IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHN DISTRICT OF TEXAS
DALLAS DIVISION

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, FINANCIAL SERVICES INSTITUTE, INC., FINANCIAL SERVICES ROUNDTABLE, GREATER IRVING-LAS COLINAS CHAMBER OF COMMERCE, HUMBLE AREA CHAMBER OF COMMERCE DBA LAKE HOUSTON AREA CHAMBER OF COMMERCE, INSURED RETIREMENT INSTITUTE, LUBBOCK CHAMBER OF COMMERCE, SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, and TEXAS ASSOCIATION OF BUSINESS, Plaintiffs, v. THOMAS E. PEREZ, SECRETARY OF LABOR, and UNITED STATES DEPARTMENT OF LABOR, Defendants.	Civil Action No. 3:16-cv-1476-M Consolidated with Nos. 3:16-1530-M and 3:16-cv-1537-M

BRIEF OF AMICUS CURIAE NATIONAL BLACK CHAMBER OF COMMERCE
IN SUPPORT OF PLAINTIFFS

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STATEMENT OF INTEREST OF AMICUS

Amicus curiae the National Black Chamber of Commerce ("NBCC") is a nonprofit, nonpartisan organization dedicated to the economic empowerment of African-American communities through entrepreneurship. Incorporated in 1993, the NBCC represents nearly 100,000 African-American owned businesses and advocates on behalf of the 2.6 million black-owned businesses in the United States. The NBCC has more than 190 affiliated chapters located throughout the Nation, as well as international affiliates in, among other countries, the Bahamas, Brazil, Colombia, Ghana, and Jamaica.

NBCC members include small broker-dealers and other sales agents, as well as numerous small businesses that rely on retirement saving services that the Department of Labor's Fiduciary Rule directly regulates. Both NBCC members who provide retirement financial services and NBCC members who consume these services are small businesses with middle-income management and employees. The cost of the Fiduciary Rule will fall especially hard on NBCC's membership.

Because the NBCC is dedicated to the financial security of its members and their employees, it is extremely concerned about the Department of Labor's Fiduciary Rule, which needlessly imposes additional costs on brokers and other sales agents that are important sources of investment information for African-American owned small businesses and their employees. Most middle-income retirement investors cannot afford to retain a fiduciary, fee-based investment adviser, and for this reason they disproportionately rely on other sales agents to provide the information they need to make sound retirement saving and investment decisions. NBCC-member small businesses and their lower- and middle-income employees already suffer from an undersupply of such information, and the Fiduciary Rule will exacerbate this problem if

allowed to stand. The NBCC thus has a strong interest in the outcome of this litigation, and it asks that the Court consider that interest in the course of its deliberations on this case.

SUMMARY OF ARGUMENT

In its zeal to stamp out purported conflicts of interest that the financial industry has responsibly managed for decades, the Department of Labor has promulgated a rule that will make retirement investment information and assistance less accessible to the lower- and middle-income investors who most need it. This is a deeply troubling result, and the Department's rule must be enjoined. Brokers and other sales agents covered by the Department's rule play a critical role in encouraging lower- and middle-income workers to save and responsibly invest for retirement, and it was only by discounting the value of this role that the Department could justify its counterproductive and misguided new rule.

Unfortunately, the administrative burdens and increased litigation costs that the Fiduciary Rule imposes will fall especially heavily on smaller, independent brokers and sales agents—financial services professionals who know their communities best and are therefore ideally positioned to assist lower- and middle-income investors. Smaller financial services businesses will only be able to survive the costs, burdens, and risks of complying with the new rule by passing these expenses on to their customers in the form of higher fees. As with any product or service offered in a market, increasing the cost of supplying information about retirement saving options will inevitably reduce the amount consumed. The Fiduciary Rule imposes new costs on those who provide critical help to lower- and middle-income investors, and the consequence will be less retirement investment assistance and worse investor decisions. Because the NBCC's membership includes both middle-income providers and consumers of the services that the

Fiduciary Rule regulates, the burdens of the new rule will have an immediate and severe effect on its members and other African-American owned small businesses.

