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,

v.

UNITED STATES DEPARTMENT OF LABOR, and JULIE SU, in her official capacity as ACTING SECRETARY OF LABOR,

Defendants.

Civil Action No. 6:24-cv-00163-JDK

DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Under the Employee Retirement Income Security Act of 1974 (ERISA), a person is a "fiduciary" to an ERISA plan, *inter alia,* "to the extent" that they "render[] investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan." 29 U.S.C. § 1002(21)(A)(ii); 26 U.S.C. § 4975(e)(3). Under its broad authority from Congress to regulate employee benefit plans and safeguard Americans' retirement savings, including employer-sponsored plans under Title I and Individual Retirement Accounts (IRAs) under Title II of ERISA, the Department of Labor (The Department or DOL) published a Final Rule on April 25, 2024 (The Retirement Security Rule or Rule), which established an amended test for determining when an individual "renders investment advice for a fee" regarding plan assets. The amended test replaces one from 1975 that was significantly narrower than the statutory text. The amended test focuses objectively on the circumstances surrounding the advice, including whether the investment recommendation is "made under circumstances that would indicate to a reasonable investor" that the advice is tailored to the investor's particular need and that the investor can rely on that advice "as intended to advance the retirement investor's best interest." 89 Fed. Reg. 32,122, 32,256 (April 25, 2024).

Plaintiffs—insurance professionals and a trade association representing insurance professionals—seek a preliminary injunction and stay of the effective date of the Rule. Their arguments are largely grounded in policy concerns about the insurance industry that cannot override the clear text of the statute passed by Congress. Contrary to Plaintiffs' wishful thinking, ERISA does not inherently exclude investment advice about plan assets when insurance agents are involved. Instead, ERISA adopted a fiduciary standard focused on function. Because the Department's amended test reasonably addresses the totality of the circumstances, Plaintiffs have failed to muster convincing arguments that the Retirement Security Rule is unlawful.

Plaintiffs chiefly argue that *Chamber of Commerce of United States of America v. United States*

Department of Labor (*Chamber*), 885 F.3d 360 (5th Cir. 2018), essentially divested the Department of all authority to amend its regulations interpreting ERISA's statutory, functional fiduciary standard. Specifically, Plaintiffs suppose that the Fifth Circuit etched in stone the five-part test included in the Department's original, 1975 regulation, including its requirement that an investment professional provide advice "on a regular basis" to an ERISA plan. Their argument fails for numerous reasons. First, the Retirement Security Rule is far more modest in scope than the 2016 Rule vacated by the Fifth Circuit, and lacks the features that led to that rule's vacatur. Second, the *Chamber* opinion did not—and could not—amend ERISA itself to divest the Department of authority to promulgate or amend regulations under the statute. Third, as evident in its plain text and further supported by the administrative record, the Rule is consistent with *Chamber*'s conclusion that ERISA only intended to reach advice relationships involving "trust and confidence." The Rule's preamble repeatedly discusses the Fifth Circuit's "trust and confidence" standard and explains why the Rule satisfies it. Plaintiffs' arguments to the contrary misread (at best) the text of the Rule and Preamble and are unavailing.

Apart from erroneously reading the *Chamber* decision to bind the Department to the 1975 regulation for all time, Plaintiffs' arguments greatly distort *Chamber*'s reasoning in ways that defy logic. They argue that there is an ironclad distinction between those investment professionals who provide fee-based investment advice and investment professionals who are compensated through commissions when they make investment recommendations to ERISA plans, with the latter category being merely salespeople. In Plaintiffs' apparent view, insurance agents are categorically exempt from fiduciary status when providing advice to clients to purchase annuities. But Plaintiffs have made no attempt to show that the market recognizes such insurance agents as mere salespeople, and the *Chamber* opinion does not exempt insurance professionals doing business with ERISA plans and beneficiaries from the Department's regulatory ambit. Plaintiffs also posit a bright line between the regulatory framework for ERISA Title I plans and IRAs such that the Department lacks authority to

interpret fiduciary investment advice in the context of rollovers from ERISA plans to IRAs. But this disregards the Department's express authority to interpret statutory terms and set the terms for exemptions from many of the prohibited transaction provisions in the Internal Revenue Code (Code).

In sum, while Plaintiffs and their members want insurance professionals to be free from fiduciary responsibility when making recommendations to retirement investors, the Department's amended regulation reasonably applies ERISA's statutory language to current market realities. Neither the statutory definition provided in ERISA, nor the common law backdrop from which ERISA's fiduciary standards were borrowed, nor *Chamber* compels Plaintiffs' desired legal interpretation or countenances such a carve-out. The Court should deny Plaintiffs' Motion.

LEGAL AND PROCEDURAL BACKGROUND

A. ERISA Statutory Framework

Congress enacted ERISA in 1974 based on its determination that Americans' retirement savings were not adequately protected from fraud and abuse, to their detriment and that of the country. Pub. L. No. 93-406, 88 Stat. 829, 898 (1974) (codified at 29 U.S.C. §§ 1001, *et seq*.). Prior to ERISA, "federal involvement in the monitoring of pension funds in this country was minimal." *Sec'y of Labor v. Fitzsimmons*, 805 F.2d 682, 689 (7th Cir. 1986). Congress thus enacted ERISA "after determining that the then present system of regulation was ineffective in monitoring and preventing fraud and other pension fund abuses." *Id.* The statutory framework included, *inter alia*, enhanced "disclosure and reporting" requirements, "standards of conduct, responsibility, and obligation for fiduciaries [to] employee benefit plans," and "appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b); *see also Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004) ("The purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans."); *Tolbert v. RBC Cap. Mkts. Corp.*, 758 F.3d 619, 621 (5th Cir. 2014) ("ERISA is designed to protect . . . the interests of participants in employee benefit plans and their beneficiaries[.]" (citation omitted)).

Title I of ERISA imposes stringent obligations on individuals who engage in important plan-related activities, *i.e.*, "fiduciar[ies]." 29 U.S.C. § 1104. Under ERISA, "a person is a fiduciary with respect to a plan to the extent," *inter alia*, "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." *Id.* § 1002(21)(A). A "fiduciary" under Title I of ERISA must adhere to duties of loyalty and prudence. *Id.* § 1104. The former requires a fiduciary to "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 and beneficiaries and defraying reasonable expenses of plan administration. *Id.* § 1104(a)(1)(A). The latter requires a fiduciary to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." *Id.* § 1104(a)(1)(B).

As an additional protective measure, Congress prohibited fiduciaries from engaging in transactions Congress deemed inherently fraught with conflicts of interest. *Id.* § 1106; *see Lockheed Corp. v. Spink*, 517 U.S. 882, 888 (1996) (Congress's goal was to "bar categorically" transactions likely to injure a plan and its beneficiaries.). In particular, a fiduciary must not "deal with the assets of the plan in his own interest or for his own account" or "receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan." 29 U.S.C. § 1106(b)(1), (3). Given the breadth of the prohibited transaction provisions, Congress enumerated statutory exemptions from some of them. *Id.* § 1108(b). In addition, Congress delegated to the Secretary of Labor (Secretary) broad authority to grant "conditional or unconditional" administrative exemptions on a class-wide or individual basis upon finding the exemption: "(1) administratively feasible, (2) in the interests of the plan and of its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries of such plan." *Id.* § 1108(a).

In Title II of ERISA, Congress amended the Code to adopt a "fiduciary" definition parallel to that in Title I. 26 U.S.C. § 4975(e)(3). Title II covers many employee benefit plans covered by Title I, as well as other tax-favored retirement and savings plans. While the Code provisions do not specifically include duties of loyalty and prudence, they do, as in Title I, prohibit fiduciaries and others from engaging in specified conflicted transactions. *Id.* § 4975(c). The Code also allows for administrative exemptions, subject to the same terms as in Title I. *Id.* § 4975(c)(2). Those who violate the Code's prohibited transaction provisions are subject to excise taxes collected by the IRS. *Id.* § 4975(a)-(b).

ERISA also delegated to the Secretary broad authority to "prescribe such regulations as he finds necessary or appropriate to carry out the provisions of [Title I of ERISA]." 29 U.S.C. § 1135. "Among other things, such regulations may define accounting, technical and trade terms used in such provisions." *Id.* The parallel provisions of Title I of ERISA and § 4975 of the Code (Title II of ERISA) led to redundancy. To harmonize their administration and interpretation, President Carter issued Reorganization Plan No. 4 in 1978, *see* 43 Fed. Reg. 47,713 (Oct. 17, 1978) ("Reorg. Plan"), which Congress ratified in 1984. *See* Pub. L. No. 98-532, 98 Stat. 2705 (1984) (codified at 29 U.S.C. § 1001 note). Among other things, the Reorg. Plan transferred to the Department the interpretive, rulemaking, and exemptive authority for the fiduciary definition and, with some exceptions, the prohibited transaction provisions that apply to Title II plans. *See* Reorg. Plan § 102.

B. ERISA Regulations

Pursuant to its broad interpretive authority, in 1975, the Department issued regulations interpreting when a person "renders investment advice for a fee or other compensation" for purposes of ERISA's "fiduciary" definition. 40 Fed. Reg. 50,842 (Oct. 31, 1975) ("1975 Regulation"). The regulations set forth a five-part test, under which a person was deemed to "render[] investment advice" when he: (1) renders advice as to the value of securities or other property, or makes recommendations 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, arrangement or understanding, with the plan or a plan fiduciary, (4) that the advice will serve as a primary basis for investment decisions with respect to plan assets, and (5) that the advice will be individualized based on the particular needs of the plan. *See* 40 Fed. Reg. 50,842 (Oct. 31, 1975); *see also* 40 Fed. Reg. 50,840 (Oct. 31, 1975) (virtually identical rule simultaneously issued Department of the Treasury before Reorg. Plan).

