No. 17-10238

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AMERICAN COUNCIL OF LIFE INSURERS, AMERICAN EQUITY INVESTMENT LIFE INSURANCE COMPANY, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, FINANCIAL SERVICES INSTITUTE, INCORPORATED, FINANCIAL SERVICES ROUNDTABLE, GREATER IRVING-LAS COLINAS CHAMBER OF COMMERCE, HUMBLE AREA CHAMBER OF COMMERCE, INDEXED ANNUITY LEADERSHIP COUNCIL, INSURED RETIREMENT INSTITUTE, LIFE INSURANCE COMPANY OF THE SOUTHWEST, LUBBOCK CHAMBER OF COMMERCE, MIDLAND NATIONAL LIFE INSURANCE COMPANY, NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS, NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS - AMARILLO, NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS - DALLAS, NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS - FORT WORTH, NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS - GREAT SOUTHWEST, NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS - TEXAS, NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS - WICHITA FALLS, NORTH AMERICAN COMPANY FOR LIFE AND HEALTH INSURANCE, SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AND TEXAS ASSOCIATION OF BUSINESS,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF LABOR AND EDWARD C. HUGLER, ACTING SECRETARY, U.S. DEPARTMENT OF LABOR,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Texas, Civil Action No. 3:16-cv-01476

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v.

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The undersigned counsel of record certifies that the following interested persons and entities described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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INTRODUCTION

This appeal concerns a Department of Labor ("Department" or "DOL") rule that would bring about the most profound changes in the retirement savings system since the adoption of the Employee Retirement Income Security Act ("ERISA") in 1974. The rule would vastly expand the definition of "fiduciary" under both ERISA and the Internal Revenue Code ("Code"), sweeping in the relationships of tens of thousands of financial-services professionals with their clients, including—by DOL's own admission—relationships "that the Department does not believe Congress intended to cover as fiduciary relationships."[1]

This new "Fiduciary Rule" is contrary to law. It uproots the term "fiduciary" from its statutory text and common law meaning, expanding it to encompass stock brokers and insurance agents engaged in ordinary sales activity. And because the Department does not possess regulatory or enforcement authority over Individual Retirement Accounts ("IRAs"), it accomplished this regulatory overreach by using its ability to provide regulatory *exemptions* as a means to compel financial-services

[1] App. 416.

professionals to make contractual commitments that will be enforced through private class actions. In doing so, the Department exceeded its exemptive authority and created a private right of action in direct contravention of *Alexander v. Sandoval*, 532 U.S. 275 (2001). For these reasons and others, the Rule is arbitrary, capricious, and unlawful.

Plaintiffs-Appellants (and others) are in urgent need of immediate relief from the Rule's onerous requirements, many which will applicable on April 10, 2017.[2] Plaintiffs respectfully ask the Court to enter an injunction pending appeal under Federal Rule of Appellate Procedure 8(a), staying the applicability date of the Fiduciary Rule until this appeal has concluded. In the alternative, Plaintiffs request that the Court expedite this appeal. *See* 28 U.S.C. § 1657(a); 5th Cir. Loc. R. 27.5. **Plaintiffs respectfully ask the Court to issue a ruling on this motion by Tuesday, April 4, 2017.**[3]

[2] Plaintiffs–Appellants filing this motion are the Chamber of Commerce of the United States of America; the Financial Services Institute, Inc.; the Financial Services Roundtable; the Greater Irving-Las Colinas Chamber of Commerce; the Humble Area Chamber of Commerce; the Insured Retirement Institute; the Lubbock Chamber of Commerce; the Securities Industry and Financial Markets Association; and the Texas Association of Business.

[3] Plaintiffs respectfully suggest that the Court order Appellees to file a response due Tuesday, March 28, 2017, with Plaintiffs' reply due Friday, March 31.

The overnment has already acknowledged the need to reexamine the wisdom of the Rule and postpone its applicability date. On February 3, 2017, the President directed DOL to reassess whether the Rule is likely to "harm investors," reduce "certain retirement savings offerings," or cause "an increase in . . . prices."[4] If DOL answers any of those questions in the affirmative, it must propose a rule revising or rescinding the Rule.