Furthermore, any conflicts of interest inherent in the financial industry cannot justify the Department's burdensome new rule because those conflicts are already fully managed by existing regulations and practices. FINRA and SEC regulations, state insurance laws, and private lawsuits and arbitrations already protect investors in those rare instances when brokers and other sales agents fail to put the interests of their customers first. Under these circumstances, it was arbitrary and capricious for the Department to heap additional operational costs on the industry in the name of providing redundant protections.

ARGUMENT

I. The Fiduciary Rule will hurt lower- and middle-income investors by restricting access to truthful, timely investment information.

A. Truthful, timely investment information helps lower- and middle-income investors avoid common retirement savings and investment pitfalls.

It is well documented that Americans do not spend enough time planning and saving for retirement. *See* OLIVER WYMAN, THE ROLE OF FINANCIAL ADVISORS IN THE US RETIREMENT MARKET 1 (July 10, 2015), http://goo.gl/HaKh5r ("Oliver Wyman Analysis"). The median net worth of American families with household heads aged between 55 and 64—on the cusp of retirement—is $165,900. *See* FEDERAL RESERVE, CHANGES IN U.S. FAMILY FINANCES FROM 2010 TO 2013: EVIDENCE FROM THE SURVEY OF CONSUMER FINANCES 12 (Sept. 2014), http://goo.gl/nSTmM7. And insufficient retirement saving is an especially dire problem for lower- and middle-income families, less than half of which own retirement accounts of any kind and whose participation in retirement plans has declined in recent years along with the availability of defined benefit pension plans. *Id.* at 20. As of 2013, among lower- and middle-income American families that maintained retirement accounts, the median aggregate holdings in

these accounts was just $40,500. *Id.* Retirement savings rates among African-American workers are especially low: African-American workers with access to a 401(k) are less likely to participate and, among those who do participate, they contribute less than their white peers at the same income levels. *See* ARIEL/HEWITT STUDY, 401(K) PLANS IN LIVING COLOR: A STUDY OF 401(K) SAVINGS DISPARITIES ACROSS RACIAL AND ETHNIC GROUPS 4, http://goo.gl/gSCI9Q.

Compounding the problems created by Americans' failure to save is their failure to pursue basic investment strategies that maximize returns and minimize risk. Retirement savers are notoriously bad at market timing, do not maintain appropriately diversified investment portfolios, fail to regularly rebalance their holdings of different asset classes, do not fully capitalize on employer retirement matching, and incur substantial penalties taking avoidable early withdrawals from their retirement accounts. *See, e.g.*, Comment Letter from SIFMA to Office of Regulations and Interpretations, U.S. Department of Labor at 21 (July 20, 2015) (Chamber App. Volume 1, at 166); Oliver Wyman Analysis at 2, 17–19; ROBERT LITAN & HAL SINGER, ECONOMISTS INCORPORATED, GOOD INTENTIONS GONE WRONG: THE YET-TO-BE RECOGNIZED COSTS OF THE DEPARTMENT OF LABOR'S PROPOSED FIDUCIARY RULE 10, 16–19 (July 2015), http://goo.gl/HFMNzi ("Economists Incorporated"). The Department of Labor conservatively estimated in 2011 that such errors cost investors $114 billion per year—a figure that dwarfs the supposed benefits of the regulations at issue in this case. Investment Advice–Participants and Beneficiaries, 76 Fed. Reg. 66,136, 66,152 (Oct. 25, 2011). A wealth of evidence also shows that investors do not adequately insure against the risk that they will outlive their savings and tend to undervalue annuities. Jeffrey R. Brown et al., Cognitive Constraints on Valuing Annuities at 2, 20 (Feb. 27, 2015), http://goo.gl/yGg3QP. The academic literature speaks of an "annuity puzzle" over why such longevity insurance is not more popular. *Id.* at 14.

