UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

FEDERATION OF AMERICANS FOR CONSUMER CHOICE, INC.; JOHN LOWN d/b/a LOWN RETIREMENT PLANNING; DAVID MESSING; MILES FINANCIAL SERVICES, INC.; JON BELLMAN d/b/a BELLMAN FINANCIAL; GOLDEN AGE INSURANCE GROUP, LLC; PROVISION BROKERAGE, LLC; and V. ERIC COUCH, Plaintiffs, v. UNITED STATES DEPARTMENT OF LABOR, and JULIE SU, ACTING SECRETARY OF LABOR,* Defendants.	Civil Action No. 3:22-cv-00243-K

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' OBJECTIONS TO THE FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS OF THE UNITED STATES MAGISTRATE JUDGE

* Pursuant to Federal Rule of Civil Procedure 25(d), the current Acting Secretary of Labor, Julie Su, is substituted for former Secretary of Labor Martin Walsh.

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INTRODUCTION

The Court should overrule Plaintiffs' objections to the Magistrate Judge's Findings, Conclusions, and Recommendations ("FCR") in this case. The Magistrate Judge engaged in a thoughtful and reasoned analysis of the Employee Retirement Income Security Act of 1974 ("ERISA") and the regulatory provisions at issue, while rejecting Plaintiffs' unfounded effort to expand the Fifth Circuit's decision in *Chamber of Commerce v. Dep't of Labor*, 885 F.3d 360 (5th Cir. 2018) far beyond what that case actually stands for. *First*, no party objects to the partial vacatur of the Department's interpretation of the "regular basis" prong of its regulation, a central issue in Plaintiffs' challenge. Those portions of the Magistrate Judge's recommendations—concluding that in determining ERISA Title I fiduciary status at the time of the rollover one cannot consider actual or planned investment advice to a Title II plan (IRA)—are reviewed for clear error, and there is none to be found. *Second,* as to the remainder of the Magistrate Judge's recommendations, Plaintiffs simply rehash the same extreme arguments and positions—particularly with respect to the *Chamber of Commerce* opinion—already rejected by the Magistrate Judge, and it is questionable whether these objections are sufficiently specific so as to engender *de novo* (as opposed to plain error) review. *Third,* whether reviewed *de novo* or for plain error, Plaintiffs' objections to the FCR are not well-taken because they ignore the clear text of ERISA and the Department's regulations, misconstrue the *Chamber of Commerce* opinion, and push for a nearly categorical exclusion of insurance agents and stockbrokers from ever being ERISA fiduciaries. *Fourth*, the Magistrate Judge's recommended relief—the partial vacatur adverse to Defendants—was appropriate, and neither a more expansive vacatur nor an injunction are appropriate here.

LEGAL AND PROCEDURAL BACKGROUND

A. ERISA Statutory Framework

Congress enacted ERISA in 1974 based on its determination that Americans' retirement

savings were not adequately protected, to their detriment and that of the country. Pub. L. No. 93-406, 88 Stat. 829, 898 (1974) (codified at 29 U.S.C. §§ 1001, *et seq.*). Prior to ERISA, "federal involvement in the monitoring of pension funds in this country was minimal." *Sec'y of Labor v. Fitzsimmons*, 805 F.2d 682, 689 (7th Cir. 1986). Congress thus enacted ERISA "after determining that the then present system of regulation was ineffective in monitoring and preventing fraud and other pension fund abuses." *Id.* The statutory framework included, *inter alia*, enhanced "disclosure and reporting" requirements, "standards of conduct, responsibility, and obligation for fiduciaries [to] employee benefit plans," and "appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b); *see also Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004) ("The purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans."); *Tolbert v. RBC Capital Markets Corp.*, 758 F.3d 619, 621 (5th Cir. 2014) ("An ambitious statutory scheme, ERISA is designed to protect . . . the interests of participants in employee benefit plans and their beneficiaries.").

Title I of ERISA imposes stringent obligations on individuals who engage in important plan-related activities, *i.e.*, "fiduciar[ies]." 29 U.S.C. § 1104. Under ERISA, "a person is a fiduciary with respect to a plan 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) (emphasis added). A "fiduciary" under Title I of ERISA must adhere to duties of loyalty and prudence. *Id.* § 1104. The former requires a fiduciary to "discharge his duties

with respect to a plan solely in the interest of the participants and beneficiaries" and for the "exclusive purpose" of providing benefits to participants and beneficiaries and defraying reasonable expenses of plan administration. *Id.* § 1104(a)(1). The latter requires a fiduciary to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims[.]" *Id.* § 1104(a)(1)(B).

As an additional protective measure, Congress prohibited fiduciaries from engaging in specified transactions Congress deemed inherently fraught with conflicts of interest. *Id.* § 1106; *see Lockheed Corp. v. Spink*, 517 U.S. 882, 888 (1996) (Congress's goal was to "bar categorically" transactions likely to injure a plan and its beneficiaries). In particular, a fiduciary must not "deal with the assets of the plan in his own interest or for his own account" or "receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan." 29 U.S.C. § 1106(b)(1), (3). Given the breadth of the prohibited transaction provisions, Congress enumerated statutory exemptions from some of them. *Id.* § 1108(b). In addition, Congress delegated to the Secretary of Labor ("the Secretary") the broad authority to grant "conditional or unconditional" administrative exemptions on a class-wide or individual basis upon making certain findings. *Id.* § 1108(a).

In Title II of ERISA, Congress amended the Internal Revenue Code ("the Code") to adopt a "fiduciary" definition parallel to that in Title I. 26 U.S.C. § 4975(e)(3). Title II covers most employee benefit plans covered by Title I, as well as other tax-favored retirement and savings plans such as individual retirement accounts (IRAs). While the Code provisions do not include duties of loyalty and prudence, they do, as in Title I, prohibit fiduciaries and others from engaging in specified conflicted transactions. *Id.* § 4975(c). The Secretary has the authority to grant

administrative exemptions on the same terms as in Title I. *Id.* § 4975(c)(2). Those who violate the Code's prohibited transaction provisions are subject to excise taxes. *Id.* § 4975(a)-(b).

ERISA also delegated to the Secretary broad authority to "prescribe such regulations as he finds necessary or appropriate to carry out the provisions of [Title I of ERISA]." 29 U.S.C. § 1135. "Among other things, such regulations may define accounting, technical and trade terms used in such provisions[.]" *Id.* The parallel provisions of Title I of ERISA and § 4975 of the Code led to redundancy. To harmonize their administration and interpretation, President Carter issued Reorganization Plan No. 4 in 1978, 29 U.S.C. § 1001 note ("Reorg. Plan"), which Congress ratified in 1984. *See* Pub. L. No. 98-532, 98 Stat. 2705 (1984). Among other things, the Reorganization Plan transferred to the Department the interpretive, rulemaking, and exemptive authority for the fiduciary definition and prohibited transaction provisions that apply to both employer-based plans and IRAs. *See* Reorg. Plan § 102 (transferring "all authority of the Secretary of the Treasury to issue [regulations, rulings, opinions, and exemptions under section 4975 of the Code] . . . to the Secretary of Labor").

B. ERISA Regulations

Pursuant to its broad interpretive authority, in 1975, the Department issued regulations interpreting when a person "renders investment advice for a fee or other compensation" for purposes of ERISA's "fiduciary" definition. *See* Definition of the Term "Fiduciary," 40 Fed. Reg. 50842 (Oct. 31, 1975) ("1975 Regulation").[1] The regulations set forth a five-part test, under which a person was deemed to "render[] investment advice" when the person: (1) renders advice as to the value of securities or other property, or makes recommendations as to the advisability of

[1] At that time, the Department of the Treasury issued a virtually identical regulation under the Code. *See* 26 CFR 54.4975-9(c), which interprets Code section 4975(e)(3). 40 Fed. Reg. 50840 (Oct. 31, 1975).

investing in, purchasing, or selling securities or other property, (2) on a regular basis, (3) pursuant to a mutual agreement, arrangement or understanding, with the plan or a plan fiduciary, (4) where that advice will serve as a primary basis for investment decisions with respect to plan assets, and (5) the advice will be individualized based on the particular needs of the plan. *See* 29 C.F.R. § 2510.3–21(c)(1).[2]

Pursuant to its authority to craft exemptions for fiduciary conflicts, the Department adopted numerous class exemptions to permit fiduciaries to engage in conduct that would otherwise be prohibited. Insurance companies and insurance agents were among those who sought an exemption. Insurance companies sell annuity contracts as retirement investment options for plan and IRA investors. Annuities are sold through different types of distributors, including broker-dealers, banks, independent insurance agents, and career insurance agents. In 1984 the Department promulgated Prohibited Transaction Exemption (PTE) 84-24, which expanded upon a 1977 exemption and permits fiduciary insurance companies and their agents to receive otherwise prohibited compensation in connection with their recommendations of annuity purchases. *See* 49 Fed. Reg. 13208, 13211 (Apr. 3, 1984); *Chamber of Commerce*, 885 F.3d at 367 (noting that PTE 84-24 "cover[s] transactions involving insurance and annuity contracts and permit[s] customary

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[2] "A person shall be deemed to be rendering 'investment advice' to an employee benefit plan . . . only if: (i) Such person renders advice to the plan as to the value of securities or other property, or *makes recommendation* as to the advisability of investing in, purchasing, or selling securities or other property; and (ii) Such person either directly or indirectly (e.g., through or together with any affiliate)— . . .

> (B) Renders any advice described in paragraph (c)(1)(i) of this section *on a regular basis* to the plan pursuant to a *mutual agreement, arrangement or understanding*, written or otherwise, between such person and the plan or a fiduciary with respect to the plan, that such services will serve as *a primary basis* for investment decisions with respect to plan assets, and that such person will render *individualized investment advice* to the plan based on the particular needs of the plan . . . ."

29 C.F.R. § 2510.3–21(c)(1) (elements of the five-part test indicated by italics).

sales commissions where the terms were at least as favorable as those at arm's-length, provided for "reasonable" compensation, and included certain disclosures").

C. The 2016 Fiduciary Rulemaking and the *Chamber of Commerce* Decision

The 1975 Regulation was promulgated before 401(k) plans existed and before IRAs were commonplace, and the market for retirement savings has since undergone a dramatic shift both in the degree to which retirement investors are responsible for investing their retirement savings and the role played by IRAs and rollovers from ERISA-covered plans. In 2016, in an effort to adjust to these changes, the Department finalized a new regulation that would have replaced the 1975 Regulation and granted new associated prohibited transaction exemptions. The 2016 Fiduciary Rule, as described in Plaintiffs' briefing, was in fact a package of seven different rules, *see Chamber of Commerce*, 885 F.3d at 363, falling into three major categories.

First, the Department revised the definition of "fiduciary" under ERISA and the Code, and eliminated several of the conditions from the 1975 Regulation. *See* 81 Fed. Reg. 20946 (Apr. 8, 2016). The Rule defined "investment advice" in terms of specified "recommendations" to an advice recipient regarding, *inter alia*, "the advisability of acquiring, holding, disposing of, or exchanging," or "the management of," "securities or other investment property," including how the securities should be invested after they are rolled over, transferred, or distributed from a plan. *Id.* at 20997. Under the 2016 Rule, a person could become a fiduciary if he or she "[d]irect[s] . . . advice to a specific advice recipient" regarding the "advisability of a particular investment . . . decision." *Id.* Thus, the 2016 Rule on its face eliminated the requirements under the 1975 regulation that fiduciary investment advice be given "on a regular basis," "pursuant to a mutual agreement, arrangement or understanding" as to fiduciary status, and that it "serve as a primary basis" for the participant or plan's decision.

