No. 17-10238

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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, d/b/a Lake Houston Chamber of Commerce; INSURED RETIREMENT INSTITUTE; LUBBOCK CHAMBER OF COMMERCE; SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION; TEXAS ASSOCIATION OF BUSINESS,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF LABOR; R. ALEXANDER COSTA, SECRETARY, U.S. DEPARTMENT OF LABOR,

Defendants-Appellees.

AMERICAN COUNCIL OF LIFE INSURERS; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS – TEXAS; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS – AMARILLO; NATIONAL ASSOCIATION OF INUSNRACE 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 – WICHITA FALLS,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF LABOR; R. ALEXANDER COSTA, SECRETARY, U.S. DEPARTMENT OF LABOR,

Defendants-Appellees.

INDEXED ANNUITY LEADERSHIP COUNCIL; LIFE INSURANCE COMPANY OF THE SOUTHWEST; AMERICAN EQUITY INVESTMENT LIFE INSURANCE COMPANY; MIDLAND NATIONAL LIFE INSURANCE COMPANY; NORTH AMERICAN COMPANY FOR LIFE AND HEALTH INSURANCE,

Plaintiffs-Appellants,

v.

R. ALEXANDER COSTA, SECRETARY, U.S. DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF LABOR,

Defendants-Appellees.

On Appeal from the United States District Court for the
Northern District of Texas, Dallas

BRIEF FOR *AMICUS CURIAE* FINANCIAL PLANNING COALITION IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Pursuant to Circuit Rule 29.2, the undersigned counsel certifies that the following listed persons and entities, in addition to those already listed in the parties' briefs, have an interest in the outcome of this case:

- *Amicus* Financial Planning Coalition, comprising: Certified Financial Planner Board of Standards; Financial Planning Association®; and National Association of Personal Financial Advisors.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

This case examines the validity of a Department of Labor rule (the "Rule") requiring certain financial professionals to act in their clients' best interests under a fiduciary standard of conduct.[2] As the district court recognized, the Financial Planning Coalition (the "Coalition") "provides a unique perspective" on these issues because it "is the lone *amicus* representative of financial professionals in the United States already operating under a fiduciary standard, and is therefore able to provide a practical perspective different from that of the parties." ROA.5383.

The Coalition advocates for policy measures that advance trustworthy, effective financial planning services. It is a collaboration of three leading national organizations of financial planners: Certified Financial Planner Board of Standards ("CFP Board"), the Financial Planning Association ("FPA®"), and the National

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[1] Pursuant to Federal Rule of Appellate Procedure 29, all parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No party, counsel for a party, or any person other than *amicus curiae* and its counsel made a monetary contribution to the preparation or submission of this brief.

[2] "Rule" refers to the administrative rule and related "prohibited transaction exemptions" recently promulgated by the U.S. Department of Labor (the "Department") and challenged by Plaintiffs in this case. *See, e.g.*, ROA.44; Chamber Br. 11. This brief uses the terms "adviser" and "financial professional" consistent with the Rule—they include any individual or entity who is, among other things, a representative of a registered investment adviser, a bank or similar financial institution, an insurance representative and company, or a registered representative of a broker-dealer and a broker dealer. Accordingly, unless otherwise indicated, the term "adviser" is not limited to investment advisers registered under the Investment Advisers Act of 1940 or applicable state law.

Association of Personal Financial Advisors ("NAPFA"). CFP Board is a non-profit organization that fosters professional standards in personal financial planning through its setting and enforcement of the competency and ethical standards for CERTIFIED FINANCIAL PLANNER™ certification. FPA® is the largest membership organization for CFP® professionals in the United States; its members use a range of compensation models. NAPFA, whose members are required annually to sign a Fiduciary Oath and to subscribe to its Code of Ethics, is the nation's leading organization of financial planning advisers who use fee-only compensation models. FPA® and NAPFA embrace CFP® certification as a foundation for the financial planning profession. Together, they represent nearly 80,000 financial planning professionals of all business models and sizes, who are devoted to providing competent, ethical financial planning services in the best interest of the public.

These stakeholders—including registered investment advisers, registered representatives of broker-dealers, and insurance agents—have a strong interest in the outcome of this proceeding. The issues are vitally important to financial professionals and the public, especially those less sophisticated investors who are particularly vulnerable to conflicted advice. The Coalition strongly believes in the virtues of a fiduciary standard that requires financial advisers to act in the best interests of their clients. The Court's pronouncements on the propriety of such a

standard will have significant repercussions for the Coalition's stakeholders and the industry of which they are a part.

Much of this case depends on the Rule's impact on the financial-adviser industry. Since 2008, CFP® professionals across all business and compensation models have been required to operate under a fiduciary standard remarkably similar to that required by the Rule when providing financial planning services. During that time, CFP® professionals have not just survived; they have thrived. The CFP® ranks have swelled 30% while providing financial advice in the best interests of their clients, who include middle-income Americans. The Coalition thus submits that the experiences of its professionals and their clients offer the Court a concrete assessment of the effects of the Rule, in the form of the real-world experience of tens of thousands of financial professionals who for nearly a decade have been effectively operating under standards like those the Rule imposes.