Pursuant to its authority to craft exemptions for fiduciary conflicts, the Department adopted numerous class exemptions to permit fiduciaries to engage in conduct that would otherwise have been prohibited. Insurance companies and agents sought such an exemption for recommending annuity contracts for retirement plan and IRA investors. Annuities are sold through different types of distributors, including broker-dealers, banks, independent insurance agents, and career insurance agents. As Plaintiffs note, "[f]iduciaries of an employee benefit plan or [IRA] are generally prohibited from receiving commissions or other compensation from third parties in connection with transactions involving the plan or IRA" unless a prohibited transaction exemption (PTE) is available "that allow[s] fiduciaries to receive otherwise prohibited compensation in such transactions." *See* Pls.' Mot. for Prelim. Inj. & Stay of Effective Date of the Rule (Pls.' Mot.) at 2 n.1, ECF No. 8. In 1984, the Department promulgated PTE 84-24, which permits fiduciary insurance companies and their agents to receive otherwise prohibited compensation in connection with their recommendations of annuity purchases. *See* 49 Fed. Reg. 13,208, 13,211 (Apr. 3, 1984); *Chamber*, 885 F.3d at 367 (PTE 84-24 "cover[s] transactions involving insurance and annuity contracts and permit[s] customary sales commissions where the terms were at least as favorable as those at arm's-length, provided for 'reasonable' compensation, and included certain disclosures." (quoting 49 Fed. Reg. at 13,211)).

C. The 2016 Rulemaking and the *Chamber* Decision

The 1975 Regulation was promulgated before 401(k) plans existed and IRAs were common; since then, the market for retirement savings has undergone a dramatic shift both in the degree to

which retirement investors are responsible for investing their retirement savings and the role played by IRAs and rollovers from ERISA-covered plans. In 2016, in an effort to account for these changes, the Department finalized a new regulation that replaced the 1975 Regulation and granted new associated prohibited transaction exemptions. The 2016 Rule was in fact a package of seven different rules, *see Chamber,* 885 F.3d at 363, falling into three major categories.

First, the Department revised the definition of "fiduciary" under ERISA and the Code, and eliminated several of the requirements of the 1975 Regulation. *See* 81 Fed. Reg. 20,946 (Apr. 8, 2016). The Rule defined "investment advice" in terms of specified "recommendations," which were further defined as "a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action." *Id.* at 20,997. Under the 2016 Rule, a person could be a fiduciary if he or she "[d]irects . . . advice to a specific advice recipient" regarding the "advisability of a particular investment . . . decision." *Id.* Because the new definition reached some advice that the Department believed Congress did not intend to include, the Department also created certain carveouts. *See id.* at 20,948.

Second, the Department promulgated two new exemptions, including the Best Interest Contract Exemption (BICE), which allowed fiduciaries to receive conflicted income only if they adhere to certain conditions, including signing a written contract with customers that were IRA holders or a plan that is not covered by Title I of ERISA. The contract was required to contain enumerated provisions, and exposed financial institutions and advisers to suits for breach of contract if those provisions were violated. *See* 81 Fed. Reg. 21,002 (Apr. 8, 2016). The contract required under the exemption could not include provisions that commonly are used to limit liability, such as a liquidated damages clause or waiver of the ability to participate in class actions. *Id.*

Third, given that the BICE would be available to all annuities and many other products, DOL amended existing exemptions, including PTE 84-24, 71 Fed. Reg. 5887 (Feb. 3, 2006), which had

previously provided prohibited transaction relief for sales of insurance and annuity contracts. *See* 81 Fed. Reg. 21,147 (Apr. 8, 2016). After notice-and-comment, the Department determined that PTE 84-24 should be available for the receipt of commissions for IRA and plan transactions only in connection with recommendations involving "[f]ixed [r]ate [a]nnuity [c]ontract[s]," defined to include only traditional fixed annuities, and to exclude variable annuities (which are regulated as securities) and fixed indexed annuities (which are more complex than traditional fixed annuities). *See* 81 Fed. Reg. 21,176-77. As a result, fiduciaries advising on many annuity products could no longer rely on PTE 84-24 but instead needed to use the BICE if they wished to be exempted from the prohibited transaction provisions that would otherwise apply.

While several federal courts rejected challenges to the 2016 Fiduciary Rule, *see Mkt. Synergy Grp, Inc. v. Dep't of Labor,* 885 F.3d 676 (10th Cir. 2018); *Mkt. Synergy Grp, Inc. v. Dep't of Labor*, No. 16-CV-4083-DDC-KGS, 2017 WL 661592 (D. Kan. Feb. 17, 2017); *Chamber of Com. of the U.S. v. Hugler*, 231 F. Supp. 3d 152 (N.D. Tex. 2017), *rev'd Chamber*, 885 F.3d 360; *Nat'l Assoc. for Fixed Annuities v. Perez,* 217 F. Supp. 3d 1, 23 (D.D.C. 2016); the Fifth Circuit vacated the 2016 Rule, including the new exemptions. *Chamber*, 885 F.3d at 360. Specifically, the court found that the 2016 Rule was inconsistent with ERISA, in several ways, including the Department's acknowledgement that the 2016 Rule was overinclusive and did not consider whether the relationships encompassed by the regulatory definition involved "trust and confidence" like common law fiduciary relationships. *See id.* at 381–82.

D. Subsequent Regulatory Developments

The market conditions that motivated the 2016 Rule have only accelerated. For example, rollovers from ERISA-covered plans to IRAs are expected to approach $4.5 trillion cumulatively from 2022 through 2027. *See* 89 Fed. Reg. at 32,179. These market conditions and associated concern about harm to investors from recommendations tainted by conflicts of interest have spurred other regulators into action, and as a result the regulatory environment for investment professionals has changed

significantly since the adoption and vacatur of the 2016 Rule. In June 2019, the Securities and Exchange Commission (SEC) finalized a regulatory package relating to conduct standards for broker-dealers and investment advisers, addressing the same kinds of market realities in the SEC's regulatory context. Included in the package were (1) Regulation Best Interest, which establishes a best interest standard applicable to broker-dealers when making a recommendation of any securities transaction or investment strategy involving securities to retail customers, (2) an interpretation of the fiduciary conduct standards applicable to investment advisers under the Investment Advisers Act, and (3) a new form, which requires broker-dealers and SEC-registered investment advisers to provide retail investors with a short relationship summary with specified information. *See* 89 Fed. Reg. at 32,125 & nn.18–20.[1]

Similarly, in 2020, the National Association of Insurance Commissioners ("NAIC"), a nonprofit governed by state chief insurance regulators, updated its Suitability in Annuity Transactions Model Regulation. This model regulation now requires that agents and insurers "when making a recommendation of an annuity, shall act in the best interest of the consumer under the circumstances known at the time the recommendation is made, without placing the producer's or the insurer's financial interest ahead of the consumer's interest." NAIC Model Regulation 275, Section 6.A, https://perma.cc/T47L-YTJG; *see also* NAIC Model Regulation 275, Project History at 1-2 (2020), https://perma.cc/K522-S2K3, explaining that NAIC's new best interest standard was intended to be "more than the model's current suitability standard, but . . . not a fiduciary standard"). "Best interest" is measured by "satisf[ying] . . . obligations regarding care, disclosure, conflict of interest and documentation." NAIC Model Regulation 275, Section 6.A. However, at its core, the care obligation

[1] *See also* Regulation Best Interest, 17 C.F.R. § 240.15*l*-l ("A broker [or] dealer . . . when making a recommendation of any securities transaction or investment strategy involving securities (including account recommendations) to a retail customer, shall act in the best interest of the retail customer at the time the recommendation is made, without placing the financial or other interest of the broker, dealer, or natural person who is an associated person of a broker or dealer making the recommendation ahead of the interest of the retail customer.").

requires only that the agent have "a reasonable basis to believe the recommendation effectively addresses the consumer's financial situation, insurance needs, and financial objectives." *Id.* Section 6.A.1.a. And the conflict of interest provision excludes all "cash" and "noncash" compensation from the definition of material conflicts that have to be identified and managed. *See id.* Section 5.I.2, Section 6.A.3. Versions of the model rule have now been adopted by at least 45 states. *See* Pls.' Mot. at 8 n.5.

E. The Department's 2020 PTE Exemption and Interpretive Rule

In July 2020, the Department proposed a new class exemption, which took into consideration the Fifth Circuit's *Chamber* decision, public correspondence and comments received by the Department since February 2017, and informal industry feedback seeking an administrative class exemption for otherwise-prohibited transactions. The Department finalized this exemption as PTE 2020-02 in December 2020. In the preamble, the Department also "set[] forth the Department's final interpretation of the [1975] five-part test of investment advice fiduciary status for purposes of this exemption and provide[d] the Department's views on when advice to roll over Title I Plan assets to an IRA will be considered fiduciary investment advice under Title I and the Code." 85 Fed. Reg. 82,799 (Dec. 18, 2020) (2020 Interpretive Rule). In that regard, the Preamble interpreted—but did not replace—the 1975 Regulation's five-part test applied to rollovers from Title I plans to Title II plans.[2]

Two lawsuits challenged the 2020 Interpretive Rule. First, a trade association in the Middle District of Florida challenged two Frequently Asked Questions (FAQs) published on the Department's website regarding PTE 2020-02—specifically FAQ 7 ("When is advice to roll over assets from an employee benefit plan to an IRA considered to be on a 'regular basis'?") and FAQ 15 ("What factors should financial institutions and investment professionals consider and document in their disclosure of the reasons that a rollover recommendation is in a retirement investor's best

[2] In December 2020, the Department also issued a technical amendment to 29 C.F.R. § 2510-3.21, formally removing the 2016 language and reinserting the 1975 Regulation's text. 85 Fed. Reg. 40589.

interest?). *Am. Sec. Ass'n. v. U.S. Dep't of Labor* (*ASA*), No. 8:22-cv-330, 2023 WL 1967573, at *4 (M.D. Fla. Feb. 13, 2023), *appeal dismissed*, No. 23-11266-F, 2023 WL 4503923 (11th Cir. May 17, 2023). The *ASA* court found "the type of documentation that FAQ 15 requires is precisely of the nature that a prudent investment advisor would undertake," granting the Department summary judgment on that count, but vacated the policy referenced in FAQ 7, finding that "the scope of the regular basis inquiry is limited to the provision of advice pertaining to a particular plan." *Id.* at *14-*19.