Recognizing the impracticability of completing this review before the Rule becomes applicable on April 10, DOL recently issued a Notice of Proposed Rulemaking to extend the applicability date by 60 days, to June 9, 2017. Without an extension, DOL explained, "retirement investors and other stakeholders might face two major changes in the regulatory environment rather than one," which "could unnecessarily disrupt the marketplace, producing frictional costs that are not offset by commensurate benefits."[5]

The same considerations support the relief Plaintiffs request here. The Rule would require a wholesale reordering of the financial-services and insurance industries, which DOL has estimated would cost $5 billion

[4] App. 618.

[5] App. 622.

in the first year alone.[6] With the Rule's applicability date just weeks away, industry participants must now commit to fundamental choices about how they will attempt to comply. Those choices will trigger a cascade of consequences that will be substantial and in many cases irreversible: financial costs, disruptions to business operations and relationships, and upheaval in the relationships between retirement savers and service providers. Once those compliance decisions have been made, sunk costs and the risk of customer confusion will make it impracticable for many firms to revert to the status quo.

DOL's proposed 60-day extension, while acknowledging the need for prompt relief, fails to provide the relief needed: There is no certainty whether DOL will adopt its proposed extension, nor when, and even if adopted DOL's proposed extension will expire while this case is pending, causing a resumption just weeks from now of the uncertainty and unnecessary costs that exist currently. Only an injunction pending appeal will relieve the financial-services industry, the insurance industry, and retirement savers of this burden and disruption.

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[6] App. 419.

BACKGROUND

A. Statutory Framework

Plaintiffs seek emergency relief principally because of the Rule's effect on IRAs. Under the Internal Revenue Code, a "fiduciary" to an IRA is defined, in relevant part, as "any person who . . . renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan." 26 U.S.C. § 4975(e)(3)(B). The Code bars fiduciaries from engaging in certain "prohibited transactions," including transactions in which fiduciaries receive commissions, payments from third parties, and other transaction-based payments. *Id.* § 4975(c)(1)(F). The Treasury Department is responsible for enforcing these prohibited-transaction provisions through the imposition of excise taxes. There is no private right of action.

IRAs—which are held by individuals—are entirely different than the employer-sponsored retirement plans governed by ERISA; the two types of plans are subject to vastly different regulatory regimes. ERISA subjects fiduciaries to duties of loyalty and prudence, 29 U.S.C. § 1104(a); the Code does not. ERISA provides plan participants carefully delineated private rights of action, 29 U.S.C. § 1132(a); the Code does not. And

ERISA, which concerns employer-sponsored plans, is administered and enforced by the nation's principal employment regulator, DOL. The Department has no authority to regulate IRAs, and no enforcement authority with respect to IRAs.

IRAs were added to the Tax Code in conjunction with the enactment of ERISA in 1974, and there is limited overlap between the two regimes. ERISA defines "fiduciary" in the same terms as the Code, 29 U.S.C. § 1002(21)(A). ERISA also generally bars fiduciaries from receiving commissions or other transaction-based payments. *Id.* § 1106(b)(3). And, as a matter of administrative convenience, a 1978 "reorganization plan" gave DOL authority to interpret the definition of "fiduciary" that appears in ERISA and the Code, and gave DOL authority to grant exemptions from the prohibited transaction provisions not only of ERISA, but also of the Code. *See* Reorganization Plan No. 4 of 1978, § 102 (Aug. 10, 1978), *reprinted in* 5 U.S.C. app. 1 (2016), *and in* 92 Stat. 3790 (1978).

B. The Fiduciary Rule

DOL's Fiduciary Rule is predicated on the Department's skepticism about the practices of broker-dealers and insurance agents, the products they offer, and the federal and state laws that govern them. For more

than 80 years, those laws have recognized three basic categories of financial professionals: (1) brokers, who offer investment products to their customers and ordinarily receive payments for each transaction executed; (2) investment advisors, who offer ongoing investment advice to clients and typically receive periodic fees for that advice; and (3) insurance agents, who sell annuities and other insurance products and charge on a transaction basis.[7] Historically, investment advisors have been considered fiduciaries; brokers and insurance agents have not. *SEC v. Capital Gains Res. Bureau, Inc.*, 375 U.S. 180, 191, 194-95 (1963).