As detailed below, the ineluctable conclusion from the Coalition's empirical and anecdotal evidence is that the imposition of the fiduciary standard has been a "win-win" for both the professionals and the public. The Coalition accordingly urges the Court to affirm the district court's grant of summary judgment to the Department.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs' three lengthy briefs leave one unmistakable impression: the financial-industry participants that they represent desperately want to avoid acting in their clients' best interests. Their refrain is that an investment which meets the "suitability" standard is good enough (even if an investor would do better absent conflicted advice that favors the adviser); that investors are not being harmed; and that the Rule will not improve the present situation in any event. The Rule is accordingly arbitrary and capricious, they say, and must be vacated.

The district court properly rejected Plaintiffs' skewed view of the financial industry. The Coalition's experiences operating under a fiduciary standard offer a reality that starkly contrasts with the speculation from Plaintiffs about the Rule's effects. These experiences show that a broadly applicable fiduciary standard represents a "win-win" for both the industry and the public. The current regulatory framework, however, fails to align advisers' interests with investors' by leaving open significant loopholes that allow for the sale of a financial product that may not be in the best interests of the investor. The Department's strengthened Rule is therefore necessary and appropriate to protect the public.

The Coalition's brief focuses on three critical points that refute Plaintiffs' position: (1) investors currently suffer from conflicted advice and a lack of complete, truthful disclosures; (2) empirical research and the Coalition's practical experience

confirm that middle-income investors will retain ready access to professional financial advice under a fiduciary standard of conduct; and (3) based on CFP® professionals' experience under standards similar to those required by the Best Interest Contract Exemption, that exemption provides a workable solution to the conflict-of-interest problem. The district court's judgment should therefore be affirmed.

ARGUMENT

I. *INVESTORS SUFFERED UNDER THE PREVIOUS RULE*

Plaintiffs' misguided legal attacks rest on the factual predicate that conflicted advice has not caused any problems for the Rule to solve, and they further allege that the Rule "constrict[s] the flow of truthful information" and infringes their members' rights "to engage in truthful, non-misleading commercial speech." ACLI Br. 1, 14; *see also, e.g.*, *id.* at 32 (doubting "that commercial information tainted by financial interest is harmful"); IALC Br. 35 (arguing that existing regulations are adequate); Chamber Br. 18 (asserting that the "Rule will have significant adverse effects"); *id.* at 40 (complaining that certain financial professionals are merely engaged in salesmanship); ROA.100 (alleging that the Rule's requirements "are not necessary to an informed and effective commercial transaction"). Plaintiffs are wrong. Investors do *not* currently receive all the

information they need to make an informed decision, and that lack of information causes them significant harm.

In truth, investors struggle even to identify which financial professionals owe fiduciary duties and which do not, confusion that is further exacerbated by industry parlance and advertising. Non-fiduciary professionals, for example, frequently offer services identical to those offered by fiduciary advisers while using titles (e.g., "advisor," "financial advisor," and "financial adviser") that are inherently ambiguous and cause confusion. It was no surprise when a 2010 study concluded that fully 75% of investors incorrectly believed that all "financial planners" *already* operate under a fiduciary standard. InfoGroup, *U.S. Investors & The Fiduciary Standard: A National Opinion Survey* (Sept. 15, 2010).[3] Similarly, that same study found that three of five investors believed that "insurance agents" owe fiduciary duties, and that two of three thought the same for stockbrokers.

Other studies confirm this enduring, pervasive confusion. For instance, a 2008 study sponsored by the U.S. Securities and Exchange Commission ("SEC") and conducted by the LRN-RAND Center for Corporate Ethics, Law, and Governance relayed that "[e]xisting studies suggest that investors do not have a clear

[3] *Available at* http://www.hastingsgroup.com/fiduciarysurvey/docs/091510%20Fiduciary%20survey%20report%20FINAL2.pdf. Unsurprisingly, the same proportion of investors mistakenly thought that "financial advisors" are uniformly held to a fiduciary standard.

understanding about the distinction between broker-dealers and investment advisers and their different levels of fiduciary responsibility." Angela Hung, et al., RAND Corp., *Investor and Industry Perspectives on Investment Advisers and Broker-Dealers* 33 (Jan. 3, 2008).[4] Another study recounted that 82% of consumers believe a "financial planner" is essentially the same as a "financial advisor," and there is only slightly less confusion between the titles "financial planner," "wealth manager" and "investment advisor." Fondulas Strategic Research, *Quantitative Survey: Consumers' Beliefs About Financial Planners* (Jan. 2014) (on file with the Coalition).

Moreover, investors can hardly be blamed for failing to ascertain the fine distinction between a "financial advisor" and an "investment adviser" in light of some financial institutions' misleading marketing communications. For example, one firm trumpets that it "proudly strive[s] to embrace [its] own fiduciary responsibilities" and that its "highest value is to 'always put the client first,'"[5] even though its Form ADV brochure (a dense regulatory filing that the SEC requires also be given to clients) confessed otherwise in legalese, drily observing that "[d]oing

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[4] *Available at* http://www.rand.org/pubs/technical_reports/TR556.html.

[5] Letter from Robert Reynolds, President and CEO of Putnam Investments, to the Department of Labor (July 20, 2015), *available at* https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA25/00077.pdf.

business with our affiliates could involve conflicts of interest if, for example, we were to use affiliated products and services when those products and services may not be in our clients' best interests."[6] It is thus little wonder investors typically believe that their advisers act in investors' best interests, even when lengthy legal disclosures flatly state the opposite.