Although these problems are driven by a variety of educational, economic, and psychological phenomena, lack of access to truthful, timely retirement investment information is clearly a contributing factor. A body of empirical research demonstrates a strong correlation between receiving financial assistance on the one hand and increased rates of saving on the other. AR631–32 (acknowledging that "the correlation between advice seeking and savings is well established"); Comment Letter from Catherine J. Weatherford, President & CEO, Insured Ret. Inst., to Office of Regulations and Interpretations, U.S. Department of Labor at 12 (July 21, 2015), http://goo.gl/AOsWeO (investors of the same income and age who have worked with a financial professional for seven to fourteen years have roughly double the average assets of those who have not). This phenomenon is especially well documented with respect to African-American retirement investors. *See Get the Facts: 10 Benefits of Working with a Financial Professional*, INSURED RETIREMENT INSTITUTE, http://goo.gl/eW29Em ("When working with a financial professional, African Americans are more likely to save in workplace retirement plans, savings accounts, IRAs and annuities. In fact, they are nearly three times more likely to save in an IRA and four times more likely to have an annuity when working with a financial professional."). And while the Department refused to credit that evidence—arguing that mere correlation does not prove a causal relationship, *see* AR632—investors' revealed preference for receiving financial information and assistance when it is available strongly supports the commonsense notion that such assistance promotes better decision making.

The best available analyses also show that behavioral coaching from brokers can increase rates of portfolio rebalancing and help investors avoid losses due to unsuccessful attempts to time the markets. *See* Economists Incorporated at 4 ("If . . . advisors persuade two of every seven clients to stay invested through [financial] downturns, the harm to small savers from losing

this kind of human advice could reach as much as $80 billion, twice the size of the DOL's purported benefits from the rule."); VANGUARD, PUTTING A VALUE ON YOUR VALUE: QUANTIFYING VANGUARD ADVISOR'S ALPHA (Aug. 2016), http://goo.gl/1y2BcU. That these factors may be difficult to quantify does not justify the Department's decision to dismiss them as merely "hypothetical." *See* AR633.

Today the greatest threat that middle- and lower-income retirement savers face is not that they will be misled by self-interested brokers and insurance agents but that they will not save or give meaningful attention to their investment strategies in the first place. The broader dissemination of investment information is an important part of the solution to this problem, and policies that inhibit the communication of information and assistance reduce social welfare.

B. The Fiduciary Rule will reduce lower- and middle-income investors' access to truthful, timely investment information.

Brokers and other sales agents who have not traditionally operated as ERISA fiduciaries are important sources of truthful, timely information that helps workers save for retirement and make better investment decisions. The Fiduciary Rule will transform these everyday business practices of financial sales agents into fiduciary acts. *See* Chamber of Commerce Plaintiffs' Mem. of Law in Supp. of their Motion for Summary Judgment at 19–20 (July 18, 2016), Doc. 52. By substantially increasing the number of legal burdens these agents bear for their services, fiduciary duties increase the risk of liability (especially considering additional legal remedies available for breaches of fiduciary duty), and increase litigation costs. *See, e.g.*, Jeffrey A. Cooper, *Empty Promises: Settlor's Intent, the Uniform Trust Code, and the Future of Trust Investment Law*, 88 B.U. L. REV. 1165, 1182–85 (2008).

If saddled with fiduciary duties, financial sales agents are likely to respond defensively to ensure that their compliance with these new standards is apparent and incontestable—behavior

that will inevitably "increase [their] costs, reduce [their] productivity, and cause [them] to forego advantageous opportunities." Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045, 1064–65 (1991). But the brunt of these burdens will be felt most acutely by investors themselves, because sales agents' increased administrative and compliance costs are "expenses which predictably would result either in increased fees for fiduciary services or a reduction in the number of potential fiduciaries willing to serve in that capacity." Cooper, *supra*, at 1182.[1] As a consequence, the Fiduciary Rule will inevitably reduce the supply of affordable financial information and ultimately exacerbate challenges already faced by lower- and middle-income workers, hurting the very investors it purports to help.