Second, Plaintiff FACC brought a separate lawsuit against the Department in the Northern District of Texas, seeking to vacate the 2020 Interpretive Rule in its entirety. *See Fed'n of Ams. For Consumer Choice v. U.S. Dep't of Labor* (*FACC I*), No. 3:22-CV-00243-K-BT, 2023 WL 5682411 (N.D. Tex. June 30, 2023). In *FACC I*, the Magistrate Judge issued a Report and Recommendation that, like the *ASA* court, found that the 2020 Interpretative Rule improperly considered possible future recommendations to Title II Plans when determining Title I fiduciary status and therefore "conflicts with ERISA." Findings, Conclusions, and Recommendations of the U.S. Magistrate Judge, *FACC I*, 2023 WL 5682411, at *18 (N.D. Tex. June 30, 2023). Some of the current Plaintiffs argued that the Magistrate Judge did not go far enough and filed Objections to her Report and Recommendations, which remain pending. *See* No. 3:22–CV–00243–K–BT (N.D. Tex.), ECF No. 73.

F. The Retirement Security Rule

On November 3, 2023, the Department published in the Federal Register a Notice of Proposed Rulemaking (NPRM) and proposed amendments to prohibited transaction exemptions (Proposed PTE Amendments). *See* 88 Fed. Reg. 75,890 (Nov. 3, 2023). The NPRM explained that the Department was "propos[ing] [an] amendment to the regulation defining when a person renders 'investment advice for a fee or other compensation, direct or indirect' with respect to any moneys or other property of an employee benefit plan, for purposes of the definition of a 'fiduciary' in the Employee Retirement Income Security Act of 1974." *Id.* at 75,890. That NPRM and Proposed PTE

Amendments were followed by a 60-day comment period, as well as a public hearing held on December 12-13, 2023. Plaintiff FACC submitted a comment and also appeared at the hearing to offer testimony regarding the proposed rule and exemptions.[3] On April 25, 2024, after consideration of the more than 400 individual comments, almost 20,000 petition submission, and the testimony provided at the hearing,[4] the Department published in the Federal Register a Final Rule adopting a new regulatory definition and amendments to existing PTEs.

In the Retirement Security Rule, "[t]he Department . . . made certain changes and clarifications . . . in response to public comments on the proposal and the testimony presented at the public hearings," including by "narrow[ing] the contexts in which a covered recommendation will constitute ERISA fiduciary investment advice." 89 Fed. Reg. at 32,123. The Rule "ma[de] clear that the test for fiduciary status is objective" and "the mere provision of investment information or education, without an investment recommendation, is not advice within the meaning of the rule." *Id.*. In the lengthy preamble to the Rule, the Department discussed the comments received, described the changes between the proposed rule and the final rule, and addressed many of the very criticisms leveled against the Retirement Security Rule in this litigation.

The Final Rule provides two ways that an investment professional "renders 'investment advice" with respect to moneys or other property" of a plan or IRA—and thus is a fiduciary under

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[3] Plaintiffs gratuitously describe the notice-and-comment period as "rushed," *see* Pls.' Mot. at 6, but they bring no procedural challenge to the Department's rulemaking. In any event, they cannot claim prejudice from any alleged procedural deficiency, as Plaintiff FACC submitted a comment on the Rule and appeared at the hearing.

[4] A view expressed by many commenters on the NPRM is that "the regulatory definition [in the 1975 Regulation] . . . obstructs Congressional intent to protect retirement investments by unduly excluding a sizable portion of modern retirement investment advice" from ERISA's fiduciary standard. *See*, *e.g.*, Cmt. 390, CFP Board at 6 (Jan. 2, 2023), https://perma.cc/L9CT-T7WU. The same commenter also noted that "[e]xisting best interest advice regulations do not cover other significant retirement investment recommendations," including investment recommendations as to "real estate, many insurance products, commodities, certificates of deposit, [or] other bank products." *Id.* at 11.

ERISA. First, this definition applies if, in making recommendations regarding plan assets that result in compensation, the investment professional "represents or acknowledges that [he or she is] acting as a fiduciary under Title I of ERISA, Title II of ERISA, or both, with respect to the recommendation." 89 Fed. Reg. at 32,143. Alternatively, an investment professional who "either directly or indirectly . . . makes professional investment recommendations to investors on a regular basis as part of their business" is a fiduciary when making recommendations regarding plan assets that result in compensation where "the recommendation is made under circumstances that would indicate to a reasonable investor in like circumstances" that three conditions are met:

> the recommendation is [a] based on review of the retirement investor's particular needs or individual circumstances, [b] reflects the application of professional or expert judgment to the retirement investor's particular needs or individual circumstances, and [c] may be relied upon by the retirement investor as intended to advance the retirement investor's best interest.

Id. at 32,256. The Department also reiterated its long-standing position that ERISA's "advice for a fee or other compensation, direct or indirect" encompassed "any explicit fee or compensation, from any source for the investment advice" or "any other fee or other compensation, from any source, in connection with or as the result of the recommended [transaction], including, though not limited to, commissions . . . ." *Id.* at 32,256-57; *cf.* 40 Fed. Reg. 50,842 (Oct. 31, 1975) (noting that indirect compensation for investment advice "may include, for example, brokerage commissions, mutual fund sales commissions, and insurance sales commissions").

On the same day, the Department also issued amendments to several PTEs, including 84-24. The PTE 84-24 amendments allow insurance agents to receive otherwise prohibited compensation provided they (i) acknowledge their fiduciary status in writing to the Retirement Investor; (ii) disclose their services and material conflicts of interest to the Retirement Investor; (iii) adhere to Impartial Conduct Standards requiring them to provide advice and exercise sound judgment in the same way that knowledgeable and impartial professionals would in similar circumstances, never place their own

interests ahead of the Retirement Investor's interest or subordinate the Retirement Investor's interests to their own, charge no more than reasonable compensation, and avoid misleading statements; (iv) adopt firm-level policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards and mitigate conflicts of interest; (v) document and disclose the specific reasons for any rollover recommendations; and (vi) conduct an annual retrospective compliance review.

The new fiduciary definition does not become applicable until September 23, 2024. *See* 89 Fed. Reg. at 32,171. Additionally, PTE 84-24 provides a one-year phase-in period beginning on September 23, 2024. *See id.*. During that period, the insurance agent may receive compensation under the amended exemption, as long as the agent complies with the Impartial Conduct Standards and the fiduciary acknowledgment requirement, without more.

STANDARD OF REVIEW

"A preliminary injunction is an extraordinary and drastic remedy" that should "never [be] awarded as of right." *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008) (citation omitted). A plaintiff may obtain this "extraordinary remedy" only "upon a clear showing" that it is "entitled to such relief," *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008), by showing (1) "a substantial threat of irreparable injury," (2) "a substantial likelihood of success on the merits," (3) "that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted," and (4) "that the grant of an injunction will not disserve the public interest." *Jordan v. Fisher*, 823 F.3d 805, 809 (5th Cir. 2016) (citation omitted). Courts also apply the traditional four-part test for preliminary injunctions when evaluating stay requests under 5 U.S.C. § 705, *see Sampson v. Murray*, 415 U.S. 61, 68 n. 15 (1974).[5]

[5] For purposes of this Motion, Defendants do not challenge Plaintiffs' standing to sue or their ability to establish irreparable harm as regulated entities.

ARGUMENT

I. PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THE MERITS

A. The Retirement Security Rule Follows Logically From the Text of ERISA and is Consistent with Congressional Intent.

1. ERISA's Statutory Definition is Distinct From the 1975 Regulation, and the Retirement Security Rule is Consistent with the Statutory Text.

Plaintiffs argue they are likely to succeed on the merits of their claims because, they contend, the Retirement Security Rule "conflicts with the text of ERISA." Pls.' Mot. at 12. Yet Plaintiffs identify no conflict between ERISA's statutory text and the regulatory text they challenge. Indeed, the statutory text is expansive: "a person is a fiduciary with respect to a plan to the extent . . . he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan." 29 U.S.C. § 1002(21)(A)(ii). The Supreme Court has long recognized that ERISA "defines 'fiduciary' not in terms of formal trusteeship, but in *functional* terms . . . thus expanding the universe of persons subject to fiduciary duties." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993); *see also Pegram v. Herdrich*, 530 U.S. 211, 226 (2000) ("threshold question" to determine "whether [a] person was acting as a fiduciary" under ERISA is whether that person "was performing a fiduciary function"); *Chamber*, 885 F.3d at 371 ("[Congress] addressed fiduciary status for ERISA purposes in terms of enumerated functions."); *LoPresti v. Terwilliger,* 126 F.3d 34, 40 (2d Cir. 1997) ("Unlike the common law definition under which fiduciary status is determined by virtue of the position a person holds, ERISA's definition is functional." (citation omitted)); *Donovan v. Cunningham*, 716 F.2d 1455, 1464 n.15 (5th Cir. 1983) ("ERISA's modifications of existing trust law include imposition of duties upon a broader class of fiduciaries."). "ERISA's standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protection." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996); *see also John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 96 (1993) ("To help fulfill ERISA's broadly protective purposes,

Congress commodiously imposed fiduciary standards on persons whose actions affect the amount of benefits retirement plan participants will receive."). Thus, "some common-law 'nonfiduciaries' are made subject to [ERISA], namely, those who fall within ERISA's artificial definition of 'fiduciary.'" *Mertens*, 508 U.S. at 255 n.5; *see also id.* at 264 (White, J., dissenting) (Congress's adoption of an "artificial definition of 'fiduciary'" was an "express statutory departure" from the common law). In sum, the statutory text makes clear that Congress did not limit fiduciary status to those already recognized as fiduciary under the common law or another statute; instead, Congress designed this new functional definition of fiduciary to address deficiencies in the previous protections for Americans' retirement savings. Thus, contrary to Plaintiffs' view, it is *Congress* that created a fiduciary status for investment advice regarding ERISA plans, "regardless of whether [the investment professional] would be so characterized in any other setting." Pls.' Mot. at 28.

Here, the Retirement Security Rule elaborates on "render[ing] investment advice" by pointing out two paths that satisfy the statutory language: (1) "represent[ing] or acknowledg[ing] . . . acting as [an ERISA] fiduciary . . . with respect to the recommendation," or (2) for an investment professional who "makes professional investment recommendations to investors on a regular basis as part of their business," making a recommendation "under circumstances that" objectively indicate that the recommendation "may be relied upon by the retirement investor as intended to advance the retirement investor's best interest" where it is "based on review of the retirement investor's particular needs or individual circumstances" and "professional or expert judgment" has been applied. These alternatives follow logically and plainly from the statutory text's use of "render investment advice." Moreover, the Retirement Security Rule recognizes investment professionals as fiduciaries only with regard to the transactions for which they provided investment advice that resulted in compensation. *See* 89 Fed. Reg. at 32,137; *cf.* 29 U.S.C. § 1002(21)(A)(ii) (making a person a fiduciary to a plan only "to the extent" there is advice regarding plan assets and compensation). And the Rule's provisions target

circumstances where the retirement investor could objectively be expected to rely upon the investment professional's advice. Thus, the Rule easily comes within the plain text of the statute.