Importantly, the distinction between fiduciary and non-fiduciary advice is far from academic. *Contra, e.g.*, IALC Br. 16 (baselessly asserting that the "gap" between a best-interest standard and a slacker standard will not have "any real-world consequences" and that current regulations are "[]sufficient to protect consumers"). Professionals who are not constrained by the fiduciary "best interests" standard may take advantage of current loopholes in the regulatory framework to steer clients toward products that are more profitable for the adviser than other available options that would better serve the clients' needs. *See, e.g.*, Department of Labor, Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20946, 20949-51 (Apr. 8, 2016), *amended by* 82 Fed. Reg. 16902 (Apr. 7, 2017). The Financial Industry Regulatory Authority ("FINRA")—on whose regulations Plaintiffs heavily rely, e.g., ACLI Br. 44-46—has echoed this concern.

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[6] Putnam Advisory Company, LLC, SEC Form ADV Part 2A at 25 (Mar. 30, 2016), *available at* http://www.adviserinfo.sec.gov/IAPD/Content/Common/crd_iapd_Brochure.aspx?BRCHR_VRSN_ID=375046. (Putnam Investments wholly owns Putnam Advisory Company through various subsidiaries.)

After completing a conflicts study that began in July 2012, FINRA declared that conflicts of interest "are widespread across the financial services industry." FINRA, *Report on Conflicts of Interest* 1 (Oct. 2013).[7] The situation had not improved by 2015, when FINRA identified the failure to "put[] clients' interests first" as a "central failing" of the "past decade." FINRA, *2015 Regulatory and Examination Priorities Letter* 1-2 (Jan. 6, 2015).[8] The organization noted that this "harm" is "especially devastating and lasting" "when it involves vulnerable investors (*e.g.*, senior investors) or a major liquidity or wealth event in an investor's life (*e.g.*, an inheritance or Individual Retirement Account rollover)." *Id.* at 2.

FINRA's assessment finds support in other studies as well. For instance, examining a couple innovations spurred by the Rule (*see infra* at 18-19), Morningstar concluded that "reducing conflicted advice" will save investors "50 basis points." Aron Szapiro & Paul Ellenbogen, Morningstar, *Early Evidence on the Department of Labor Conflict of Interest Rule* 9 (Apr. 2017).[9] And based on a performance audit from May 2011 to March 2013, the U.S. Government Accountability Office ("GAO") "found that service providers' call center representatives encouraged rolling 401(k) plan savings into an IRA even with only

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[7] *Available at* https://www.finra.org/sites/default/files/Industry/p359971.pdf.

[8] *Available at* https://www.finra.org/sites/default/files/p602239.pdf.

[9] *Available at* https://corporate1.morningstar.com/ResearchLibrary/article/802119/early-evidence-on-the-department-of-labor-conflict-of-interest-rule.

minimal knowledge of a caller's financial situation." GAO, *401(k) Plans: Labor and IRS Could Improve the Rollover Process for Participants* 1, GAO-13-30 (Mar. 7, 2013).[10] According to the GAO, some advisers made "misleading statements" like claiming "that their IRAs were 'free' or had no fees with a minimum balance," even though the opposite was true. *Id.* at 36. Unfortunately, offering harmful and conflicted advice will remain perfectly legal for the broad swath of financial advisers who are not otherwise subject to a fiduciary standard when providing financial advice. And the costs that those tactics inflict on consumers will likewise persist.

In sum, Plaintiffs' declaration that the essence of a fiduciary relationship at common law was one involving a "special relationship of trust and confidence" (e.g., Chamber Br. 30), may be true, but it misses the point. Plaintiffs cannot explain why an individual making a single financial decision—which might be that person's single most important financial decision of her life, such as whether and how to roll over employer-sponsored retirement assets—is less deserving of her adviser's utmost "trust and confidence" than a wealthy investor seeking ongoing advice. *Cf.* DOL Br. 33. Yet Plaintiffs would have the Court hold that the Department's decision to require that this one-time advice be provided in the investor's best interests is not only wrong but wholly irrational. Their position is not tenable.

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[10] *Available at* https://www.gao.gov/assets/660/652881.pdf.

II. *MIDDLE-INCOME INVESTORS WILL RETAIN READY ACCESS TO PROFESSIONAL FINANCIAL ADVICE UNDER A FIDUCIARY STANDARD OF CONDUCT*

The thrust of Plaintiffs' attack is that the Rule will force advisers out of business rather than comply with a fiduciary standard, and that the advisers who stay in business will not be able to profitably serve middle-income investors with smaller asset bases. This speculation is belied by the demonstrated effects of a fiduciary standard of conduct: the real experience of CFP® professionals who already operate under a fiduciary standard when providing financial planning services; various studies confirming the lessons of that experience; and early responses to the Rule's promulgation, which show that firms are already adopting new practices and products to benefit investors and readily achieve compliance with the Rule.

A. The Rule Need Not Drive Advisers Out Of Business

Plaintiffs' contention that the Rule and its exemptions are so restrictive that advisers will go out of business (or at least cease to provide a full panoply of financial advice to all segments of society) (*see, e.g.*, Chamber Br. 18-19; ACLI Br. 9, 35-36; ROA.47, 74-75, 113-14), is belied by the tens of thousands of CFP® professionals who successfully operate under similar standards. Indeed, when the CFP Board adopted a fiduciary standard for CFP® professionals in 2008, it heard the very same arguments the Department and the Court are hearing now. Like Plaintiffs, major firms in the brokerage and insurance industries told CFP Board that

a fiduciary standard of conduct was incompatible with their business models and that they would have no choice but to require their advisers to relinquish their CFP® certification if it added a fiduciary standard.

