No. 17-10238

IN THE 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, doing business as 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; EDWARD C. HUGLER, ACTING 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 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-WICHITA FALLS,
Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF LABOR; EDWARD C. HUGLER, ACTING 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.

EDWARD C. HUGLER, ACTING 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 Division, Nos. 3:16-cv-1476, -1530, -1537

OPENING BRIEF OF IALC PLAINTIFFS-APPELLANTS

COUNSEL LISTED ON INSIDE COVER

JOSEPH R. GUERRA
Counsel of Record
PETER D. KEISLER
ERIC D. MCARTHUR
JENNIFER J. CLARK
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

Counsel for 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

May 2, 2017

CERTIFICATE OF INTERESTED PERSONS

No. 17-10238

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, doing business as 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; EDWARD C. HUGLER, ACTING 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 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-WICHITA FALLS,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF LABOR; EDWARD C. HUGLER, ACTING 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.

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

Defendants-Appellees.

The undersigned counsel of record certifies the following listed persons and entities as described in the fourth sentence of Local 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.

Plaintiff-Appellant the Indexed Annuity Leadership Council has no parent corporation and no publicly held corporation owns 10% or more of its stock.

The parent company of Plaintiff-Appellant Life Insurance Company of the Southwest is National Life Insurance Company. No publicly held corporation owns 10% or more of the stock of Life Insurance Company of the Southwest.

Plaintiff-Appellant American Equity Investment Life Insurance Company is wholly owned by its parent company, American Equity Life Holding Company.

Plaintiff-Appellant Midland National Life Insurance Company ("Midland") is wholly owned by Sammons Financial Group, Inc. ("Sammons Financial"); Sammons Financial is wholly owned by Consolidated Investment Services, Inc. ("Consolidated"); and Consolidated is wholly owned by Sammons Enterprises, Inc. ("Sammons Enterprises"). Midland owns Solberg Reinsurance Company, MNL Reinsurance Company and Midland National Services Corporation, LLC. Midland is also otherwise related by common ownership to Sammons Retirement Solutions, Inc. and Sammons Securities, Inc. (which owns Sammons Financial Network, LLC).

Plaintiff-Appellant North American Company for Life and Health Insurance ("North American") is wholly owned by Sammons Financial Group, Inc. ("Sammons Financial"); Sammons Financial is wholly owned by Consolidated Investment Services, Inc. ("Consolidated"); and Consolidated is wholly owned by Sammons Enterprises, Inc. ("Sammons Enterprises"). North American is also otherwise related by common ownership to Sammons Retirement Solutions, Inc. and Sammons Securities, Inc. (which owns Sammons Financial Network, LLC).

A. Plaintiffs-Appellants

1. Indexed Annuity Leadership Council
2. Life Insurance Company of the Southwest
3. American Equity Investment Life Insurance Company
4. Midland National Life Insurance Company
5. North American Company for Life and Health Insurance
6. Others who are not participants in this matter but may be financially interested in its outcome include financial services providers, insurance companies, and retirement savers.

B. Current and Former Attorneys for Plaintiffs-Appellants

Joseph P. Guerra
Peter D. Keisler
Eric D. McArthur
Jennifer J. Clark
Benjamin Beaton
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005

Yvette Ostolaza
SIDLEY AUSTIN LLP
2001 Ross Avenue, Suite 3600
Dallas, TX 75201

C. Co-Plaintiffs-Appellants

7. Chamber of Commerce of the United States of America
8. Financial Services Institute, Inc.

9. Financial Services Roundtable
10. Greater Irving-Las Colinas Chamber of Commerce
11. Humble Area Chamber of Commerce d/b/a Lake Houston Area Chamber of Commerce
12. Insured Retirement Institute
13. Lubbock Chamber of Commerce
14. Securities Industry and Financial Markets Association
15. Texas Association of Business
16. American Council of Life Insurers
17. National Association of Insurance and Financial Advisors
18. National Association of Insurance and Financial Advisors-Texas
19. National Association of Insurance and Financial Advisors-Amarillo
20. National Association of Insurance and Financial Advisors-Dallas
21. National Association of Insurance and Financial Advisors-Fort Worth
22. National Association of Insurance and Financial Advisors-Great Southwest
23. National Association of Insurance and Financial Advisors-Wichita Falls

D. Attorneys for Co-Plaintiffs-Appellants

Eugene Scalia
Jason J. Mendro
Paul Blankenstein
Rachel Mondl
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036

Steven P. Lehotsky
Janet Galeria
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, DC 20062

David T. Bellaire
Robin Traxler
FINANCIAL SERVICES INSTITUTE, INC.
607 14th Street, N.W., Suite 750
Washington, DC 20005

Kevin Carroll
Ira D. Hammerman
SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION
1101 New York Avenue, N.W.
Washington, D.C. 20005

James C. Ho
Russell H. Falconer
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue, Suite 1100
Dallas, TX 75201

Kevin Richard Foster
Felicia Smith
FINANCIAL SERVICES ROUNDTABLE
600 13th Street, N.W., Suite 400
Washington, DC 20005

J. Lee Covington II
INSURED RETIREMENT INSTITUTE
1100 Vermont Avenue, N.W.
Washington, DC 20005

David W. Ogden
Kelly P. Dunbar
Jessica P. Leinwand
Ari Holtzblatt
Kevin M. Lamb
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Andrea J. Robinson
WILMER CUTLER PICKERING HALE AND DORR LLP
60 State Street
Boston, MA 02109

Michael A. Yanof
THOMPSON COE COUSINS & IRONS, LLP
700 North Pearl Street
25th Floor – Plaza of the Americas
Dallas, TX 75201

E. Defendants-Appellees

24. United States Department of Labor
25. Edward C. Hugler, Acting Secretary, U.S. Department of Labor

F. Attorneys for Defendants-Appellees

Nicholas C. Geale
G. William Scott
Edward D. Sieger
Thomas Tso
Megan Hansen
M. Patricia Smith
Elizabeth Hopkins
U.S. DEPARTMENT OF LABOR
OFFICE OF THE SOLICITOR
200 Constitution Avenue, N.W., Suite N-2119
Washington, DC 20210

Michael Shih
Michael S. Raab
U.S. DEPARTMENT OF JUSTICE
CIVIL DIVISION, APPELLATE SECTION
950 Pennsylvania Avenue, N.W., Suite 7268
Washington, DC 20530

Galen N. Thorp
Emily Newton
Joyce R. Branda
Benjamin C. Mizer
John R. Parker
Judry L. Subar
U.S. DEPARTMENT OF JUSTICE
CIVIL DIVISION, FEDERAL PROGRAMS
BRANCH
20 Massachusetts Avenue, N.W.,
Room 6140
Washington, DC 20001

G. Amici in the District Court

26. AARP
27. AARP Foundation
28. American Association for Justice
29. Financial Planning Coalition
30. Public Citizen Inc.
31. Better Markets Inc.
32. Consumer Federation of America
33. Public Investors Arbitration Bar Association
34. National Black Chamber of Commerce

H. Attorneys for Amici in the District Court

Mary Ellen Signorille
AARP FOUNDATION LITIGATION
601 E St., N.W.
Washington, DC 20049

Bernard A. Guerrini
6500 Greenville Avenue, Suite 320
Dallas, TX 75206

Martin Woodward
STANLEY LAW GROUP
6116 North Central Expressway,
Suite 1500
Dallas, TX 75206

Deepak Gupta
Matthew W. H. Wessler
GUPTA WESSLER PLLC
1735 20th Street, N.W.
Washington, D.C. 2009

Brandan S. Maher
STRIS & MAHER LLP
1920 Abrams Parkway, Suite 430
Dallas, TX 75124
Doug D. Geyser
STRIS & MAHER LLP
6688 North Central Expressway,
Suite 1650
Dallas, TX 75206

Brian W. Barnes
David H. Thompson
Peter A. Patterson
COOPER & KIRK PLLC
1523 New Hampshire Ave NW
Washington, DC 20036

Brent M. Rosenthal
ROSENTHAL WEINER LLP
12221 Merit Drive, Suite 1640
Dallas, TX 75251

Julie Alyssa Murray
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, DC 20009

Braden W. Sparks.
BRADEN W. SPARKS PC
12222 Merit Drive, Suite 800
Dallas, TX 75251

Dennis M. Kelleher
BETTER MARKETS INC.
1825 K. Street, N.W., Suite 1080
Washington, DC 20006

Theodore Carl Anderson, III
Alexandra Treadgold
KILGORE & KILGORE PLLC
3109 Carlisle Street, Suite 200
Dallas, TX 75204
Richard Aaron Lewins
LEWINSLAW
7920 Belt Line Road, Suite 650
Dallas, TX 75254

Charles Flores
BECK REDDEN LLP
1221 McKinney Street, Suite 4500
Houston, TX 77010

/s/ Joseph R. Guerra

JOSEPH R. GUERRA
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

May 2, 2017

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-appellants respectfully submit that their challenges to the fiduciary rule and related exemptions promulgated by the Department of Labor are sufficiently important to warrant oral argument.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS i

STATEMENT REGARDING ORAL ARGUMENT viii

TABLE OF AUTHORITIES xi

INTRODUCTION 1

JURISDICTIONAL STATEMENT 3

STATEMENT OF ISSUES 4

STATEMENT OF THE CASE..5

A. Fixed Indexed Annuities 5

B. States' Regulation Of FIA Sales 6

C. The Previously Limited Regulation Of FIA Sales Under ERISA 9

D. DOL's Rulemaking 11

E. Proceedings Below 13

SUMMARY OF ARGUMENT 14

STANDARD OF REVIEW 18

ARGUMENT 19

I. DOL'S NEW DEFINITION OF A "FIDUCIARY" IS INVALID...............19

A. DOL's New Definition Of A "Fiduciary" Is Inconsistent With The Plain And Unambiguous Meaning Of ERISA 19

1. Settled rules of statutory construction demonstrate that ERISA imposes fiduciary status only on persons who render investment advice in a relationship of trust and confidence 20

2. The district court's reasons for accepting DOL's new definition are mistaken..26

B. DOL's Interpretation Is Unreasonable 31

II. DOL'S TREATMENT OF FIXED INDEXED ANNUITIES WAS ARBITRARY AND CAPRICIOUS 35

A. DOL Was Required To Consider The Sufficiency Of Existing Regulation 36

B. DOL Failed To Give A Rational Explanation For Finding That Existing Regulation Is Insufficient To Protect FIA Buyers 38