Second, the Department promulgated two new exemptions, including the Best Interest

Contract Exemption (BICE), which allowed fiduciaries to receive conflicted income only if they adhere to certain conditions, including signing a written contract with the consumer that contained enumerated provisions, and exposed financial institutions and advisers to suits for breach of contract if those provisions were violated. *See* Best Interest Contract Exemption, 81 Fed. Reg. 21,002 (Apr. 8, 2016). In particular, to rely on the exemption, financial institutions were required to, *inter alia*, acknowledge fiduciary status with respect to investment advice in a written contract with any IRA or non-ERISA plan; implement policies and procedures reasonably and prudently designed to prevent violations of certain impartial conduct standards; refrain from giving or using incentives for advisers to act contrary to the customer's best interest; and fairly disclose the fees, compensation, and material conflicts of interest associated with their recommendations. *See Chamber of Commerce*, 885 F.3d at 367. The required contract could not include provisions that commonly are used to limit liability, such as a liquidated damages clause or waiver of the ability to participate in class actions. *Id.*

Third, given that the BICE would be available to all annuities and many other products, the DOL amended existing exemptions, including PTE 84-24, 71 Fed. Reg. 5887 (Feb. 3, 2006), which had previously provided prohibited transaction relief for sales of insurance and annuity contracts. *See* Amendment to and Partial Revocation of Prohibited Transaction Exemption 84–24, 81 Fed. Reg. 21147 (Apr. 8, 2016). After the notice-and-comment period, the Department determined that PTE 84-24 should be available for the receipt of commissions for IRA and plan transactions only in connection with recommendations involving "fixed rate annuity contracts," which was defined to exclude variable annuities and fixed indexed annuities. *See* 81 Fed. Reg. at 21176-77. As a result, fiduciaries advising on many annuity products could no longer rely on PTE 84-24 but instead needed to use the BICE if they wished to be exempted from the prohibited

transaction provisions that would otherwise apply.

A variety of legal challenges ensued following the promulgation of the 2016 Fiduciary Rule. Four federal courts upheld the rule, *see Market Synergy Grp, Inc. v. Dep't of Labor,* 885 F.3d 676 (10th Cir. 2018); *Market Synergy Grp, Inc. v. Dep't of Labor*, No. 16-CV-4083-DDC-KGS, 2017 WL 661592 (D. Kan. Feb. 17, 2017); *Chamber of Com. of the United States of Am. v. Hugler*, 231 F. Supp. 3d 152 (N.D. Tex. 2017); *Nat'l Assoc. for Fixed Annuities v Perez,* 217 F. Supp. 3d 1, 23 (D.D.C. 2016). However, the U.S. Court of Appeals for the Fifth Circuit vacated the 2016 rulemaking, including the new exemptions, in *Chamber of Commerce*, 885 F.3d 360. Specifically, the court found that the 2016 rule—which did away with the "regular basis," "mutual agreement," and "primary basis" prongs of the 1975 rule—was inconsistent with ERISA, and took particular issue with a requirement in the 2016 rulemaking that financial services providers, as a condition for receiving the associated exemption, enter into an enforceable contract with the retirement investor, which would have given IRA investors the right to sue financial institutions and advisers for breach of contract. *See id.* at 366-67.

D. Subsequent Developments in the Retirement Advice Marketplace

The market conditions that motivated the 2016 Rulemaking have only accelerated. For example, rollovers from ERISA-covered Plans to IRAs were expected to approach $2.4 trillion cumulatively from 2016 through 2020. AR 6, 75.[3] These market conditions have spurred other regulators into action, and as a result the regulatory environment for investment professionals has changed significantly since the adoption and vacatur of the 2016 Rulemaking. In June 2019, the Securities and Exchange Commission ("SEC") finalized a regulatory package relating to conduct

[3] Citations with the prefix "AR" refer to the Administrative Record for this case, the relevant portions of which are contained in the Joint Appendix. *See* ECF No. 58.

standards for broker-dealers and investment advisers. Included in the package were (1) Regulation Best Interest which establishes a best interest standard applicable to broker-dealers when making a recommendation of any securities transaction or investment strategy involving securities to retail customers, (2) an interpretation of the fiduciary conduct standards applicable to investment advisers under the Investment Advisers Act of 1940, and (3) a new form, which requires broker-dealers and SEC-registered investment advisers to provide retail investors with a short relationship summary with specified information. *See* AR 4 & nn. 23-25.[4]

In addition, in Spring 2020, the National Association of Insurance Commissioners ("NAIC"), a standard-setting organization governed by state chief insurance regulators, updated its Suitability in Annuity Transactions Model Regulation to include a "best interest" standard for agents. NAIC Model Regulation 275, Section 6.A (https://perma.cc/T47L-YTJG); *see also* NAIC Model Regulation 275, Project History at 1-2 (https://perma.cc/K522-S2K3), explaining that NAIC's new best interest standard was intended to be "more than the model's current suitability standard, but . . . not a fiduciary standard" while requiring satisfaction of "four obligations: 1) care, 2) disclosure, 3) conflict of interest, and 4) documentation").

Regulations based upon the NAIC Model Regulation have been adopted in at least 43 states. *See* NAIC, Annuity Suitability & Best Interest Standard, updated August 23, 2023 (https://perma.cc/8REU-C26A). For example, in June 2021, Texas passed HB 1777, which amended the state's insurance code "to require an agent to act in the best interest of the consumer

[4] *See also* Regulation Best Interest*,* 17 C.F.R. § 240.15I-l(a)(1) ("A broker, dealer, or a natural person who is an associated person of a broker or dealer, when making a recommendation of any securities transaction or investment strategy involving securities (including account recommendations) to a retail customer, shall act in the best interest of the retail customer at the time the recommendation is made, without placing the financial or other interest of the broker, dealer, or natural person who is an associated person of a broker or dealer making the recommendation ahead of the interest of the retail customer.").

when making a recommendation of an annuity." HB 1777 § 2 (amending Section 1115.001 Insurance Code) (https://perma.cc/8PDL-9V3F); *see also id.* § 8 (amending Section 1115.051) ("When making a recommendation of an annuity, an agent shall act in the best interest of the consumer under the circumstances known to the agent at the time the recommendation is made, without placing the agent's or the insurer's financial interest ahead of the consumer's interest." "An agent is presumed to act in the best interest of the consumer if the agent satisfies the care, disclosure, conflict of interest, and documentation obligations described by this subchapter."). This statute was implemented by regulation in October 2021. *See* Tex. Dep't of Ins., HB 1777 Adoption Order, Oct. 14, 2021 (https://perma.cc/83VS-2R9K).

E. The Department's 2020 Interpretation and Exemption

On July 7, 2020, the Department proposed a new class exemption, which took into consideration the Fifth Circuit's ruling, public correspondence and comments received by the Department since February 2017, and informal industry feedback seeking an administrative class exemption for otherwise-prohibited transactions. *See* AR 70.[5] The Notice "set[] forth the Department's interpretation of the [1975] five-part test of investment advice fiduciary status and provide[d] the Department's views on when advice to roll over Plan assets to an IRA could be considered fiduciary investment advice under ERISA and the Code." AR 71. In light of the Fifth Circuit's ruling in *Chamber of Commerce*, the Notice made clear that:

> [a]ll prongs of the [1975] five-part test must be satisfied for the investment advice provider to be a fiduciary within the meaning of the regulatory definition, including the "regular basis" prong and the prongs requiring the advice to be provided

[5] At the same time, the Department published a technical amendment to the Code of Federal Regulations, implementing the Fifth Circuit's vacatur of the 2016 rulemaking by removing language from the CFR that the 2016 rulemaking added and reinstating the 1975 Regulation. *See* AR 102-107. In that regard, as to Plaintiffs' suggestion that the Department "could have complied with the Fifth Circuit's ruling by simply reinstating the five-part test," FACC Br. in Supp. of Mot. for Summ. J. at 18, ECF No. 20 ("FACC Br."), the Department did just that.

> pursuant to a "mutual" agreement, arrangement, or understanding that the advice will serve as "a primary basis" for investment decisions.

AR 75. In contrast to the 2016 Rulemaking, the final Exemption was not accompanied by a change in the definition of fiduciary investment advice under either ERISA or the Code; did not impose any contractual requirements on brokers, financial advisors, or insurance advisors as a precondition for availing themselves of the exemption; and did not amend or alter PTE 84-24. Rather it served to bring regulatory requirements into alignment with the changes brought about by the SEC's Best Interest Regulation and NAIC Model Regulation 275, both of which generally require that brokers and insurance agents act in the best interest of their customers. *See* AR 9 (noting that "the updated conduct standards adopted by the SEC and the NAIC reflect an acknowledgment of the fact that broker-dealers and insurance agents commonly provide investment and annuity recommendations to their customers").

In the preamble to the proposed Exemption, the Department announced that it did not intend to rely on a prior Advisory Opinion, commonly known as the Deseret Letter, *see* Advisory Opinion 2005-23A (Dec. 7, 2005). That Advisory Opinion had concluded that advice to roll assets out of a Title I plan and invest them elsewhere did not constitute investment advice to the Title I plan. *See* AR 6. Just five years after issuing the letter, the Department sought comments on whether to reverse course. *See* 75 Fed. Reg. 65266 (Oct. 22, 2010) ("Concerns have been expressed that, as a result of this position [AO 2005-23A], plan participants may not be adequately protected from advisers who provide distribution recommendations that subordinate participants' interests to the advisers' own interests. The Department, therefore, is requesting comment on whether and to what extent the final regulation should define the provision of investment advice to encompass recommendations related to taking a plan distribution."). The 2016 Rulemaking specifically "supersede[d]" Advisory Opinion 2005-23A. *See* 81 Fed. Reg. 20964.

In the 2020 exemption proceeding, the Department received 106 written comments on the proposed exemption from a variety of interested parties. Federation of Americans for Consumer Choice ("FACC"), a Plaintiff here, submitted a comment on August 6, 2020. AR 291. Following a public hearing on September 3, 2020—at which commenters, including Plaintiff FACC, were permitted to give additional testimony, AR 1178—the Department published Prohibited Transaction Exemption 2020-02 on December 18, 2020. *See* AR 1. In the preamble to the Exemption, which contained a lengthy discussion of the comments and the rationale for the Department's decision-making with respect to the Exemption, the Department characterized part of the preamble to the Exemption as its "final interpretation of when advice to roll over Plan assets to an IRA will be considered fiduciary investment advice under Title I and the Code." AR 2.

Critically, the Department did not amend the 1975 five-part test as it had done in the 2016 rulemaking. *See* AR 49 ("While this exemption proceeding interprets aspects of the five-part test, including by providing a new interpretation as to how it applies to rollovers, this exemption has not put at issue the five-part test itself as codified at 26 CFR 54.4975-9 and 29 CFR 2510.3-21"). Instead, as explained in the preamble:

> The Department's interpretation does not amend the five-part test, but only provides interpretive guidance, in the context of the relief provided in the new exemption, as to how that test applies to current practices in providing investment advice. The regulatory five-part test has long been understood to provide a functional fiduciary test, and the Department's interpretation is based on this understanding. The Department's interpretation does not effectively eliminate any of the elements of the five-part test, but rather applies them to current marketplace conduct and harmonizes with the current regulatory environment.

AR 12.

The preamble stated the agency's conclusion that a one-time rollover recommendation, without other "objective evidence" demonstrating that the parties "mutually intend an ongoing advisory relationship," would not "be considered fiduciary investment advice under the five-part

test set forth in the Department's regulation." AR 7, 9-10. The Department noted that "[p]arties can and do, for example, enter into one-time sales transactions in which there is no ongoing investment advice relationship, or expectation of such a relationship." AR 7. As with other transactions involving plan assets, "whether insurance transactions will fall within or outside the scope of the fiduciary definition in Title I and the Code depends on the related facts and circumstances," and "insurance and annuity transactions must be evaluated based on application of the five-part test to the particular scenario." AR 10.

Unlike the 2016 Rulemaking, the Exemption did not alter PTE 84-24, and the preamble included detailed language explaining that this prior exemption remained available for qualifying insurance professionals. *See* AR 13 (noting that, "unlike the 2016 fiduciary rulemaking, this project did not amend other, previously granted, prohibited transaction exemptions."). Specifically, "[t]o the extent that insurance companies determine that the supervisory requirements of this exemption are not well-suited to their business models, it is important to note that insurance and annuity products can also continue to be recommended and sold under the existing exemption for insurance transactions, PTE 84-24." AR 16.

Additionally, the preamble addressed a variety of comments received during the rulemaking with respect to the Fifth Circuit's *Chamber of Commerce* decision, including comments (from Plaintiff FACC and others) suggesting the proposed Exemption was inconsistent with that opinion. Most prominently, the Department noted that "[u]nlike the 2016 fiduciary rule and related exemptions, the present exemption provides relief to a more limited group of persons already deemed to be fiduciaries within the meaning of the five-part test and does not impose contract or warranty requirements on fiduciaries." AR 25. In light of the Fifth Circuit's concern that the 2016 BICE had created a private right of action for retirement investors to sue financial

professionals, the Department further noted that neither "the fiduciary acknowledgment" nor "any of the disclosure obligations" under the Exemption "create a private right of action," and the Department "does not intend that any of the exemption's terms, including the acknowledgement, give rise to any causes of action beyond those expressly authorized by statute." AR 31.