Yet just the opposite occurred. Since CFP Board established the fiduciary requirement in 2008, the number of CFP® professionals has grown by 30% to nearly 80,000 today. And these professionals reach every corner of the industry—working in large firms and small businesses, advising large 401(k) plans and individuals with only a few thousand dollars to invest, and using fee-based and transaction-based compensation models. Far from going out of business, they have grown their businesses and benefitted the public at the same time.

Despite Plaintiffs' doom-and-gloom predictions, this reality should not come as a surprise. U.S. investors have over fifteen trillion dollars invested in 401(k) plans and IRAs. *See* Investment Company Institute, *Retirement Assets Total $26.1 Trillion in First Quarter 2017* (June 22, 2017).[11] It defies credibility to think financial professionals will simply give up on providing services to those substantial accounts rather than comply with the "burden" of a fiduciary duty. Adherence to a fiduciary standard has not only proved economically viable, it has also enhanced the quality of planners' relationships with their clients. A 2016 study relates that nearly 70% of

[11] *Available at* https://www.ici.org/research/retirement/retirement/ret_17_q1.

CFP® professionals found the certification a benefit to client trust and technical expertise. Alois Pirker & Sophie Schmitt, Aité Group, *Building a Wealth Management Practice: Measuring CFP® Professionals' Contribution* 4 (Feb. 2016).[12] These professionals can proudly—and truthfully—boast to potential and existing clients that they provide financial advice in the best interests of their customers.

B. Middle-Income Investors Will Continue To Receive Effective Financial Advice—Now From Advisers Acting In The Investors' Best Interests Rather Than Their Own

Plaintiffs also claim that the Rule will force financial advisers exclusively to use fee-based compensation models that will close off middle-income investors from obtaining professional financial guidance. *See, e.g.*, ROA.82, 94-96; Chamber Br. 1 (baselessly asserting that the Rule "seeks to outlaw the compensation models that have long been a cornerstone of these industries"), 35; ACLI Br. 36. This contention is doubly wrong: commission-based compensation will survive, and financial professionals will continue to serve middle-income investors using all types of existing compensation models and other innovative methods.

Once again, the Court need not wonder about the accuracy of Plaintiffs' predictions, for we already know what happens when financial professionals operate

[12] *Available at* http://www.cfp.net/docs/default-source/news-events---research-facts-figures/2016-cfpboard-aite-white-paper.pdf.

under a fiduciary standard of conduct: they continue providing financial advice to U.S. investors of all income levels, but now do so in those investors' best interests. As noted, thousands of CFP® professionals and FPA and NAPFA members across the country currently provide fiduciary-level services to everyday Americans via business models requiring no or very low minimum assets under management. The successes of these organizations' stakeholders reveal that the dire consequences anticipated by Plaintiffs are not a necessary outcome of the Rule.

What's more, the Coalition's experiences are confirmed by a variety of real-world studies demonstrating that an industry-wide fiduciary standard will not prevent ordinary investors from readily obtaining professional financial advice. These studies compared services offered under a non-fiduciary standard to those offered under a fiduciary standard and found no meaningful differences in the availability of services:

- A 2014 study interviewed professionals who either changed from a lower standard of care to a fiduciary standard or who operated under both standards, and reported that 80% of these professionals either maintained or increased their range of services when using a fiduciary standard, and 69% maintained or increased their range of products under a fiduciary standard of conduct. The study also noted that, while a "strong majority of all respondents" thought that extending the fiduciary standard would increase the costs of advising investors, that "belief is in stark

contrast to the actual experience of financial professionals who have switched from a suitability standard to a fiduciary standard of care or operate under both."[13]

- A 2013 study compared the client base of fiduciary and non-fiduciary registered representatives and found that each group serviced a comparable number of clients with under $100,000 of investable assets and that fiduciary advisers actually spent a smaller percentage of their time on compliance than did other advisers. It concluded that extending the fiduciary standard would not reduce the availability of advisory services for lower-income investors.[14]

- A 2012 study compared broker-dealer registered representatives in states that impose fiduciary standards to those in states that do not and found no statistical differences between the two across a wide range of areas, including: the proportion of lower-income (less than $75,000) clients served; the range of products offered (including under commission-based compensation arrangements); and the advisers' ability to tailor advice to their clients. The authors concluded that there was "no evidence that the broker-dealer industry is affected significantly by the imposition of a stricter legal fiduciary standard," and thus "the industry is likely to

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[13] Princeton Research Associates International, *Fiduciary Standard Survey* 1, 6 (Feb. 14, 2014), *available at* http://financialplanningcoalition.com/wp-content/uploads/2015/07/Princeton-Research-Fiduciary-Study-Final.pdf.