C. DOL Failed To Support Its Claim That FIA Sales Are Inflicting Consumer Harms Despite Existing Regulation 44

D. At The Very Least, The Revocation Of The 84-24 Exemption For FIAs Should Be Set Aside 51

CONCLUSION 52

CERTIFICATE OF SERVICE 53

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS 54

TABLE OF AUTHORITIES

Page

Cases

10 Ring Precision, Inc. v. Jones,
722 F.3d 711 (5th Cir. 2013) 37

Am. Driver Serv., Inc. v. Truck Ins. Exch.,
631 N.W.2d 140 (Neb. Ct. App. 2001)...22

Am. Fed'n of Unions Local 102 Health & Welfare Fund v. Equitable Life Assurance Soc'y of U.S.,
841 F.2d 658 (5th Cir. 1988) 25

Am. Equity Inv. Life Ins. Co. v. SEC,
613 F.3d 166 (D.C. Cir. 2010)...8, 37, 38, 42

Associated Builders & Contractors of Tex., Inc. v. NLRB,
826 F.3d 215 (5th Cir. 2016) 18, 38

Burlington N. & Santa Fe Ry. v. White,
548 U.S. 53 (2006)..29

Bus. Roundtable v. SEC,
647 F.3d 1144 (D.C. Cir. 2011)..51

Chavez v. Chenoweth,
553 P.2d 703 (N.M. Ct. App. 1976) 22

City of Arlington v. FCC,
133 S. Ct. 1863 (2013)..20

ConocoPhillips Co. v. EPA,
612 F.3d 822 (5th Cir. 2010) 47, 48

Del. Dep't of Nat. Res. & Envtl. Control v. EPA,
785 F.3d 1 (D.C. Cir. 2015)...36

Desoto Gen. Hosp. v. Heckler,
766 F.2d 182 (5th Cir. 1985) 49

S.D. ex rel. Dickson v. Hood,
391 F.3d 581 (5th Cir. 2004) 32, 46

Ellis v. Rycenga Homes, Inc.,
484 F. Supp. 2d 694 (W.D. Mich. 2007) 25

Encino Motorcars, LLC v. Navarro,
136 S. Ct. 2117 (2016)...37

Evans v. United States,
504 U.S. 255 (1992)...21, 22, 27, 28

Fin. Planning Ass'n v. SEC,
482 F.3d 481 (D.C. Cir. 2007)...26, 34

Hi-Ho Tower, Inc. v. Com-Tronics, Inc.,
761 A.2d 1268 (Conn. 2000) 33

Kap-Pel Fabrics, Inc. v. R.B. Jones & Sons, Inc.,
402 S.W.2d 49 (Mo. Ct. App. 1966) 21

Luminant Generation Co. v. EPA,
675 F.3d 917 (5th Cir. 2012) 19

Mertens v. Hewitt Assocs.,
508 U.S. 248 (1993)..23, 28

Michigan v. EPA,
135 S. Ct. 2699 (2015)...33

Moses v. Mfrs. Life Ins. Co.,
298 F. Supp. 321 (D.S.C. 1968), *aff'd*, 407 F.2d 1142 (4th Cir. 1969) 22

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983)..37

Nat'l Fuel Gas Supply Corp. v. FERC,
468 F.3d 831 (D.C. Cir. 2006)...*passim*

Nationwide Mut. Ins. Co. v. Darden,
503 U.S. 318 (1992)..20, 22

Neder v. United States,
527 U.S. 1 (1999) 21, 22, 23

NLRB v. Amax Coal Co.,
453 U.S. 322 (1981) 20, 22

Pitts v. Jackson Nat'l Life Ins. Co.,
574 S.E.2d 502 (S.C. Ct. App. 2002) 22

Rishel v. Pac. Mut. Life Ins. Co. of Cal.,
78 F.2d 881 (10th Cir. 1935) 21

Russello v. United States,
464 U.S. 16 (1983) 23, 29

Stockett v. Penn Mut. Life Ins. Co.,
106 A.2d 741 (R.I. 1954) 21

Texas v. EPA,
690 F.3d 370 (5th Cir. 2012) 19

Texas v. United States,
497 F.3d 491 (5th Cir. 2007) 31, 34

Varity Corp. v. Howe,
516 U.S. 489 (1996) 20, 28

Statutes and Regulations

Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub.
L. No. 111-203, 124 Stat. 1376 (2010) 8, 34

5 U.S.C. § 706 31

15 U.S.C. § 1011 34

26 U.S.C. § 4975 10

29 U.S.C. § 1002(21)(A) 10, 23, 24

29 U.S.C. § 1104(a) 10

29 U.S.C. § 1106 10

40 Fed. Reg. 50840 (Oct. 31, 1975)....10, 25

74 Fed. Reg. 3138 (Jan. 16, 2009)....8, 34

Legislative History

S. Rep. No. 93-127 (1973)....24

H.R. Rep. No. 93-533 (1973)....24

120 Cong. Rec. 3977 (1974)....25

Other Authorities

G. Bogert, *Confidential Relations and Unenforcible Express Trusts*, 13 Cornell L.Q. 237 (1928)....21, 32, 33

Certified Fin. Planner Bd. of Standards, APCO Insight, *Senior Financial Exploitation Study* (Aug. 2012), http://www.cfp.net/docs/news-events---supporting-documents/senior-americans-financial-exploitation-survey.pdf?sfvrsn=0....50

Richard Evans & Rüdiger Fahlenbrach, *Institutional Investors and Mutual Fund Governance: Evidence from Retail-Institutional Fund Twins*, *in The Review of Financial Studies* (2012)....46

D. Schwarcz & P. Siegelman, *Insurance Agents in the 21st Century: The Problem of Biased Advice* (forthcoming)....49

D. Schwarcz & P. Siegelman, *Insurance Agents in the 21st Century: The Problem of Biased Advice*, *in Research Handbook on the Economics of Insurance Law* (Edward Elgar Pub. 2015)....39

INTRODUCTION

Appellants are the Indexed Annuity Leadership Council (IALC), an association of insurance companies that offer fixed indexed annuities (FIAs), and several of the association's members. Appellants brought this action to challenge new rules issued by the Department of Labor (DOL) that dramatically—and unlawfully—alter the longstanding regulatory treatment of sales of these products under the Employee Retirement Income Security Act of 1974 (ERISA).

Long before ERISA was enacted, it was well recognized that, absent special circumstances, insurance products are sold in arm's-length transactions, and that recommendations incidental to such sales are not "fiduciary" in nature. This is because the defining characteristic of a "fiduciary" relationship—special trust and confidence—does not arise in ordinary, one-time sales of insurance. These legal principles explain why, shortly after ERISA was enacted, DOL interpreted the statute's definition of a "fiduciary" to require the attributes of a confidential relationship, and to exclude persons who provide incidental advice in non-confidential sales transactions. They also explain why DOL maintained this standard for over four decades, across six presidential administrations of both parties.

Yet, at the government's urging, the district court concluded that the term "fiduciary" in ERISA is properly read to transform an arm's-length sale of an annuity into fiduciary conduct. Indeed, the government persuaded the district court

that DOL's own 41-year-old contrary interpretation was "difficult … to reconcile with" ERISA. ROA.9895. These conclusions are plainly mistaken.

Because Congress incorporated the term "fiduciary" into ERISA (and the parallel provisions of the Internal Revenue Code), courts must presume that Congress intended to incorporate the term's well-established common-law meaning unless the statute dictates otherwise. Nothing in ERISA requires jettisoning the fundamental common-law requirement of a special relationship of trust and confidence. To the contrary, the language Congress used elsewhere in the statute to depart from *other* common-law requirements confirms that Congress retained this defining characteristic of a fiduciary. Thus, the plain meaning of ERISA precludes DOL's new and radically broader definition.

Even if ERISA's fiduciary definition was ambiguous—and it is not—DOL's new interpretation is still unreasonable. As DOL itself conceded, Congress did not intend to regulate advice offered outside relationships of trust and confidence, yet the agency chose to capture recommendations incidental to non-confidential one-time sales of insurance products. Moreover, Congress has forsworn federal regulation of advice incidental to sales of other financial products, and it has prohibited federal regulation of the very products at issue here—FIAs—when they are sold in compliance with recently enhanced state "suitability" rules. An interpretation that flouts Congress's intent in ERISA and two other laws is not entitled to deference.

In addition to adopting a legally invalid interpretation of ERISA, DOL acted arbitrarily and capriciously in subjecting sales of FIAs to stringent new federal regulation. Because sales of these products are subject to newly enhanced state suitability rules, DOL was obligated to provide a reasoned explanation for why this state regulation is inadequate. DOL identified a theoretical "gap" between its new "best interest" standard and the state-law requirement to recommend only FIAs that are suitable for a purchaser. But DOL nowhere explained why it is reasonable to believe that this regulatory "gap" has any real-world significance. And it failed to offer any relevant evidence of actual consumer harms from FIA sales subject to enhanced state regulation. To the contrary, DOL repeatedly relied on harms caused by sales of unsuitable FIAs (the very harms addressed by the enhanced state regulations) and evidence drawn from studies of *mutual funds*, rather than FIAs.

As appellants explain in detail below, the district court's decision upholding DOL's new rules should be reversed, and those rules should be set aside as unlawful.

JURISDICTIONAL STATEMENT

The IALC plaintiffs filed this suit in the Northern District of Texas on June 8, 2016. The district court had jurisdiction to review DOL's final agency actions under 28 U.S.C. § 1331 and 5 U.S.C. § 704.

The district court entered its final judgment on February 9, 2017, ROA.9954, and the IALC plaintiffs filed a timely notice of appeal on February 28, 2017, ROA.9962. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether DOL's new fiduciary rule, which treats recommendations incidental to the one-time sale of insurance products as fiduciary in nature, is invalid because it rests on an interpretation of the term "fiduciary" in ERISA and parallel provisions of the Internal Revenue Code that is inconsistent with the statutes' plain meaning and/or is unreasonable.

2. Whether, in subjecting sales of FIAs to fiduciary regulation, revoking a longstanding prohibited transaction exemption (the "84-24 exemption") for commission-based sales of insurance products, and moving FIAs into the new and more onerous "Best Interest Contract" exemption, DOL acted arbitrarily and capriciously because it failed to (a) offer a reasoned explanation for why newly enhanced state regulations governing FIA sales are insufficient to protect consumers, (b) offer evidence that FIA sales subject to the new state regulations are actually harming consumers, and (c) explain why the enhancements it adopted for the 84-24 exemption do not adequately protect consumers who purchase FIAs.

STATEMENT OF THE CASE

A. Fixed Indexed Annuities

Annuities are insurance contracts that protect against the risk of outliving retirement savings. In exchange for principal contributed by an individual, the insurance company makes payments to the individual, either immediately or on a deferred basis, such as at retirement.