Because the Rule is consistent with the text of ERISA, the text controls and the Court need go no further. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020) ("[W]hen the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration."); *Food Marketing Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) ("In statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself. Where, as here, that examination yields a clear answer, judges must stop."); *Jama v. Immigr. & Customs Enf't,* 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply"); Antonin Scalia and Brian Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012) ("When deciding an issue governed by the text of a legal instrument, the careful lawyer or judge trusts neither memory nor paraphrase but examines the very words of the instrument.").

In arguing otherwise, Plaintiffs conflate the text of ERISA with the text of the 1975 Regulation. *See* Pls.' Mot. at 15-16. But several courts have concluded that the text of ERISA is broader than that of the 1975 Regulation; explaining that the two provisions raise separate interpretive questions; and rejecting efforts by litigants (including Plaintiffs FACC here in an ongoing lawsuit in the Northern District of Texas) to treat them as one and the same. *See* M.J. Report & Recommendation, *FACC I,* No. 3:22-CV-00243-K-BT, 2023 WL 5682411, at *17 n. 10 (N.D. Tex. June 30, 2023) ("The Court emphasizes that the five-part test requires a 'regular basis' but that ERISA itself does not."); *id.* at 18 & n. 11 (finding that "[f]irst-time advice may be sufficient to confer fiduciary status and is consistent with ERISA" because "the analysis for consistency with ERISA and consistency with the DOL's regulations is distinct."); *Nat'l Ass'n for Fixed Annuities*, 217 F. Supp. 3d at

23 ("Indeed, if anything, it is the five-part test . . . that is difficult to reconcile with the statutory text. Nothing in the phrase 'renders investment advice' suggests that the statute applies only to advice provided 'on a regular basis.'"); *Mkt. Synergy Grp.*, 885 F.3d at 680 (noting that ERISA itself "broadly defines a fiduciary as someone who 'renders investment advice for a fee'" (citation omitted)); *Chamber of Com.*, 231 F. Supp. 3d at 171 ("Nothing in ERISA suggests 'investment advice' was intended only to apply to advice provided on a regular basis."). The Department's own conclusion in the Retirement Security Rule—that the "components of the [1975] five-part test are not found in the statute's text," 89 Fed. Reg. at 32,136—is consistent with this line of authority. Thus, this Court should reject Plaintiffs' efforts to import the language of the 1975 Regulation into the text of ERISA itself, and recognize that the Retirement Security Rule is wholly consistent with ERISA's statutory text.

2. *The Major Questions Doctrine is Inapplicable, and Even if Did Apply, Congress's Clear Grant of Authority to DOL is Sufficient to Satisfy That Standard.*

In an effort to put a thumb on the scale against the plain text, Plaintiffs invoke the Supreme Court's "Major Questions" Doctrine. *See* Pls.' Mot. At 25-26. But that doctrine does not apply to this case. Here, the Department relies on no "newfound power" in an "ancillary provision" of ERISA. *See West Virginia v. EPA,* 597 U.S. 697, 724 (2022); *see also id.* at 710, 730 (concluding that EPA had identified for its Clean Power Plan regulation a statutory "backwater" that had been "used . . . only a handful of times since the enactment of the statute."). To the contrary, Congress expressly granted the Department of Labor the authority to grant exemptions and to interpret the term "fiduciary" in ERISA and the Code. *See* 29 U.S.C. § 1135; Reorg. Plan § 102, 29 U.S.C. § 1001 note; *see also* H.R. Doc. 95-375 at 1 (1978) (President Carter's transmittal message for the Reorg. Plan, emphatically stating that "Labor will have statutory authority for fiduciary obligations" under ERISA Title I *and* ERISA Title II plans); *Johnson v. Buckley*, 356 F.3d 1067, 1073 (9th Cir. 2004) ("not[ing] the broad authority of . . . the Secretary of Labor . . . to promulgate regulations governing ERISA"); *Guidry v. Sheet Metal Workers Int'l Ass'n, Local No. 9*, 10 F.3d 700, 708 (10th Cir. 1993), *rev'd in part on other grounds*,

39 F.3d 1078 (10th Cir. 1994) (en banc) ("Congress delegated broad authority to the Secretary of Labor to publish regulations under ERISA.").[6]

In *FACC I*, some of the Plaintiffs here advanced this same argument. The Magistrate Judge found the Major Questions Doctrine inapplicable, for several reasons. First, she concluded that "Congress granted the DOL broad authority to issue technical terms relating to fiduciary status," *FACC I*, 2023 WL 5682411, at *14, and that "[t]he DOL's actions fall within the broad grant of Congressional authorization, and it is similar to previous actions such as the DOL's initial 1975 regulation and clarifying opinion in the Deseret Letter."[7] *Id.* Second, the Magistrate Judge rejected the application of the Major Questions Doctrine based on the economic impacts of the 2020 Interpretive Rule at issue in that case, rejecting FACC's argument that the amount of assets subject to potential rollovers was sufficient to trigger application of the Major Questions Doctrine. To that end, the court

[6] Under ERISA, "the Secretary may prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this subchapter," including "defin[ing] accounting, technical and trade terms." 29 U.S.C. § 1135. Beyond ERISA, similar "necessary and appropriate" language has been construed to confer broad authority on the relevant agencies. *See, e.g., Ninilchik Traditional Council v. United States*, 227 F.3d 1186, 1191 (9th Cir. 2000) ("Congress delegated to the Secretary of the Interior the broad authority to 'prescribe such regulations as are necessary and appropriate to carry out his responsibilities under [ANILCA].'" (citation omitted)); *Pharm. Rsch. & Mfrs. of Am. v. Fed. Trade Comm'n*, 44 F. Supp. 3d 95, 116-17 (D.D.C. 2014) (statute gave FTC a "blank slate" to "define the terms used in this section" and "broadly awarded" the FTC authority to "prescribe such other rules as may be necessary and appropriate to carry out the purposes of this section" (citation omitted)).

[7] The "Deseret Letter" refers to Advisory Opinion 2005-23A (December 7, 2005), which was withdrawn more than three years ago in connection with PTE 2020-02. Of course, the Department is free to withdraw prior advisory opinions just as it is free to change prior interpretations of its own regulations, provided it adequately explains its reasoning. *See, e.g., POET Biorefining, LLC v. EPA*, 970 F.3d 392, 413 (D.C. Cir. 2020). In 2010 and 2016, the Department, concerned that the Deseret Letter—which concluded that advice to roll assets out of a Title I plan and invest them elsewhere did not constitute investment advice to the Title I plan—had proven controversial, sought comments on the Letter and whether its guidance should continue to be followed. *See, e.g.,* 75 Fed. Reg. 65,263, 65,266 (Oct. 22, 2010). The Department withdrew the Deseret Letter in connection with PTE 2020-02, following a period of notice-and-comment in which Plaintiff FACC participated. In that 2020 rulemaking, the Department concluded that the Deseret Letter's analysis was incorrect and that "recommendation to roll assets out of a Title I Plan is necessarily a recommendation to liquidate or transfer the plan's property interest in the affected assets and the participant's associated property interest in plan investments." 85 Fed. Reg. at 82,804; *see also* 89 Fed. Reg. at 32,127.

noted that "ERISA necessarily involves substantial assets, as Americans save billions of dollars annually in ERISA plans," and "[i]f absolute asset values that are regulated were the dispositive factor for the application of the Major Questions Doctrine, the doctrine would likely apply to *any* DOL regulation under ERISA solely due to the nature of the retirement industry." *Id.* at *15. Third, the Magistrate Judge concluded that the 2020 Interpretive Rule was "directly within the core competencies of the DOL," adding that "[s]ince ERISA's enactment, the DOL has been expressly granted the authority to issue PTEs for Title I plans; and, in 1984, the President and Congress granted the DOL the ability to issue PTEs for Title II plans." *Id.* Fourth, the court concluded that "the issue is not one of vast political significance," as the 2020 Interpretive Rule "neither endeavors to transform constitutional rights nor does it involve an entirely new statutory scheme." *Id.*

The same persuasive analysis applies to the identical arguments made by FACC in its challenge to the Retirement Security Rule. Because none of the other factors the Supreme Court has considered to invoke the doctrine weigh in favor of invoking it here, the Court should decline Plaintiffs' invitation.

B. The Rule Is Consistent With the *Chamber* Decision.

Having no shelter in ERISA's plain text, Plaintiffs argue instead that the Retirement Security Rule resurrects the 2016 Rule found to be unlawful in *Chamber*. *See* Pls.' Mot at 12-14. Plaintiffs cannot force this new rule into that prior mold. The Retirement Security Rule differs in key ways, especially because it takes account of the "trust and confidence" standard articulated by *Chamber*, and because it omits several specific aspects of the 2016 package of rules that the Fifth Circuit found objectionable.

1. The Retirement Security Rule Is Consistent With The Trust and Confidence Standard Articulated By the Fifth Circuit.

In *Chamber*, the Fifth Circuit applied the presumption that Congress intended to incorporate the common law meaning of "fiduciary." 884 F.3d at 369-70. The Fifth Circuit concluded that "all relevant sources indicate that Congress codified the touchstone of common law fiduciary status—the parties' underlying relationship of trust and confidence." *Id.* at 369; *see also id.* at 370 ("The common

law understanding of fiduciary status . . . . turns on the existence of a relationship of trust and confidence between the fiduciary and client.").[8] The Department acknowledges that the 2016 Rule treated "all investment recommendations directed to a specific retirement investor or investors regarding the advisability of a particular investment or management decision as fiduciary in nature, subject to a few carveouts." 89 Fed. Reg. at 32,141. Because of this overbreadth, *Chamber* concluded that the 2016 Rule conflicted with the statute because it would have treated relationships that did not involve "trust and confidence" as fiduciary. 885 F.3d at 379 n.13 ("[T]he Fiduciary Rule's overbreadth flows from DOL's concession that any financial services or insurance salesman who lacks a relationship of trust and confidence with his client can nonetheless be deemed a fiduciary.").