F. This Litigation and Related Developments

Plaintiff filed this lawsuit on February 2, 2022. *See* Compl., ECF No. 1. This Court referred the case to a magistrate judge for pretrial management, including dispositive motions, on April 6, 2022. *See* ECF No. 15. The parties cross-moved for summary judgment, and the magistrate judge held a hearing on these motions on January 24, 2023. *See* ECF No. 59.

Separately, on February 14, 2023, in a lawsuit brought by a trade association in the Middle District of Florida, the District Court vacated one aspect of the Department's 2020 Interpretation of the "regular basis" prong of the 1975 five-part test, as summarized in a Frequently Asked Question ("FAQ") document posted on the Department's website. *See American Securities Association v. U.S. Department of Labor*, No. 8:22-cv-330, 2023 WL 1967573 (M.D. Fla. Feb. 13, 2023) ("*ASA*"). Specifically, the *ASA* court concluded that "the scope of the regular basis inquiry is limited to the provision of advice pertaining to a particular plan," *id.* at *16, and therefore, "the policy referenced in FAQ 7 contradicts the plain language of the rule it purports to interpret" because "after the rollover is complete, any future provision of advice is, by nature, no longer to that ERISA plan." *Id.* at *17. Thus, according to the *ASA* court, the policy referenced in FAQ 7 "contradicts [the 1975] regulation to the extent it disposes of the requirement that [regular basis] advice be made *to a particular plan*." *Id.* (emphasis added). The *ASA* court vacated the Department's 2020 Interpretation and FAQ 7 only to the extent that the regular basis test must be satisfied with respect to each ERISA plan about which advice is rendered. The Department did not appeal the *ASA* court's judgment. *See* ECF No. 64, Exhibit B. The magistrate judge here permitted

supplemental briefing regarding the effect of the *ASA* court's judgment. *See* ECF Nos. 65, 66.

On June 30, 2023, in a thorough 74-page opinion, the Magistrate Judge recommended that the Department's interpretive rule be vacated in part, essentially to the same extent as the *ASA* court's judgment. *See* Findings, Conclusions, and Recommendations of the United States Magistrate Judge (hereinafter "MJ FCR"), ECF No. 69. The Magistrate Judge concluded that:

> The Court should vacate the portions of PTE 2020-02's text and preamble that allow consideration of Title II investment advice relationships when determining Title I fiduciary status, including the New Interpretation's (i) allowance of review that a single rollover 'can be the beginning of an ongoing advice relationship' to Title II plans, PTE 2020-02, 85 Fed. Reg. at 82806; (ii) inclusion of potential 'future, ongoing relationships' to Title II plans, *id.* at 82805; and (iii) conclusion that 'an ongoing advisory relationship spanning both the Title I Plan and the IRA satisfies the regular basis prong,' *id.* at 82807.

MJ FCR at 74. The Magistrate Judge also concluded that each plaintiff has standing to sue, *id.* at 22-29, and that Plaintiffs' other arguments should all be rejected. *See id.* at 32-43, 47-52, 57-65. In light of these findings and recommendations, the Magistrate Judge recommended a tailored vacatur to the "narrow extent" that the New Interpretation is inconsistent with ERISA and DOL's own regulations and recommended against a permanent injunction. *See id.* at 65-74.

The Department has submitted no objections to the Magistrate Judge's recommendations. However, Plaintiffs argue that the Magistrate Judge's recommendation "does not . . . go far enough," *see* FACC Brief in Support of Objections, ECF No. 73 at 4 (hereinafter "FACC Obj."), and press for the Court to adopt all of the additional arguments contained in Plaintiffs' complaint and briefing before the Magistrate Judge.

STANDARD OF REVIEW

Where a party has lodged specific objections to a Magistrate Judge's findings, the district court's review of the underlying report and recommendation is generally *de novo*. *See United States v. Wilson,* 864 F.2d 1219, 1221 (5th Cir. 1989). *See also United States v. Raddatz*, 447 U.S.

667, 676 (1980) ("[I]n providing for a 'de novo determination,' rather than de novo hearing, Congress intended to permit whatever reliance a district judge, in the exercise of sound judicial discretion, chose to place on a magistrate's proposed findings and recommendations.") However, it is well-settled that "[p]arties filing objections must specifically identify those findings objected to," *Battle v. U.S. Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987), and "an objection that merely restates general arguments already presented to the magistrate judge is not specific." *Nolen-Davidson v. Soc. Sec. Admin.*, No. 4:20-CV-01085-P, 2021 WL 4476763, at *1 (N.D. Tex. Sept. 30, 2021). Therefore, a court "need not review [Findings, Conclusions and a Recommendation (FCR)] de novo if a party's objections are merely recitations of arguments already made to and rejected by the magistrate judge." *Mindy C. v. Kijakazi*, No. 1:20-CV-222-H-BU, 2022 WL 3210357, at *2 (N.D. Tex. Aug. 9, 2022); *see also Leslie G. v. Kijakazi*, No. 5:21-CV-202-H-BR, 2023 WL 2536111, at *3 (N.D. Tex. Mar. 16, 2023) ("Essentially, the plaintiff repeats the same arguments in an attempt to achieve a different outcome in this setting. But her rehashing of arguments that were already thoroughly considered and expressly rejected by the magistrate judge cannot trigger de novo review."). Similarly, an objection that merely disagrees with a recommendation or summarizes what has been presented before cannot trigger de novo review. *Hernandez v. United States*, No. PE:11-CR-442, 2016 WL 6998387, at *16 (W.D. Tex. Apr. 26, 2016). Rather, in such cases, a court reviews the FCR for plain error alone. *See Freeman v. Am. Credit Acceptance, LLC*, No. 4:20-CV-01211-P-BP, 2021 WL 1015956, at *2 (N.D. Tex. Mar. 17, 2021).

As to Plaintiffs' claim that the Department's interpretation is arbitrary and capricious, "[t]he APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). When

applying this deferential standard, courts "must not substitute" their "own policy judgment for that of the agency." *Id.* An agency's actions are arbitrary and capricious if it "entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983); *see also Univ. of Tex. M.D. Anderson Cancer Ctr. v. HHS*, 985 F.3d 472, 475 (5th Cir. 2021) ("[W]e must set aside any action premised on reasoning that fails to account for relevant factors or evinces a clear error of judgment.") Moreover where, as here, "[t]he Secretary is expressly delegated the authority to grant [an] exemption and is required to make certain other determinations in order to do so," the granting of an exemption is "entitled to great deference under the 'arbitrary and capricious' standard." *AFL-CIO v. Donovan*, 757 F.2d 330, 343 (D.C. Cir. 1985).

ARGUMENT

I. THE MAGISTRATE JUDGE'S RECOMMENDED PARTIAL VACATUR OF THE DEPARTMENT'S INTEPRETIVE RULE IS UNDISPUTED.

The Department does not dispute the Magistrate Judge's recommended holdings that Plaintiffs have standing to press their claims and that the New Interpretation should be vacated to the "narrow extent" that the Magistrate Judge found it to be inconsistent with ERISA and the Department' regulations. *See* MJ FCR at 69. Plaintiffs do not oppose these proposed holdings, as far as they go. *See* FACC Obj. at 3 n.2; *id.* at 4 n.3 ("Plaintiffs agree with the Magistrate Judge's conclusion on this point"). Therefore, the Court may review these aspects of the report "for findings and conclusions that are either clearly erroneous or contrary to law." *Parsons v. Liberty Ins. Corp.*, No. 3:20-CV-1682-K, 2021 WL 5629145, at *1 (N.D. Tex. Dec. 1, 2021), *aff'd*, No. 21-11220, 2022 WL 1831135 (5th Cir. June 3, 2022).

The Magistrate Judge concluded that the Department's interpretation "narrowly conflicts

with ERISA and the DOL's own regulations" and therefore should be vacated in part. *See* MJ FCR at 4. Specifically, the Magistrate Judge concluded that it was improper to "consider recommendations as to Title II plans when determining Title I fiduciary status" because ERISA distinguishes between these types of plans in several ways and limits fiduciary status to those who render advice with regard to "any moneys or other property *of such plan*." 29 U.S.C. § 1002(21)(A)(ii) (emphasis added). *See* MJ FCR at 44. Further, the Magistrate Judge concluded that because the 1975 regulation addresses advice given "on a regular basis to the plan," the Department may not consider an adviser's potential future relationship with IRA plans in determining Title I fiduciary status for the plan from which a rollover would be taken. *See id.* at 53-57.

For these reasons, and because the Magistrate Judge found no other defect in the Department's interpretive rule, the Magistrate Judge recommended that

> The Court should vacate the portions of PTE 2020-02's text and preamble that allow consideration of Title II investment advice relationships when determining Title I fiduciary status, including the New Interpretation's (i) allowance of review that a single rollover 'can be the beginning of an ongoing advice relationship' to Title II plans, PTE 2020-02, 85 Fed. Reg. at 82806; (ii) inclusion of potential 'future, ongoing relationships' to Title II plans, *id.* at 82805; and (iii) conclusion that 'an ongoing advisory relationship spanning both the Title I Plan and the IRA satisfies the regular basis prong,' *id.* at 82807.

MJ FCR at 74.[6] There was no error in the Magistrate Judge's conclusions on this point, and the

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[6] Plaintiffs assert that the Magistrate Judge's recommendations "effectively reinstates . . . the Deseret Letter." *See* FACC Obj. at 14 n.7; *see also id.* at 42 (calling for reinstatement of Deseret Letter). As discussed above, that contested 2005 guidance from the Department had concluded that rollover advice did not count as advice to a Title I plan, notwithstanding that the advice specifically concerned the decision to liquidate, transfer, withdraw, or reinvest assets held by a Title I plan. *See supra*, Background § E. The Magistrate Judge found that the withdrawal of the Deseret Letter was procedurally proper. *See* MJ FCR at 36-38; *see also id.* at 49 (rejecting any approach that would "ossify the DOL's enforcement into . . . the Deseret Letter's position, essentially foreclosing any coverage of fiduciary conduct regarding rollovers"). Substantively, the Deseret Letter conflicts with ERISA's text, which applies to investment advice "with respect to

(*footnote continued on next page*)

Court should adopt the FCR with respect to this narrow finding.

To the extent the Court adopts the Magistrate Judge's reasoning and conclusions, it is also undisputed that these holdings would have essentially the same effect as the *ASA* court's decision. *See* FACC Obj. at 4 n.3 ("The ASA opinion previously vacated the same portion of the New Interpretation . . . ."). *See also* MJ FCR at 71 ("This crafted relief is reinforced by the Middle District of Florida in the ASA case.").

II. IN THEIR OBJECTIONS, WHICH ARGUE THAT THE MAGISTRATE JUDGE DID NOT GO FAR ENOUGH, PLAINTIFFS REHASH THE SAME ABSOLUTIST, EXTREME ARGUMENTS THAT THE MAGISTRATE JUDGE CORRECTLY REJECTED.

Not content with a substantive victory, Plaintiffs press forward in asking the Court to adopt their stark view that insurance agents and stockbrokers should be almost categorically exempt from fiduciary obligations under ERISA. As discussed in the following section, the Magistrate Judge recognized and explained how Plaintiffs' approach far exceeds the statutory and regulatory text, as well as the Fifth Circuit's *Chamber of Commerce* decision.

While Plaintiffs' arguments fail on any standard of review here, *see infra* Section III, a comparison of Plaintiff's objections and their underlying summary judgment briefing before the Magistrate Judge show that "Plaintiff's objections do little more than rehash the arguments made before the Magistrate Judge which were thoroughly addressed in the FCR." *Beck v. Texas Dep't of Crim. Just.*, No. 2:18-CV-218-Z, 2021 WL 272213, at *1 (N.D. Tex. Jan. 27, 2021), which is generally insufficient for *de novo* review. Some non-exhaustive examples follow:

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any moneys or other property of such plan." 29 U.S.C. § 1002(21)(A)(ii). Thus, the Magistrate Judge's conclusion that advice on a "regular basis to the plan" cannot include advice to another plan does not require a return to the now-rejected position that a rollover recommendation is not advice to a Title I plan at all. MJ FCR at 54-57.