In this rulemaking, the Department concluded that the laws Congress enacted to regulate broker-dealers, and the state laws regulating insurance agents, were inadequate. For example, disclosure requirements are a cornerstone of the securities laws and state insurance regulation, but DOL concluded that disclosure was "ineffective to mitigate conflicts in advice" and might actually "make consumers worse off."[8] DOL also based the Rule on its preference for "passively managed mutual funds (i.e. index funds)" over "actively managed funds," and its

[7] *See Brokers*, FINRA (2016), http://www.finra.org/investors/brokers; App. 370, 395-97.

[8] App. 418-19, 592.

"deep and continuing concerns" with "proprietary" financial products, for example, insurance policies that an insurance company both designs and markets.[9]

In order to substitute DOL's regulatory preferences for Congress's and the States', the Fiduciary Rule (which is a package of seven integrated rules[10]) proceeds by two basic steps. First, it erases the distinctions among fiduciaries, brokers, and insurance agents that have existed for time immemorial. It does this by jettisoning the interpretation of "fiduciary" adopted by the Department in 1975 in favor of one that covers virtually all financial and insurance professionals who provide services to IRAs, as well as to ERISA plans. A person can become a fiduciary if she simply "[d]irect[s] . . . advice to a specific advice recipient" regarding the "advisability of a particular investment . . . decision."[11] <u>An insurance sales agent or broker-dealer who merely recommends purchasing a product for an IRA is now a fiduciary.</u>

DOL removed the requirements of its old interpretation that

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[9] App. 522, 594.

[10] App. 50 n.1.

[11] App. 465.

captured the historical hallmarks of fiduciary status: A special relationship of trust and confidence. For example, advice no longer need be given "pursuant to a mutual agreement, arrangement or understanding" as to fiduciary status and "serve as a primary basis" for the participant or plan's decision. 29 C.F.R. § 2510.3-21(c)(1) (2015).

The immediate consequence of DOL's new "fiduciary" interpretation is that it bans forms of compensation—such as commissions and sales loads—that have long been a cornerstone of the market for services related to retirement savings. That is because under the Code, commissions and sales loads (third party payments) are prohibited transactions in which fiduciaries may not engage. 26 U.S.C. § 4975(c)(1)(F), (e)(3)(B).

However, to entirely ban such payments for IRAs would be impractical and—as DOL repeatedly stated in the rulemaking—deprive consumers of beneficial services and products.[12] Instead, DOL's ultimate objective was to impose new standards of conduct on "the IRA market," which it calls its "best interest" standards.[13] This was the second step of

[12] App. 481.

[13] *See* App. 532.

DOL's two-step regulatory process: New and amended prohibited-transaction "exemptions" for broker-dealers and insurance agents that will enable them to continue selling on commission—but only on the "condition" that they accede to a whole new regulatory framework.

The most important of these exemptions is the Best Interest Contract ("BIC") exemption. This exemption allows financial institutions and professionals to receive some transaction-based payments if, among other things, they enter enforceable contracts with their customers that bind them to fiduciary standards of conduct and to a range of other requirements and restrictions, including prohibitions on liquidated damages clauses and on waivers of the ability to participate in class actions.[14]

By this two-step process, DOL has made itself—not the Treasury Department, not the SEC, and not the States—the primary regulator of broker-dealers and insurance agents with respect to IRAs.

C. This Action

Plaintiffs brought suit challenging the Rule under the Administrative Procedure Act. Two other actions filed in the same court

[14] App. 471-559.

were consolidated with this case, and the parties sought expedited consideration. After the district court granted summary judgment to DOL, Plaintiffs noticed this appeal and moved the district court for an injunction pending appeal. That motion was denied on March 20, 2017.[15]

ARGUMENT

An injunction pending appeal is warranted where a plaintiff has "establish[ed] that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). Where "a serious legal question is involved" and "the balance of equities weighs heavily in favor of granting" relief, "the movant need only present a substantial case on the merits." *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. Unit A June 1981).