Unlike the Fifth Circuit's understanding of the 2016 Rule, the Retirement Security Rule would not apply where an investment professional simply said "You'll love the return on X stock in your retirement plan, let me tell you about it" and the IRA owner purchases the stock and the professional receives a commission. *See* 885 F.3d at 369, 379 n.13. Instead, the Department has crafted a standard that objectively assesses reasonable expectations of the parties based on all of the circumstances. *See* 89 Fed. Reg. at 32,141 ("this rule specifically focuses on whether the investment recommendation can be appropriately treated as trust and confidence advice"). This new rulemaking responds to *Chamber*'s

[8] The Fifth Circuit's decision inverts the most straightforward reading of how Congress was using the well-recognized "fiduciary" category. Long-standing Supreme Court and Fifth Circuit caselaw states that ERISA applied the term to people who would not have been fiduciaries under the common law. *See, e.g.*, *Mertens*, 508 U.S. at 255 n.2 (noting that ERISA's statutory definition of fiduciary "expand[ed] the universe of persons subject to fiduciary duties"; *Varity Corp.*, 516 U.S. at 496–97 (noting that while ERISA's provisions "draw much of their content from the common law of trusts," "trust law does not tell the entire story . . . [and] will offer only a starting point."); *Pegram*, 530 U.S. at 225 ("[t]he analogy between ERISA fiduciary and common law trustee becomes problematic"); *John Hancock Mut. Life Ins. Co.*, 510 U.S. at 96 ("To help fulfill ERISA's broadly protective purposes, Congress commodiously imposed fiduciary standards on persons whose actions affect the amount of benefits retirement plan participants will receive."); *Donovan*, 716 F.2d at 1464 n.15 (noting that "ERISA's modifications of existing trust law include imposition of duties upon a broader class of fiduciaries"). This suggests that Congress used the term for the well-known duties that came with the label, not the common law requirements for who was already a fiduciary apart from ERISA.

invitation that "[t]o the extent . . . that some brokers and agents hold themselves out as advisors to induce a fiduciary-like trust and confidence, the solution is for an appropriately authorized agency to craft a rule addressing that circumstance[.]" 885 F.3d at 379 n.13; *see also id.* (stating that *Chamber*'s holding "does not mean that any regulation of such transactions, or of IRA plans, is proscribed"). The Retirement Security Rule addresses relationships of "trust and confidence" where an investment professional expressly acknowledges their fiduciary status. *See* 89 Fed. Reg. at 32,155. The Rule also addresses investment professionals who "make[] professional investment recommendations to investors on a regular basis as part of their business" where it is objectively clear that "the recommendation [a] is based on review of the retirement investor's particular needs or individual circumstances, [b] reflects the application of professional or expert judgment to the retirement investor's particular needs or individual circumstances, and [c] may be relied upon by the retirement investor as intended to advance the retirement investor's best interest." *Id.* at 32,143.

Where a retirement investor can expect to rely on advice as "intended to advance the retirement investor's best interest," along with the other conditions, a relationship of trust and confidence is present. Indeed, such a totality-of-the-circumstances test also comports with how courts approach common law fiduciary issues outside of ERISA. *See, e.g.*, *Xereas v. Heiss*, 987 F.3d 1124, 1131 (D.C. Cir. 2021) ("Whether a fiduciary relationship exists is a fact-intensive question involving a searching inquiry into the nature of the relationship, the promises made, the type of services or advice given and the legitimate expectations of the parties"); *ARA Auto. Grp. v. Cent. Garage, Inc.*, 124 F.3d 720, 723 (5th Cir. 1997) ("The existence of a fiduciary relationship, outside of formal relationships that automatically give rise to fiduciary duties, is usually a fact intensive inquiry."); *Janvey for Stanford Int'l Bank, Ltd. v. Alvarado*, No. 3:10-CV-2584-N, 2015 WL 13739416, at *5 (N.D. Tex. June 24, 2015) ("Whether and to what extent a fiduciary duty is owed by an employee to an employer requires

consideration of all aspects of the relationship.").[9]

Plaintiffs' most egregious error is their argument that *Chamber* effectively precludes for all time the Department's regulation of rollovers as fiduciary investment advice. According to Plaintiffs, the Fifth Circuit adopted a rigid common-law formulation of fiduciary status that simultaneously (1) announced that only the 1975 Regulation is faithful to the common law understanding of fiduciary, and (2) exempted insurance industry professionals entirely from the scope of ERISA's functional fiduciary standard, even when they provide investment advice to ERISA plans. On this tortured reading, insurance agents providing professionalized investment advice are free to hold themselves out as acting in their clients' best interest while prioritizing lucrative commissions from sales of annuities and rollover recommendations that may involve a retiree's life savings—so long as they are not on a monthly retainer nor providing recurring investment advice. Indeed, many applications of the 1975 Regulation would defeat legitimate expectations of trust and confidence. Under that regulation an insurance agent who had been providing an investor advice for many years regarding non-ERISA insurance and investments, who holds himself out as giving individualized advice in the investor's best interest, who recommended a transaction involving the entire amount the investor had accumulated for retirement, and who then received the complete reliance of the investor, would not be a fiduciary because this was the first advice regarding the ERISA assets. *See* 89 Fed. Reg. at 32,184.

One of the named Plaintiffs further illustrates the Department's concern about "ensur[ing] that retirement investors' reasonable expectations are honored when they receive advice from financial professionals who hold themselves out as trusted advice providers." 89 Fed. Reg. at 32,122. On their

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[9] Plaintiffs erroneously claim that the Retirement Security Rule "studiously avoids any consideration of whether a special relationship of trust and confidence" exists, contending that the Rule "contains nothing but a passing reference, buried in a footnote, in which the DOL superficially and erroneously asserts" that the Rule comports with *Chamber*'s trust and confidence standard. *See* Pls.' Mot. at 14 (quoting 89 Fed. Reg. at 32,142 n. 164). In fact, the Rule's preamble repeatedly returns to these issues, using the phrase "trust and confidence" at least 80 times and citing *Chamber* more than 40 times.

public website, Plaintiff ProVision Brokerage states that it "is driven by making a difference in the financial health of people's lives" and that "[t]he needs/goals/wants of those we serve are the only thing that matters; period." *See* ProVision Brokerage, https://perma.cc/YT2E-4GSM. Yet under Plaintiffs' framing, insurance professionals selling annuities can make these sorts of representations to retirement investors, but then make annuity recommendations regarding ERISA plan assets with no accountability to actually act in their clients' best interest as ERISA requires.[10]

Nothing in the Fifth Circuit's ruling commands this extreme result, and the Department is not precluded under *Chamber*'s reasoning from taking note of current market realities and reasonably enacting new regulations in light of how investment professionals actually provide advice regarding ERISA plan assets. Since the *Chamber* decision, the SEC has required both broker-dealers and registered investment advisers to employ a best interest standard in the rollover context. *See* 89 Fed. Reg. at 32,129. The Retirement Security Rule is aligned with the SEC's new standards. *See id.* at 32,141. And most states, including Texas, have adopted the NAIC's best interest standard for insurance agents, which includes obligations of care, disclosure, conflict of interest, and documentation. *See id.*; *see also* Background § D, *supra.*

Moreover, by its own terms the Rule does not, as Plaintiffs baselessly and repeatedly argue, "ensure[] [that] every financial professional in every transaction will be deemed a fiduciary," Pls.' Mot. at 7, or that 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." *Id.* Instead, consistent with its focus on "trust and confidence," the Rule "properly focuses on the nature of the

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[10] *See also* Cmt. 390, CFP Board at 10 ("[T]he marketing materials that accompany sales recommendations often imply a relationship of trust and confidence . . . and financial professionals often portray themselves as knowledgeable experts."); Cmt. 309, Pub. Investors Advocate Bar Ass'n at 2 (Jan. 2, 2024), https://perma.cc/FK7U-FB84 ("Changing the rule to eliminate firms' purported legal defenses that different investment recommendations are subject to different legal rules, moves the industry towards what public investors already reasonably believe is true.").

relationship between the parties," 89 Fed. Reg. at 32,138 and "[t]o the extent a person does not meet the final rule's requirements (e.g., by not making a recommendation, receiving a fee, providing individualized advice, or purporting to act in the investor's best interest), they are not a fiduciary with respect to that recommendation." *Id.* at 32,137; *see also id.* at 32,141 ("In writing the proposal and this final rule, the Department has been careful to craft a definition that is consistent with both the statutory text and with the Fifth Circuit's focus on relationships of trust and confidence.").

In this way, the Rule makes clear that the Department did not ignore the Fifth Circuit's common-law framing of the definition of fiduciary investment advice; rather, the Department amended its regulation to capture additional transactions, including in the context of rollovers from ERISA Title I plans to ERISA Title II plans, that satisfy the "trust and confidence" standard.

2. The Retirement Security Rule Imposes No Contractual Requirements.

One of the key features of the 2016 Rule was a requirement that fiduciaries that received conflicted compensation enter into an enforceable contract with the IRAs they advised as a condition for relief from the prohibited transaction provisions that otherwise barred the compensation (the Best Interest Contract Exemption or BICE). The Department had characterized the BICE "and the potential for liability" it offered as "central goals of this regulatory project." 81 Fed. Reg. at 21,021, 21,033. The required contractual arrangements and the specter of legal liability were the principal targets of the financial services industry's concerns during that rulemaking. The Fifth Circuit found these contractual requirements particularly problematic, concluding that "[t]he BICE supplants former exemptions with a web of duties and legal vulnerabilities," and that, because "the contracts may not include exculpatory clauses such as a liquidated damages provision nor may they require class action waivers . . . a BIC Exemption comes at a high price." *Chamber*, 885 F.3d at 367. The Fifth Circuit ultimately found the BICE inconsistent with Congressional intent under Title II. *See id.* at 381-82.

Here, by contrast, the contract requirement has been excluded from the Retirement Security

Rule or PTEs. *See* 89 Fed. Reg. 32,142 ("The final rule and associated exemptions, unlike the 2016 Rulemaking, contain no contract or warranty requirements. . . . The sole remedies for non-compliance are precisely those set forth in ERISA and the Code, which include only the imposition of excise taxes in the context of advice to IRAs."). The Department, cognizant of the Fifth Circuit's determination that a contract-based compliance mechanism was unlawful in this context, did not impose one in the Retirement Security Rule or PTEs.