FACC SJ Brief, ECF No. 20	FACC Objections, ECF No. 73
"This time, however, [DOL] has attempted to proceed stealthily by professing adherence to the five-part test but radically reinterpreting and effectively eviscerating it. As detailed below, the New Interpretation carries forward many of the fundamental problems the Fifth Circuit identified in the 2016 Fiduciary Rule. The DOL's nominal concessions to what Congress intended in enacting ERISA, as explained in Chamber of Commerce, amount to nothing more than window dressing." (p. 10)	"This time, however, [DOL] has attempted to proceed stealthily by professing adherence to the five-part test but radically reinterpreting and effectively eviscerating it. As detailed below, the New Interpretation carries forward many of the fundamental problems the Fifth Circuit identified in the 2016 Fiduciary Rule. The DOL's nominal concessions to what Congress intended in enacting ERISA, as explained in Chamber of Commerce, amount to nothing more than window dressing." (p. 5)
arguing that Interpretive Rule at issue in this case "perpetuates the original sin of the 2016 Fiduciary Rule by completely ignoring the historically recognized distinction between fiduciary investment advisers and financial salespeople and failing to distinguish between those financial professionals who undertake a "special relationship of trust and confidence" with clients and those who do not." (p. 12)	DOL rule here "perpetuates the original sin of the 2016 Fiduciary Rule by completely ignoring the historically recognized distinction between fiduciary investment advisers and financial salespeople and failing to distinguish between those financial professionals who undertake a "special relationship of trust and confidence" with clients and those who do not." (p. 8)
accusing the Department of an "attempted obliteration of the historical divide between commissioned salespeople and fee-based advisers" (p. 29)	accusing the Department of "attempting to obliterate the distinction between sales activities and investment advice by regulation." (p. 8)

Indeed, as a general matter, FACC does not raise specific objections to the magistrate judge's thorough and detailed findings as such; instead, they fault the Magistrate Judge for not adopting their arguments and instead for reading the text of the Interpretation—and underlying case law and other legal authority on ERISA—on their own terms. *See, e.g.,* FACC Obj. at 11 (complaining that "the Magistrate Judge merely accepted the DOL's meaningless statements that it will look at the 'facts and circumstances' of a particular relationship between an investment professional and a retirement investor"); *see also* FACC SJ Reply Br. at 1, ECF No. 48 (arguing that the Department was seeking refuge in "empty words" including that "whether a relationship

of "trust and confidence" exists will depend on "objective evidence" of the "facts and circumstances."). Indeed, FACC's original brief included an entire section heading that "The New Interpretation Renders the Requirements of the Five-Part Test Meaningless," FACC SJ Br. at 13, ECF No. 20, now restyled as "The Magistrate Judge Erred in Failing to Recognize the New Interpretation Renders the Requirements of the Five-Part Test Meaningless," FACC Objections at 12—or, in other words, the Magistrate Judge erred in failing to agree with Plaintiffs' hyperbolic description of the underlying administrative action at issue.

In short, because the Magistrate Judge rejected Plaintiffs' extreme reading of relevant case law and statutes, Plaintiffs now cut-and-paste these same arguments hoping that the second time will be the charm. But in similar cases, district judges in this court have found that a magistrate judge's findings—when attacked using the very same arguments mustered before and rejected by the magistrate judge—should be reviewed for plain error. *See Leslie G.*, 2023 WL 2536111, at *3 (noting that where "the plaintiff repeats the same arguments in an attempt to achieve a different outcome in this setting," the Plaintiff's "rehashing of arguments that were already thoroughly considered and expressly rejected by the magistrate judge cannot trigger de novo review," while conducting *de novo* review only "out of an abundance of caution"); *Mindy C.*, 2022 WL 3210357, at *2 (a court "need not review an FCR de novo if a party's objections are merely recitations of arguments already made to and rejected by the magistrate judge."). Other courts are in accord. *See, e.g., Garcia v. Lumpkin,* No. 6:22-CV-067-JDK-JDL, 2022 WL 1800935, at *1 (E.D. Tex. June 2, 2022); *CyWee Grp. Ltd. v. Google LLC*, No. 620CV000128ADAJCM, 2021 WL 2425999, at *3 (W.D. Tex. Feb. 17, 2021); *United States v. Morales-Castro*, 947 F. Supp. 2d 166, 171 (D.P.R. 2013); *Vega v. Artuz*, No. 97-cv-3775, 2002 WL 31174466, at *1 (S.D.N.Y. Sept. 30, 2002).

Indeed, here, the Magistrate Judge quoted from Plaintiffs' briefs in the process of

considering (and rejecting) their arguments that the New Interpretation "perpetuates the original sin of the 2016 Fiduciary Rule by completely ignoring the historically recognized distinction between fiduciary investment advisers and financial salespeople," "neglects incorporating the 'special relationship of trust and confidence' into the determination of whether financial professionals are acting as investment advice fiduciaries," and otherwise "renders different requirements of the five-part test 'meaningless.'" MJ FCR at 31. Objections that amount to no more than a complaint that the Magistrate Judge failed to adopt their proposed framing of the case are not specific enough to warrant *de novo* review.

Moreover, Plaintiffs struggle to explain what practical effect a further ruling in their favor would have, or how their clients need additional relief. Plaintiffs acknowledge that the "regular basis" interpretation that the Magistrate Judge proposed to vacate was "one critical component of the New Interpretation" and assert that the Magistrate Judge's recommended ruling "will significantly limit the effect of the New Interpretation." FACC Obj. at 2-3. And they further claim that "vacatur of the scope recommended by the Magistrate Judge frustrates the DOL's express purpose in adopting the New Interpretation," *id.* at 3. However, despite the Department's acquiescence in the *ASA* court's judgment and the Magistrate Judge's recommendation, Plaintiffs press for the district court to fully adopt Plaintiffs' own absolutist views—without clearly explaining why more a more expansive ruling in their favor is necessary.

III. PLAINTIFF'S REMAINING ARGUMENTS ARE MERITLESS, AND THE COURT SHOULD ADOPT THE RESONING OF THE MAGISTRATE JUDGE.

Stripped to its essence, Plaintiffs' central claim is that rollover recommendations by insurance agents and stockbrokers can virtually never be fiduciary investment advice under ERISA. Their arguments that the Magistrate Judge erred all center around this premise. But Plaintiffs' stark, absolutist argument misreads ERISA, the Department's longstanding regulations,

and the Fifth Circuit's *Chamber of Commerce* decision. Instead of a nearly categorical exclusion for insurance agents and stockbrokers, ERISA calls for case-by-case assessments of the context in which financial professionals provide investment advice to ERISA plans. Because the Magistrate Judge appropriately explained how the Department reasonably applied the 1975 five-part test to the rollover context, the Court should adopt the Magistrate Judge's reasoning. The facts and circumstances analysis called for by the 1975 regulation, and applied by the Department, allows for a fuller assessment of whether a "relationship of trust and confidence" is involved than Plaintiffs' nearly categorical exclusion of certain types of financial professionals.

A. The Magistrate Judge Did Not Err In Rejecting Plaintiffs' Effort to Permanently Insulate Insurance Agents and Stockbrokers From ERISA Fiduciary Obligations.

Plaintiffs attempt to characterize themselves as "ordinary salespeople who only provide advice incidental to the sale of products," FACC Obj. at 4, and fault the Department's interpretation for "sweep[ing] within its reach financial salespeople, such as insurance agents and stockbrokers, who inarguably are not fiduciaries at common law." *Id.* at 8. While Plaintiffs dispute that they are advocating for a "categorical exclusion" and disclaim the idea that "a salesman can never be a fiduciary," *id.* at 8-9, their own rhetoric is comprehensive. Indeed, in Plaintiffs' view, the 1975 five-part test only "describes the attributes of a fee-based Investment Professional, such as a registered investment adviser" and does not reach "the normal function of stockbrokers and insurance agents engaged in sales to individual customers." *Id.* at 29. Two fundamental problems plague Plaintiffs' approach. First, the statutory text and longstanding regulations reject any simplistic exclusion for whole categories of financial professionals. And second, in many instances, the actions of stockbrokers and insurance agents are far removed from "mere salespeople," demonstrating that a meaningful facts and circumstances test is warranted.

1. ERISA's Fiduciary Investment Advice Standard Requires a Case-by-Case Assessment, Not the Nearly Categorical Exclusions for Brokers and Insurance Agents That Plaintiffs Desire.

Plaintiffs' categorical approach cannot be squared with ERISA's text and purpose. As the Magistrate Judge recognized, ERISA defined investment advice fiduciaries functionally, "to the extent" that they provide advice about plan assets and receive compensation for that advice. *See* 29 U.S.C. § 1002(21)(A); MJ FCR at 40, 59-60; *Chamber of Commerce*, 885 F.3d at 371 ("[Congress] addressed fiduciary status for ERISA purposes in terms of enumerated functions."). *See also Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993) (holding that "ERISA . . . defines 'fiduciary' not in terms of formal trusteeship, but in *functional* terms . . . thus expanding the universe of persons subject to fiduciary duties"); *Donovan v. Cunningham*, 716 F.2d 1455, 1464 n.15 (5th Cir. 1983) ("ERISA's modifications of existing trust law include imposition of duties upon a broader class of fiduciaries.").[7] The Department's five-part test implements that functional definition by focusing not on the advisor's title or position in the constellation of financial professionals, but instead on aspects of the advisor's interaction with the retirement investor or ERISA plan. *See* 29 C.F.R. § 2510.3–21(c)(1).

Nor is Plaintiffs' stark position consistent with *Chamber of Commerce*, which expressly noted that its holding "does not mean that any regulation of such transactions, or of IRA plans, is proscribed." 885 F.3d at 379 n.13. *See also id.* ("To the extent . . . that some brokers and agents hold themselves out as advisors to induce a fiduciary-like trust and confidence, the solution is for an appropriately authorized agency to craft a rule addressing that circumstance[.]"). The Fifth

[7] Plaintiffs fault the Department and Magistrate Judge for citing cases like *Mertens* that addressed the "authority or control" fiduciary provision immediately preceding the investment advice fiduciary provision at issue here. *See* FACC Obj. at 25-26 & n.14. The Supreme Court's recognition that ERISA's fiduciary definition is functional, based on the interaction between the financial professional and the advisee, plainly applies here. *See, e.g.*, MJ FCR at 39, 60.

Circuit's core holding was that ERISA's investment advice fiduciary definition incorporated a common law understanding that "[f]iduciary status turns on the existence of a relationship of trust and confidence between the fiduciary and client." *Id.* at 370. While vacating the 2016 Fiduciary Rule for conflicting with that understanding, the Fifth Circuit also concluded that the five-part test "upheld the common law understanding of fiduciary relationships." *Id.* at 381; *id.* at 374 ("DOL's 1975 regulation . . . contemplated an intimate relationship between adviser and client beyond ordinary buyer-seller interactions"). The court also approvingly quoted the Department's longstanding conclusion that the five-part test can apply to brokers and insurance agents:

> [A] fee or other compensation, direct or indirect, for the rendering of investment advice to a plan by a fiduciary [where the five-part test has been met], should be deemed to include all fees or other compensation incident to the transaction in which the investment advice to the plan has been rendered or will be rendered. *This may include, for example, brokerage commissions, mutual fund sales commissions, and insurance sales commissions*.

40 Fed. Reg. 50842 (Oct. 31, 1975) (emphasis added) (approvingly quoted in *Chamber of Commerce*, 885 F.3d at 373)[8]; *see also* Adv. Op. 83-60A (Nov. 21, 1983) ("[A] determination whether the provision of research and/or recommendations by a broker-dealer constitutes the rendering of 'investment advice' within the meaning of [the five-part test] *will depend on the particular facts and circumstances*." (emphasis added)) (approvingly quoted in *Chamber of Commerce*, 885 F.3d at 373-74).