[14] Aité Group, *Fiduciary Study Findings* 3 (June 2013), *available at* http://cfp.net/docs/public-policy/aite-fiduciary-study-june-2013.pdf.

operate after the imposition of fiduciary regulation in much the same way it did" before.[15]

Critically, while adherence to a fiduciary standard did not negatively affect the *availability* of services, it did positively affect the *quality* of services. According to the 2014 study, over 80% of financial professionals who had switched to a fiduciary standard reported that the change was mostly positive for their clients and their own practice, and 76% reported increases in both revenue and assets under management.[16] Similarly, the 2013 study related that professionals operating under a fiduciary standard reported stronger asset and revenue growth for their clients.[17] And early responses to the fiduciary rule confirm these results: "Early evidence suggests that the asset management industry is adapting in ways that will benefit investors by reducing conflicts of interest and adding transparency. * * * We think that 50 basis points is a reasonable estimate of savings to investors from reducing conflicted advice."[18] In sum, these studies confirm what Coalition stakeholders have

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[15] Michael Finke & Thomas Langdon, *The Impact of the Broker-Dealer Fiduciary Standard on Financial Advice*, Journal of Financial Planning (July 2012), available at https://www.onefpa.org/journal/Pages/The%20Impact%20of%20the%20Broker-Dealer%20Fiduciary%20Standard%20on%20Financial%20Advice.aspx.

[16] Princeton Research Associates International, *supra* note 12, at 6, 21.

[17] Aité Group, *supra* note 13, at 3.

[18] Szapiro, *supra* note 9, at 9.

known for years—providing services under a fiduciary standard benefits both the industry and the public.

C. The Industry Will Adapt And Modify Its Products And Compensation Practices To Satisfy The Rule And Benefit Consumers

As shown by the experiences of financial professionals already operating under a fiduciary standard, the industry will adapt to meet the needs of consumers while maintaining compliance with the Rule. The trillions of dollars available for investment provide a strong incentive to do so, and Plaintiffs acknowledge (as they must) that "[t]he financial services industry and small businesses have evolved to meet consumer preferences." ROA.60. That evolution will continue and, in fact, has already begun as described below.

1. Firms and advisers have modified their practices in a multitude of ways. For instance, brokerages have already begun lowering fees and asset minimums. LPL Financial, the largest independent broker-dealer in the country, announced in March that it would reduce pricing on some funds and lower some account minimums from $15,000 to $10,000. *See* Tariro Mzezewa, *LPL lowers minimums, cuts fees to prepare for fiduciary rule*, Reuters (Mar. 16, 2016).[19] These changes are expected to yield 30% cost savings for consumers compared to LPL's current pricing

[19] *Available at* https://www.reuters.com/article/us-lpl-fiduciary-idUSKCN0WI32Y.

structure. *Id.* LPL has also been lauded for the novelty of a new fund-only brokerage IRA. *See*, Janet Levaux, *LPL, Edward Jones Pre-DOL Rule Shifts: Smart Moves or Overreaction?*, ThinkAdvisor (Mar. 17, 2016).[20] Like LPL, Edward Jones is reducing some minimums to just $5,000. *Id.* Other firms are adopting similar business practices, such as implementing a hard cap on fees. *See* Danielle Andrus, *New Firm Caps Account Fees at $1,500*, ThinkAdvisor (June 21, 2016).[21]

Other notable responses to the Rule include the creation of two new classes of mutual-funds shares. "Clean shares" allow brokers to "charge investors directly for any services rendered," instead of relying on "indirect" payments that "go[] from the investor to the fund company and back to an affiliate or third party." Szapiro, *supra* note 9, at 6-7. These shares enhance transparency for investors by offering "greater insight into what [investors] are paying for and the advice they are getting for their fees." *Id.* at 7. One commentator has called them "an enormous game changer" that "could revolutionize the fund industry." John Waggoner, *Clean shares could revolutionize the fund industry*, InvestmentNews (Feb. 2, 2017).[22] It is difficult to see how this development is anything but a boon for investors and the industry.

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[20] *Available at* http://www.thinkadvisor.com/2016/03/17/lpl-edward-jones-pre-dol-rule-shifts-smart-moves-o?slreturn=1471978349.

[21] *Available at* http://www.thinkadvisor.com/2016/06/21/new-firm-caps-account-fees-at-1500?eNL=576be213160ba0da747e92d5.

[22] *Available at* http://www.investmentnews.com/article/20170202/FREE/170209977/clean-shares-could-revolutionize-the-fund-industry

The other new type of share class is "T" shares, which "feature uniform commissions, reducing or eliminating financial advisors' conflicts of interest in making recommendations to clients." Szapiro, *supra* note 9, at 2. At the same time that T shares help satisfy the Rule, they also help meet "customer pressure on costs and transparency." Michael Wursthorn & Sarah Krouse, *New Class of Mutual Fund Shares in Limbo as 'Fiduciary' Rule Is Delayed*, Wall Street Journal (Mar. 5, 2017).[23] Morningstar summarized the substantial benefits of T shares:

> This will likely save some investors money immediately, and it helps align advisors' interests with those of their clients. * * * [T]he incentives T shares create to recommend higher-quality funds could add around 50 basis points in returns * * * compared to conflicted advice. * ** Further, we think that a best-interest incentive could save investors about 20 basis points in fees * * * .

Szapiro, *supra* note 9, at 3-5. Again, aside from naked self-interest, it is difficult to see how Plaintiffs can condemn increased transparency, higher-quality funds, and better returns for investors.