3. No Private Right of Action Has Been Created.

Relatedly, the Fifth Circuit found unlawful the form contract language included in the BICE on the basis that it would subject plaintiffs to state law liability, in effect creating a private right of action for retirement investors against advisors, brokers, and agents. *See Chamber*, 885 F.3d at 384 (finding that the BICE "provisions regarding lawsuits also violate the separation of powers" by creating a "private right of action" (citation omitted)); *see also id.* at 385 (finding that "whether federal or state law may be the vehicle for DOL's BICE-enabled lawsuits is immaterial in the absence of statutory authorization," and that the potential for state law breach-of-contract lawsuits under the required language of the BICE in turn rendered the BICE arbitrary and capricious under the APA). No such concerns are present here, where there is no contract requirement at all. *See* 89 Fed. Reg. at 32,225 ("[T]his rulemaking does not create a new private right of action."); *id.* ("Nothing in the exemption compels Independent Producers to make contractually enforceable commitments.").

4. The Rule Contains No Limitation on Arbitration.

The 2016 Rule also limited an investment adviser's ability to require an advice recipient to agree to binding, pre-dispute arbitration, which the Fifth Circuit said in *dicta* likely violated the Federal Arbitration Act ("FAA"). *See Chamber*, 885 F.3d at 385 ("Although it is now disavowed by DOL, another unsustainable feature of the BIC Exemption is the forced rejection, in transactions involving transaction-based compensation, of contractual provisions that would have allowed arbitration of class

action claims. This contractual condition violates the Federal Arbitration Act."). The Retirement Security Rule and related PTEs do not limit the rights of any advisor, insurance agent, or other market participant to incorporate arbitration clauses into any investor agreement.

* * * *

Beneath their hyperbole, Plaintiffs' argument that the Retirement Security Rule is "virtually indistinguishable" from the 2016 Rule, *see* Pls.' Mot. at 1, does not withstand scrutiny. Instead, the Retirement Security Rule adopts a narrower definition of fiduciary and provides more expansive prohibited transaction relief with fewer burdensome conditions. The Retirement Security Rule also complies with the Fifth Circuit's "trust and confidence" standard for ERISA's functional fiduciary test. This case is therefore not controlled by the *Chamber* opinion.

C. Plaintiffs' Remaining Merits Arguments Are Baseless.

1. The Chamber Opinion Did Not Carve the 1975 Regulation in Stone.

In *Chamber*, the Fifth Circuit observed that the 1975 Regulation "captured the essence" of the common-law fiduciary standard. 885 F.3d at 365. The thrust of Plaintiffs' argument seizes upon this observation, as they maintain that the Department is precluded from regulating further in this area. *See* Pls.' Mot. at 16 (describing the 1975 Regulation as "a correct implementation of the standard Congress articulated" in ERISA). In Plaintiffs' apparent view, the 1975 Regulation set a regulatory ceiling: the Department could enact a regulatory definition that was more relaxed than the 1975 Regulation (and thus reached a smaller universe of investment advice), but could not alter or eliminate any of the elements of the 1975 five-part test or regulate *more* investment advice than the 1975 Regulation, or otherwise take account of changes to the marketplace for retirement investment advice. That argument badly mischaracterizes the Fifth Circuit's holding in *Chamber* and is contrary to well-accepted principles of administrative law under which agencies retain the right to amend prior regulations, absent "a judicial precedent holding that the statute unambiguously forecloses the agency's

interpretation." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967, 982–83 (2005). *See, e.g., Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,* 467 U.S. 837, 863–64 (1984) ("An initial agency interpretation is not instantly carved in stone."); *POET Biorefining, LLC*, 970 F.3d at 413 ("agencies are free to shift interpretive positions, especially where . . . they do so on a comprehensively updated record").

2. *The Department of Labor Has Relevant Authority Over ERISA Title II Plans, Including IRAs.*

Next, Plaintiffs argue that the Department of Labor lacks authority to regulate Title II plans, including IRAs. *See* Pls.' Mot. at 21-22. Plaintiffs are wrong. To be sure, Congress originally vested responsibility for Title II's prohibited-transaction provisions in the Secretary of the Treasury. 26 U.S.C. § 4975(c)(2). However, in 1978, to harmonize administration of the parallel provisions in Title I and Title II, the President transferred to the Secretary of Labor interpretive, rulemaking, and exemption authority regarding the fiduciary definition and, with some exceptions, the prohibited-transaction provisions in Title II. *See* Reorg. Plan, 43 Fed. Reg. 47,713 (Oct. 17, 1978). Congress ratified this transfer in 1984. *See* Pub. L. No. 98-532, 98 Stat. 2705 (1984) (codified at 29 U.S.C. § 1001 note). Therefore, since at least 1984, the Department of Labor has had the precise regulatory authority over ERISA Title II plans, including IRAs, that Plaintiffs seem to insist belongs somewhere else.[11]

Plaintiffs cite no authority for the proposition that "the DOL does not have supervisory or regulatory authority with respect to IRAs," Pls.' Mot. at 4, and the statutory history explained above belies any such characterization. Moreover, Titles I and II are covered by the same general definition of fiduciary and the same framework of prohibited transactions: under both, fiduciaries must comply

[11] It is true that the penalty for a violation of the Prohibited Transaction Exemptions differs between Title I and Title II—for Title II, those who violate the Code's prohibited transaction provisions are subject to excise taxes assessed by the IRS. 26 U.S.C. § 4975(a)-(b). But that speaks only to the remedies available for violations of fiduciary duties, not to the overall rulemaking and exemptive authority for those provisions.

with the conditions of an available PTE in order to engage in a transaction that would otherwise be prohibited as self-dealing. *See Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 242 (2000) (prohibited transaction provisions "categorically bar[] certain transactions deemed likely to injure the pension plan" (citation omitted)). Given the Department's authority over both types of plans, and the parallel fiduciary definitions, the Rule was "designed to ensure that the standards and rules applicable under Title I and Title II of ERISA are broadly uniform as applied to retirement investors receiving advice from a trusted advisor across different categories of investment advice providers and advisory relationships." 89 Fed. Reg. at 32,131. To that end, the amended exemptions promulgated in connection with the Retirement Security Rule (including amended PTE 84-24) apply equally to both Title I and Title II plans.[12]

3. Neither DOL Nor the Market Has Recognized Plaintiffs' Supposed Dichotomy Between "Salespeople" and Fiduciaries.

Plaintiffs advance a stark "distinction between fiduciary investment advisers and financial salespeople" in an effort to minimize the roles of and expectations for brokers and insurance agents, and carve them out of the "fiduciary" definition. *See* Pls.' Mot. at 13. However, *Chamber* endorsed no such absolute distinction; rather, the court merely observed that it was "ordinarily inconceivable" that certain "one-time . . . transactions" would involve "an intimate relationship of trust and confidence." 885 F.3d at 380. But in the process of preparing this rulemaking, the Department developed significant evidence that insurance agents do build relationships of trust and confidence with their clients. For example, the president of an insurance association testified about how he builds relationships with clients and rejects the salesperson role. *See* Public Hr'g Tr. 174:7-11 (Dec. 12, 2023), https://perma.cc/T65S-8EMQ (Brian Holz, President of Nat'l Ass'n of Ins. and Fin. Advisors)

[12] Indeed, Plaintiffs' framing throughout their brief—which purports to distinguish between "ERISA plans" and "IRAs"—misses the point that IRAs were created by Title II of ERISA and are thus also "ERISA plans," subject to DOL's regulatory oversight.

("[B]asically we have a long term relationship where I get to know the client . . . and try to figure out what the best products and services are to meet their needs."); *id.* at 175:15-17 (even with new client "we typically meet at least a couple of times"); *id.* at 176:6-9 ("I am absolutely not a salesperson. An advisor and somebody who helps and serves my clients, that's my highest ethic and creed."); *id.* at 180:17-22 (Q: "[D]o you think you have a sort of relationship of trust and confidence with your customer?" A: "Absolutely. I don't think my clients would stick with me for decades if they didn't.").

Moreover, while the Department acknowledged that distinct regulations apply to different financial professionals, *see supra* Background § D, the Rule focuses on the circumstances surrounding the compensated investment advice to an ERISA plan, which bring it within the scope of ERISA. Importantly, too, regulators of stockbrokers and insurance agents have, in recent years, adopted heightened conduct standards that recognize that these financial professionals are not mere salespeople. In 2019, the SEC observed that "broker-dealer investment advice can be consequential" and "need not be trivial, inconsequential, or infrequent" under the securities regulations. *See* 84 Fed. Reg. 33,681, 33,685 (July 12, 2019). In the same regulatory package, the SEC issued "Regulation Best Interest," which established a best interest standard applicable to broker-dealers when making a recommendation of any securities transaction or investment strategy involving securities to retail customers. *See* 84 Fed. Reg. 33,318 (July 12, 2019). This standard "draws from key principles underlying fiduciary obligations, including those that apply to [registered] investment advisers under the Investment Advisers Act of 1940." *Id.* at 33,318, 33,320, 33,332. While the SEC did not impose the full Advisers Act fiduciary standard on broker-dealers, the primary remaining distinction is that a registered investment adviser's "fiduciary duty generally includes a duty to provide ongoing advice and monitoring, while Regulation Best Interest imposes no such duty and instead requires that a broker-dealer act in the retail customer's best interest at the time a recommendation is made." *Id.* at 33,321; *see also XY Planning Network, LLC v. U.S. Secs. Exch. Comm'n*, 963 F.3d 244, 255 (2d Cir. 2020). Thus,

SEC rules do not distinguish between investment advisers and mere salespeople.

Likewise, in 2020, the National Association of Insurance Commissioners (NAIC) revised its model regulation to state that insurance agents must act in the best interest of the consumer when making a recommendation of an annuity, and insurers must establish and maintain a system to supervise recommendations so that the insurance needs and financial objectives of consumers at the time of the transaction are effectively addressed. *See supra* Background § D. The insurance agent's best interest obligation includes four components, including care and conflict of interest, and regulations based upon the NAIC Model Regulation have been adopted in at least 45 states.