In sum, the Magistrate Judge correctly recognized that the Department has consistently

[8] *See also* Employee Benefit Plans, 41 Fed. Reg. 56760, 56762 (Dec. 29, 1976) ("The advice and recommendations made to plans and plan fiduciaries by insurance agents and brokers . . . could constitute 'investment advice' . . . if it is rendered under circumstances described in [the five-part test]. A determination whether such advice constitutes 'investment advice' . . . *can be made only on a case-by-case basis*.") (emphasis added); 42 Fed. Reg. 32395, 32396 (June 24, 1977) ("[A] determination of whether such sales presentation, recommendations, and advice constitute [ERISA fiduciary] "investment advice" . . . *can be made only on a case-by-case basis*.") (emphasis added).

taken the position that the application of the five-part test is a "facts and circumstances" analysis, and that the Fifth Circuit has approved use of that test to distinguish "between mere sales conduct, which does not usually create a fiduciary relationship under ERISA, and investment advice for a fee, which does." 885 F.3d at 374; MJ FCR at 41. Here, the Department's Interpretation applies the same framework, clarifying the application of individual prongs of the five-part test to the rollover context but emphasizing that "[t]he focus is on the facts and circumstances surrounding the recommendation and the relationship" and that "fiduciary status applies only if all five prongs are satisfied." AR11; MJ FCR at 40-41. For this reason, Plaintiffs are also mistaken that the Department's goal or the effect of the Department's interpretation is to make fiduciaries of all financial professionals who "direct[] . . . sales efforts at ERISA plan members and IRA owners." FACC Obj. at 20.[9]

2. Insurance Agents and Brokers Are Often Not Mere Salespeople.

Plaintiffs use variations of the term "salesperson" at least 30 times in their brief, adopting this characterization to minimize the role and expectations for brokers and insurance agents. It is difficult to discern any circumstance in which Plaintiffs would find it appropriate to apply ERISA to a stockbroker's or insurance agent's investment advice that resulted in a transaction and commission.[10] While Plaintiffs' arguments depend on a hard-and-fast distinction between "a

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[9] Plaintiffs claim that the Department's prior briefing "gives up the game" by quoting the general principle that Congress wanted fiduciary status to apply to those "whose actions affect the amount of benefits retirement plan participants will receive." *See* FACC Obj. at 10, 12 n.6; Defs.' Br. at 57, ECF No. 40 (quoting *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 96 (1993)). The Department referenced this Supreme Court language in discussing how its interpretation aligned with ERISA's "broadly protective purposes," Defs.' Br. at 39-40, 57, not as a substitute for the five-part test or a suggestion that all advice regarding ERISA plan assets is inherently fiduciary.

[10] Plaintiffs make much of *Chamber of Commerce*'s observation that it was "ordinarily inconceivable" that certain "one-time . . . transactions" would involve "an intimate relationship of

(*footnote continued on next page*)

registered investment advisor" who is hired to manage a client's portfolio on the one hand, and "salespeople" on the other, FACC Obj. at 29, the Magistrate Judge properly recognized that "[n]othing in the five-part test or ERISA expressly excludes rollovers from DOL's purview under Title I or Title II (viewed separately)." MJ FCR at 64. Instead, "[i]f a financial professional, through the lens of the facts and circumstances surrounding the rollover recommendation, crosses the line from mere selling of investment products to offering investment advice, the DOL (or, potentially, private individuals) will hold the professional accountable for their recommendations but only to the extent the professional acts in a manner of trust and confidence." MJ FCR at 40-41. Because an ERISA investment advice fiduciary is defined functionally, the circumstances surrounding the compensated investment advice matter more than the label used by the financial professional or the distinct regulations applicable to that financial professional beyond the ERISA context. Moreover, regulators of stockbrokers and insurance agents have adopted heightened conduct standards that recognize that these financial professionals are not mere salespeople.

In 2019, the SEC observed that "broker-dealer investment advice can be consequential" and "need not be trivial, inconsequential, or infrequent" under the securities regulations. *See* 84 Fed. Reg. 33681, 33685 (July 12, 2019). In the same regulatory package, the SEC issued "Regulation Best Interest," which established a best interest standard applicable to broker-dealers when making a recommendation of any securities transaction or investment strategy involving securities to retail customers. *See* 84 Fed. Reg. 33318 (July 12, 2019). This standard "draws from

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trust and confidence," 885 F.3d at 380, *see* FACC Obj. at 9, which was dicta based on the Fifth Circuit's general expectation about such circumstances rather than a holding rooted in detailed information about the specific facts and circumstances of any actual investment interactions. Plaintiffs' efforts to twist such dicta into far broader pronouncements are baseless. At any rate, the Department's view is that consideration of the facts and circumstances surrounding the actual interactions is necessary before determining how common or rare relationships of trust and confidence are, even for certain "one-time" transactions. *See* AR 8-9, 11.

key principles underlying fiduciary obligations, including those that apply to [registered] investment advisers under the Investment Advisers Act of 1940." *Id.* at 33318, 33320, 33332. The SEC emphasized that, "regardless of whether a retail investor chooses a broker-dealer or an investment adviser (or both), the retail investor will be entitled to a recommendation (from a broker-dealer) or advice (from an investment adviser) that is in the best interest of the retail investor and that does not place the interests of the firm or the financial professional ahead of the interests of the retail investor." *Id.* at 33321. While the SEC did not impose the full Advisers Act fiduciary standard on broker-dealers, the primary remaining distinction is that a registered investment adviser's "fiduciary duty generally includes a duty to provide ongoing advice and monitoring, while Regulation Best Interest imposes no such duty and instead requires that a broker-dealer act in the retail customer's best interest at the time a recommendation is made." *Id.*; *see also XY Planning Network, LLC v. SEC*, 963 F.3d 244, 255 (2d Cir. 2020). It is thus clear that the SEC's distinction is not between investment advisers on the one hand and mere salespeople on the other.

Likewise, in 2020, NAIC revised its model regulation to provide that insurance agents must act in the best interest of the consumer when making a recommendation of an annuity, and insurers must establish and maintain a system to supervise recommendations so that the insurance needs and financial objectives of consumers at the time of the transaction are effectively addressed. *See* NAIC Model Regulation 275, Suitability In Annuity Transactions Model Regulation, https://perma.cc/5LF6-M5SQ. The insurance agent's best interest obligation includes four components, including an obligation of care and an obligation to avoid and disclose conflicts of interest. *Id.*, NAIC Model Regulation 275, Section 6. Regulations based upon the NAIC Model Regulation have been adopted in at least 43 states. *See* NAIC, Annuity Suitability & Best Interest Standard, https://perma.cc/5U6Q-5N9Q. The NAIC adopted a best interest standard in part to

promote "harmonization across regulatory platforms." *See id.*

Plaintiffs attempt to dismiss these actions by emphasizing that these regulatory actions are not labelled as "fiduciary" by the SEC or NAIC. *See* FACC Obj. at 31 & n.7. However, as discussed above, ERISA's functional definition looks to the overall circumstances, not just the regulatory structure. Practically, Plaintiffs identify no meaningful difference between a stockbroker's obligations under Regulation Best Interest and ERISA's requirements for fiduciary investment advice. Both prominently include the obligation to comply with standards of care and loyalty and the obligation to avoid conflicts of interest. Indeed, because ERISA does not require ongoing monitoring and advice for investment advice fiduciaries, the SEC's reservation of its "fiduciary" label for those who must provide such ongoing services does not preclude stockbrokers from satisfying the distinct ERISA fiduciary standard. While there are important differences of degree between ERISA's obligations and those adopted by NAIC Model Regulation 275, these related and overlapping best interest standards inform the expectations of both financial professionals and retirement investors about the relationships being formed. The Department's interpretation of the five-part test reasonably describes a set of circumstances where the advice relationship rises to the level of one of trust and confidence.

B. The Five-Part Test Describes Relationships of Trust and Confidence.

Plaintiffs challenge the Magistrate Judge's recommendations by focusing on each individual prong of the test, asking the Court to find that the Department's Interpretation of each prong is individually insufficient to identify a fiduciary, and then extrapolating that the entire test must also fail. This approach is inconsistent with the common law understanding that "[w]hether a fiduciary relationship exists is a fact-intensive question involving a searching inquiry into the nature of the relationship, the promises made, the type of services or advice given and the legitimate expectations of the parties." *See Xereas v. Heiss*, 987 F.3d 1124, 1131 (D.C. Cir. 2021);

see also ARA Auto. Grp. v. Cent. Garage, Inc., 124 F.3d 720, 723 (5th Cir. 1997) ("The existence of a fiduciary relationship . . . is usually a fact intensive inquiry.").

When somebody makes an investment recommendation meeting all five parts of the 1975 test, the relationship between the adviser and the investor is fairly characterized as one of trust and confidence. Plaintiffs repeatedly contend that the Court should assume that the Department's Interpretation means something other than what it actually says. But well-established case law provides for a presumption of regularity to the actions of government agencies. *See U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001); *10 Ring Precision, Inc. v. Jones*, 722 F.3d 711, 725 n. 79 (5th Cir. 2013). Plaintiffs' doubts about the Department's sincerity are not a sufficient reason to reject the Magistrate Judge's recommendations. Instead, as the Magistrate Judge recognized, the Department's Interpretation must be considered on its own terms.

1. Regular Basis Prong

In critiquing the Department's interpretation of the regular basis prong, Plaintiffs temporarily ignore that the Magistrate Judge, like the *ASA* court, recommended limiting this prong to advice provided on a regular basis to the same Title I or Title II plan.[11] *See* MJ FCR at 74. To the extent the Court adopts this undisputed limitation, it is no longer the case that a mutual agreement to "check-in periodically on the performance of the customer's post-rollover financial products," FACC Obj. at 16 (quoting AR 9), could support a fiduciary relationship for the Title I

[11] Plaintiffs' suggestion that a second court had "addressed" the regular basis issue, *see* FACC Obj. at 3, is inaccurate. The case Plaintiffs cite, *Carfora v. Teachers Ins. Annuity Ass'n of Am.*, 2022 WL 4538213 (S.D.N.Y. Sept. 27, 2022), does not support Plaintiffs' broader argument about "dissolving the distinction" between the types of plans. Instead, *Carfora*'s holding focused on the plaintiffs' failure to allege facts that would trigger fiduciary status during the relevant timeframe. *See id.* at *16. The decision specifically did not apply the Department's Interpretation retroactively to the facts of that case and offered no opinion as to whether it would reach the same conclusion if the Department's Interpretation were applicable.

plan from which the rollover was withdrawn. Instead, under the regulatory text, only investment advice provided or mutually expected to be provided on a regular basis regarding the same ERISA plan would satisfy this prong. *See* MJ FCR at 43-47, 53-57. It is unclear why Plaintiffs continue to dispute this significantly narrowed prong, but regardless all of their objections to the Magistrate Judge's conclusions should be rejected.[12]

Plaintiffs err in claiming that the Department's Interpretation means that "any type of ongoing relationship" imposes fiduciary obligations on any advice resulting in a sale. FACC Obj. at 23; *see also id.* at 32 ("[A]ny Investment Professional who successfully recommends the purchase of a financial product . . . will have automatically satisfied all of the elements of the five-part test, so long as there is any expectation that the parties will have any future dealings[.]"). First, the regular basis prong is only satisfied where a financial professional "[r]enders any advice . . . on a regular basis to the plan." 29 C.F.R. § 2510.3–21(c)(1)(ii)(B). Accordingly, this prong does not encompass "any type" of relationship but instead encompasses only an "ongoing advice relationship" with respect to the plan or IRA at issue. *See, e.g.*, AR 8 ("In circumstances in which the investment advice provider has been giving advice to the individual about investing . . . the advice to roll assets out of a Title I Plan is part of an ongoing advice relationship that satisfies the regular basis prong."). Relationships that do not, or are not expected to, include advice on a regular basis to the same plan would not satisfy this prong. *See, e.g.*, AR 7 ("Parties can and do, for

[12] Plaintiffs fault the Magistrate Judge for noting that some courts have observed that the regular basis prong is not inherently required by ERISA's statutory text. *See* MJ FCR at 42 (quoting *Nat'l Ass'n for Fixed Annuities*, 217 F. Supp. 3d at 23). But the Fifth Circuit's holding that ERISA's use of "fiduciary" entailed a relationship of trust and confidence and its observation that the five-part test "captured the essence of a fiduciary relationship," 885 F.3d at 365, does not inherently require that the "regular basis" prong or a particular interpretation of that prong is itself dictated by ERISA. Because the Magistrate Judge consistently focused on whether the Department's interpretation of each prong served to collectively identify relationships of trust and confidence, it committed no error.

example, enter into one-time sales transactions in which there is no ongoing investment advice relationship, or expectation of such a relationship."). Thus, this prong is not met in every instance where a salesperson may "seek[] to develop or nurture a relationship with his or her customers." FACC Obj. at 19.[13]

Second, this prong does not stand alone. Not every interaction on a regular basis will ultimately qualify as fiduciary under the five-part test. *See* AR 9 (stating that financial professionals in ongoing advice relationships are ERISA fiduciaries only "if the other prongs of the test are satisfied"). Even where this prong is met, the other prongs still must be satisfied under the regulation, and where they are, a relationship of trust and confidence is present. As discussed below, the mutual agreement prong specifically provides an opportunity for the financial professional to ensure a nonfiduciary interaction. Therefore, nothing in ERISA or the *Chamber of Commerce* decision requires that this regular basis prong be interpreted so narrowly that it never reaches conduct by people who are not ERISA fiduciaries. Instead, fiduciary status depends on all of the facts and circumstances as a whole.