Because all four prongs of this test favor of an injunction pending appeal here, the district court abused its discretion in denying an

[15] App. 357-64. Three other suits challenging the rule are pending. *Nat'l Ass'n for Fixed Annuities v. Dep't of Labor*, No. 16-5345 (D.C. Cir.); *Market Synergy Grp. v. Dep't of Labor*, No. 17-3038 (10th Cir.); *Thrivent Fin. For Lutherans v. Hugler*, No. 0:16-cv-3289 (D. Minn.). DOL prevailed in the district court in the two that are on appeal.

injunction. *Sepulvado v. Jindal*, 729 F.3d 413, 417 (5th Cir. 2013).

A. Plaintiffs Are Likely to Succeed on the Merits.

Through the Fiduciary Rule, DOL arrogated to itself sweeping new regulatory authority that Congress never intended it to have. Congress gave DOL regulatory and enforcement authority over employer-sponsored retirement plans and virtually no authority over retirement savings outside that context. Desiring to regulate all retirement-related financial products and services but lacking that power, DOL leveraged its limited authority to interpret terms under the Code in a way that left firms no choice but to either abandon the IRA market or submit to onerous new requirements that DOL imposed through its exemptive authority. This "back door" regulation is unlawful for numerous reasons.[16]

1. The Rule redefines "fiduciary" in contravention of the plain text of ERISA and the Code and the term's meaning at common law. Congress incorporated principles of trust law into ERISA and the Code, *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-11 (1989), and a

[16] The Rule's legal deficiencies are many and varied. The flaws discussed below are the most striking, but do not represent all of the arguments that Plaintiffs will raise on the merits.

fundamental principle of trusts is that a fiduciary relationship arises only where "special intimacy or . . . trust and confidence" exists between the parties. *Bogert's Trusts & Trustees* § 481. Investment advisers, for example, are fiduciaries precisely because they have a continuing relationship of trust with their clients. *Capital Gains Res. Bureau*, 375 U.S. at 191, 194-95.

A fiduciary relationship is fundamentally different than a sales relationship—the two are mutually exclusive, as was understood prior to ERISA's enactment. "Simply urging the purchase of [the company's] products does not make an insurance company an ERISA fiduciary with respect to those products." *Am. Fed'n of Unions Local 102 Health & Welfare Fund v. Equitable Life Assur. Soc. of U.S. v. Equitable Life Assurance Soc'y of the U.S.*, 841 F.2d 658, 664 (5th Cir. 1988).

Under DOL's interpretation, however, essentially any purchase recommendation by a broker-dealer or insurance agent makes her a fiduciary. Even "providing a selective list of securities" and indicating they are "appropriate for [that] investor" without making a "recommendation . . . with respect to any one security" can create a

fiduciary relationship and fiduciary obligations.[17] Touting one's product—in common parlance, "selling"—*makes* one a fiduciary under DOL's rule, even though at common law and under the securities laws, a sales relationship is a tell-tale indicator that one is not a fiduciary.

The plain text of the Code (and ERISA) also precludes DOL's interpretation of "fiduciary": the phrase "renders investment advice for a fee" necessarily refers to payment for advice. A broker-dealer or insurance agent, however, is not compensated for "advice." A commission is paid if—and only if—a sale is made, regardless whether and how much advice is conveyed. At the heart of federal securities' law is a distinction between investment advisers—who are fiduciaries in an advice-based relationship—and broker-dealers, non-fiduciaries who enter sales-based relationships. But just as DOL rejected the efficacy of the securities' law disclosure requirements, so it dismissed Congress's separation of "brokers" from "investment advisers" as a "fine legal distinction" that is "often completely lost on" consumers.[18] Likewise, the "dichotomy

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[17] App. 440. The only sales relationship DOL recognizes for IRAs is where a broker-dealer receives and executes a trade request from a customer. App. 468.

