawing from the market." *Id*. at 386. As was the case in 2016, the 2024 Fiduciary Rule is "occupying the Dodd-Frank turf" in contravention of Congress' intent and seeking to supplant state insurance regulation in the same manner as the 2016 Fiduciary Rule, only this time with respect to all annuities, not just fixed index annuities. *Id*.[16]

Finally, the PTE 84-24 amendments are unreasonable, arbitrary, and capricious because they reflect a deep-rooted misunderstanding of (at best), or bias against, annuities and the insurance sales channel through which they are primarily sold. As described in the declarations submitted in support of this motion, amended PTE 84-24: (1) creates unrealistic requirements for insurance companies to implement compliance and supervisory programs over insurance agents who are not captive and sell annuities on behalf of multiple insurers; (2) foists impractical requirements upon insurance agents to comply with loyalty and prudence standards designed for ERISA trust officers, not retail insurance professionals; and (3) creates compensation restrictions and conflict disclosure requirements that are incompatible with and unworkable for insurance agents operating in the independent distribution channel. Regarding the last point, amended PTE 84-24 establishes illogical rollover disclosure requirements that fail to recognize the "apples and oranges" nature of any comparison between guaranteed annuity products, on the one hand, and yield driven investments in stocks or mutual funds on the other. Insurance agents typically are neither trained nor in a position to obtain and interpret the information about employer retirement plans that is demanded of them under the 2024 Fiduciary Rule and amended PTE 84-24–*i.e.*, comparative fees and expenses, whether an employer pays administrative expenses, and levels of fiduciary

[16] The DOL's answer to this charge in the preamble to the 2024 Fiduciary Rule is, in a nutshell, that it thinks the Fifth Circuit was wrong. *See* 89 Fed. Reg. at 32138.

protection, services, and investments available under such plans. In short, the DOL is ramming through amendments to PTE 84-24 that disregard the realities of how insurance agents operate in the independent distribution channel and will be highly disruptive and bring harm to industry and consumers.

E. THE BALANCE OF HARMS AND PUBLIC INTEREST SUPPORT THE ISSUANCE OF A PRELIMINARY INJUNCTION.

"The balance-of-harms and public-interest factors merge when the government opposes an injunction." *Career Colleges*, 98 F.4th at 254. Moreover, the Fifth Circuit has held that "[t]here is generally no public interest in the perpetuation of unlawful agency action." *Texas* v. *Biden*, 10 F.4th 538, 560 (5th Cir. 2021) (cleaned up).

As described above, and detailed in the accompanying declarations, Plaintiffs face severe and irreparable harm if the 2024 Fiduciary Rule and amended PTE 84-24 become effective. Along with this harm to Plaintiffs and, according to the DOL's estimate, another 86,000 similarly situated insurance agents across the country, there will be a corresponding loss or limitation of access to annuities that harms the general public and disserves the many middle-class retirement savers who need the safety and security that annuities provide. Conversely, maintaining the status quo simply results in leaving in place the five-part test, which has been in place for 50 years and which the Fifth Circuit held correctly expresses the will of Congress when it rejected the DOL's first attempt to replace it. The balance of harms and public interest factors thus heavily favor granting a preliminary injunction.

IV. CONCLUSION

Plaintiffs respectfully request that the Court grant this motion and enter an order staying the effective date of the 2024 Fiduciary Rule and amendments to PTE 84-24, preliminarily enjoining their enforcement pending a final judgment in this case, or both.

Dated: May 21, 2024

Respectfully submitted,

By: */s/ Don Colleluori*

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CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2024, a true and correct copy of the above and foregoing document has been served electronically using the CM/ECF system, which will subsequently send copies to all counsel of record registered to accept electronic service in this matter, and via email on the following:

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CERTIFICATE OF CONFERENCE

The undersigned counsel hereby certifies that he has complied with the meet and confer requirement in Local Rule CV-7(h) and that the motion is **opposed**. Undersigned counsel hereby certifies that the conference required by this rule was conducted on May 20, 2024 by telephone, with Alexander Ely, counsel for Defendants. Because of the nature of the relief sought, Defendants could not agree to the requested preliminary injunction, which is an issue to be resolved by the Court.

/s/ Don Colleluori
Don Colleluori