Third, the Magistrate Judge reasonably concluded that "[f]irst time advice may be sufficient to confer fiduciary status," MJ FCR at 43, where all prongs of the five-part test are met. *See also id.* at 42 (concluding that *Chamber of Commerce* did not foreclose fiduciaries who "render advice, even for the first time, 'for a fee or other compensation'"). Plaintiffs' contrary assertion that a fiduciary relationship "cannot exist where there is no prior relationship" lacks support. *See*

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[13] Despite the Department's many clear statements focused on the parties' mutual expectations, Plaintiffs claim that the Magistrate Judge failed to address Plaintiffs' concern that the Department intends the regular basis prong to be triggered by a financial professional's "unilateral expectation of offering ongoing advice to a customer." FACC Obj. at 27. Any ambiguity in the language Plaintiffs quote from the preamble is addressed by the beginning of the same paragraph: "fiduciary status is determined by the facts as they exist at the time of the recommendation, including whether the parties, at that time, mutually intend an ongoing advisory relationship." AR 10.

FACC Obj. at 22. ERISA focuses on the "extent" to which someone "renders investment advice." 29 U.S.C. § 1002(21)(A). Here, the Department reasonably recognizes that "[e]very relationship has a beginning, and the five-part test does not provide that the first instance of advice in an ongoing relationship is automatically free from fiduciary obligations." AR 10. Indeed, the circumstances where the necessary "relationship of trust and confidence" can arise are necessarily diverse. For example, one court held that "a common law fiduciary relationship arises when one party places trust and confidence in the other," ultimately concluding that "a fact-finder could reasonably conclude that there was a common law fiduciary relationship between [the parties]" even though they had met "a handful of times, always at social events" but only once at the adviser's office to discuss business. *Goldsenson v. Steffens*, 2014 WL 12788001, at *83-84 (D. Me. Mar. 7, 2014). And even one-time advice can be fiduciary advice if the recipient of the advice has a reasonable expectation that the relationship is one of trust and confidence. *See, e.g.*, *Chiste v. Hotels.com L.P.*, 756 F. Supp. 2d 382, 416 (S.D.N.Y. 2006) (comparing a travel agent to "a broker, which engages in a single business transaction with the principal," and owes a resulting fiduciary obligation, including an obligation to disclose to the client "a conflict of interest or some interest that would be adverse to the client or affect the client's decision").

Fourth, Plaintiffs are mistaken that the Department's interpretation creates an "expectations-based model" regardless of whether "a relationship of trust and confidence will ever come to pass." FACC Obj. at 22 n.12. To the contrary, the five-part test examines the nature of the *current* relationship and recognizes that an expectation of an ongoing advice relationship regarding the same ERISA plan can contribute to a present relationship of trust and confidence. *See, e.g.*, AR 10 (explaining that the regular basis prong depends on "the facts as they exist at the time of the recommendation, including whether the parties, at that time, mutually intend an ongoing

advisory relationship"); *see also* AR 9 ("[W]hen the parties reasonably expect an ongoing advice relationship at the time of the rollover recommendation, the regular basis prong is satisfied.").

2. Mutual Agreement Prong

This prong requires "evaluating the parties' reasonable understandings with respect to the relationship." AR 9. The Department's interpretation of this prong is not "designed to obscure" whether the parties are entering a relationship of trust and confidence, as Plaintiffs claim, *see* FACC Obj. at 24-25, but instead to give effect to the parties' intentions. *See* AR 11 ("This interpretation will not deprive parties of the ability to define the nature of their relationship, but recognizes that there needs to be consistency in that respect."). The reason that a disclaimer asserting that financial professionals are not acting as a fiduciary would not be dispositive is that written boilerplate could contradict actual behavior. *See id.* ("[W]ritten statements disclaiming a mutual understanding . . . will not be determinative, although such statements can be appropriately considered in determining whether a mutual understanding exists").[14]

[14] Plaintiffs take issue with the Magistrate Judge's citation to 29 U.S.C. § 1110(a), which provides that, for plan administrators and other individuals operating in a pre-existing fiduciary relationship to an ERISA plan, "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void against public policy," arguing that the Department "never made this public policy argument." FACC Obj. at 27. It is true that the Department did not rely on this specific statutory provision; however, the Magistrate Judge correctly found that the Department's interpretation of the Mutual Agreement prong was reasonable in applying that same principle to ERISA's functional fiduciary test in scenarios where "the parties are de facto agreeing to partake in an advice relationship." MJ FCR at 60. Because "functional outcomes require a factual inquiry into not just the title or fee structure of the transaction, but how the financial professional is interacting with the retirement investor," *id.* at 60, the facts and circumstances test necessarily means that a disclaimer cannot be dispositive if it is buried in the fine print of an agreement and at odds with the behavior of the investment professional toward the retirement investor. On the other hand, "financial services professionals may contractually disclaim engaging in activities that trigger elements of the five-part test" so long as they "do so clearly and act accordingly to demonstrate that there is in fact no mutual agreement, arrangement, or understanding to the contrary." AR 11. There was no error in the Magistrate Judge referencing other statutory provisions of ERISA that reflect this same principle.

The Magistrate Judge reasonably concluded that the Department's interpretation "is not defective for promulgating a facts-and-circumstances analysis of any mutual agreement of the parties." MJ FCR at 59-60. The Department has simply emphasized that a financial professional may not rely on a boilerplate disclaimer while simultaneously holding themselves out as a trusted adviser. *See* AR 11 ("While financial services professionals may contractually disclaim engaging in activities that trigger elements of the five-part test, . . . they must do so clearly and act accordingly to demonstrate that there is in fact no mutual agreement, arrangement, or understanding to the contrary."). This is not an assumption that "any type of ongoing relationship . . . must be fiduciary in nature" but instead a realistic assessment of what "the parties themselves . . . expect." *See* FACC Obj. at 23.[15] The Department has emphasized repeatedly that each prong of the test must be satisfied. *See* AR 8 ("All the elements of the five-part test must be satisfied for the investment advice provider to be a fiduciary . . . , including . . . requirements that the advice be provided pursuant to a ''mutual'' agreement, arrangement, or understanding that the advice will serve as ''a primary basis'' for investment decisions."); *see also* AR 11, 12.[16] And the Department has made clear the steps a financial professional can take to prevent any misunderstanding about whether there is a mutual agreement. *See, e.g.*, AR 9 (one who "does not want to assume a fiduciary relationship or create misimpressions about the nature of its undertaking, [] can clearly disclose

[15] Plaintiffs quibble that the new exemption available to fiduciaries to permit them to receive otherwise conflicted compensation requires acknowledgement "that he or she is a fiduciary." *See* FACC Obj. at 24 n. 13. This does not permit "clarity only in the direction of [the Department's] pre-selected outcome," *id.*, because ERISA exemptions are only needed by those who meet the terms of ERISA's fiduciary definition.

[16] Plaintiffs claim that one of the Department's observations—that a financial professional who "recommends that Retirement Investors roll potential life savings out of a Title I Plan" and satisfies the "regular basis" prong "should reasonably understand that the provider will be held to fiduciary standards," AR 10—means that the other prongs are irrelevant or prejudged. FACC Obj. at 27. Plaintiffs are simply misreading this sentence, which merely concerned the reasonableness of the Department's interpretation of the "regular basis" prong, not the negation of the other prongs.

that fact to its customers up-front, clearly disclaim any fiduciary relationship, and avoid holding itself out to its . . . customer as acting in a position of trust and confidence").[17]

3. Remaining Prongs

Under the five-part test, there must also be: (1) a "*recommendation* as to the advisability of investing in, purchasing, or selling securities or other property," (2) "*individualized investment advice* . . . based on the particular needs of the plan," and (3) mutual agreement or understanding "that such services will serve as *a primary basis* for investment decisions with respect to plan assets." *See* 29 C.F.R. § 2510.3–21(c)(1) (emphasis added). These prongs further distinguish ERISA fiduciary advice from mere sales activity, and the Magistrate Judge's recommendations are a reasonable application of the plain text of the 1975 regulation. Plaintiffs' criticisms are unmoored from that text and offer no meaningful alternative.

First, Plaintiffs are concerned that the first and second of the remaining prongs practically collapse and "every recommendation to purchase a particular product satisfies the individualized advice standard" because "for stockbrokers and insurance agents who are subject to the SEC and

[17] In a further effort to mischaracterize the Magistrate Judge's analysis of the Mutual Agreement prong, Plaintiffs fault the Magistrate Judge for citing to another provision of ERISA's statutory definition of fiduciary, *see* FACC Obj. at 25 & n.14, which provides a person is a fiduciary to the extent "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." *See* 29 U.S.C. § 1002(21)(A)(i). While the parties' briefing focuses principally on 29 U.S.C. § 1002(21)(A)(ii)—which provides in the alternative to the "authority or control" prong that a person is a fiduciary "to the extent . . . he renders investment advice for a fee or other compensation"—the citation to this adjoining provision does not call into question the reasonableness of the Department's interpretation that the "Mutual Agreement" prong of the 1975 regulation can be satisfied outside of the context of an "authority or control" fiduciary, that is, where an investment professional is "render[ing] investment advice for a fee." Again, citations to other provisions of ERISA to inform the Magistrate Judge's interpretation of the issues in this case, is not error, particularly where "[f]iduciary status under ERISA is to be construed liberally, consistent with ERISA's policies and objectives." *Ariz. State Carpenters Pension Tr. Fund v. Citibank (Arizona)*, 125 F.3d 715, 720 (9th Cir. 1997).

NAIC best interest standards, all advice incidental to the sale of financial products" must be individualized. FACC Obj. at 31-32.[18] But the fact that other regulators now require stockbrokers and insurance agents to provide individualized advice should require no alteration to the Department's longstanding "individualized investment advice" prong.

Second, Plaintiffs complain that the primary basis prong (1) can apply where the investor consults with multiple professionals, and (2) typically will be met for "advice based on the individual needs of the Retirement Investor" because of a "reasonable understanding by both parties that the advice will serve as at least a primary basis for the decision." FACC Obj. at 30 (quoting AR 11). Because the 1975 regulation specifically uses "a primary basis" rather than "the primary basis," the Department reasonably concluded that consultation with multiple professionals should not create a situation where all can disclaim meeting this prong. *See* AR 11. Further, the practical context for those giving and receiving individualized advice gives rise to a reasonable expectation that the advice may be a basis for decision. *See* AR 11. Plaintiffs argue that this renders the primary basis prong "meaningless" because "it would be impossible . . . to argue it was not satisfied where the Retirement Investor has in fact accepted their recommendation to buy a particular financial product." FACC Obj. at 30-31. They are mistaken (even if Plaintiffs' business practices and regulatory obligations generally satisfy this prong). Rather, the Department must consider the practical reality that stockbrokers and insurance agents now typically provide individualized advice that may be a primary basis for decision in weighing whether a relationship

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[18] Plaintiffs do not back up their effort to reduce the primary basis and individualized investment advice prongs to merely "attributes of a fee-based Investment Professional, such as a registered investment adviser" and not "the normal function of stockbrokers and insurance agents." FACC Obj. at 29. Indeed, they cannot dispute the regulatory developments in their fields that make clear that individualized advice that may be a basis for decision is emphatically now "the normal function" of such financial professionals.

of trust and confidence is present for purposes of the ERISA fiduciary advice standard. Indeed, as discussed above, the best way for a financial professional to ensure nonfiduciary status is to expressly and consistently "make clear in its communications that it does not intend to enter an ongoing relationship to provide investment advice and act in conformity with that communication." AR 11-12.