And multiple firms have broadly promised new products and practices to ensure compliance and benefit their clients. As just a few examples: Merrill Lynch Wealth Management has detailed how it will move its businesses to a fiduciary

[23] *Available at* https://www.wsj.com/articles/new-class-of-mutual-fund-shares-in-limbo-as-fiduciary-rule-is-delayed-1488736422.

model;[24] Morgan Stanley Wealth Management announced a product to help service small 401(k) plans under a fiduciary model;[25] Aegon has "already started launching new products that address th[e] new environment";[26] American Financial likewise "continues to implement product and process changes needed to comply" without "material impact on [their] results or operations";[27] and Ameriprise has "a substantial number of projects [that are] well underway."[28] As the Coalition's own experience predicts, these firms are not exiting the market; they are continuing to prosper in—and even take advantage of—the new regulatory environment.

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[24] Barron's, *Merrill Details Fiduciary Shift for 401(k) Business* (Mar. 16, 2017), *available at* http://www.barrons.com/articles/merrill-details-fiduciary-shift-for-401-k-business-1489681716.

[25] Greg Iacurci, *Morgan Stanley debuts fiduciary product for small 401(k) plans, with eye toward DOL rule*, InvestmentNews (Mar. 9, 2017), *available at* http://www.investmentnews.com/article/20170309/FREE/170309904/morgan-stanley-debuts-fiduciary-product-for-small-401-k-plans-with.

[26] Aegon's (AEG) CEO Alex Wynaendts on Q4 2016 Results - Earnings Call Transcript (Feb. 17, 2017), *available at* http://seekingalpha.com/article/4047300-aegons-aeg-ceo-alex-wynaendts-q4-2016-results-earnings-call-transcript?part=single.

[27] American Financial Group's (AFG) CEO Carl Lindner III on Q4 2016 Results - Earnings Call Transcript (Feb. 2, 2017), *available at* http://seekingalpha.com/article/4042203-american-financial-groups-afg-ceo-carl-lindner-iii-q4-2016-results-earnings-call-transcript?part=single.

[28] Ameriprise Financial's (AMP) CEO Jim Cracchiolo on Q4 2016 Results - Earnings Call Transcript (Feb. 2, 2017), *available at* http://seekingalpha.com/article/4042184-ameriprise-financials-amp-ceo-jim-cracchiolo-q4-2016-results-earnings-call-transcript?part=single.

2. Contrary to Plaintiffs' insistence about the dire consequences of the Rule, these innovations permeate the annuities sector, too. *Cf., e.g.*, ACLI Br. 2, 7, 12, 38. Four of the top ten fixed-indexed annuity sellers (including the top seller) are developing fee-based fixed-indexed annuities, "forging ahead into virtually uncharted territories for product development." Greg Iacurci, *Insurers developing fee-based fixed-indexed annuities post-DOL fiduciary rule*, InvestmentNews (July 14, 2016).[29] Although the Rule did create a "sense of urgency," these products also meet a "growing appetite for fixed indexed annuities in this space." *Id.* One of those firms, Voya Financial, also has introduced new fixed-indexed annuity products with lower surrender fees. *See* Nick Thornton, *Voya rolls out new, less expensive FIAs*, BenefitsPro (June 15, 2016).[30] The company explained that these products are more "flexible" and "fit better with new trends, customer preference and the market." *Id.* These changes support the prediction of one indexed-annuity consulting firm that any negative effect will disappear "[o]nce the industry has had time to adjust," for "[t]he bottom line is that consumers want indexed annuities' guarantees; they want protection from market volatility and the ability to outpace CDs as well."

[29] *Available at* http://www.investmentnews.com/article/20160714/FREE/160719964/insurers-developing-fee-based-fixed-indexed-annuities-post-dol.

[30] *Available at* http://www.benefitspro.com/2016/06/15/voya-rolls-out-new-less-expensive-fias?page_all=1&slreturn=1470760535.

Arthur Postal, *Industry insiders react cautiously to DOL fiduciary rule*, ThinkAdvisor (Apr. 7, 2016).[31]

3. And other companies have stepped in to provide assistance and services for advisers worried about liability risk. Morningstar, for example, is launching a new service for broker-dealers wanting to outsource 401(k) responsibility. *See* Greg Iacurci, *Morningstar launching 401(k) service for broker-dealers worried about DOL fiduciary risk*, InvestmentNews (Aug. 8, 2016).[32] Another company is offering financial-planning software aimed at compliance strategies, while a third is adding compliance training courses covering the new standards. *See* Press Release, BusinessWire, *Advicent product suite empowers firms and advisors to comply with impending DOL fiduciary rule while keeping financial planning at the core* (June 28, 2016);[33] Press Release, GlobeNewswire, *RegEd Announces Expanded Compliance Education and Product Training Solutions in Response to DOL Fiduciary Rule* (June 2, 2016).[34] Financial Services Institute, a Plaintiff in this

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[31] *Available at* http://www.thinkadvisor.com/2016/04/07/industry-insiders-react-cautiously-to-dol-fiduciar?migration=1.

[32] *Available at* http://www.investmentnews.com/article/20160808/FREE/160809924/morningstar-launching-401-k-service-for-broker-dealers-worried-about.

[33] *Available at* http://www.businesswire.com/news/home/20160628006452/en/Advicent-product-suite-empowers-firms-advisors-comply.