Fixed annuities, including FIAs, are a type of deferred annuity that shields the purchaser from loss of principal due to “investment risk.” ROA.8596. In contrast to variable annuities, the insurer bears the market risk for a fixed annuity, and interest credited to the contract is guaranteed. *See* ROA.8596, 9232, 579–81. Premiums paid by the owner are not placed in a separate account or invested in a specific product or market, but are supported by the insurer’s general account. *See* ROA.8596, 9232.

With a traditional fixed annuity, earnings accrue at an interest rate that may be guaranteed for a term of years or periodically declared by the insurer. *See* ROA.8596. With an FIA, the interest rate is tied to an established market index, such as the S&P 500. Although the indexed formulas are typically capped at a certain upper level, they also set a floor such that only the *positive* change of a market index is used to calculate the interest rate credit. As a result, the credit can never be less than zero and the owner will not lose any principal if the index declines. Fixed

annuities thus provide an affordable and low-risk option for individuals seeking guaranteed income in retirement.

Because fixed annuities are intended primarily to provide guaranteed income in retirement, contract owners pay a surrender charge if they choose to cash-in the contract early. *See* ROA.8596. Though surrender charges and periods vary among insurers and products, insurers may charge no more than is permitted under state insurance standards. ROA.579.

FIAs are sold through a variety of channels, including by banks, broker-dealers, independent agents, and captive agents of insurers. ROA.8597, 8609, 8536. Agents are generally compensated through commissions, which are paid by the insurance company and not deducted from the buyer's principal. This commission-based compensation system reflects a fundamental feature of sales of such annuities: An FIA is a one-time "buy and hold" product. ROA.8535. There is no ongoing provision of investment advice or management of the consumer's funds. FIA sales thus stand in contrast to a fee-for-advice arrangement, in which a consumer pays an advisor a fee to manage his or her money on an ongoing basis. *See id.*

B. States' Regulation Of FIA Sales

States have developed "a robust set of consumer protection[s]" to ensure that those selling annuities act in a manner that protects the interests of retirement savers. ROA.8529; *see also* ROA.8598. One important component of this framework

is the model "suitability" regulation developed by the National Association of Insurance Commissioners (NAIC). ROA.8538. The NAIC enhanced the suitability model in 2010, imposing more extensive suitability standards on the sale of fixed annuities, including FIAs, to ensure that consumers' needs and financial objectives are appropriately addressed. ROA.8538–39. As of September 2015, 35 states plus the District of Columbia had adopted the model suitability rule. ROA.679.

FIAs can only be sold by state-licensed insurance agents, who must complete an annuity-specific training course, as well as training about each specific product they sell. ROA.8534–35; NAIC Suitability In Annuity Transactions Model Regulation §§ 6(F)(1)(b)-(c), 7(A) (ROA.6034, 6036). Each type of FIA must be approved by each state in which it is sold. ROA.8533. An agent may not recommend even state-approved FIAs unless the agent has "reasonable grounds for believing that the recommendation is suitable for the consumer." ROA.6032 § 6(A).

To make a suitability determination, the agent must evaluate a host of factors, including the consumer's age, income, intended use of the annuity, assets and liquid net worth, financial needs and experience, financial time horizon, liquidity needs, risk tolerance, and tax status. ROA.6032–33 §§ 5(I), 6(A). An agent must also have a reasonable basis to believe that the "consumer would benefit from certain features of the annuity, such as tax-deferred growth, annuitization or death or living benefit," ROA.6033 § 6(A)(2), and must ensure the consumer has received a

reasonable explanation of the FIA, including the surrender period, early surrender charges, any other fees or charges, and limitations on interest credited, *id.* § 6(A)(1). The insurance company must then review and approve the transaction as suitable. *Id.* § 6(C).

State insurance commissioners have broad powers to ensure that insurers do not engage in unfair trade practices. *See* ROA.8529. As the NAIC explained, "[s]uch authority allows state regulators to identify market issues and take the appropriate regulatory action swiftly and effectively," and "states have a strong record of protecting consumers, especially seniors, from inappropriate sales practices or unsuitable products." *Id*.

Congress has recognized the effectiveness of these state protections. In 2009, the Securities and Exchange Commission (SEC) proposed a rule that would have treated many FIAs as securities subject to registration and federal supervision. 74 Fed. Reg. 3138 (Jan. 16, 2009). The proposed rule was invalidated, however, because the SEC "fail[ed] to determine whether, under the existing [state-law] regime, sufficient protections existed to enable investors to make informed investment decisions and sellers to make suitable recommendations to investors." *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 179 (D.C. Cir. 2010). Shortly thereafter, Congress adopted the Harkin Amendment to the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 989J, 124

Stat. 1376, 1949–50 (2010). The Harkin Amendment provides that FIAs sold in states that have adopted the latest NAIC model suitability regulation, or by companies following the latest NAIC model regulation, shall be treated as exempt securities not subject to federal regulation.

Today, versions of the NAIC regulations have been adopted by most states, and insurance companies selling FIAs generally apply suitability standards at least as stringent as the model regulations even if domiciled in states that have not adopted them, in order to benefit from the Harkin Amendment exemption. ROA.8537. Thus, virtually all FIA sales are as a legal or practical matter subject to requirements that are at least as stringent as the NAIC model regulations. ROA.8598, 8537.

C. The Previously Limited Regulation Of FIA Sales Under ERISA

Prior to the adoption of DOL's new rules, sales of fixed annuities, including FIAs, were generally not subject to regulation under ERISA's fiduciary standards. Under ERISA and parallel provisions of the Code, a person is a "fiduciary" only "to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) 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, or (iii) he has

any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. § 1002(21)(A); 26 U.S.C. § 4975(e)(3). Among other things, ERISA requires fiduciaries of an ERISA plan to act prudently and "solely in the interest of the participants and beneficiaries," 29 U.S.C. § 1104(a), and it prohibits certain transactions absent an exemption, *id*. § 1106. Under the Code, fiduciaries of individual retirement accounts (IRAs) and plans not covered by ERISA are also subject to prohibited transaction rules. 26 U.S.C. § 4975.

Shortly after ERISA was enacted, DOL confirmed that sellers of fixed annuities are ordinarily not fiduciaries. Under regulations DOL issued in 1975, persons lacking discretionary authority or control with respect to the investment of plan assets did not "rende[r] investment advice for a fee"—and thus were not fiduciaries—unless, among other things, they made investment recommendations "on a regular basis" "pursuant to a mutual agreement, arrangement or understanding" that the advice "will serve as a primary basis for investment decisions with respect to plan assets," and that the advice will be "individualized … based on the particular needs of the plan." 40 Fed. Reg. 50840, 50841 (Oct. 31, 1975). Advice incidental to the sale of an insurance product thus did not generally qualify as fiduciary investment advice triggering the prohibited transaction rules.

Even a person who meets the definition of a fiduciary may engage in prohibited transactions if an exemption applies. Prohibited Transaction Exemption 84-24,

originally promulgated in 1977, long permitted insurance agents and brokers who otherwise satisfied the regulatory test for fiduciary status "to effect the purchase of the insurance or annuity contracts for the plans or IRAs and receive a commission on the sale." ROA.1108.

D. DOL's Rulemaking

In the rule at issue in this proceeding, DOL abandoned its more than 40-year-old recognition that sales of fixed annuities do not ordinarily involve fiduciary conduct. DOL dramatically expanded the definition of fiduciary investment advice to sweep in "recommendations" specifically directed to a recipient for consideration in making investment or management decisions with respect to securities or other property of an ERISA plan or IRA, even if not provided on a regular basis as part of an ongoing advisory relationship. ROA.324. Under DOL's new rule, recommendations made in a one-time annuity sale render a sales agent a fiduciary.

In proposing this expanded definition, DOL recognized that it would sweep in communications that "Congress did not intend to cover as fiduciary 'investment advice' and that parties would not ordinarily view as communications characterized by a relationship of trust or impartiality." ROA.1033. DOL accordingly proposed to adopt specified "carve-outs," including one for "incidental advice provided in connection with an arm's length sale" of a financial product. *Id.* Neither the

proposed nor final rule, however, included a "carve-out" (or what DOL later described as an "exclusion") for advice incidental to the sale of annuities.

DOL also amended the 84-24 exemption in order to "increase the safeguards of the exemption." ROA.549. To rely on the amended 84-24 exemption, fiduciaries must "adhere to certain 'Impartial Conduct Standards,' including acting in the best interest of the plans and IRAs when providing advice." *Id.* Having thus expanded the definition of "fiduciary" and enhanced the protections of the 84-24 exemption, DOL revoked relief under this exemption for sales of FIAs (but not fixed rate annuities). ROA.553–58. DOL did so based primarily on its view that FIAs are more complicated than other fixed annuities. ROA.555.

Finally, for transactions falling outside the 84-24 exemption, DOL adopted a new "Best Interest Contract" (BIC) exemption. ROA.379–466. To use this exemption, advisers and the financial institutions that employ or retain them must acknowledge their fiduciary status, and commit to "Impartial Conduct Standards" that require advice in the customer's "best interest," "reasonable" compensation limits, disclosure of all "material" conflicts of interest, and (for the institution) supervisory obligations. ROA.384. For IRAs and non-ERISA plans, the financial institution must commit to these standards in an enforceable contract. ROA.385. For ERISA plans, the financial institution must acknowledge its fiduciary status and that of its advisers. *Id.* For both IRAs and ERISA plans, financial institutions can-

not disclaim liability for compensatory remedies or waive or qualify the customer's rights to bring or participate in a class action suit. ROA.397–98.

E. Proceedings Below

DOL published the final fiduciary rule and exemptions on April 8, 2016. ROA.322 (fiduciary definition); ROA.378 (BIC exemption); ROA.547 (amended 84-24 exemption). The IALC plaintiffs filed their complaint on June 8, 2016, and their case was consolidated before Chief Judge Barbara Lynn with two other suits raising similar challenges, one brought by the Chamber of Commerce and related plaintiffs (the Chamber plaintiffs), the other brought by the American Council of Life Insurers and related plaintiffs (the ACLI plaintiffs).

Following briefing and argument on cross-motions for summary judgment, the district court entered judgment in favor of DOL. ROA.9873–953, 9954. The court concluded that ERISA's definition of a fiduciary—in particular, the second prong, which refers to those who "rende[r] investment advice for a fee"—does not unambiguously foreclose DOL's new interpretation. ROA.9888–95. The court concluded that the common law did not limit the meaning of ERISA's "investment advice" prong because Congress had departed from other common-law requirements elsewhere in the statute. ROA.9889–90. The court also asserted, without explanation, that it was not convinced that DOL's new definition "varies from the common law of trusts." ROA.9890. Finally, the court concluded that DOL's inter-

pretation of the "investment advice" prong was reasonable, and indeed, that the agency's 41-year-old prior interpretation was "more difficult … to reconcile with" ERISA. ROA.9895.