In sum, under the Department's interpretation, each prong of the five-part test must be satisfied under the regulatory test, and together they establish a relationship of trust and confidence based on the specific facts and circumstances of the relationship. Consider Plaintiffs' hypothetical of a "single sales transaction and the expectation of a continuing relationship," *see* FACC Obj. at 20 (modifying a scenario presented by *Chamber of Commerce* plaintiffs). It is true that, under the regulatory test, each transaction with the IRA could be fiduciary if (1) the stockbroker made recommendations (2) that involved individualized advice, (3) it could reasonably be understood that the advice could serve as a primary basis for decision, (4) the circumstances demonstrated a mutual understanding that the advice would be a primary basis for decision, and (5) the stockbroker had already been providing investment advice regarding this IRA on a regular basis, or the parties had a mutual expectation of an ongoing advice relationship regarding this same IRA, and (6) the transaction resulted in a fee or other compensation to the stockbroker. As this application shows, the elements make sense because when they are met, the stockbroker has held himself out as someone in a position of trust and the investor is likely to act accordingly. But by contrast, under this same standard the stockbroker can make clear that there was no fiduciary relationship: he "can clearly disclose that fact to its customers up-front, clearly disclaim any fiduciary relationship, and avoid holding itself out to its . . . customer as acting in a position of trust and confidence." AR 9.

C. Plaintiffs' Attempt to Draw a Clear Line Between Sales Commissions and Investment Advice for a Fee Misreads *Chamber of Commerce* and ERISA's Clear Text, as the Magistrate Judge Correctly Found.

Under ERISA, a person is an investment advice fiduciary to the extent that 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[.]" 29 U.S.C. § 1002(21)(A)(ii). In their briefing before the Magistrate Judge and now again before this Court, Plaintiffs have continually sought to argue that insurance brokers who receive sales commissions are effectively *per se* excluded from fiduciary status because such commissions are not "investment advice for a fee or other compensation." *See, e.g.,* FACC Obj. at 6; *id.* at 4 (decrying the Department's supposed "attempt to broaden the definition of fiduciary to encompass ordinary salespeople who only provide advice incidental to the sale of products"); *id.* at 35 (suggesting that the Department is engaged in an "attempted obliteration of the historical divide between commissioned salespeople and fee-based advisers" based on Plaintiffs' reading of the *Chamber* opinion); FACC Br. at 29 (same); FACC SJ Reply Br. at 18 (arguing that the Department's interpretation whereby "a salesperson's commission constitutes a fee for investment advice . . . flies in the face of the Fifth Circuit's holding."). In short, Plaintiffs push for an extraordinarily restrictive reading of ERISA (and expansive reading of *Chamber of Commerce*) that would treat as compensation only a fee paid exclusively for ongoing investment advice, such as a regular investment retainer, *see* FACC SJ Reply Br. at 18, and would—for all practical purposes—exclude commissions earned by insurance brokers entirely from the reach of ERISA's functional fiduciary test.

None of these arguments holds water. As an initial matter, the Fifth Circuit's holding did not wall off commissions-based compensation from ERISA fiduciary investment advice. Instead, as the Magistrate Judge expressly recognized, *see* MJ FCR at 50, *Chamber of Commerce*

approvingly quoted the preamble to the 1975 Rule, which stated that the term "fee or other compensation, direct or indirect" "should be deemed to include all fees or other compensation incident to the transaction in which the investment advice to the plan has been rendered or will be rendered" and "'may include' brokerage commissions" where the five-part test is met. 885 F.3d at 373 (quoting 40 Fed. Reg. at 50842); *see also* 40 Fed. Reg. at 50842 (including as covered fees "brokerage commissions, mutual fund sales commissions, and insurance sales commissions"). Indeed, the Department specifically rejected Plaintiffs' proposed approach in a 1983 advisory opinion. There, the requester had asked that broker-dealers not be deemed investment advice fiduciaries "unless the broker-dealer provides investment advice for distinct, nontransactional compensation." Advisory Opinion 83-60A at 1 (Nov. 21, 1983). The Department rejected this request, concluding that where the five-part test is met "under the particular facts and circumstances," then "it may be reasonably expected that, even in the absence of a distinct and identifiable fee for such advice, a portion of the commissions paid to the broker-dealer would represent compensation for the provision of such investment advice." *Id.* at 3. The Fifth Circuit quoted this language from the 1983 advisory opinion with approval, see 885 F.3d at 373-74,[19] and the Interpretation challenged here makes no change to this longstanding, reasonable interpretation of compensation triggering ERISA fiduciary status. As the Magistrate Judge noted, "[t]he DOL's New Interpretation does not stray from previous, approved iterations of the five-part test," MJ FCR

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[19] Other courts have also widely supported this conclusion. *See, e.g.*, *Farm King Supply, Inc. v. Edward D. Jones & Co.*, 884 F.2d 288, 291-92 (7th Cir. 1989) (ERISA investment advice includes "stock brokers and dealers who recommend certain securities and then participate in the acquisition . . . of those securities and receive a commission for their services"); *Eaves v. Penn*, 587 F.2d 453, 458 (10th Cir. 1978) (ERISA investment advice "includes . . . stock brokers or dealers who recommend certain securities and then participate in the acquisition or disposition of those securities and receive a commission for their services"); *Ellis v. Rycenga Homes, Inc.*, 484 F. Supp. 2d 694, 710 (W.D. Mich. 2007) (rejecting as "untenable" broker's argument that it was paid only "commissions for sales, not a fee for investment advice" and that "the advice . . . was free").

at 50, rejecting in the process the same "scattered citations to the Fifth Circuit's Chamber of Commerce decision," *id.* at 51, that Plaintiffs now regurgitate in their briefing before this Court.

In addition to rejecting Plaintiffs' cherry-picked quotations to *Chamber of Commerce*, the Magistrate Judge also supportably found that the Plaintiffs' proffered distinction between sales commissions and advice for a fee is at odds with the text of ERISA itself, which provides that a party is a fiduciary if it "renders investment advice for a fee or other compensation, direct or indirect." 29 U.S.C. § 1002(21)(A)(ii). The Magistrate Judge noted that "[t]he expansive choice of investment advice 'for other compensation' indicates an intent to cover any transaction where the financial professional may receive conflicted income if they are acting as a trusted adviser." MJ FCR at 50. In that respect, as the Magistrate Judge recommended, the Department's interpretation "does not categorically cover nor exclude specific financial professionals based on their fee structure, instead looking to the relationship and parties' understandings of the reasons for the compensation to determine fiduciary status to determine if a fee was given for advice." *Id.* at 51-52. And in any event, it would clearly be illogical for financial professionals to evade ERISA coverage simply by structuring their compensation differently. Because the Magistrate Judge's conclusions on these issues were faithful to *Chamber of Commerce* and the text and structure of ERISA, Plaintiffs' objections to the contrary should be overruled.[20]

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[20] Nor did the Magistrate Judge err in drawing from other cases to inform her reading of ERISA, and Plaintiffs' attempt to distinguish those cases fails. For example, with respect to *Am. Fed'n of Unions Loc. 102 Health & Welfare Fund v. Equitable Life Assur. Soc. of the U.S.*, 841 F.2d 658, 663 (5th Cir. 1988)— in which the Fifth Circuit held that an insurance broker "is a fiduciary with respect to his commissions" that he earned as plan administrator—Plaintiffs appear to suggest that the insurance broker in that case was operating as plan administrator at the time, which renders the case inapposite. But all that proves is that the facts and circumstances of a particular transaction, and an insurance agent's role vis-à-vis the particular retirement investor or ERISA plan, are relevant to determining whether that individual is a fiduciary, a point on which Defendants wholeheartedly agree. Yet insofar as Plaintiffs ask this Court to adopt its extreme position that insurance sales commissions can *never* be "investment advice for a fee" under ERISA, *American*

(*footnote continued on next page*)

D. The Major Questions Doctrine Does Not Apply, and the Elements of the Department's Interpretive Rule That Were Not Subject to the Recommended Vacatur Are Not Arbitrary and Capricious.

Aside from their overwrought argument that the Magistrate Judge erred in finding that the Department had not exceeded its authority in promulgating the portions of the New Interpretation for which the Magistrate did not recommend vacatur—an argument that badly misreads *Chamber of Commerce* and ERISA—Plaintiffs also fail in their effort to find fault with the Magistrate Judge's Recommendations on their claim that the remaining elements of the Department's interpretation are arbitrary and capricious under the APA. In their brief before this Court, Plaintiffs offer two objections to the Magistrate Judge's findings, neither of which is persuasive.

First, Plaintiffs' invocation of the Major Questions Doctrine—a Hail Mary effort to circumvent standard principles of judicial statutory interpretation—should be rejected, as the Magistrate Judge correctly recommended. That doctrine is limited to "certain extraordinary cases," *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022), such as those involving "decisions of vast economic and political significance", *id.* at 2605; assertions of "extravagant statutory power over the national economy", *id.* at 2609; or assertions of "highly consequential power beyond what Congress could reasonably be understood to have granted." *Id.* The doctrine does not otherwise displace general statutory interpretation principles, including that courts ordinarily may not "impos[e] limits on an agency's discretion that are not supported by the text." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2381 (2020).[21]

The Magistrate Judge correctly concluded that "the authority that the DOL seeks to exert

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Federation of Unions Local 102 clearly suggests otherwise.

[21] The Magistrate Judge also correctly noted that "[t]he Middle District of Florida did not invoke the Doctrine in the ASA case to avoid analyzing the policy referenced in FAQ 7," MJ FCR at 34, although the same Major Questions argument was pressed by the *ASA* Plaintiffs in briefing before that court.

here is not novel or based in any 'ancillary' provision in ERISA." MJ FCR at 34 (citing *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."); *see also West Virginia*, 142 S. Ct. at 2602, 2610, 2613 (concluding that EPA had identified for its regulation a statutory "backwater" that had been "used . . . only a handful of times since the enactment of the statute.") Instead, as the Magistrate Judge concluded, Congress through ERISA "granted the DOL broad authority to issue technical terms relating to fiduciary status," and "the challenged agency action includes the DOL's restoration of the previous five-part test, withdrawal of the Deseret Letter, and modification of the factors that the DOL will review in determining fiduciary status"—each of which clearly falls within the authority granted to the Department by Congress. MJ FCR at 34. The Magistrate also correctly noted that the Department had exercised its rulemaking and interpretative authority in this very space going back to 1975, consistent with the Department's "express authority to publish exemptions for Titles I and II and to define 'accounting, technical and trade terms' used in ERISA." MJ FCR at 35; *see also id.* at 34 ("The DOL's actions fall within the broad grant of Congressional authorization, and it is similar to previous actions such as the DOL's initial 1975 regulation and clarifying opinion in the Deseret Letter."). Additionally, the Magistrate Judge correctly noted that "[s]ince ERISA's enactment, the DOL has been expressly granted the authority to issue PTEs for Title I plans; and, in 1984, the President and Congress granted the DOL the ability to issue PTEs for Title II plans." MJ FCR at 35. Therefore, the Magistrate Judge correctly found that "the New Interpretation is directly within the core competencies of the DOL." *Id.*

The Magistrate Judge also rejected Plaintiffs' hyperbolic argument that through this interpretive rule the Department has asserted a "highly consequential power" or suddenly sought to regulate "an entire industry of financial salespeople." FACC SJ Reply Br. at 37. Congress has

long given the Department responsibility to address those who are fiduciaries to Title I or Title II ERISA plans based on the provision of "investment advice." As discussed above, that has never categorically excluded those who consider themselves salespeople. The 1975 five-part test, from its inception, applied not only to those who held themselves out as SEC fiduciaries, but also to broker-dealers and insurance agents who met the terms of the test. *See supra*, Arg. § III(A)(1). The Department's 2020 Interpretation simply applies that same five-part test to specific market transactions, and requires analysis of all the facts and circumstances to determine whether the parties intend to enter a fiduciary relationship.