[34] *Available at* https://globenewswire.com/news-release/2016/06/02/845653/0/en/RegEd-Announces-Expanded-Compliance-Education-and-Product-Training-Solutions-in-Response-to-DOL-Fiduciary-Rule.html.

lawsuit, is providing its members "five critical tools to assist firms in complying with the BIC exemption of the Department of Labor's (DOL) fiduciary rule." Financial Services Institute, *DOL Fiduciary Rule Resources* .[35] Similarly, another leading provider of investment and consulting solutions for financial advisers has developed a tool that specifies "actionable next steps based on [advisers'] individual assessment[s] that can help them address any necessary adjustments to their business practices." Press Release, AssetMark, *AssetMark Launches Assessment Tool to Gauge Advisor Readiness for Department of Labor (DOL) Fiduciary Rule* (Oct. 19, 2016).[36] All these new products and services provide compelling evidence of an industry ready and willing to adapt to the new Rule.[37]

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[35] *Available at* http://www.financialservices.org/DOL-Fiduciary-Rule-Resources (last visited July 6, 2017).

[36] *Available at* https://www.assetmark.com/~/media/assetmark/files/press%20 releases/dol_assessment_tool_press_release_am22634_m00000_10_14_16_final.p df.

[37] ACLI blames the Rule for a drop in variable annuity sales in 2016. ACLI Br. 41 (quoting Greg Iacurci, *Department of Labor's fiduciary rule blamed for insurers' massive hit on variable annuity sales*, InvestmentNews (Mar. 28, 2017), *available at http://www.investmentnews.com/article/20170328/FREE/ 170329922/department-of-labors-fiduciary-rule-blamed-for-insurers-massive-hit*). But that same article points out that "the DOL regulation doesn't provide the whole story." While some commentators do in fact blame the Rule in part, others cite different factors: "variable annuity sales have been declining for the past half-decade, and some believe the trend is symptomatic of other factors, too, such as poor product structure, the rise of indexed and hybrid indexed-variable annuities, and a strategic move among insurers to control their VA sales." *See also* Ameriprise Earnings Call, *supra* note 28 (explaining that "the operating environment has been challenging with continued low interest rates and lingering geopolitical unease").

4. Consistent with these early adapters and the economic incentive to continue servicing investors of all income levels, some major players in the financial sector publicly disagreed with Plaintiffs filing this lawsuit, including some of the biggest banks on Wall Street. *See* Robert Schmidt, *Wall Street Splits With Smaller Firms Over Broker-Rule Lawsuit*, Bloomberg (June 23, 2016).[38] Wells Fargo even "threatened to quit [the trade group Securities Industry and Financial Markets Association] if it joined the suit." *Id.* Reactions to the Rule collected by the Wall Street Journal further confirm industry support for the Department's actions. *See* Wall Street Journal, *Reactions to the Labor Department's Fiduciary Rule* (Apr. 6, 2016).[39] For example, broker-dealer Cetera Financial Group initially opposed the Rule but explained that "the final rule shows that the Labor Department has listened to some of the brokerage industry's early criticisms." *Id.* Merrill Lynch and LPL were likewise "pleased" with the Department's response, and 401(k) and IRA manager Financial Engines, who has supported the Department throughout the

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What's more, to the extent that the Rule does represent one factor, it is likely a short-term one that will dissipate "[o]nce the industry has had time to adjust." Postal, *supra* note 31. For instance, ACLI's same InvestmentNews article relates, "[s]ome advisers backed off of sales until receiving more concrete information on their compensation for product sales." An adjustment period is just that—an adjustment *period*. The sky is not falling.

[38] *Available at* http://www.bloomberg.com/news/articles/2016-06-23/wall-street-splits-with-smaller-firms-over-broker-rule-lawsuit.

[39] *Available at* https://www.wsj.com/articles/reactions-to-the-labor-departments-fiduciary-rule-1459954904.

rulemaking process, stated that the Rule is "an unqualified win for the public and will ultimately benefit the industry." *Id.* Plaintiffs may disagree with these peers and the Department's decision, but that disagreement supplies no basis for vacating the Rule.

III. *FINANCIAL PROFESSIONALS CAN READILY SATISFY THE BEST INTEREST CONTRACT EXEMPTION'S REQUIREMENTS, INCLUDING THE FIDUCIARY STANDARD OF CONDUCT*

Recognizing that transaction-based compensation can be desirable, the Department properly crafted the Best Interest Contract Exemption to address the conflict-of-interest problems inherent in transaction-based compensation while still allowing financial professionals to use those compensation arrangements. Plaintiffs contend that the exemption's requirements are so impractical that the exemption is useless, and, as a consequence, advisers will have no choice but to switch uniformly to fee-based compensation models. *Cf., e.g.*, Chamber Br. 62; ACLI Br. 36. Plaintiffs are wrong. Again, as the district court recognized, their dire predictions cannot be squared with the real experience of CFP® professionals who have worked under standards similar to those in the Best Interest Contract Exemption. *See* ROA.9907.