The court also rejected the IALC plaintiffs' contention that DOL had acted arbitrarily and capriciously in regulating sales of FIAs as fiduciary transactions and in revoking the 84-24 exemption for such sales. ROA.9916–26. The court accepted DOL's contention that the agency's description of state regulation, and the fact that a minority of states have not adopted the NAIC's enhanced suitability rules, sufficed to establish the need for federal regulation. ROA.9920–23. The court also accepted DOL's claim that it was reasonable to rely on studies of commission-based sales of *mutual funds* to demonstrate that sales of FIAs cause actual consumer harms. ROA.9923–24. In so ruling, the court did not address the IALC plaintiffs' showing that the dynamics DOL itself identified as the cause of mutual fund underperformance do not apply to FIAs.

SUMMARY OF ARGUMENT

I. DOL's new definition of a "fiduciary" is inconsistent with ERISA's plain meaning. Because it used the common-law term "fiduciary," Congress is presumed to have incorporated the term's well-settled meaning unless ERISA itself dictates otherwise. This presumption is strong. To overcome it, ERISA's language, structure, or purpose must be incompatible with, and require a deviation from, the

common law. The fact that ERISA deviates from *some* common-law requirements does not demonstrate that Congress intended to jettison others.

Nothing in ERISA's "investment advice" prong shows that Congress departed from the fundamental requirement that a "fiduciary" occupy a position of special trust and confidence. By contrast, when it chose to deviate from the common-law rule that a fiduciary be a named trustee, Congress used language incompatible with that rule—defining a fiduciary as one who exercises "*any*" authority or control over a plan or its assets. The "investment advice" prong, however, does not reach those who render "*any* investment advice for a fee." Other language in the "investment advice" prong, the remainder of the statute's definition, and ERISA's legislative history all confirm that Congress limited fiduciary status under this prong to investment advice rendered in a relationship of trust and confidence.

Even if the statute was ambiguous—and it is not—DOL's new definition is unreasonable because it is inconsistent with congressional intent in several related but distinct ways. First, DOL recognized that Congress did not intend to burden activities that do not implicate relationships of trust and confidence, and DOL had no basis for concluding that sales of annuities involve such relationships. Treating recommendations incidental to such sales as fiduciary conduct is thus inconsistent with Congress's intent in ERISA itself. Second, in the Investment Advisers Act, Congress imposed fiduciary duties on investment advisers, but not when they pro-

vide advice solely incidental to their business as brokers or dealers. This statute reflects Congress's broad understanding that recommendations made in traditional sales relationships should not be treated as fiduciary in nature. Third, Congress prohibited federal regulation of FIAs themselves when they are sold in compliance with the NAIC suitability rules. An interpretation that flouts Congress's intent in three separate laws is plainly unreasonable, and not entitled to deference.

II. Independently, the rules—or, at a minimum, the revocation of the 84-24 exemption—must be set aside as arbitrary and capricious as applied to FIAs. As numerous commenters demonstrated, FIA sales are already subject to extensive consumer protections under state law, including recently enhanced suitability standards. DOL failed to provide a reasonable explanation for why these existing regulations are insufficient to protect consumers. And it failed to support its claim that FIA sales are inflicting excessive losses on consumers notwithstanding existing regulation.

DOL identified a perceived "gap" between its best-interest standard and state suitability standards, but it never explained why this theoretical gap can be expected to have any real-world consequences or how it renders suitability standards insufficient to protect consumers. To the contrary, in explaining the purported need for additional regulation, DOL repeatedly—and irrationally—cited the concern that agents might recommend *unsuitable* products.

The other explanations DOL offered are equally incoherent. It faulted state regulation for not being uniform, but failed to explain why national uniformity is needed, failed to address the evidence that virtually all FIA sales comply with the NAIC model suitability rules to avoid federal securities regulation, and failed to recognize that an interest in national uniformity does not support the adoption of a national best-interest standard as opposed to a national suitability standard. And DOL relied heavily on purported concerns expressed by securities regulators, while ignoring Congress's conclusion in the Harkin Amendment that those concerns are properly addressed by compliance with the NAIC suitability rules.

In any event, regardless of any theoretical concerns, DOL's treatment of FIAs was arbitrary and capricious because it staked the rules in part on the empirical claim that existing regulation has failed to prevent consumer harms, but failed to present any relevant evidence to back up that claim. DOL's principal evidence of purported consumer harms consisted of studies involving mutual funds, not FIAs. But the factors that DOL identified as leading to underperformance in the mutual fund context—excessive trading, timing errors, underinvestment in fund management—do not apply to FIAs. And none of the insurance-specific evidence DOL cited, much of which concerns other products in other countries that are not subject to suitability standards and/or predates the recent enhancements to the suit-

ability rules, shows that FIA sales are inflicting consumer losses despite existing regulation.

Finally, in revoking the 84-24 exemption for FIAs, DOL failed to explain why the enhanced protections of that exemption—including a best-interest standard—are insufficient, coupled with state suitability rules, to protect consumers.[1]

STANDARD OF REVIEW

This Court "review[s] *de novo* a district court's grant of summary judgment, 'applying the same standard as the district court.'" *Associated Builders & Contractors of Tex., Inc. v. NLRB*, 826 F.3d 215, 219 (5th Cir. 2016).

In "anaylyz[ing] an agency's interpretation of its authorizing statute," this Court uses "the two-step procedure set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)," asking first "whether Congress has directly spoken to the precise question at issue." *Associated Builders & Contractors*, 826 F.3d at 219. If Congress has, the Court "must give effect to the unambiguously expressed intent of Congress." *Id.* "If it has not, [this Court] defers to the agency's reasonable interpretations of the statute." *Id.*

In determining whether agency action is arbitrary, capricious, an abuse of discretion, or unsupported by substantial evidence within the meaning of the Ad-

[1] The IALC plaintiffs incorporate by reference the briefs and all arguments therein filed today by the Chamber and ACLI plaintiffs-appellants.

ministrative Procedure Act (APA), this Court "look[s] to whether the [agency] examined the relevant data," considered "the relevant factors," and "articulated a 'satisfactory explanation for its action including a rational connection between the facts found and the choice made.'" *Texas v. EPA*, 690 F.3d 670, 676–77 (5th Cir. 2012) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983)). This Court "must disregard any post hoc rationalizations of the [agency's] action and evaluate it solely on the basis of the agency's stated rationale at the time of its decision." *Luminant Generation Co. v. EPA*, 675 F.3d 917, 925 (5th Cir. 2012). "An important corollary is that where [the agency] has relied on multiple rationales …, and … at least one of the rationales is deficient, [the Court] will ordinarily vacate the [rule] unless [it is] certain that [the agency] would have adopted it even absent the flawed rationale." *Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 839 (D.C. Cir. 2006).

ARGUMENT

I. DOL'S NEW DEFINITION OF A "FIDUCIARY" IS INVALID.

A. DOL's New Definition Of A "Fiduciary" Is Inconsistent With The Plain And Unambiguous Meaning Of ERISA.

Under the common law, a fiduciary is one who occupies a position of trust and confidence with respect to another. Settled rules of statutory interpretation demonstrate that Congress did not jettison this defining characteristic when it used the term "fiduciary" in ERISA.

1. Settled rules of statutory construction demonstrate that ERISA imposes fiduciary status only on persons who render investment advice in a relationship of trust and confidence.

When an agency interprets a statute it administers, a reviewing court must address a threshold question. "*[A]pplying the ordinary tools of statutory construction*, the court must determine 'whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013) (emphasis added) (quoting *Chevron*, 467 U.S. at 842–43). Here, an "ordinary tool of statutory construction" resolves this case.

Because ERISA uses the word "fiduciary," a term with a "settled meaning under … the common law, a court *must* infer, unless the statute otherwise *dictates*, that Congress mean[t] to incorporate the established meaning." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992) (emphases added) (applying principle to another definition in ERISA); *see also Varity Corp. v. Howe*, 516 U.S. 489, 502 (1996) (citing *Darden* in construing terms "fiduciary" and "administration" in ERISA). This presumption is strong. Where Congress used trust-law "terms long established in the courts of chancery," the Court held that those terms must be given their traditional meaning "unless Congress has unequivocally expressed an intent to the contrary." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 330 (1981).

Nor does the presumption disappear simply because a statute departs from the common law in certain respects. To the contrary, even when Congress departs from some elements of the common law, it is presumed to retain other common-law requirements. *See Neder v. United States*, 527 U.S. 1, 24–25 (1999) (elimination of common-law elements of reliance and damage in fraud statutes did not demonstrate that Congress also eliminated materiality element); *Evans v. United States*, 504 U.S. 255, 263–64 (1992) (adoption of "much broader" definition of persons who could engage in "extortion" was not a "direction" to expand the common-law definition of the underlying misconduct).

These principles are dispositive here. Long before ERISA was enacted, the term "fiduciary" had a settled common-law meaning. It required a *special* relationship of trust and confidence—"an extraordinary reliance which causes [another] to drop his guard, abandon formalities, and deal with another in intimacy." G. Bogert, *Confidential Relations and Unenforcible Express Trusts*, 13 Cornell L. Q. 237, 245 (1928) (ROA.4168). Such a confidential relationship, moreover, had to "be *pre-existing*." *Id.* Courts have thus long recognized that, absent unusual circumstances, a fiduciary relationship does not arise out of one-time sales of insurance products.[2]

[2] *Rishel v. Pac. Mut. Life Ins. Co. of Cal.*, 78 F.2d 881, 886 (10th Cir. 1935) ("[t]he law does not cast upon insurance companies the affirmative burden cast upon trustees who deal with the property of their cestuis"); *Stockett v. Penn Mut. Life Ins. Co.*, 106 A.2d 741, 744 (R.I. 1954) ("Ordinarily an insurance company stands in no fiduciary relationship to a legally competent applicant for an annuity"); *Kap-Pel*

Accordingly, courts must presume that a fiduciary relationship under ERISA is one of trust and confidence, unless something in the statute constitutes a "contrary direction," *Evans*, 504 U.S. at 264, that "*dictates*" jettisoning this defining characteristic, *Darden*, 503 U.S. at 322 (emphasis added).