Nor does the Department's Interpretation substantially restructure a significant portion of the economy like the complete reorganization of American energy infrastructure, *West Virginia*, 142 S. Ct. at 2604; changing the terms of 80% of American residential leases, *Alabama Ass'n of Realtors v. HHS*, 141 S. Ct. 2485 (2021); unilaterally rescinding physicians' state-issued licenses to practice medicine, *Gonzales v. Oregon*, 546 U.S. 243 (2006); or regulating the entire tobacco industry, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). The Department's action also has less impact than the Department of Health and Human Services (HHS) rule the Supreme Court recently upheld in the face of a major questions doctrine challenge. *See Biden v. Missouri*, 142 S. Ct. 647 (2022). Plaintiffs challenged that HHS rule, requiring COVID-19 vaccinations for approximately 10.4 million healthcare workers at facilities accepting federal Medicare or Medicaid funds, invoking the major questions doctrine. *See, e.g.*, *Louisiana v. Becerra*, 20 F.4th 260, 262 (5th Cir. 2021) (per curiam). However, the Supreme Court did not apply the doctrine, even though the rule was to have total costs of approximately $1.38 billion in the first year, 86 Fed. Reg. 61555, 61602, 61609 (Nov. 5, 2021), and went further than any condition HHS had previously placed on funding for the purpose of infection control, *Missouri*,

142 S. Ct. at 653.

Here, by contrast, even if the Major Questions doctrine could be reduced to a simple dollar measure, the estimated compliance cost of the Department's Interpretation is roughly 6% of that for the rule at issue in *Missouri*. *See* AR 52 (estimating $87.8 million in the first year, and "annualized to $80.1 million per year" over a ten-year period). Plaintiffs continue to argue that "[t]he DOL estimates that the rollovers from Title I ERISA plans to IRAs would approach $2.4 trillion cumulatively from 2016 through 2020 alone," FACC Obj. at 44, but the Magistrate Judge appropriately rejected relying on this figure because "[w]hile the parties note that the rollover market cumulatively approached $2.4 trillion in 2020, the economic impact looks primarily to the costs imposed on individuals covered by the statute—not simply the total amount of assets affected." MJ FCR at 34; *see also BST Holdings, L.L.C.*, 17 F.4th at 617 (holding that the Major Questions Doctrine applies when compliance costs exceed $3 billion); *Brown v. U.S. Dep't of Educ.*, 2022 WL 16858525, at *11 (N.D. Tex. Nov. 10, 2022) (holding major questions doctrine applies when compliance costs exceed $400 billion); *Biden v. Nebraska*, 143 S. Ct. 2355, 2372 (2023) (suggesting the major questions doctrine applies in a case "to release 43 million borrowers from their obligations to repay $430 billion in student loans"). And critically, as the Magistrate Judge concluded, because "ERISA necessarily involves substantial assets, as Americans save billions of dollars annually in ERISA plans," Plaintiffs' argument that "absolute asset values that are regulated were the dispositive factor for the application of the Major Questions Doctrine" would mean that "the doctrine would likely apply to *any* DOL regulation under ERISA solely due to the nature of the retirement industry." MJ FCR at 35 (emphasis in original). The Magistrate Judge thus logically found that such an interpretation, which would essentially nullify any Department of Labor rulemaking under ERISA, casts the Major Questions Doctrine adrift far

beyond its moorings.

Beyond the Major Questions Doctrine, Plaintiffs further argue that the Department's interpretation is "unreasonable under any standard," including the deferential framework established in *Chevron, USA, Inc. v. Nat. Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and that the Magistrate Judge erred in concluding otherwise. Plaintiffs argue the Department's interpretation "rewr[o]te the meaning of 'investment advice fiduciary' without reference to the common law trust and confidence standard [and] not only exceeded its statutory authority but [is] also unreasonable in the context of the other prongs of ERISA's fiduciary definition." FACC Obj. at 36.

The problem with this argument is that it completely ignores that the Department's interpretation *does explicitly* focus on the parties' relationship of trust and confidence. Here, the Department stated on a number of occasions in the preamble and the FAQs that a one-time rollover recommendation, without other "objective evidence" demonstrating that the parties "mutually intend an ongoing advisory relationship," AR 9-10, would not "be considered fiduciary investment advice under the five-part test set forth in the Department's regulation." AR 7; *see also* AR 1351 (FAQ 7) ("A single, discrete instance of advice to roll over assets from an employee benefit plan to an IRA would not meet the regular basis prong of the 1975 test."). This approach—under which "the Department intends to consider the *reasonable* understandings of the parties based on the totality of the circumstances" to determine whether a fiduciary relationship exists—is entirely consistent with the approach taken by the Fifth Circuit. AR 1351 (FAQ 8). In other words, to the extent that the Fifth Circuit suggested that a special relationship of trust and confidence between parties "is the *sine qua* non" of a fiduciary relationship as used in ERISA's definition of "fiduciary investment-advice," the Department's interpretation here is consistent with that reading. *Chamber*

of Commerce, 885 F.3d at 370-71.

The Magistrate Judge recognized that, as to the Interpretation's fidelity to the common law standard, the Department argues "that the New Interpretation is 'in line with the Fifth Circuit's interpretation of ERISA's text' and consistent with the *sine qua non* of a fiduciary relationship—that of trust and confidence between parties. Defs.' Br. 46-51." MJ FCR at 38. Despite this clear language in Defendants' briefing, and in the Preamble to the Exemption, Plaintiffs double down on their argument that the Department has not paid due attention to the "trust and confidence" standard. While Plaintiffs might prefer not to take the Department's rule on its own terms with respect to this issue—or perhaps to question the Department's "candor" on this issue, *see* FACC Obj. at 46—the Magistrate Judge was not obliged to read hidden, unsupported motives into the clear text of the regulation she was evaluating, nor did she err in finding that the clear text of the Interpretation corresponds to a relationship of trust and confidence, while recognizing that the determination of who is a fiduciary is a fact-intensive question. *See* MJ FCR at 41 ("Utilizing facts and circumstances to determine fiduciary status is not a novel concept. Courts routinely review the underlying record to determine whether a fiduciary relationship is established, regardless of whether one party attempts to contract out their fiduciary status. *See, e.g., Santomenno ex rel. John Hancock Tr. v. John Hancock Life Ins. Co. (U.S.A.)*, 768 F.3d 284, 299 (3d Cir. 2014); *Hamilton v. Carell*, 243 F.3d 992, 1000 (6th Cir. 2001)." Again, Plaintiffs' argument essentially boils down to a claim that the Department doesn't mean what it says in its regulatory enactments, but the Magistrate Judge did not err in rejecting this fanciful contention.

Plaintiffs fail to demonstrate, on any standard of review, that the Magistrate Judge erred in recommending that Plaintiffs' arbitrary and capricious claims be rejected, and the District Court should overrule Plaintiffs' objections.

IV. THE MAGISTRATE JUDGE'S RECOMMENDED REMEDY WAS CAREFULLY TARGETED AND APPROPRIATE.

The Magistrate Judge appropriately started from the premise that "[t]he scope of judicial review under the APA is limited '[t]o the extent necessary to the decision . . . ,' and the APA directs that the 'reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" MJ FCR at 66 (quoting 5 U.S.C. § 706(2)(A)). Additionally, citing Fifth Circuit precedent, the Magistrate Judge noted that where an agency rule "may sensibly be given independent life" because only a part of a rule is invalid, the court should only set aside the invalid portion." *Id.* at 67 (quoting *Cath. Soc. Serv. v. Shalala*, 12 F.3d 1123, 1128 (D.C. Cir. 1994)).

Applying these principles, the Magistrate Judge determined that a partial vacatur was appropriate. Specifically, she found that:

> The Court should vacate the portions of PTE 2020-02's text and preamble that allow consideration of Title II investment advice relationships when determining Title I fiduciary status, including the New Interpretation's (i) allowance of review that a single rollover "can be the beginning of an ongoing advice relationship" to Title II plans, PTE 2020-02, 85 Fed. Reg. at 82806; (ii) inclusion of potential "future, ongoing relationships" to Title II plans, *id.* at 82805; and (iii) conclusion that "an ongoing advisory relationship spanning both the Title I Plan and the IRA satisfies the regular basis prong," *id.* at 82807; these provisions exceed the DOL's authority under ERISA and constitute arbitrary and capricious interpretations of the five-part test to determine whether financial professionals are acting as "investment advice fiduciaries."

MJ FCR at 74. Defendants have not objected to the Magistrate Judge's recommended relief.

Plaintiffs, however, raise two distinct arguments—apart from referencing their unpersuasive arguments that the entire interpretation should be vacated—in an effort to call into question the Magistrate Judge's recommended relief. Neither has merit.

First, Plaintiffs take issue with the Magistrate Judge's conclusion that "the New Interpretation can stand alone without" the vacated provisions, by "covering those financial

professionals who work regularly with a specific Title I plan and also give rollover recommendations to that same Title I plan in a fiduciary manner (or working regularly with a Title II plan and giving advice to that same Title II plan)." *Id.* at 70. Plaintiffs do not make any serious attempt to argue that the Department's interpretation of other elements of the five-part test—such as the "primary basis" or "mutual agreement" prongs—could not operate independently of the severed provisions of the rule. Instead, their argument appears to be that because the Interpretation is concerned with rollovers, the vacated portions are so central and important that the Department "should be required" to promulgate a revised interpretation "clearly via new rulemaking," as a precondition for offering an interpretation that is wholly consistent with the existing rule. FACC Obj. at 47-48.

As an initial matter, Plaintiffs shoot themselves in the foot: if the central issue in the Interpretation has been vacated in their favor, it is not clear why they spend 50 pages seeking more expansive relief. Because the Department's interpretation of the remaining elements of the five-part test are consistent with the Department's prior regulations and with ERISA, and Plaintiffs make no effort to explain why those provisions cannot stand alone following the severing of the vacated portions of the rule, the Court should overrule Plaintiffs' objections. Finally, even if the vacatur in practical terms affects a significant portion of the rule, courts are obliged to "decide cases on the best and narrowest grounds available," and should resist using a machete where a scalpel will do. *United States v. Patel*, 2022 WL 17246941, at *1 n.1 (5th Cir. Nov. 28, 2022); *see also*, *e.g.*, *Handley v. Chapman,* 587 F.3d 273, 281 (5th Cir. 2009) (noting that APA review is "a narrow and highly deferential standard"). Moreover, as the Magistrate Judge further noted, this "crafted relief" would align with the relief ordered by the *ASA* court in the Middle District of Florida, which "tailored the remand with vacatur of the policy only to the specific terms in one

FAQ, while upholding other portions of the rule because those latter portions were within the scope of ERISA and the five-part test," MJ FCR at 71. That court's limited vacatur, the Magistrate Judge found, "demonstrates a likelihood that the New Interpretation is able to have a meaningful effect without vacatur of the entire rule." *Id.*

Second, Plaintiffs fault the Magistrate Judge for failing to recommend that the Court "enter a permanent injunction against the enforcement of the New Interpretation." FACC Obj. at 48. But the Magistrate Judge appropriately noted that an injunction is a "drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010); *see also id.* at 165-66 ("If a less drastic remedy (such as partial or complete vacatur of [an agency's] decision [is] sufficient to redress respondents' injury, no recourse to the additional and extraordinary relief of an injunction was warranted."). While Plaintiffs note that, in some instances, courts will "couple final judgments vacating an agency action with a permanent injunction" against enforcement of the rule, *see* FACC Obj. at 48, they fail to show that this is the norm or otherwise required in this instance given the Magistrate Judge's detailed findings that the remaining portions of the Interpretation could be severed from the issues subject to vacatur, and the clear teaching of *Geertson Seed Farms* that permanent injunctions should not be issued as a matter of course where more tailored relief remains available. The Magistrate Judge did not err in declining to enter a permanent, nationwide injunction against the Interpretation at issue.

CONCLUSION

For the foregoing reasons, the District Court should overrule Plaintiffs' objections to the Magistrate Judge's Report and Recommendations in this case and adopt the Magistrate Judge's reasoning and partial vacatur of the Department's interpretation.

Dated: September 13, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 13, 2023, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which sent e-mail notification of such filing to all CM/ECF participants.

/s/ Alexander N. Ely
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