As the administrative record amply demonstrates, small retirement account holders typically cannot obtain assistance from annual fee-based financial advisers, who normally require investors to maintain sizable minimum account balances. Comment Letter from Karen L. Sukin, EVP & Deputy Gen. Counsel, Primerica, Inc., to Office of Regulations and Interpretations, U.S. Department of Labor at 5 (Sept. 24, 2015) (Chamber App. Vol. 4 at 1291); *see* OLIVER WYMAN REPORT: ASSESSMENT OF THE IMPACT OF THE DEPARTMENT OF LABOR'S PROPOSED "FIDUCIARY" DEFINITION RULE ON IRA CONSUMERS 16 (Apr. 12, 2011) (Chamber App. Vol. 2 at 606) ("OLIVER WYMAN REPORT"). Instead, these smaller investors turn to commission-based brokers and insurance agents, who have historically been able to provide information about investment options at lower cost and without the strictures of an ongoing, fiduciary

[1] *Cf.* Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 835 (1983) ("[R]educing the cost to the fiduciary increases the likelihood that the fiduciary will enter into the relation."); Economists Incorporated at 14 ("Basic economics implies that many brokers would abandon a substantial number of . . . small-saver clients when confronted with enhanced legal risks and costs of doing so.").

relationship. Commission-based fee arrangements are the dominant way in which financial sales agents are compensated for assisting investors with smaller retirement accounts; according to a 2011 study, for example, 98% of IRA accounts with less than $25,000 are commission-based brokerage accounts. Comment Letter from Marcia E. Asquith, Senior Vice President & Corporate Sec'y, FINRA, to Office of Regulations and Interpretations, U.S. Department of Labor at 5 (July 17, 2015) ("FINRA Comment Letter"). For smaller investors, such arrangements help to encourage saving and investing by reducing costs. As even the Department acknowledges, commission-based fee structures "often support beneficial advice arrangements," AR119, particularly for smaller investors and those who make infrequent trades, *see* OLIVER WYMAN REPORT at 21–23 (Chamber App. Vol. 2 at 611–13) (documenting negative compounding effect of annual fees for smaller investors). Indeed, "reverse churning"—the practice of recommending that an investor agree to pay an annual fee when he could more economically pay commission-based fees—has been the subject of SEC enforcement actions. Comment Letter from David Hirschmann, President, Ctr. for Capital Mkts. Competitiveness, and Randal Johnson, Senior Vice President, Labor Immigration & Emp. Benefits, U.S. Chamber of Commerce to Office of Regulations and Interpretations, U.S. Department of Labor at 16 (July 17, 2015) (Chamber App. Vol. 1 at 51).

Because annual fee-based arrangements are neither feasible nor desirable for most small account holders, *see* AR118–19, the Department promulgated the Best Interest Contract (BIC) exemption to permit commission-based fees that ERISA and the Internal Revenue Code, when coupled with the Department's unlawfully expansive definition of "fiduciary" in the Fiduciary Rule, would otherwise prohibit. To comply with the BIC exemption, a financial institution must, among other things, acknowledge in writing that it is serving as a fiduciary, promise to make

recommendations "without regard" to its own interests, warrant that it will follow policies to ensure that it provides impartial advice, and make a range of conflict of interest and third-party payment disclosures. AR133–36. As the Department acknowledged, complying with these requirements will impose significant costs on the financial sales agents affected. AR539. That is especially so because the BIC exemption gives investors legally enforceable rights that turn on unsettled and context-specific questions such as what constitutes "reasonable compensation" for investment advice, how to determine an investor's "best interest," and what it means for a broker or other sales agent to make a recommendation "without regard to" its own interests. AR133, 139.