[18] App. 423.

between advice and sales"—a dichotomy established by Congress in the securities laws—is, the Labor Department said, "no[t] existent in reality."[19]

In defying Congress and the text of the Code in this manner, DOL exceeded its authority. And this was arbitrary and capricious, because when it came to employer-sponsored ERISA plans—*i.e.*, retirement plans within its actual regulatory and enforcement authority—DOL did an about-face and recognized this "dichotomy" between advice and sales relationships. It did so by excluding certain transactions involving ERISA plans with at least $50 million in assets. For this aptly named "seller's carve-out"[20] to apply, "the person must not receive a fee or other compensation directly from the plan . . . for the provision of investment advice (as opposed to other services)," *i.e.* sales.[21] DOL thus recognized a sales exclusion under ERISA, while insisting on making fiduciaries out of the insurance agents and broker-dealers in the IRA market for which Congress never gave it regulatory authority.

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[19] *Chamber of Commerce of the U.S.A. v. Hugler*, No. 3:16-cv-1476, ECF 112, at 2 (N.D. Tex. Oct. 7, 2016).

[20] App. 448-49, 452.

[21] App. 451 (emphasis added).

The court below concluded that "*Chevron*" deference to DOL's new fiduciary interpretation was warranted.[22] But among other things, the court never addressed the central point that "fiduciary" cannot be interpreted so broadly that the act of being a salesperson makes one a fiduciary.

2. "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). For this reason, an agency gets no *Chevron* deference when it attempts to institute "an enormous and transformative expansion in [its] regulatory authority without clear congressional authorization." *Util. Air Reg. Grp. v. EPA*, 134 S. Ct. 2427, 2442-44 (2014) (emphasis added); *see also MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218, 229–32 (1994).

DOL seeks to institute the most sweeping changes for broker-dealers and insurance agents since enactment of the Investment Advisers Act of 1940, yet has nothing approaching "clear congressional authorization." That is arbitrary and capricious.

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[22] App. 150.

In simultaneously enacting ERISA and the IRA provisions of the Tax Code, Congress prescribed a detailed code of conduct and private rights of action with respect to ERISA fiduciaries, and wholly omitted such provisions for IRAs. DOL is now imposing on insurance agents and broker-dealers (who are not genuine fiduciaries at all) obligations that exceed those under ERISA, and is even requiring that they give up their right to enter agreements requiring individual arbitration—a right that fiduciaries have under ERISA (and that is protected by the Federal Arbitration Act).[23]

Most remarkable of all, DOL is effecting this transformation through an "exemptive" authority—that is, an authority to lift restrictions imposed by the Tax Code. "When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism." *Util. Air Reg. Grp.*, 134 S. Ct. at 2444 (quotation marks omitted). That is because "[w]e expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significant." *Id.*. The authority to exempt

[23] App. 548-49.

entities from regulatory requirements hardly "clearly" authorizes DOL to prescribe a transformative code of conduct and private rights of action; never before has DOL suggested that the "mousehole" of its exemptive authority, *Whitman*, 531 U.S. at 468, could be used to implement changes of the elephantine proportions involved here—let alone for IRAs, over which it lacks regulatory and enforcement power.

In upholding DOL's misuse of its exemptive authority, the district court again gave *Chevron* deference, even though *Utility Air*, *Whitman*, and *MCI Telecommunications* make clear that *Chevron* does not apply. The court also relied on what it saw as DOL's "explicit and broad authority to regulate IRAs," an authority that DOL, with its focus on employer-sponsored plans, simply does not have.[24]

3. DOL has created a private right of action that Congress did not authorize, in direct contravention of *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). To use the BIC exemption, firms must enter contracts that subject them to lawsuits on terms and in forums dictated by the

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[24] App. 155-56. Similarly, another district court upholding the rule erroneously stated that DOL "has long exercised jurisdiction over those who provide investment advice to IRAs" and has "authority under title II" of ERISA to "regulate IRA advisers." *Nat'l Ass'n for Fixed Annuities v. Perez* ("*NAFA*"), 2016 WL 6573480, at *22, *24 (D.D.C. Nov. 4, 2016).