Plaintiffs attempt to dismiss these actions by arguing that, because these separate regulatory regimes do not treat such advice as fiduciary, the state insurance regulations and the SEC Regulation Best Interest support their posited dichotomy between "salespeople" and fiduciaries, *see* Pls.' Mot. at 7-8. That argument is misplaced: these regulatory regimes make very clear that investment professionals, including insurance agents, are not mere salespeople but have significant additional obligations. The nature of those obligations and the way that investment professionals behave in the marketplace can satisfy ERISA's functional fiduciary test, regardless of how other regulatory regimes label the conduct. For example, the SEC reserves its "fiduciary" label for those who must provide ongoing monitoring and advice, *see* 89 Fed. Reg. 32,169, but ERISA does not require such ongoing monitoring and advice for investment advice fiduciaries—ERISA's "to the extent" language makes clear that it only applies to advice leading to a compensated transaction. *See* 29 U.S.C. § 1002(21)(A). Yet, Plaintiffs identify no meaningful difference between a broker's obligations under Regulation Best Interest and ERISA's Title I requirements for fiduciary investment advice; both are transactional and involve obligations of prudence, loyalty, and avoidance of conflicts of interest. Thus, brokers who satisfy the ERISA fiduciary standard when they do business with ERISA plans may be subject to similar obligations from both sources. And while there are important differences between ERISA's

obligations and those adopted by NAIC Model Regulation,[13] the NAIC's approach appears to lead to insurance professionals holding themselves out as providing individualized advice in the investor's best interest when they make recommendations about ERISA plan assets and receive compensation for that advice. Thus, the NAIC standard informs the expectations of both financial professionals and retirement investors about the relationships being formed. And insurance professional may meet the terms of ERISA's investment advice fiduciary standard even if the NAIC would not label the standard "fiduciary" for state law purposes. *See also* 89 Fed. Reg. 32,140 ("Congress imposed a uniquely protective regime on tax-preferred retirement investments" and "[t]he Department's final rule, which covers compensated retirement recommendations under conditions where it is reasonable to place trust and confidence in the advice, falls well within ERISA's broad fiduciary definition, even if it is more protective of federally-protected retirement investments than State insurance regulations.").

The reasonableness of DOL's rejection of the salesperson-fiduciary dichotomy is underscored by its historical practice. DOL has never accepted the view that salespeople are categorically exempt from ERISA's fiduciary obligations. The agency made that clear as early as 1976, when insurers asked the agency to interpret ERISA to exclude salespeople who made "normal sales presentation[s]" and "recommendations" while selling insurance products. 41 Fed. Reg. 56,760, 56,762 (Dec. 29, 1976). DOL at the time refused to do so, explaining that the question of whether salespeople had acted as

[13] This is not to say that the obligations imposed by the NAIC Model Regulation are equivalent to the obligations imposed by the Department under this Rule or by the SEC's closely aligned Regulation Best Interest. ERISA, for example, takes a much more protective approach to conflicts of interest than the NAIC Model Regulation, which excludes all compensation, cash and noncash, from the definition of material conflicts of interest that must be managed. *See* NAIC Model Regulation 275, Section 5.I.2, Section 6.A.3. Similarly, while the NAIC Model Regulation states that agents may not put their own financial interests ahead of their customers, it treats this best interest obligation as satisfied as long as the four component obligations are met, none of which appear to require the agent to avoid placing their own financial interests ahead of their client (for example, the care obligation requires only that the agent have "a reasonable basis to believe the recommendation effectively addresses the consumer's financial situation, insurance needs, and financial objectives"). *See id.*, Section 6.A.

fiduciaries should instead be evaluated on a case-by-case basis. *Id.* The Retirement Security Rule is consistent with that fact-dependent approach.

Finally, it bears noting that the Department has ensured that the Rule avoids covering sales pitches or "hire me" communications that do not meet the various requirements set out in the Retirement Security Rule. *See* 89 Fed. Reg. 32,142 (confirming that "recommendations that do not satisfy the specific contexts for fiduciary advice will not lead to ERISA fiduciary status"); *see also id.* (noting that "mere sales pitches" do not receive fiduciary treatment). And ERISA's structure also means that only investment recommendations that result in a transaction involving plan assets are subject to fiduciary requirements. Thus, "mere salespeople" not otherwise meeting the elements of the new test would not be rendering fiduciary investment advice under the Rule.

4. ERISA Does Not Distinguish Between Sales Commissions and Retainer Fees

Plaintiffs next argue that because insurance agents generally receive compensation in the form of sales commissions, they do not qualify as having rendered investment advice "for a fee" under ERISA. 29 U.S.C. § 1002(21)(A). *See* Pls.' Mot. at 19-20. But under ERISA, anyone who renders investment advice regarding plan assets for a fee "*or other compensation, direct or indirect*," is a fiduciary. 29 U.S.C. § 1002(21)(A)(ii) (emphasis added). This statutory language necessarily captures advisers who are paid by commission in part for recommending certain products to their clients. *See* 89 Fed. Reg. 32,138 (rejecting argument that "commission-based recommendations are properly viewed as mere sales pitches" because it is "neither supported by the text of the statute nor the Department's consistent views starting in 1975 that advice can be compensated through commissions"). And the Fifth Circuit in *Chamber* approvingly quoted the statement from the 1975 Rule's preamble that the term "fee or other compensation, direct or indirect" "should be deemed to include all fees or other compensation incident to the transaction in which the investment advice to the plan has been rendered or will be rendered" and "'may include' brokerage commissions" where the 1975 five-part test is met.

885 F.3d at 373 (quoting 40 Fed. Reg. at 50,842); *see also* 40 Fed. Reg. at 50,842 ("brokerage commissions, mutual fund sales commissions, and insurance sales commissions").

Further, the Department specifically rejected Plaintiffs' proposed approach in a 1983 advisory opinion responding to a request that broker-dealers not be deemed an investment advice fiduciary "unless the broker-dealer provides investment advice for distinct, non-transactional compensation." Advisory Opinion 83-60A at 1 (Nov. 21, 1983). The Department concluded that where the 1975 five-part test is met "under the particular facts and circumstances," then "it may reasonably be expected 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." *Id.* at 3. The Fifth Circuit approvingly quoted this language, too, *see* 885 F.3d at 373-74,[14] and while the Department has updated the 1975 test, the Retirement Security Rule works no change to this longstanding, reasonable interpretation of compensation triggering ERISA fiduciary status.[15]

5. The Insurance Industry Is Not Exempt From ERISA's Functional Fiduciary Standard.

Perhaps most ambitiously, Plaintiffs effectively seek to carve the entire insurance industry out of ERISA, arguing that the Department "has no authority to impose such regulations as a policy

[14] Other courts have also endorsed this conclusion. *See, e.g.*, *Farm King Supply, Inc. v. Edward D. Jones & Co.*, 884 F.2d 288, 293 (7th Cir. 1989) (ERISA investment advice includes "stock brokers or dealers who recommend certain securities and then participate in the acquisition . . . of those securities and receive a commission for their services" (citation omitted)); *Eaves v. Penn*, 587 F.2d 453, 458 (10th Cir. 1978) (ERISA investment advice "includes … stock brokers or dealers who recommend certain securities and then participate in the acquisition or disposition of those securities and receive a commission for their services"); *Ellis v. Rycenga Homes, Inc.*, 484 F. Supp. 2d 694, 710 (W.D. Mich. 2007) (rejecting as "untenable" broker's argument that it was paid only "commissions for sales, not a fee for investment advice" and that "the advice . . . was free").

[15] Plaintiffs attempt to explain away the 1983 Advisory Opinion by asserting it only allowed for the possibility that commissions could qualify as "investment advice for a fee" based on "particular facts and circumstances" *See* Pls.' Mot. at 21. But the Retirement Security Rule itself applies a facts-and-circumstances test, as discussed above. It is Plaintiffs that posit a "general rule"—namely that commission-based compensation is necessarily excluded from ERISA—and that position is contrary to the statutory text and the Department's longstanding position. *See Chamber*, 885 F.3d at 373-74.

choice—that is the role of the SEC and state insurance commissioners." Pls.' Mot. at 16. However, the Department has explicit regulatory authority to interpret ERISA's functional fiduciary standard as applied to Title I *and* Title II, *see supra* Background § A, and the Department only regulates insurance agents insofar as they do business with ERISA plans. Further, during this rulemaking, commenters "described significant conflicts of interest associated with large commissions on some annuity sales, as well as abusive sales practices," and "noted that the terms of annuity contracts, including surrender charges, may often be detrimental to retirement investors but may not be well understood." 89 Fed. Reg. 32,133; *see also id.* 32,142 ("commenters informed the Department that it is common for broker-dealers and insurance agents to hold themselves out as trusted advisers and take deliberate steps to develop relationships of trust and confidence with their customers"). The Department appropriately addressed these comments and concerns in its rulemaking.

That insurance agents are also regulated by state law, or that state laws define insurance agents' general obligations for licensure differently from what federal law says about their obligations when they do business with ERISA plans, does not change the calculus. Congress enacted ERISA to ensure the "continued well-being and security of millions of employees and their dependents [that] are . . . affected by" retirement plans and declared it "desirable . . . that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans." 29 U.S.C. § 1001(a). ERISA's system of duties and obligations were crafted to confer protections beyond those provided by then-existing federal and state laws. *Id.*; *see Comm'r v. Keystone Consol. Indus.*, 508 U.S. 152, 160 (1993). Congress recognized that imposing fiduciary obligations on "any person with a specific duty" described "by th[e] statute" represented a "departure from current judicial precedents." *See* 120 Cong. Rec. 3977, 3983 (1974) (statement of Rep. Perkins). But Congress deemed this departure "necessary to the proper protection" of retirement-investment plans. *Id.* Although the specific duties imposed on insurance agents pursuant to state law (including regulations modeled on the NAIC Model

Regulation) may, as a factual matter, contribute to retirement investors' reasonable expectations of advice that is intended to advance their best interest, *see* Pls.' Mot. at 8, the Department has not exceeded its authority by crafting the Rule in a way that honors those reasonable expectations.