The increased costs associated with the Fiduciary Rule and the BIC exemption will be passed on to investors, and for two reasons the burden of these costs and the resulting reduction in the supply of retirement investment information will fall disproportionately on lower- and middle-income investors, including many NBCC members and their employees. First, lower- and middle-income investors are often serviced by independent insurance agents and brokers—small businesses that will have particular difficulty erecting the large regulatory apparatus necessary to comply with the Fiduciary Rule and the BIC Exemption. *See* Steve Garmhausen, *Why Your Advisor Doesn't Like the Fiduciary Rule*, BARRON'S (Apr. 16, 2016), http://goo.gl/S2bQjc (predicting that costs of complying with Fiduciary Rule will force many smaller brokers to consolidate); Ross David Carmel, *The DOL fiduciary rule's effect on small broker-dealers*, INVESTMENTNEWS (May 4, 2016), http://goo.gl/6AvCCP (warning that Fiduciary Rule will increase broker-dealers' overhead and legal exposure). These smaller financial sales agents know and are uniquely equipped to assist the investors they serve—indeed, that is one of the principal reasons that many lower- and middle-income investors choose them. *See* John

Cain, *Buying Insurance from Independent Insurance Brokers vs Direct Writer*, U.S. INSURANCE AGENTS, https://goo.gl/bhpwsZ. The Fiduciary Rule will make it even more difficult for these small businesses to help underserved communities.

Second, lower-and middle-income investors are already especially likely to lack access to the information and assistance that the Fiduciary Rule will make it even more costly to provide. The administrative record shows that working class investors disproportionately lack access to personalized financial information. *See* Comment Letter from John Mueting, President, Farmers Fin. Sols., to Office of Regulations and Interpretations, U.S. Department of Labor at 2 (Sept. 24, 2015), http://goo.gl/u82hHa. These investors also face larger educational and financial literacy barriers to making good financial decisions. Brown, *supra*, at 2, 20. And they disproportionately lack access to job-based retirement benefits, which vastly increase retirement savings rates. *See* AR684; Oliver Wyman Analysis at 1 (observing that 84% of retirement investors begin via a workplace retirement plan and that these plans are "often the primary vehicle for personal retirement savings"). Making truthful, timely investment information even less accessible to this already-disadvantaged population will only further exacerbate the retirement saving and investment challenges they face.

"To justify the special rules of fiduciary law in economic terms, the increase in the cost of fiduciary services must be more than offset by the gain to principals . . . ." Cooter & Freedman, *supra*, at 1065. Given the administrative record before the Department, it is implausible to conclude that the significant costs to low- and middle-income investors from lack of access to affordable financial information would be more than offset by the amorphously estimated "benefits" of the Fiduciary Rule. *See* NATIONAL ECONOMIC RESEARCH ASSOCIATES, COMMENT ON THE DEPARTMENT OF LABOR PROPOSAL AND REGULATORY IMPACT ANALYSIS 30

(July 17, 2015), http://goo.gl/Ih3SlA ("[G]iven the variety to the DOL's own numbers, the 'benefit' estimates do not provide a credible foundation on which to base significant changes in policy and regulation. The very wide range in the numbers suggests that the DOL itself does not have a good measure of the dollar magnitude of purportedly conflicted advice that they seek to ameliorate.").

But it is not necessary to speculate about the probable net cost of the Fiduciary Rule to small retirement account holders. Brokerage Edward Jones recently announced that in an effort to comply with the Fiduciary Rule it will stop allowing customers with commission-based retirement accounts to invest in exchange-traded funds and mutual funds. *See* Michael Wursthorn, *Watch Out, Retirement Savers, Your Choices Are Poised to Shrink*, WALL STREET J. (Aug. 18, 2016), http://goo.gl/owza3j. Edward Jones has historically served smaller retirement savers, often in small towns with a limited number of retirement investment service providers. Its decision to narrow the range of investment options available to smaller, commission-based account holders—and specifically to bar further investment in an asset class that is a sensible choice for virtually all retirement savers—underscores the losses the Fiduciary Rule will inflict on the most vulnerable group of investors.