Department. DOL's purpose was to "create[ ] a mechanism for investors to enforce their rights" under the exemption, precisely because "IRA owners and participants and beneficiaries in non-ERISA plans do not have an independent statutory right to bring suit against fiduciaries for violation of the prohibited transaction rules."[25] The "enforceable commitment" of the BIC exemption, and the "potential for liability" it created, were a "central goal[]" "of this regulatory project."[26] Simply, DOL sought to correct a perceived deficiency in the enforcement regime Congress enacted.

Although the court below identified other federal rules that require entities to have contracts,[27] none of those rules are remotely comparable to what DOL did here. In none of them did agencies require contracts for the "central" purpose of creating an "enforcement" regime, or decide such matters as what damages should be available, or whether arbitration and class actions should be permitted. And the district court never addressed what is left of *Sandoval* if regulatory agencies can simply require

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[25] App. 491, 503.

[26] *Id.*

[27] App. 161-62.

regulated entities to enter contracts that provide private rights of action. *See Astra USA, Inc. v. Santa Clara County, Cal.*, 563 U.S. 110, 118 (2011) (Congress's decision to omit a right of action—and the limitation articulated in *Sandoval*—would be "rendered meaningless" if a right of action could be created using contract law).[28]

* * *

Plaintiffs believe DOL clearly erred in imposing these transformative changes to the IRA market. All Plaintiffs ask now, however, is that these changes—which upend nearly a century of settled business practices—be deferred until after this Court decides Plaintiffs' challenge on the merits. At minimum, Plaintiffs have "present[ed] a substantial case on the merits," and since the Rule's legitimacy is a "serious legal question" and the balance of harms strongly favors relief, an injunction pending appeal is appropriate. *Ruiz*, 650 F.2d at 565.

[28] Another court upholding the Rule attempted to avoid this problem by asserting that plaintiffs there had conceded that BIC claims would be governed by state law. *NAFA*, 2016 WL 6573480, at *25. Plaintiffs here made no such concession, and it is immaterial anyway: The BIC exemptive requirements and its terms are federal law; an agency may not use federal <u>or</u> state courts to enforce causes of action that they purposely create.

B. Plaintiffs Will Be Irreparably Harmed Absent an Injunction.

Central elements of the Rule's new regime must be in place by the Rule's April 10, 2017 applicability date. If this Court does not enjoin the Rule in advance of that date, industry participants will suffer at least four types of irreparable injury.

First, the financial costs of ongoing and upcoming compliance efforts will be massive and unrecoverable. DOL estimated that the cost over 10 years will be between $10.0 billion and $31.5 billion.[29] Those costs tend "to be front-loaded" because the "start-up costs" are "substantial"; DOL estimated that the Rule will cost $5.0 billion in the first year and that some of those costs "may be incurred in advance" of the applicability date.[30] These unrecoverable costs constitute irreparable injury. *See Texas v. EPA*, 829 F.3d 405, 434 (5th Cir. 2016); *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 770-71 (10th Cir. 2010).

Second, efforts to comply with the Rule as the applicability date

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[29] App. 419.

[30] *Id.*

approaches will create significant operational burdens by "irreversibly" affecting a wide range of "business practices."[31] For the insurance industry, efforts to comply with the Rule will require many independent marketing organizations ("IMOs") to reconstruct their operational models,[32] change their product offerings,[33] and "invest heavily in infrastructure."[34] By April 10, the distribution system through which Fixed Indexed Annuities ("FIAs") are sold will be changed in ways that, in some instances, will be irreversible even if the Rule ultimately is vacated.[35]

As for the financial-services industry, broker-dealers will be forced to "restructur[e] their businesses."[36] Firms that intend to rely on the BIC exemption will have to identify products they can no longer offer IRAs, rewrite their contracts with providers of those products, write the software code necessary to implement complicated new compliance

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[31] App. 224 ¶ 4.

[32] App. 239-40 ¶ 23.

[33] App. 227-28 ¶ 16.

[34] App. 226 ¶ 11.

[35] App. 224 ¶ 4.