In both its rulemaking and its briefs below, the agency focused on the fact that a person can be a fiduciary if "he renders investment advice for a fee." ROA.330, 366, 4973–75, 4978–81. But nothing in this phrase is fundamentally "incompatible with," *Neder*, 527 U.S. at 25—and thus reflects an "unequivocal[] … intent" to abandon, *Amax Coal*, 453 U.S. at 330—the common law's requirement of trust and confidence. This prong is thus properly construed to treat as a fiduciary only one who "renders investment advice for a fee" *in a relationship of trust and confidence*.

Fabrics, Inc. v. R.B. Jones & Sons, Inc., 402 S.W.2d 49, 58 (Mo. Ct. App. 1966) (in an insurance transaction, "two contracting parties are dealing with each other at arms' length" and no fiduciary relationship is established); *Moses v. Mfrs. Life Ins. Co.*, 298 F. Supp. 321, 323 (D.S.C. 1968) aff'd, 407 F.2d 1142 (4th Cir. 1969) ("claim of fiduciary relationship … cannot rest upon the mere relationship of insurer and insured"); *Chavez v. Chenoweth*, 553 P.2d 703, 710 (N.M. Ct. App. 1976) ("Something more than the fact of the insurance relationship is required before a fiduciary relationship results"); *Am. Driver Serv., Inc. v. Truck Ins. Exch.*, 631 N.W.2d 140, 148 (Neb. Ct. App. 2001) ("the contractual nature of an insurance policy, … does not give rise to a presumption of a fiduciary relationship," even where the insurer has "superior knowledge or bargaining power"); *Pitts v. Jackson Nat'l Life Ins. Co.*, 574 S.E.2d 502, 508 (S.C. Ct. App. 2002) ("[T]he cases clearly establish the sale of insurance is an arm's length commercial transaction, which does not give rise to a fiduciary relationship").

Any conceivable doubt is eliminated by comparing the language of ERISA's "investment advice" prong with the language Congress used elsewhere to depart from other common-law requirements. The common law conferred fiduciary status only on named trustees. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993). In ERISA, however, Congress adopted a "functional" definition that includes a person who "exercises *any* discretionary authority or discretionary control respecting management of such plan or exercises *any* authority or control respecting management or disposition of its assets," 29 U.S.C. § 1002(21)(A)(i) (emphases added). A functional definition that encompasses those who exercise "*any*" control or authority over a plan or its assets is inescapably "incompatible with," *Neder*, 527 U.S. at 25, and thus departs from, the common law's named trustee limitation.[3]

Critically, however, the "investment advice" prong does not encompass a person who "renders *any* investment advice for a fee." Indeed, the fact that Congress used the word "any" five separate times in the definition of a fiduciary, but did not use it to modify "renders investment advice," makes clear that this choice was intentional. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in an-

[3] Although language encompassing *any* "control and authority" is inconsistent with the common law's formal trusteeship requirement, that language is *not* inconsistent with the central aspect of a fiduciary relationship: persons who are afforded broad powers to control a plan or to manage and dispose of its assets are those in whom others repose special trust and confidence.

other section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”). This choice thus reflects a conscious decision *not* to sweep in all persons who render any investment advice, including advice incidental to the one-time sale of insurance products.

Further confirmation, if any were needed, can be found in the second half of the “investment advice” prong, which makes a person a fiduciary if he or she “has any authority or responsibility to” render investment advice. 29 U.S.C. § 1002(21)(A)(i). An advisor in an ongoing relationship of trust and confidence would possess “authority” or “responsibility” to render investment advice. Because the second half of the “investment advice” prong clearly retains the common-law requirement of a relationship of trust and confidence, there is no basis to conclude that the first half of the same prong “dictates” a departure from that requirement.

Finally, the legislative history confirms that Congress retained this defining characteristic of a fiduciary even as it altered other aspects of the common law. Just before explaining how ERISA’s fiduciary definition included any person “who exercises any power of control, management or disposition with respect to monies or other property of an employee benefit fund, or who has authority or responsibility to do so,” the Senate Report reiterated that a “fiduciary is one who occupies *a position of confidence or trust*.” S. Rep. No. 93-127, at 28–29 (1973) (emphasis added); *see also* H.R. Rep. No. 93-533, at 11 (1973) (same). Similarly, Representa-

tive Perkins provided material in the nature of a committee report explaining that "[a] fiduciary is one who occupies *a position of confidence o[r] trust*," and that the definition dispensed with "any requirement of *a written or other formal acknowledgement* of fiduciary status." 120 Cong. Rec. 3977, 3982–83 (1974) (Rep. Perkins) (emphases added). Dispensing with formal *acknowledgement* of fiduciary status is far different than dispensing with the *central characteristic* of a fiduciary relationship.

The foregoing explains why, for 41 years, DOL regulations established that a person who provided investment advice was a fiduciary "only if" the person had "discretionary authority or control … with respect to purchasing or selling securities or other property," or rendered advice "on a regular basis," "pursuant to a mutual agreement, arrangement or understanding" that the advice would be "individualized" and would "serve as a primary basis for investment decisions with respect to plan assets." 40 Fed. Reg. at 50843.[4] These requirements reflect a relationship of trust and confidence—and properly exclude one-time, arm's-length sales. *See Am.*

[4] In light of the foregoing language, the district court's statement that DOL previously interpreted the "investment advice" prong "to include commissions for advice *incidental to sales transactions*," ROA.9892 (emphasis added), is incorrect. Nor do the cases the district court cited, *id.*, show otherwise. These cases simply applied the regulation and recognized that "each element set forth in the regulation must be satisfied." *Ellis v. Rycenga Homes, Inc.*, 484 F. Supp. 2d 694, 707 (W.D. Mich. 2007) (describing the rulings in *Farm King Supply, Inc. v. Edward D. Jones & Co.*, 884 F.2d 288 (7th Cir. 1989), and *Thomas, Head & Greisen Emps. Tr. v. Buster*, 24 F.3d 1114 (9th Cir. 1994)).

Fed'n of Unions Local 102 Health & Welfare Fund v. Equitable Life Assurance Soc'y of U.S., 841 F.2d 658, 664 (5th Cir. 1988) (holding that, under DOL's prior regulation, "[s]imply urging the purchase of its products d[id] not make an insurance company an ERISA fiduciary with respect to those products"); *cf. Fin. Planning Ass'n v. SEC*, 482 F.3d 481, 491 (D.C. Cir. 2007) (agency's consistent interpretation over the course of decades reflected statute's "clear" meaning).

In short, the "investment advice" prong of ERISA's "fiduciary" definition has a plain and unambiguous meaning that forecloses DOL's new interpretation.

2. The district court's reasons for accepting DOL's new definition are mistaken.

In sustaining DOL's novel interpretation, the district court deemed it significant that ERISA does not "expressly define 'investment advice,'" but it does authorize DOL to promulgate regulations "to 'define [the] accounting, technical and trade terms used in [ERISA]'" and to generally "carry out" the statute. ROA.9888. The term "fiduciary," however, is not an "accounting," "technical," or "trade" term. It is a common-law term with a well-established meaning. And DOL's authority to issue regulations to "carry out" ERISA or to construe its "technical" terms is no basis for concluding that Congress stripped the term "fiduciary" of its central meaning, thereby empowering the agency to regulate arm's-length commercial relations lacking trust and confidence. DOL's interpretive authority only comes into play *if* the statute is ambiguous; it is not a basis for finding ambiguity.

The district court also deemed it significant that Congress expressly departed from trust law by defining "fiduciary" not "in terms of formal trusteeship, but in *functional* terms of control and authority over the plan … thus expanding the universe of persons subject to fiduciary duties." ROA.9889 (omission in original) (quoting *Mertens*, 508 U.S. at 262, 264). But, as noted earlier, a statute's departure from *one* aspect of the common law does not jettison *all* aspects of the common law. Just as a statutory expansion of who can engage in extortion was not a "direction" to expand the common-law definition of extortion itself, *Evans*, 504 U.S. at 263–64, Congress's decision to depart from the trust-law requirement of formal trusteeship is not a direction to dispense with the central requirement of a relationship of trust and confidence. Moreover, as noted above, the language that compels a departure from the common law in the "control and authority" prong of the fiduciary definition is conspicuously absent from the "investment advice" prong.

Relying on snippets of language in the Supreme Court's *Varity* decision, the district court appeared to assume that *Darden*'s presumption concerning incorporated common-law terms does not apply to ERISA. The district court noted that "trust law does not tell the entire story … [and] will offer only a starting point" because, when Congress "enacted ERISA, it made a 'determination that the common law of trusts did not offer completely satisfactory protection.'" ROA.9889 (alterations and omission in original) (quoting *Varity*, 516 U.S. at 496–97); *see also id.*

("the analogy between ERISA fiduciary and common law trustee becomes problematic") (alterations omitted) (quoting *Pegram v. Hedrich*, 530 U.S. 211, 225 (2000)). In *Varity* itself, however, the Court cited *Darden* and, eschewing reliance on dictionaries, "look[ed] to the common law" to determine the scope of fiduciary activity under ERISA. *See* 516 U.S. at 502. Indeed, in the very sentence where it noted that the common law provides only a "starting point," the Supreme Court went on to say that a court must consider whether ERISA's text, structure, or purpose "*require* departing from common-law trust requirements." *Id.* at 497 (emphasis added). This is the same inquiry required under the presumption recognized in *Darden*, *Neder*, *Evans*, and *Amax Coal*. This inquiry into whether ERISA "requires," "dictates," or "directs" a departure from the common law—not invocations of ERISA's general "remedial purpose," ROA.9895, 9896 n.69—determines the statute's meaning. *See Mertens*, 508 U.S. at 262 (stressing that ERISA is "an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs"). And, as shown above, that inquiry demonstrates that the "investment advice" prong does not jettison the common law's trust and confidence requirement.[5]

[5] In the district court, DOL argued that the *Darden* presumption does not apply where the statute defines the incorporated common-law term. ROA.5640–41. But in *Evans*, Congress expressly defined the term "extortion," yet the Court interpreted this defined term based on the presumption that Congress incorporated its common-law meaning. *See* 504 U.S. at 263–66.

The district court also deemed it important that the Investment Advisers Act (IAA) defines "investment adviser" in a way that "specifically excludes 'any broker or dealer whose performance of such services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor,'" yet ERISA contains no comparable exclusion. ROA.9890 (quoting 15 U.S.C. § 80b-2(a)(11)(c)). Noting that different statutory wording is presumed to be intentional, the district court concluded that Congress's failure to limit ERISA's definition of a "fiduciary" "to that in the IAA" shows that "ERISA does not unambiguously foreclose the DOL's new interpretation." ROA.9891.