Predictably, when the UK adopted regulations similar to the Fiduciary Rule that prohibited commission-based fees in an effort to eliminate conflicts of interest, an "advice gap" emerged that left smaller account holders unable to obtain financial advice at an affordable price. *See* FINANCIAL CONDUCT AUTHORITY, FINANCIAL ADVICE MARKET REVIEW: FINAL REPORT 6 (Mar. 2016), https://goo.gl/TCM5Qj ("FINANCIAL ADVICE MARKET REVIEW"). The UK regulations caused several large banks to make their investment advice services less accessible to small account holders or to exit the market entirely. *See Restricting Access to Financial Advice:*

Evaluating the Costs and Consequences for Working Families and Retirees: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions, 114th Cong. (June 17, 2015) (written testimony of Kent A. Mason at 7–8). The total number of investment advisors in the UK also fell significantly in the years after the regulation went into effect. *See* FINANCIAL ADVICE MARKET REVIEW at 5 (acknowledging that regulations "contributed to a reduction in adviser numbers"). As a result of these changes, a Morningstar analysis concluded that 11 million UK investors had fallen through the advice gap and were unable to obtain assistance with retirement investing decisions. *See* Emma Wall, *10 Million Find Advice Too Expensive*, MORNINGSTAR (Aug. 28, 2014), http://goo.gl/IqFfQP.

The narrowed retirement investment options available to Edward Jones customers and the UK's experience with regulations similar to the Fiduciary Rule both underscore the fact that increasing the cost of providing investing support reduces its supply, ultimately redounding to the disadvantage of investors in most need of assistance. Moreover, the costs and burdens associated with the Fiduciary Rule will fall especially heavily on minority-owned small businesses that provide financial services, forcing many of these small businesses to close and ultimately reducing the dynamic flow of retirement investment information from providers to middle-income investors such as those employed by many NBCC members. Ultimately, the effect of making almost all financial sales agents into fiduciaries—and significantly increasing the costs and risks associated with servicing smaller retirement accounts—will be to make investment information and support more expensive, less available, and less personalized for NBCC members and many minority investors. In this respect the Fiduciary Rule is like a federal mandate that all cars be Cadillacs; while such a rule might prompt some Americans to buy nicer vehicles, many others would be left walking to work.

II. The Fiduciary Rule is not needed to address conflicts of interest among financial sales agents.

Financial sales agents are already subject to a web of laws and regulations designed to protect customers from inappropriate investment recommendations. These regulations are generally effective in protecting retirement investors, and there is no basis for expecting that the Fiduciary Rule will shield small investors from any harmful effects of conflicted investment advice that existing laws and regulations do not prevent.

Federal securities laws and FINRA rules comprehensively regulate broker-dealers, who are required to deal fairly with customers, adhere to just and equitable principles of trade, and ensure that their recommendations are suitable for customers. *See* FINRA Comment Letter at 3. FINRA's suitability rule, in particular, protects investors from inappropriate broker advice by requiring brokers to exercise reasonable diligence in assessing a customer's investment profile before recommending a particular securities transaction or investment strategy. *See* FINRA Rule 2111, http://goo.gl/iCLCi2. FINRA has devoted significant attention to helping broker-dealers manage conflicts of interest, *see generally* FINRA, REPORT ON CONFLICTS OF INTEREST (Oct. 14, 2013), http://goo.gl/RLIOIx, and broker-dealers that do not comply with its rules are subject to enforcement actions, *see* FINRA, 2016 Regulatory and Examination Priorities Letter at 6 (Jan. 5, 2016), http://goo.gl/WsPBnr (discussing current suitability enforcement priorities); News Release, FINRA, FINRA Sanctions MetLife Securities, Inc. $25 Million for Negligent Misrepresentations and Omissions in Connection With Variable Annuity Replacements (May 3, 2016), https://goo.gl/2GjTqj.