[36] App. 214 ¶ 10.

programs, and train personnel.[37] The changes to the financial-services industry "will be extensive and, in many instances, irreversible."[38]

Third, allowing the Rule to become applicable would disrupt longstanding business relationships. Some "annuity carriers will end existing relationships with IMOs and independent agents and forge new business relationships with broker-dealers," jeopardizing independent insurance agents' ability to continue in their business.[39] A number of IMOs are likely "to go out of business,"[40] and as many as 20,000 independent insurance agents who currently sell FIAs could be forced out of that business.[41] Likewise, brokerage firms that intend to eliminate commission-based accounts face a serious risk that skilled brokers who prefer to work on commission will leave the firm.[42] Unemployment resulting from the Rule is irreparable injury. *Texas*, 829 F.3d at 434.

Finally, the Rule will inject upheaval into relationships with

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[37] App. 216-18 ¶¶ 16–20.

[38] App. 214 ¶ 10.

[39] App. 225 ¶ 9; App. 252-53 ¶ 22.

[40] App. 229 ¶ 23; *see also* App. 253-54 ¶ 25.

[41] App. 230 ¶ 28.

[42] App. 215-16 ¶ 14.

retirement savers. Brokerage firms that plan to eliminate commission-based accounts will face "significant problems directing people to other flat fee-based accounts" because their customers want to keep the accounts they have.[43] Firms that retain commission-based accounts must send customers detailed notifications explaining the Rule's requirements.[44] Once these changes have been communicated to customers, "they will be difficult to retract or alter;" attempts to reverse them would cause customer confusion and further damage relations with customers.[45] Customers lost in the transition would be unlikely to return.[46] These effects on firms' reputations and customer goodwill constitute irreparable harm. *See, e.g.*, *Fla. Businessmen for Free Enter. v. City of Hollywood*, 648 F.2d 956, 958 n3. (5th Cir. Unit B 1981).

DOL's proposal to postpone the April 10 applicability date for 60 days is insufficient to avoid these harms. The comment period for the proposal ended last Friday, March 17. DOL must now consider hundreds

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[43] App. 215 ¶ 13.

[44] App. 216-18 ¶¶ 16, 18.

[45] App. 218 ¶ 18.

[46] *Id.*

of comments, make its final decision, prepare a written explanation, and secure White House approval.[47] There is no certainty DOL will adopt the extension or that these tasks will be completed by April 10.[48]

After all this, moreover, DOL's extension—if adopted—will end on June 9. This litigation will not be resolved by then, so very shortly DOL will have to consider a new extension. Once again firms will be under a shadow of uncertainty that requires them to incur compliance costs and reorder their affairs.[49] Simply, DOL's short proposed extension does not adequately guard against the risk DOL identifies: That "retirement investors and other stakeholders might face two major changes in the regulatory environment rather than one," which "could unnecessarily disrupt the marketplace, producing frictional costs that are not offset by

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[47] Employee Benefits Security Administration, Department of Labor, *Definition of the Term "Fiduciary" & Related Exemptions – Proposed Delay of Applicability Dates* (public posting of comments) (available here).

[48] Adequate relief is not provided by the a March 10, 2017 "Bulletin" in which DOL announced that it would not bring enforcement actions in any "gap period" between April 10 and the date the Department acts on its extension proposal. *See* App. 630-32. DOL's enforcement policy is not an "opinion" and does not bind the IRS, which has enforcement authority over IRAs. Similarly, the Bulletin cannot prevent private individuals and their counsel from trying to identify means for private enforcement of the duties imposed by the Rule.

[49] App. 213-14 ¶ 9.

commensurate benefits."[50]

C. The Balance Of Hardships and the Public Interest Weigh Heavily in Favor of an Injunction.

An injunction will benefit DOL. DOL has already proposed to postpone the applicability date; an injunction would advance that goal.