This reasoning is doubly flawed. First, the "'disparate inclusion or exclusion'" principle the court cited, *id.*, applies to different wording *in the same statute*. The district court quoted *Burlington Northern & Santa Fe Railway v. White*, 548 U.S. 53, 63 (2006), for this proposition. But *Burlington Northern* quoted *Russello*, which as noted earlier, refers to the situation in which Congress "includes particular language in one section of a statute but omits it in another section *of the same Act*." 464 U.S. at 23 (emphasis added). And in *Burlington Northern* itself, the Court applied this principle to two sections of Title VII. *See* 548 U.S. at 61–63.

Second, textual differences between ERISA and the IAA preclude the negative inference the district court attempted to draw from its comparison of the two laws. In the IAA, Congress did not define "investment advisers" as "fiduciaries."

For that very reason, Congress needed to clarify that those who provide merely incidental advice are excluded from the definition of "investment advisers." That clarification would not have been necessary if Congress had defined investment advisers as "fiduciaries"; the use of that term would have dictated that investment advisers must have relationships of trust and confidence, and merely providing advice incidental to a sale is insufficient. By contrast, Congress used the common-law term "fiduciary" in ERISA, thereby incorporating the well-recognized limitations on its common-law meaning: fiduciary status arises only out of a relationship of trust and confidence. Congress thus had no need to reiterate that limitation in an exclusion to the definition of "investment advice."

Finally, the district court asserted that it did not believe that DOL's rule varies from the common law. ROA.9890. DOL itself, however, did not contest the IALC plaintiffs' showing that the common law required a relationship of trust and confidence, nor did DOL attempt to show that the rule includes this requirement. To the contrary, it insisted that the rule was an appropriate departure from the common law. *See* ROA.4987 ("DOL need not assess common law 'factors' to 'determin[e]' whether a person who renders investment advice would be a fiduciary under the common law, … given Congress's express adoption of a standard that applies fiduciary status more broadly than the common law"); ROA.4975–77

(DOL "need not have confined its interpretation of fiduciary 'investment advice' to those relationships recognized as fiduciary under the common law").

In short, the district court's decision should be reversed and DOL's new definition of "fiduciary" should be set aside as "contrary to law." 5 U.S.C. § 706.

B. DOL's Interpretation Is Unreasonable.

Even if ordinary principles of statutory construction do not foreclose DOL's interpretation—and they do—that interpretation is still invalid. Under *Chevron*'s second step, an agency's interpretation of an ambiguous statute is unreasonable if it is inconsistent with congressional intent. *Texas v. United States*, 497 F.3d 491, 506, 509 (5th Cir. 2007). DOL's interpretation is unreasonable because it conflicts with Congress's intent in ERISA itself, and in two other statutes.

DOL acknowledged that its new definition "could sweep in some relationships that are not appropriately regarded as fiduciary in nature and that the Department *does not believe Congress intended to cover* as fiduciary relationships." ROA.324 (emphasis added); *see also* ROA.324–25, 1021, 1033. The *reason* these relationships were "not appropriately regarded as fiduciary," DOL explained, was because they do not involve trust and confidence. Thus, DOL adopted exclusions

from its new definition to "avoi[d] burdening activities *that do not implicate relationships of trust.*" ROA.325 (emphasis added). *See also* ROA.356, 359.[6]

DOL had no basis for concluding that one-time annuity sales involve "relationships of trust." It stressed that (1) retirement products are complex, (2) retirement savers are confused by the products and unable to distinguish good advice from bad, (3) older savers are particularly vulnerable, (4) retirement decisions are important, and (5) sellers of retirement products have superior expertise and knowledge. *See* ROA.332, 356–57, 640–41, 645, 743, 745–47,754, 756, 760, 772–77. None of these conclusions, however, demonstrates that the relationship between sellers and purchasers of annuities involves special trust and confidence. In fact, special knowledge, or "dominance," "is not a relevant factor in determining the *existence* of a confidential relation." Bogert, *supra*, at 247 (ROA.4170); *see also id.* at 246 (ROA.4169) ("that A is ignorant and inexperienced, and B educated

[6] Government counsel's revisionist claim that "most" of the exclusions reflect decisions that the transactions did "not present the same ills that ERISA was enacted to remedy," ROA.4987 n.40, cannot be credited in light of DOL's clear statements that the exclusions were necessary because the transactions did not involve relationships of trust and confidence, *see S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 601 (5th Cir. 2004) (agency decision "must be upheld on the rationale set forth by the agency itself") (citing, *inter alia*, *SEC v. Chenery Corp.*, 318 U.S. 80, 93–95 (1943)). Nor did DOL exclude certain transactions because they do not involve "recommendations." ROA.9896 n.70. DOL explained that the excluded transactions involve "recommendations" but, because there is no relationship of trust, "neither party expects that recommendations will necessarily be based on the buyer's best interests." ROA.356.

and skilled in affairs, does not tend to prove that A and B are in a confidential relation"); *Hi-Ho Tower, Inc. v. Com-Tronics, Inc.*, 761 A.2d 1268, 1280 (Conn. 2000) ("[s]uperior skill and knowledge alone do not create a fiduciary duty among parties involved in a business transaction"). Instead, "[s]uch superiority is *an effect or consequence of* the confidential relation." Bogert, *supra*, at 247 (ROA.4170) (emphasis added).

Thus, DOL acknowledged that Congress did not intend to burden activities that do not involve relationships of trust and confidence, yet DOL swept in one-time purchases of annuities that do not involve such relationships. This inconsistency alone renders DOL's interpretation unreasonable. "*Chevron* allows agencies to choose among competing reasonable interpretations of a statute; it does not license interpretive gerrymanders under which an agency keeps parts of statutory context it likes while throwing away parts it does not." *Michigan v. EPA*, 135 S. Ct. 2699, 2708 (2015).

The interpretive gerrymander at issue here, moreover, is particularly unreasonable, because DOL chose to regulate a kind of recommendation (one incidental to a one-time sale) in a particular industry (insurance) about a particular product (FIAs) all of which Congress has elsewhere chosen *not* to regulate. As noted, in the IAA, Congress imposed fiduciary duties on "investment advisers," but explicitly excluded brokers who make recommendations that are "'merely incidental to bro-

kerage transactions for which they receive only brokerage commissions.'" *Fin. Planning Ass'n*, 482 F.3d at 485 (quoting S. Rep. No. 76-1775 (1940)). These are the same kinds of recommendations DOL chose to regulate here.

Similarly, Congress has refrained for decades from regulating the business of insurance, leaving regulation of this industry to the states. *See* 15 U.S.C. § 1011. And when the SEC decided to regulate FIAs—based on many of the same considerations that motivated DOL here, *see* 74 Fed. Reg. 3138 (Jan. 16, 2009)—Congress prohibited such regulation for FIAs that are either sold in states that have adopted the latest NAIC model suitability rules or are sold by companies that comply with those rules. *See* Pub. L. No. 111-203, § 989J, 124 Stat. 1376, 1949–50 (2010).

Thus, even assuming DOL has discretion to attach fiduciary duties to recommendations offered in some, but not all, arm's-length commercial transactions, it is "an unreasonable interpretation of Congress's intent," *Texas*, 497 F.3d at 509, to attach fiduciary duties to precisely the kind of incidental sales recommendations that Congress has explicitly excluded from fiduciary treatment elsewhere, in connection with the sale of a product that Congress exempted from federal securities regulation precisely because it believes state regulation of that product is sufficient to protect consumers. *See id.* at 504 (noting that "later enacted statutory provisions

may be relevant to determine congressional intent" in the *Chevron* inquiry) (emphasis omitted).

II. DOL'S TREATMENT OF FIXED INDEXED ANNUITIES WAS ARBITRARY AND CAPRICIOUS.

Even if ERISA's "investment advice" prong lacked a clear meaning and DOL had discretion to regulate incidental sales recommendations, the agency acted arbitrarily and capriciously in subjecting FIA sales to fiduciary regulation, revoking the 84-24 exemption, and moving FIA sales into the BIC exemption. In so doing, DOL claimed that existing regulation has "proven inadequate to prevent adviser conflicts from inflicting excessive losses on investors." ROA.733. But DOL simply identified various factors that theoretically could lead agents to act on their incentives and sell inappropriate products to vulnerable customers. These are the very problems the NAIC suitability rules address, and DOL failed to provide a reasoned explanation for why this existing scheme of regulation is inadequate. DOL also staked its treatment of FIAs on a claimed record of abuse. None of the "evidence" it cited, however, shows that FIAs are actually "inflicting excessive losses on investors." ROA.733. And "[p]rofessing that [a rule] ameliorates a real industry problem but then citing no evidence demonstrating that there is in fact an industry problem is not reasoned decision-making." *Nat'l Fuel*, 468 F.3d at 843–44.

A. DOL Was Required To Consider The Sufficiency Of Existing Regulation.

As discussed above, and as numerous commenters showed, the sale of annuities, including FIAs, is governed by a comprehensive set of state insurance laws that protect consumers. *See supra* pp. 6–9; ROA.8596–98, 8544–42, 9224–26, 8631–33, 7822–24. These regulations are designed to ensure that insurance agents are adequately trained and supervised, that they recommend only annuities that are suitable in light of the customer's circumstances, and that the annuity's terms and risks are reasonably disclosed and explained. *See* ROA.6030–38 (NAIC Suitability Model Regulation); ROA.4212–25 (NAIC Annuity Disclosure Model Regulation). As the NAIC's comment letter explained, states have "implement[ed] a robust set of consumer protection and education standards for annuity and insurance transactions," they have "extensive enforcement authority," and they "have a strong record of protecting consumers, especially seniors, from inappropriate sales practices or unsuitable products." ROA.8529.

Despite this extensive commentary, the district court ruled that DOL was not even required to consider the sufficiency of existing regulation. ROA.9921 & n.139 ("whether existing regulation was sufficient … is not the standard DOL must meet"). That ruling violates basic principles of administrative law. Under the APA, agencies must respond to "relevant and significant" comments. *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 15 (D.C. Cir. 2015). And "[m]any com-

menters took the position that existing regulation of these products is sufficient." ROA.558. In addition, the APA required DOL to "consider [each] important aspect of the problem," *State Farm*, 463 U.S. at 43, and there is no question that the adequacy of existing regulation is an "important aspect of the problem" when an agency promulgates a rule that radically alters a 40-year-old regulatory scheme that has engendered "decades of industry reliance," *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016); *see 10 Ring Precision, Inc. v. Jones*, 722 F.3d 711, 724 (5th Cir. 2013) ("an agency must consider and explain its rejection of reasonably obvious alternatives") (alteration omitted).