As already discussed, CFP® professionals have for years successfully provided financial planning services under a fiduciary standard using a variety of business models. Plaintiffs offer no reason to think that they and their members will be unable to do the same. As the chart below reflects, many of the Best Interest

Contract Exemption's conditions match requirements for CFP® professionals, including: (1) to act in the best interest of the client; (2) to exercise a reasonable and prudent judgment; (3) to execute a written contract with the client; (4) to identify and mitigate conflicts of interest between the client and the CFP® professional and his or her employer; and (5) to provide written disclosures including the full costs of products and services and the compensation to the CFP® professional and/or employer.[40]

	Best Interest Contract Exemption	Analogous CFP Board Rule or Standard (if providing financial planning)
Fiduciary Standard	Required	Rule of Conduct 1.4
Written Contract	Required	Rule of Conduct 1.3
Disclosure of Certain Fees and Costs	Required	Rule of Conduct 2.2(A) and Practice Standards 100-1 and 500-1 (require disclosure of accurate and understandable information related to costs and compensation, along with any material changes to that information)

[40] CFP Board, *Standards of Professional Conduct*, Rules of Conduct 1.3, 1.4, 2.2, 4.1, 4.3 and 4.4, *available at* http://www.cfp.net/for-cfp-professionals/professional-standards-enforcement/standards-of-professional-conduct/rules-of-conduct (last visited July 6, 2017). In June 2017, CFP Board requested public comment on proposed revisions to its ethical standards for CFP® professionals. The proposal would broaden the application of the fiduciary standard and enhance and update standards related to financial planning. The proposed new standards are available for review at https://www.cfp.net/about-cfp-board/proposed-standards.

	Best Interest Contract Exemption	Analogous CFP Board Rule or Standard (if providing financial planning)
Conflicts of Interest	Requires written notification of conflicts of interest	Rule of Conduct 2.2(B) and Practice Standards 100-1, 400-3, and 500-1 (require disclosure of summary of likely conflicts of interest)
Prudent Standards	Required	Rule of Conduct 4.4 (requires reasonable and prudent professional judgment)
Policies to Mitigate Conflicts	Required	Rule of Conduct 4.1 (requires integrity and objectivity in providing professional services)

And the Department did not charge forward without heeding the advice of commenters on the Proposed Rule. On the contrary, the Department made multiple revisions in the final Rule "to ease implementation in response to commenters' concerns about [the exemption's] workability." Department of Labor, Best Interest Contract Exemption, 81 Fed. Reg. 21002, 21008 (Apr. 8, 2016), *corrected at* 81 Fed. Reg. 44773 (July 11, 2016), *and amended by* 82 Fed. Reg. 16902 (Apr. 7, 2017). Multiple financial firms expressly and publicly recognized the Department's receptiveness to industry critiques. As a Morningstar representative succinctly explained, "[B]ecause the final rule incorporates the financial-services industry's comments, '[i]t will be harder for people in the industry to argue that the DOL didn't take their feedback into account.'" Wall Street Journal, *Reactions to the Labor Department's Fiduciary Rule*, *supra* note 39; *see also id.* (noting comments that the

Department "listened to some of the brokerage industry's early criticisms" (Cetera Financial Group), the Department "worked to address many of the practical concerns raised" (Merrill Lynch), and that the Department "made sincere efforts to streamline the original rule and make it easier for the industry to accommodate to the rule and minimize the unintended consequences and cost of complying" (Financial Engines)).

The Department's responsiveness is evident even from examining only modifications made corresponding to issues raised by the Coalition:

- The Coalition (as did other commenters) urged the Department to expand the exemption to include "small, participant-directed plans." Letter from the Coalition to Department of Labor at 22 ("Comment")[41]. The Department did just that, agreeing that extending the exemption "would better promote the provision of best interest advice to all retail Retirement Investors." 81 Fed. Reg. at 21014.

- The Coalition also made several suggestions to address the feasibility of the exemption's requirement that the financial professional enter into a written contract with the customer: permit the contract to be executed concurrently with signing an engagement contract or opening an account, rather than, as the Proposed Rule mandated, before the adviser makes any recommendations; permit the contract requirement to be satisfied for existing clients through "negative consent," i.e., by

[41] *Available at* https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/00702.pdf.

notifying the client of the new obligations undertaken by the adviser under the exemption; and, to ease compliance for business models that use adviser call centers, allow the financial institution itself, rather than the individual adviser, to execute the contract. Comment at 25-26. Again, the Department accepted these recommendations to increase the exemption's flexibility. *See* 81 Fed. Reg. at 21023-24. Notably, some commenters advocated keeping the stricter timing rules, for instance, but the Department nonetheless readily modified them in accordance with the Coalition's (and other commenters') concerns.

- In response to the proposal that the Department "remove the disclosure requirements for Adviser-level compensation," Comment at 29, the Department specified that the "disclosures need not contain amounts paid to specific individuals." 81 Fed. Reg. at 21050.

- Where the Coalition requested a specific good-faith compliance exception for certain warranties and disclosure requirements, Comment at 30, the Department implemented such "a good faith correction mechanism" in two separate parts of the Rule. 81 Fed. Reg. at 21059.

The Department has thus created a regulatory framework that both protects consumers and gives financial professionals the flexibility to provide much-needed financial advice consistent with a wide range of business models. The district court

properly concluded that the Department reasonably implemented a "best interests" standard.

CONCLUSION

The district court's judgment should be affirmed.

Dated: July 6, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) as it contains 6,286 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). I further certify that this brief complies with the format, typeface, and type-style requirements of Rules 32(a)(4)-(6).

Dated: July 6, 2017

/s/ Brendan S. Maher
Brendan S. Maher

CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2017, I electronically filed the foregoing brief with the Clerk of the Court of the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. Upon acceptance by the Clerk of the Court of the electronically filed document, one copy of the foregoing will be served by U.S. Mail on:

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