In short, and apparently owing to Plaintiffs' misunderstanding of the Department's regulatory authority over Title II plans, Plaintiffs wrongly argue that the Department "is trying to transform sales conduct standards that were adopted by the appropriate regulatory bodies into a fiduciary obligation that ERISA does not impose." *Id.* at 18. But the Department *is* the appropriate regulatory body overseeing ERISA's fiduciary definition and the PTEs from both Title I and Title II, and the "sales conduct standards" the insurance agent Plaintiffs complain of only subject them to fiduciary status if they meet all of the elements of the test in the Retirement Security Rule, including that they make an investment recommendation to a retirement investor that has an ERISA plan or IRA. Plaintiffs' other sales activity outside of ERISA plans or IRAs are of no concern to the Department and are unaffected by the Retirement Security Rule. Thus, insofar as Plaintiffs seek to argue a likelihood of success on the merits based on a purported carve-out for the insurance industry in its dealings with ERISA plans or IRAs, that argument should be rejected. *See John Hancock Mut. Life Ins. Co.*, 510 U.S. at 98.

6. The Conditions Included In PTE 84-24 Are Not Arbitrary and Capricious

While most of Plaintiffs' arguments are aimed at the Rule itself, Plaintiffs also argue that the Department's promulgation of PTE 84-24 was arbitrary and capricious based on the disclosure obligations that are included in the text of that exemption. *See* Pls.' Mot. at 26. Plaintiffs are not likely to succeed on the merits of this claim, either.

The arbitrary-and-capricious standard simply "requires that agency action be reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021). As discussed *supra* Background § A, Congress delegated to the Secretary of Labor the broad authority to grant "conditional or unconditional" administrative exemptions on a class-wide or individual basis, if the

Secretary finds that such an exemption is: (1) administratively feasible, (2) in the interests of the plan and of its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries of such plan. *Id.* § 1108(a). The Department included a detailed discussion in the preamble to amended PTE 84-24 articulating why the statutory criteria were met in this instance, *see generally* 89 Fed. Reg. at 32,302-38, and Plaintiffs do not appear to argue otherwise. *See* Pls.' Mot. at 27.

Instead, Plaintiffs appear to argue that by requiring insurance agents to acknowledge their fiduciary status in writing to the Retirement Investor in order to avail themselves of the relief provided in the exemption, the Department is subjecting them to "potential liabilities" under state law for breach of fiduciary duty. Pls.' Mot. at 27-28. However, such acknowledgements are not novel in PTEs. *See, e.g.*, 26 U.S.C. § 4975(f)(12)(B)(i) (statutory exemption requiring fiduciary acknowledgement); 49 Fed. Reg. at 13,212 (requiring a fiduciary acknowledgement); *see also* 89 Fed. Reg. 32,271 (collecting additional cases). Yet Plaintiffs identify no instances where an ERISA fiduciary acknowledgement led to a viable state-law claim. Thus, Plaintiffs' claim is highly speculative and meritless. Unlike the 2016 Rule, neither the Rule nor PTE 84-24 require that insurance agents enter into a contract, and the Department has been categorical that the acknowledgments are not intended to create a private right of action. *See* 89 Fed. Reg. at 32,302 (observing that "the requirement simply ensures up-front clarity about the nature of the relationship and services being provided," does "not impose any contract or warranty requirement," and "stands in marked contrast to the Department's 2016 rulemaking on fiduciary advice" because "the Department has imposed no obligation on fiduciary advice providers to enter into enforceable contracts with or to provide enforceable warranties to their customers."); *see also id.* at 32,312 ("The only remedies for violations of the exemption's conditions, and engaging in a nonexempt prohibited transaction, are those provided by Title I of ERISA, which specifically provides a cause of action for fiduciary violations with respect to ERISA-covered Plans, and Title II of ERISA, which provides for imposition of the excise tax.").

Finally, the Department addressed and rejected Plaintiffs' undeveloped argument that the Dodd-Frank Act somehow prohibits ERISA regulation of fixed indexed annuities or all annuities. *see* Pls.' Mot. at 28-29. The Department explained that one provision of the Dodd-Frank Act called for the SEC to study potential regulation and another provision prohibited the SEC from regulating fixed indexed annuities as securities. *See* 89 Fed. Reg. 32,138 & nn.146-147. Plaintiffs do not engage with the Department's reasonable explanation or even quote the statutory language. Plaintiffs also claim that the disclosure requirements "fail to recognize the 'apples and oranges' nature of any comparison between guaranteed annuity products . . . and yield driven investments in stocks or mutual funds." Pls.' Mot. at 29. But the Department specifically considered these arguments, *see* 89 Fed. Reg. at 32,213-14 (noting the "apples and oranges" notion and explaining why it is mistaken), and its conclusion to adopt the disclosure requirements was not unreasonable. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)("the scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency"); *ConocoPhillips Co. v. EPA*, 612 F.3d 822, 831–32 (5th Cir. 2010) ("Under this highly deferential standard of review, a reviewing court has the least latitude in finding grounds for reversal" (citation omitted)).

II. THE EQUITIES DISFAVOR INJUNCTIVE RELIEF

For all of these reasons, Plaintiffs fail to demonstrate a likelihood of success on the merits, and, in any event, two of the remaining requirements for issuance of a preliminary injunction—the balance of harms and the public interest, which "merge when the Government is the opposing party," *Nken v. Holder*, 556 U.S. 418, 435 (2009)— tilt sharply against the issuance of the injunctive relief they seek. First, during the period for which a preliminary injunction would apply, any harm to Plaintiffs is very limited. The Retirement Security Rule's fiduciary definition is not applicable until September 23, 2024, *see* 89 Fed. Reg. at 32,171, and for a year after that both PTE 84-24 and PTE 2020-02 have a "phase-in" period. *See* 89 Fed. Reg. 32,344. Thus, until September 23, 2025, an ERISA fiduciary can

receive compensation under the exemptions so long as they comply with the impartial conduct standards and provide a fiduciary acknowledgment. By contrast, Plaintiffs' requested injunction would harm Defendants in executing their statutory responsibilities and disserve the public interest. First, the injunction would directly interfere with the Department's ability "to advise the public of [its] construction of the statutes and rules which it administers," *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 97 (2015) (citation omitted). Second, there is a public interest in protecting retirement investments. *See Su v. RiversEdge Advanced Ret. Sols., LLC*, No. 2:24-CV-00104, 2024 WL 1193858, at *1 (W.D. Pa. Feb. 20, 2024) ("In passing ERISA, Congress declared a national public interest in protecting "the continued well-being and security of millions of employees and their dependents ... directly affected by these plans." (quoting 29 U.S.C. § 1001(a))); *Herman v. S.C. Nat. Bank*, 140 F.3d 1413, 1423 (11th Cir. 1998). Returning to the *status quo ante* of the 1975 Regulation would produce the very harms the Department identified in the preamble of the Rule, because that test is "underinclusive in assigning fiduciary status," "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 "too often works to defeat legitimate retirement investor expectations of impartial advice and allows investment advice providers to hold themselves out as offering individualized advice that is intended to promote the best interest of the customer, when they, in fact, have no such obligation under the 1975 regulation's implementation of Title I or Title II of ERISA." 89 Fed. Reg. at 32,132.

III. ANY INJUNCTIVE RELIEF SHOULD BE LIMITED TO PLAINTIFFS BEFORE THE COURT.

Should the Court disagree with the Department, any preliminary injunction or stay should be limited in scope. At the outset, Plaintiffs' effort to seek a nationwide injunction against the Department's interpretation should be rejected. *See* FACC Compl. ¶ 55(c), ECF No. 1 (requesting that the Court "[p]reliminarily and permanently enjoining the DOL and all of its officers, employees and agents from implementing, applying, or taking any action of any type under the 2024 Fiduciary Rule

or amended PTE 84-24 *anywhere within the DOL's jurisdiction*" (emphasis added)). While past courts have found universal or nationwide injunctions permissible in some cases, the Fifth Circuit has recently explained that prior precedent "does not hold that nationwide injunctions are required or even the norm." *Louisiana v. Becerra*, 20 F.4th 260, 263 (5th Cir. 2021). Instead, "[p]rinciples of judicial restraint control," and "the scope of the injunction must be justified based on the 'circumstances.'" *Id.* Moreover, many jurists have questioned the wisdom and even constitutionality of nationwide injunctions. *See Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring in the grant of a stay) ("Injunctions like these thus raise serious questions about the scope of courts' equitable powers under Article III."); *Trump v. Hawaii*, 585 U.S. 667, 713 (2018) (Thomas, J., concurring) ("I am skeptical that district courts have the authority to enter universal injunctions."); *Georgia v. President of the United States*, 46 F.4th 1283, 1303 (11th Cir. 2022) ("In their universal reach to plaintiffs and nonplaintiffs alike, nationwide injunctions push against the boundaries of judicial power, and very often impede the proper functioning of our federal court system."); *Arizona v. Biden*, 40 F.4th 375, 396 (6th Cir. 2022) (Sutton, C.J., concurring) ("Call them what you will—nationwide injunctions or universal remedies—they seem to take the judicial power beyond its traditionally understood uses, permitting district courts to order the government to act or refrain from acting toward nonparties in the case."). While Plaintiffs are not entitled to relief in any event, should the Court disagree, any injunctive relief should be appropriately tailored and limited to the Plaintiffs before the Court (which here would include FACC's individual members).[16]

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[16] Plaintiffs' request for a stay under § 705 supports no additional relief. "Motions to stay agency action pursuant to [Section 705] are reviewed under the same standards used to evaluate requests for interim injunctive relief." *Texas v. Biden*, 646 F. Supp. 3d 753, 769 (N.D. Tex. 2022). "A Section 705 stay can [] be seen as an interim or lesser form of vacatur under Section 706[.]" *Id.* Its plain language requires the Court to consider relief that merely "preserve[s] status or rights pending conclusion of the review proceedings" tailored only "to the extent necessary to prevent irreparable injury." 5 U.S.C. § 705; *see also Administrative Procedure Act*, S. Doc. No. 248, 79th Cong., 2d Sess. 277 (1946) (indicating that relief under § 705 should "normally, if not always, be limited to the parties complainant").

CONCLUSION

For the foregoing reasons, Defendants are entitled to dismissal or summary judgment on all claims, and the Court should deny Plaintiffs' Motion for Preliminary Injunction and Stay of the Effective Date of the Rule.

Dated: June 14, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 14, 2024, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which sent e-mail notification of such filing to all CM/ECF participants.

/s/ Galen N. Thorp
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