The D.C. Circuit's decision in *American Equity* illustrates these principles. The court there invalidated the SEC's attempt to regulate FIAs under the securities laws because the agency had failed to address existing state regulation. 613 F.3d at 176–78. Here, the district court disregarded *American Equity* because the statute at issue there required the SEC to consider the effect of its rules on "efficiency, competition, and capital formation," *id.* at 177, and "no similar statutory requirement" applies here, ROA.9921. But that is of no moment. It was the APA and its requirement of reasoned decisionmaking, not the statutory factors at issue in *American Equity*, that obligated the SEC to consider the sufficiency of existing regulation. *See* 613 F.3d at 178–79 (holding that the SEC's analysis was arbitrary and capricious *under the APA*). By the same logic, DOL cannot rationally determine

whether federal regulation is needed to address the potential problems caused by conflicts of interest unless it first considers whether existing laws already prevent those problems.[7]

B. DOL Failed To Give A Rational Explanation For Finding That Existing Regulation Is Insufficient To Protect FIA Buyers.

Citing various sections of DOL's Regulatory Impact Analysis (RIA), the district court concluded that DOL "assessed existing … insurance regulation" and "found the protections prior to the current rulemaking insufficient to protect investors." ROA.9921 & n.139. At most, however, the record shows that DOL *described* existing regulation and *asserted* that it is insufficient. Under the APA, that is not enough. DOL was obligated to give a "reasonable explanation" for concluding that existing regulation is insufficient to address the risk of conflicted advice in connection with FIA sales. *Associated Builders*, 826 F.3d at 219–20. It failed to do so.

The district court erred at the outset of its analysis by wrongly asserting that "DOL found … that existing protections do not 'limit or mitigate potentially harmful adviser conflicts.'" ROA.9922 (quoting ROA.747). DOL made no such finding. Nor could it have rationally done so for FIAs.

[7] Even if DOL was not required to consider the sufficiency of existing regulation, having claimed to have done so, it cannot now defend the rules on the ground that such an analysis was unnecessary. *See Am. Equity*, 613 F.3d at 177.

Contrary to the district court's truncated quotation, the quoted sentence of the RIA states only that "[e]xisting protections do not *always* limit or mitigate potentially harmful adviser conflicts *as robustly*" as DOL's new rules. ROA.747 (emphases added). Indeed, DOL elsewhere cited with approval a Treasury Department report that "urge[d] that states adopt the Model Suitability Regulation." ROA.679. That exhortation is necessarily premised on the understanding that the regulation provides meaningful consumer protections.[8]

DOL's assertion that existing protections are not "always" as "robust[]" as its new rules, ROA.747, rests on its observation that the suitability standard is "less exacting than the fiduciary duty to act in a customer's best interest," ROA.748. But that truism does not explain why state suitability standards are *insufficient*.[9] DOL stated that existing suitability rules "leave some room for advisers to subordinate their customer's interest to their own" and "to favor one suitable product over oth-

[8] DOL also quoted a *draft* article's assertion that "'neither market forces nor legal or regulatory rules substantially constrain insurance agents' capacity to advance their own interests by providing biased advice." ROA.792. But the published version of this article omits this statement and says that suitability rules "*can help to meaningfully mitigate* the risk of incompetent or *self-interested* advice." D. Schwarcz & P. Siegelman, *Insurance Agents in the 21st Century: The Problem of Biased Advice*, *in Research Handbook on the Economics of Insurance Law* 60 (Edward Elgar Pub. 2015) (emphasis added) (ROA.4521, 4545).

[9] Likewise, DOL's determination that its "new rules would work with and complement state insurance regulations," ROA.9923, says nothing about why additional federal regulation is needed in the first place.

ers that would better serve their customers' interests." ROA.733, 768. But DOL did not explain how likely it is that higher commissions will attach to suitable but less beneficial products, or why it is reasonable to assume that the magnitude of any difference between two suitable products is so significant that the resulting consumer harm warrants federal regulation.

Instead, the concrete explanations of consumer harms that DOL provided for commission-based sales of annuities involved sales of *unsuitable* products. DOL asserted that conflicts of interest "can result in *unsuitable* sales of annuity products to investors," ROA.805 (emphasis added), and it cited a study of life insurance sales in India that found that agents often recommended "*unsuitable* products," ROA.785–86 (emphasis added), a comment highlighting sales to "senior citizens for whom [FIAs] are clearly *unsuitable*," ROA.555 (emphasis added), and complaints about sales of FIAs that were "not right for customers," ROA.769.[10] Similarly, in its brief below, DOL stressed how surrender charges can cause a loss of principal if an FIA is cancelled early, then described how a customer who has few liquid assets and needs immediate access to them could be persuaded to buy an illiquid annuity with large surrender charges. ROA.5029. But this is precisely the

[10] DOL also claimed that conflicts "*may* have led consumers to purchase annuities that were not in their best interest." ROA.805 (emphasis added). That, of course, is speculation, and it is belied by DOL's failure to marshal concrete evidence of actual harm. *See infra* § II.C.

kind of sale that suitability rules are designed to prevent. The risk that sales of *un-suitable* products will harm consumers does not rationally support the conclusion that suitability regulation is inadequate and that a stricter standard is needed.

Nor is that conclusion supported by the assertion that "state standards are not uniform (nor uniformly administered) across all states." ROA.748. DOL never explained why uniformity is necessary to protect FIA buyers. The mere fact that "state insurance laws and their enforcement vary," ROA.9922, does not mean that any state's regulation is inadequate, and DOL did not explain how any variance in state laws or their enforcement could or would harm FIA buyers.

Moreover, neither the district court nor DOL offered a meaningful response to the showing made by IALC and other commenters that virtually all FIA sellers follow the NAIC suitability rules to avoid being regulated as securities. ROA.8398, 8537. This omission is telling, because DOL acknowledged that even FIA sellers operating in the minority of states that have not adopted the NAIC suitability rules have incentives under the Harkin Amendment to comply with the rules to avoid regulation under the securities laws, ROA.922, and that "most indexed annuities are not registered with the SEC," ROA.558—which confirms that issuers are choosing to comply with the NAIC standards on a national basis.[11]

[11] The district court cited no authority for its assertion that "sellers of FIAs need not satisfy the SEC's safe harbor" because "the SEC is not currently regulating FIAs." ROA.9925 n.156. DOL itself recognized that indexed annuities that "fall

In any event, an asserted interest in national uniformity cannot rationally support the imposition of a best-interest standard. If greater uniformity was needed, DOL could simply have required compliance with the NAIC suitability rules. Like the SEC's asserted interest in clarifying the "uncertain legal status" of FIAs in *American Equity*, DOL's asserted interest in uniformity cannot "justify the adoption of a particular rule" because "[w]hatever rule [DOL] chose to adopt could equally be said to make" the law more uniform. 613 F.3d at 177–78.

Nor do the "concern[s]" expressed by other regulators, ROA.9925, support the conclusion that existing suitability regulations are inadequate to protect FIA buyers. For example, DOL cited an SEC investor bulletin and a FINRA investor alert addressing FIAs. ROA.777, 921. But neither document expressed any "concern" about harmful sales practices, cited any evidence of such practices, or suggested that suitability regulations are insufficient to prevent such practices. DOL also cited a comment by the North American Securities Administrators Association submitted as part of an SEC rulemaking in 2008. ROA.555. But, as noted above, the abuse that comment alleged concerned sales to "senior citizens for whom [FIAs] are clearly *unsuitable*," *id.* (emphasis added)—a concern that was directly addressed by the later-adopted suitability rules.

---

outside the Harkin Amendment"—and thus do not come within its safe harbor for "exempt securities"—generally are "registered with the SEC." ROA.679 n.110.

Indeed, it is remarkable that DOL placed so much weight on "concerns" raised by securities regulators, while all but ignoring Congress's resolution of those very concerns in the Harkin Amendment. Contrary to the district court's view, plaintiffs did not "argue that the Harkin Amendment … prevents the DOL from regulating FIAs." ROA.9925 n.156. Rather, plaintiffs' point was that DOL never *explained* why it rejected Congress's recent determination in a closely related context—indeed, in response to the same concerns by the same regulators that DOL relied upon as a basis for regulating FIAs—that additional regulation of FIAs is unnecessary if they are sold in compliance with the NAIC suitability rules. That point stands unrebutted. Particularly given DOL's extensive reliance on concerns expressed by securities regulators, it had an obligation to give meaningful consideration and weight to Congress's determination, embodied in recent legislation, that state suitability rules are sufficient to address those concerns.

Equally misplaced is the district court's reliance on the fact that DOL "considered comments" asserting that consumers "lac[k] sufficient protections" and "need greater protections when investing in indexed annuities precisely because such products are not regulated as securities." ROA.9922–23. Unadorned assertions from unidentified sources cannot satisfy DOL's obligation to provide a rational explanation for its action. The mere fact that a commenter expressed a view

does not make that view a reasoned basis for agency action; otherwise an agency could support any result simply by pointing to a commenter who advocated it.

In sum, DOL failed to grapple seriously with the adequacy of state suitability regulations or to give a reasoned explanation for finding that these existing—and recently enhanced—regulations are insufficient to protect FIA buyers.

C. DOL Failed To Support Its Claim That FIA Sales Are Inflicting Consumer Harms Despite Existing Regulation.

Even if DOL had articulated a coherent *theoretical* basis for believing that existing regulation is insufficient, the rules' treatment of FIAs would still be invalid because DOL *also* premised the rules on its claim that, "notwithstanding existing protections, there is convincing *evidence* that advice conflicts are inflicting losses on IRA investors." ROA.747–48 (emphasis added); *see also* ROA.733. DOL failed, however, to identify relevant evidence that sales *of FIAs* are inflicting losses on consumers despite existing regulation. Because DOL's evidence-based claim about consumer harms is a central pillar of the rules, and because the "claimed record evidence does not support" DOL's claim that FIAs are harming consumers, the rules are invalid as applied to FIAs, regardless of any "theoretical threat" posed by conflicts of interest. *Nat'l Fuel*, 468 F.3d at 839 ("where [an agency] has relied on multiple rationales …, and we conclude that at least one of the rationales is deficient, we will ordinarily vacate the order unless we are certain that [the agency] would have adopted it even absent the flawed rationale.").