Insurance brokers and agents who sell variable annuities are even more heavily regulated, for they must not only register as broker-dealers and comply with FINRA's specific rule governing variable annuities, *see* FINRA Rule 2330, http://goo.gl/97kPEx, but are also subject to

comprehensive state insurance regulations. All but two of the states have adopted some version of the National Association of Insurance Commissioners' Model Suitability Rule, which prohibits insurance agents from recommending an annuity unless he or she has reasonable grounds for believing that the recommendation is suitable in light of the investor's financial situation. *See* NAIC 2010 Suitability Model Rule §§ 5(I), 6(A) in Suitability in Annuity Transactions Model Regulation (Revised) at 4 n.1, 5 n.2, http://goo.gl/6aMfD2 . State attorneys general and insurance regulators in every state enjoy "extensive enforcement authority to examine companies, revoke producer and company licenses to operate, as well as collect and analyze industry data," Comment Letter from Monica Lindeen, President, NAIC, et al. to Thomas E. Perez, Secretary, U.S. Department of Labor (July 21, 2015) (Indexed Annuity App. Vol. 2, at 133), and these powers are aggressively exercised when appropriate, *see, e.g.*, Sandra McDermott & Alex J. Yastrow, *Midland Life Insurance Company Pays $1.3 Million to California Department of Insurance for Improper Annuity Sales*, THE INSURANCE & REINSURANCE REPORT (Feb. 20, 2015), http://goo.gl/ZAmggf; Arthur D. Postal & Elizabeth D. Festa, *Allianz to Pay $10 Million in Multi-State Suitability Settlement*, LIFEHEALTHPRO (Sept. 4, 2012), http://goo.gl/eje0QZ; INSURANCE JOURNAL, *Minn. Attorney General Swanson Targets 3rd Insurance Firm* (Dec. 3, 2007), http://goo.gl/YKs4Qa.

Finally, while the Fiduciary Rule significantly (and unlawfully) expands the circumstances in which financial sales agents are subject to suit, it bears emphasis that consumers harmed by unsuitable investment recommendations will not be left without remedies if the Department's rule is vacated. To the contrary, plaintiffs routinely file lawsuits and arbitration demands challenging alleged misconduct in the industry:

- *Remington v. Newbridge Securities Corp.*, 2013 WL 2444719 (S.D. Fla. June 5, 2013), was a class action against a broker-dealer that was alleged to have overcharged its customers for handling securities transactions. The district court certified a class, and the case later settled.
- *In re PaineWebber Ltd. Partnerships Litigation*, 171 F.R.D. 104 (S.D.N.Y. 1997), approved a class action settlement in a case in which a broker was alleged to have systematically misled customers into investing in unsuitable securities.
- In *Abbit v. ING USA Annuity and Life Insurance Co.*, 999 F. Supp. 2d 1189 (S.D. Cal. 2014), the plaintiff asserted a variety of state law claims on behalf of himself and a putative class, alleging that an insurance company's marketing of indexed annuities was misleading. The district court certified a class, and the parties are currently engaged in discovery.
- In *Brooks v. Lincoln National Life Insurance Co.*, 2008 WL 623222 (E.D. Tex. Mar. 5, 2008), the plaintiff brought a putative class action arguing that the insurance company had improperly failed to conduct a suitability analysis before selling him a variable deferred annuity. The district court refused to certify a class but also denied the insurance company's motion for summary judgment, and the case subsequently settled.

As these cases show, insurance agents and brokers are subject to suit—including class action suits—when there are plausible allegations that they have made unsuitable investment recommendations or otherwise violated their legal duties to their customers. The Department's costly and redundant new rule is not needed to protect retirement investors in these rare cases.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Summary Judgment should be granted.

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Respectfully submitted,

/s/ Chad Flores
Chad Flores
Lead Attorney
Texas Bar No. 24059759
cflores@beckredden.com
Beck Redden LLP
1221 McKinney St., Suite 4500
Houston, TX 77010
(713) 951-3700
(713) 951-3720 Fax

Of Counsel:
David H. Thompson
Peter A. Patterson
Brian W. Barnes
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
Telephone: 202.220.9600
Facsimile: 202.220.9601

Counsel for Proposed Amicus Curiae National Black Chamber of Commerce

CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2016, a true and correct copy of the foregoing was served upon all counsel of record via the Court's Electronic Case Filing system.

/s/ Chad Flores
Chad Flores