

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS**

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:
3:16-cv-1530-C
3:16-cv-1537-N

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, Local Rule 56.3, and this Court's Order dated July 7, 2016, plaintiffs 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 respectfully move this Court for summary judgment on all of their claims in this action.

Plaintiffs are submitting herewith a brief in support of this motion, an appendix, and a proposed order.

As explained in their briefs, plaintiffs submit that they are entitled to summary judgment on each of the following grounds:

1. Defendant the U.S. Department of Labor (the “Department”) exceeded its authority in violation of the Employee Retirement Income Security Act of 1974 (“ERISA”), the Internal Revenue Code (“Code”), and the Administrative Procedure Act (“APA”) by adopting the so-called “Fiduciary Rule” and related prohibited transaction exemptions in April 2016.¹ The Fiduciary Rule impermissibly re-interprets the terms “fiduciary” and “investment advice for a fee” in a manner that conflicts with the plain meaning of ERISA and the Code. That re-interpretation is contrary to law and unreasonable. *See* Chamber Mem. Part I; ACLI Mem. Part

¹ Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20,946 (Apr. 8, 2016); Best Interest Contract Exemption, 81 Fed. Reg. 21,002 (Apr. 8, 2016); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs, 81 Fed. Reg. 21,089 (Apr. 8, 2016); Amendment to Prohibited Transaction Exemption (PTE) 75-1, Part V, Exemptions from Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Certain Broker-Dealers, Reporting Dealers and Banks, 81 Fed. Reg. 21,139 (Apr. 8, 2016); Amendment to and Partial Revocation of Prohibited Transaction Exemption (PTE) 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters, 81 Fed. Reg. 21,147 (Apr. 8, 2016); Amendment to and Partial Revocation of Prohibited Transaction Exemption (PTE) 86-128 for Securities Transactions Involving Employee Benefit Plans and Broker-Dealers; Amendment to and Partial Revocation of PTE 75-1, Exemptions from Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefits Plans and Certain Broker-Dealers, Reporting Dealers and Banks, 81 Fed. Reg. 21,181 (Apr. 8, 2016); Amendments to Class Exemptions 75-1, 77-4, 80-83, and 83-1, 81 Fed. Reg. 21,208 (Apr. 8, 2016).

I; IALC Mem. Part I. The Department misused its limited exemptive authority under the Code to establish entirely new, substantive standards of conduct applicable to service providers to Individual Retirement Accounts, or IRAs, when those requirements have no basis in the Code. *See* Chamber Mem. Part II; ACLI Mem. Part I; IALC Mem. Part I. The Department also exceeded its statutory authority by imposing varying burdens on different types of retirement products in a deliberate effort to steer consumers towards products the Department favors and away from those it disfavors. *See* ACLI Mem. Part IV.

2. The Department unlawfully created a private right of action in the Best Interest Contract Exemption and Principal Transactions Exemption; only Congress may create a private right of action. *See* Chamber Mem. Part III; ACLI Mem. Part II.

3. The Department violated the Federal Arbitration Act by prohibiting financial institutions and insurance companies who rely on the Best Interest Contract Exemption or Principal Transactions Exemption from including an arbitration agreement with a class action waiver in their contract with customers. *See* Chamber Mem. Part IV.

4. The Department arbitrarily and capriciously adopted the Rule and exemptions in violation of ERISA's "administrative feasibility" requirement with respect to variable and fixed-indexed annuities and the APA, based on an erroneous cost-benefit analysis that relied on a flawed assessment of benefits, failed to consider significant costs, neglected to examine the existing regulatory framework, and resulted in the Department arbitrarily rejecting less onerous alternatives. *See* ACLI Mem. Part V; Chamber Mem. Part V; IALC Mem. Part II(B).

5. The Department's regulation of fixed-indexed and group variable annuities through the Best Interest Contract Exemption was arbitrary, capricious, and contrary to law,

including the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. *See* IALC Mem. Part II; Chamber Mem. Part VI; ACLI Mem. Part VI.

6. The Department's regulation of fixed-indexed and group variable annuities through the Best Interest Contract Exemption was in violation of the APA, as it was not subject to proper notice and comment procedures. *See* IALC Mem. Part III; ACLI Mem. Part VI; Chamber Mem. Part VI.

7. The Department's regulation violates the First Amendment rights of financial institutions, insurance companies, financial professionals, insurance agents, consumers, and other entities and persons who are affected by the rulemaking. *See* ACLI Mem. Part III; Chamber Mem. Part VII.

WHEREFORE, plaintiffs respectfully request that this Court grant summary judgment in favor of plaintiffs on all of their claims, declare unlawful and set aside the Fiduciary Rule and the related prohibited transaction exemptions, vacate and enjoin the implementation and enforcement of the same, and grant any further relief to which plaintiffs are justly entitled.

Respectfully submitted,

Dated: July 18, 2016

s/ Eugene Scalia

James C. Ho, Texas Bar No. 24052766
Russell H. Falconer, Texas Bar No. 24069695
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue
Suite 110
Dallas, TX 75291
Telephone: (214) 698-3264
Facsimile: (214) 571-2917
jho@gibsondunn.com
rfalconer@gibsondunn.com

Eugene Scalia*
Jason J. Mendro*
Paul Blankenstein*
Rachel E. Mondl*
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 955-8500
Facsimile: (202) 467-0539
escalia@gibsondunn.com
jmendro@gibsondunn.com
pblankenstein@gibsondunn.com
rmond1@gibsondunn.com

*Counsel for Plaintiffs 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*

* Admitted *pro hac vice*

(continued on next page)

Steven P. Lehotsky*
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
Telephone: (202) 463-5337
Facsimile: (202) 463-5346
slehotsky@uschamber.com

*Counsel for Plaintiff Chamber of Commerce
of the United States of America*

David T. Bellaire*
Robin Traxler*
FINANCIAL SERVICES INSTITUTE, INC.
607 14th Street, N.W.
Suite 750
Washington, DC 20005
Telephone: (888) 373-1840
Facsimile: (770) 980-8481
david.bellaire@financialservices.org
robin.traxler@financialservices.org

*Counsel for Plaintiff Financial Services
Institute, Inc.*

Kevin Richard Foster*
Felicia Smith*
FINANCIAL SERVICES ROUNDTABLE
600 13th Street, N.W.
Suite 400
Washington, DC 20005
Telephone: (202) 289-4322
Facsimile: (202) 589-2526
richard.foster@FSRoundtable.org
felicia.smith@FSRoundtable.org

Counsel for Plaintiff Financial Services Roundtable

* Admitted *pro hac vice*

J. Lee Covington II*
INSURED RETIREMENT INSTITUTE
1100 Vermont Avenue, N.W.
Washington, DC 20005
Telephone: (202) 469-3000
Facsimile: (202) 469-3030
lcovington@irionline.org

*Counsel for Plaintiff Insured Retirement
Institute*

Kevin Carroll*
Ira D. Hammerman*
SECURITIES INDUSTRY AND FINANCIAL
MARKETS ASSOCIATION
1101 New York Avenue, N.W.
8th Floor
Washington, DC 20005
Telephone: (202) 962-7300
Facsimile: (202) 962-7305
kcarroll@sifma.org
ihammerman@sifma.org

*Counsel for Plaintiff Securities Industry and
Financial Markets Association*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 18, 2016, the foregoing document was electronically submitted with the clerk of the court for the United States District Court, Northern District of Texas, using the electronic case file system of the court. I hereby certify that I have served all counsel of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

s/ Eugene Scalia

Eugene Scalia*