DOL claimed that a "wide body of economic evidence supports [its] finding that the impact of … conflicts of interest on retirement investment outcomes is large and negative." ROA.326; *see also* ROA.555 (asserting that "conflicts of interest in the marketplace for retail investments result in billions of dollars of underperformance to investors saving for retirement"); ROA.641, 747–48, 765–67, 786–92, 795–803. But this claim—the centerpiece of DOL's purported showing of harms—is based on analyses of mutual funds, *not* FIAs. ROA.795–803. Even setting aside the defects in its analysis of mutual funds, DOL's extrapolation from mutual funds to FIAs is irrational because the *reasons* why conflicted advice purportedly harms mutual fund investors do not apply to FIAs.

DOL claimed that conflicted advice "inflict[s] … losses … by prompting IRA investors to trade more frequently, which will increase transaction costs and multiply opportunities for chasing returns and committing timing errors." ROA.795; *see also* ROA.790. But FIAs cannot cause such losses because they are "buy and hold" products that do not involve trading. Similarly, DOL asserted that conflicts cause underperformance for actively managed mutual funds, ROA.788, 812, and tied this underperformance to "a mutual fund company['s] … tradeoff between incentivizing its brokers … and investing sufficient resources in fund management," ROA.810; *see* ROA.788 & n.350. But FIAs are not actively managed (interest is tied to an index) and thus this concern does not apply to FIAs either.

These differences completely belie DOL's claim that "insurance products also are likely to be subject to underperformance due to conflicts." ROA.795. Indeed, the only evidence DOL cited for this critical proposition was an article that does not even discuss FIAs. *See* Richard Evans & Rüdiger Fahlenbrach, *Institutional Investors and Mutual Fund Governance: Evidence from Retail-Institutional Fund Twins*, *The Review of Financial Studies* 25, no. 12 (2012). In nevertheless concluding that DOL properly relied on mutual fund studies, the district court strung together a series of citations from the RIA to support the theory that, because both FIAs and mutual funds are sold through conflict-creating commissions, and because both are subject to suitability and disclosure requirements, evidence that mutual funds cause injury justifies the same conclusion for FIAs. ROA.9924. But this theory cannot be found on the pages the court cited. DOL itself explained at length why it believed commission-based sales of mutual funds led to underperformance—and, as just shown, none of these factors apply to FIAs. DOL also explicitly said that the basis for extrapolating from mutual fund studies was the Evans & Fahlenbrach study—which, as just noted, says nothing whatsoever about FIAs. "It is elementary that if an agency's decision is to be sustained in the courts on any rationale under which the agency's factual or legal determinations are entitled to deference, it must be upheld on the rationale set forth by the agency itself," *Hood*, 391 F.3d at 601—not theories advanced by agency counsel or a reviewing court.

Nor is there any merit to the district court's contention that "DOL reasonably extrapolated from mutual fund studies" because "annuity data is not readily and widely available." ROA.9924. DOL staked its regulation of annuities in part on the claim that "adviser conflicts [are] inflicting excessive losses on investors," ROA.733, and argued below that it had "collected, examined, and relied on a wide body of evidence, both empirical and qualitative, to conclude that conflicted advice about mutual funds, annuities, and other retirement investments inflicts significant harm on retirement investors," ROA.5001. It cannot now defend the rules by asserting there is insufficient data to determine *whether* adviser conflicts are inflicting excessive losses on annuity buyers. Because the record does not support that claim, the rules must be set aside as arbitrary and capricious. *See Nat'l Fuel*, 468 F.3d at 844 (where agency relied in part on claimed evidence of abuse, "explaining away the *absence* of such evidence merely underscores the need to vacate").

The cases the district court cited are inapposite. ROA.9924–25 (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 219 (2009); *ConocoPhillips Co. v. EPA*, 612 F.3d 822, 841–42 (5th Cir. 2010)). It is one thing to say that an agency must make do with available information when performing a statutorily mandated analysis (like the environmental impact analysis in *ConocoPhillips*) or that an agency need not marshal empirical evidence that is unobtainable to support propositions that are obvious (like the harmful effect of expletives on minors in *Fox*). It

is another thing entirely to say that an agency may stake the asserted need for additional regulation on the claim that real-world harms exist, rely on evidence that does not support that claim, and then defend the rules on the ground that the evidence needed to support the claim is unobtainable. "Professing that a [rule] ameliorates a real industry problem but then citing no evidence demonstrating that there is in fact an industry problem is not reasoned decisionmaking." *Nat'l Fuel*, 468 F.3d at 843–44.

Moreover, this is not a situation where relevant evidence is "impossible" to obtain. *ConocoPhillips*, 612 F.3d at 841. As the government acknowledged below, ROA.5025 n.83, commenters produced data showing the low rate of consumer complaints about fixed annuity products, ROA.8541–42, 8631, 9242, 9224. Moreover, if FIA sales were causing significant consumer harms, it should be readily apparent. In fact, DOL noted that "state-based market condition examinations … revealed unsupervised sales of annuities that were not appropriate for the consumer's profile," which led to adoption of the new NAIC rules. ROA.678. If evidence of harmful FIA sales was possible in the past, DOL should have been able to demonstrate that such sales remain harmful despite the NAIC rules. Yet it failed to do so.

Instead, apart from its misplaced reliance on mutual fund studies, DOL relied on a grab-bag of irrelevant and outdated studies. For example, DOL cited stud-

ies regarding contingent commissions in "the commercial property-casualty insurance market." ROA.759. But "no property/casualty insurance products are subject to suitability rules." D. Schwarcz & P. Siegelman, *Insurance Agents in the 21st Century: The Problem of Biased Advice* 20 (forthcoming) (ROA.6087). Similarly, DOL cited studies of the annuity and life insurance markets in Chile, Germany, and India. ROA.784–86. But studies in other countries "are not necessarily applicable to the U.S. market, where competitive and regulatory structures may be quite different." Schwarcz & Siegelman, *supra*, at 10 (ROA.6077). For example, the study of life insurance sales in India found that agents often recommended "*unsuitable* products," ROA.785–86 (emphasis added). Because annuity sales in the U.S. are subject to robust suitability rules, studies of products not subject to such rules do not support DOL's claim of harms and "abuse." *See Desoto Gen. Hosp. v. Heckler*, 766 F.2d 182, 185–86 (5th Cir. 1985) (rule arbitrary and capricious because agency relied on study that did not support agency's conclusions). Indeed, as noted, one of the very studies on which DOL itself relied acknowledged that "suitability rules can help to meaningfully mitigate the risk of incompetent and self-interested advice," Schwarcz & Siegelman, *supra*, at 19 (ROA.6086).[12]

[12] Although this article suggests that "the problem of biased advice by insurance agents is likely to be significant," ROA.6073, it focuses on other insurance products, contains no evidence of FIA abuses, and, as noted, recognizes the general efficacy of suitability rules.

DOL also cited "surveys conducted among life insurance professionals in 1990, 1995 and 2003," ROA.784–85, and a study by the Financial Planning Coalition, in which approximately 42% of respondents reported "financial exploitation that involved equity-indexed or variable annuities," ROA.769. The surveys, however, clearly predate the significant steps the states have taken in the wake of the NAIC's 2010 enhancements to its suitability rules. And this same problem infects the Financial Planning Coalition's 2012 study: planners were asked if they knew an older person who had been "subject[ed]" to various sales practice issues—without any time limit—and 74% identified "unsuitable products" from a list of practices.[13] It cannot be that evidence of harms that occurred before the new suitability rules went into effect is valid evidence that the new rules are inadequate.

Finally, DOL asserted that various "media reports and lawsuits … demonstrate the clear need for regulatory action in the annuity market." ROA.769. But none of the cited media reports contains any evidence that existing suitability regulations have failed to prevent harms to FIA buyers. And allegations in class action lawsuits—not court judgments—are not evidence of anything.

In short, none of DOL's "evidence" supports its claim that FIA sales are inflicting losses on consumers notwithstanding existing regulation. Indeed, that DOL

---

[13] *See* Certified Fin. Planner Bd. of Standards, APCO Insight, *Senior Financial Exploitation Study* (Aug. 2012), http://www.cfp.net/docs/news-events---supporting-documents/senior-americans-financial-exploitation-survey.pdf?sfvrsn=0.

felt compelled to rely on studies so out-of-date and far afield, and on assertions so irrelevant or unsubstantiated, underscores the lack of evidence of real-world harms from commission-based FIA sales. Because DOL "staked its rationale in part on a record of abuse, but that record is non-existent," *Nat'l Fuel*, 468 F.3d at 843, DOL's treatment of FIAs was arbitrary and capricious.

D. At The Very Least, The Revocation Of The 84-24 Exemption For FIAs Should Be Set Aside.

For the reasons set forth in the foregoing sections, all of the rules should be set aside as applied to FIAs. At a minimum, however, the revocation of the 84-24 exemption for FIAs should be set aside.

The basis for subjecting FIAs to the BIC exemption is even weaker than the basis for subjecting them to fiduciary regulation in the first place, because the BIC exemption's requirements are layered on top of not only existing suitability regulations, but also the newly enhanced protections of the 84-24 exemption, under which annuity sales are subject to DOL's best-interest standard as well as state suitability standards. *Supra* pp. 6–9, 12. Having relied, in part, on the gap between a suitability and best-interest test to justify new federal regulation of FIAs, DOL was obligated to explain why the new best-interest standard in the 84-24 exemption is also inadequate to protect FIA buyers from conflicts of interest. DOL's bare assertion that the BIC exemption's conditions "are necessary," ROA.559, is nothing more than the agency's unexplained "*ipse dixit*," *Bus. Roundtable v. SEC*, 647

F.3d 1144, 1155 (D.C. Cir. 2011). Accordingly, to the extent FIAs are to remain subject to fiduciary regulation at all, they should be restored to the 84-24 exemption.

CONCLUSION

For all of the foregoing reasons, the rules should be set aside in their entirety because they rest on an interpretation of ERISA that is inconsistent with the statute's plain meaning, properly construed, and/or is unreasonable. Alternatively, the rules' application to FIAs, or at a minimum, the revocation of exemption 84-24 for FIAs, should be set aside as arbitrary and capricious.

May 2, 2017

Respectfully submitted,

/s/ Joseph R. Guerra

JOSEPH R. GUERRA
Counsel of Record
PETER D. KEISLER
ERIC D. MCARTHUR
JENNIFER J. CLARK
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

Counsel for 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

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of May, 2017, an electronic copy of the foregoing brief 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 that service will be accomplished by the appellate CM/ECF system.

/s/ Joseph R. Guerra
JOSEPH R. GUERRA

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

This document complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because, excluding the parts of the document exempted by FED. R. APP. P. 32(f) and Fifth Circuit Rule 32.2, this document contains 12,241 words.

This document complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type-style requirements of FED. R. APP. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman font.

Dated: May 2, 2017

/s/ Joseph R. Guerra
JOSEPH R. GUERRA