An injunction also will serve the public interest. The President has issued a memorandum expressing concerns about the Rule's costs and potential impact. Given this, the public interest is not served by the Rule becoming applicable on April 10. Just the opposite: It is in the public's interest for DOL to conduct a thorough reexamination of the Rule so that "advisers, investors and other stakeholders" do not bear "the risk and expenses of facing two major changes in the regulatory environment," if the Rule takes effect and is subsequently set aside.[51]

In its proposal to postpone the Rule's applicability date, the Department speculated that deferring the Rule's effectiveness might cause "investor losses," but it conceded that any "actual impact" on investors "is unknown" and any attempt to put a number on those losses

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[50] App. 622.

[51] *Id.*

is "uncertain and incomplete."[52] In contrast, DOL predicts the Rule will cause $5 billion in costs in the year following the applicability date.[53]

In the district court, DOL did not seriously dispute Plaintiffs' explanations why DOL's proposed extension was insufficient to safeguard Plaintiffs' interests during this appeal. DOL did not dispute that this litigation is likely to extend beyond June 9. It did not deny that it cannot guarantee that an extension of the applicability date is forthcoming. And it could not assure that Plaintiffs' members would not be subject to enforcement actions by the IRS despite DOL's March 10 Bulletin. *See supra* note 48.

DOL's primary argument in the district court regarding the public interest was that only DOL—not a court—is properly positioned to make the "complex," "nuanced" assessment "whether delay [of the applicability date] is appropriate and, if so, for how long."[54] This claim—which contradicts DOL's "assurances" elsewhere that it is "poised" to act, making court intervention "unnecessary"[55]—illustrates the uncertainty

[52] *Id.*

[53] App. 419.

[54] App. 354.

[55] App. 345, 350.

produced by DOL's halting, patchwork approach toward an extension. And this argument reflects, once again, DOL's misunderstanding of its place in our constitutional system: The courts' authority to preserve the status quo during litigation over an industry-reshaping rule is well-established. *See West Virginia v. EPA*, 136 S. Ct. 1000 (2016); *see also Texas v. United States*, 809 F.3d 134, 187 (5th Cir. 2015).

* * *

The government has adopted a transformative rule that raises such serious questions that the government itself is re-evaluating the rule, may rescind it, and recognizes the need for interim relief. Yet to provide that relief, the government has offered only a proposal that—if adopted—would provide relief later, and for a shorter duration, than is needed. In these circumstances, a court-ordered injunction during the pendency of this litigation is an eminently sensible solution.

CONCLUSION

Plaintiffs respectfully ask the Court to enter an injunction staying the Fiduciary Rule pending appeal. If the Court does not grant the injunction, it should expedite briefing and argument.

March 21, 2017

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

In accordance with Fifth Circuit Rules 27.3 and 27.4, the undersigned hereby certifies that on March 21, 2017, I conferred with counsel for Defendants, Michael Shih. Defendants' counsel communicated that the government opposes the motion for an injunction and believes that expedited consideration of the case on the merits would not be advisable. The undersigned further certifies that on March 21, 2017, I conferred with counsel for Co-Plaintiffs, Joseph Guerra and Kelly Dunbar. Co-Plaintiffs' counsel communicated that they concur in the relief requested.

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CERTIFICATE OF ELECTRONIC COMPLIANCE

I hereby certify that on this 21st day of March, 2017, the foregoing Emergency Motion for an Injunction Pending Appeal was transmitted to the Clerk of the United States Court of Appeals for the Fifth Circuit through the Court's CM/ECF document filing system, https://ecf.ca5.uscourts.gov. I further certify that: (1) required privacy redactions have been made pursuant to this Court's Rule 25.2.13, (2) the electronic submission is an exact copy of the paper document pursuant to this Court's Rule 25.2.1, (3) the document has been scanned with the most recent version of Microsoft Forefront Endpoint Protection and is free of viruses, and (4) the body of the motion does not exceed 5,200 words pursuant to Fed. R. App. P. 27(d)(2)(A).

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CERTIFICATE OF FACTS

Pursuant to this Court's Rule 27.3, I hereby certify that the facts supporting consideration of this motion are true and complete.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of March, 2017, an electronic copy of the foregoing Emergency Motion for an Injunction Pending Appeal was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and service will be accomplished on all parties by the appellate CM/ECF system.

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