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

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| FEDERATION OF AMERICANS FOR CONSUMER CHOICE ET AL.,<br><br>Plaintiffs,<br><br>v.<br><br>JULIE A. SU, ACTING SECRETARY OF LABOR, and UNITED STATES DEPARTMENT OF LABOR,<br><br>Defendants. | Civil Action No. 3:22-cv-00243-K-BT |

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

In this action, Plaintiffs challenge an Interpretive Rule promulgated by the Department of Labor in 2020, which "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. As detailed in the Department's brief in opposition to Plaintiffs' Objections to the Findings, Conclusions, and Recommendations, *see* ECF No. 74, the Magistrate Judge engaged in a reasoned analysis of the text of the Interpretive Rule at issue, the text of the 1975 regulation which that rule interprets, and the text of ERISA itself, and rejected Plaintiffs' unfounded argument that the Interpretive Rule means something other than what it says. *See* Findings, Conclusions, and Recommendations of the United States Magistrate Judge (hereinafter "MJ FCR"), ECF No. 69. Now, in a last-ditch effort to convince this Court to adopt Plaintiffs' extreme and atextual reading of ERISA and the 1975 five-part test, Plaintiffs erroneously claim that their challenge to the Interpretive Rule is somehow proved by the Notice of Proposed Rulemaking published by the Department in the Federal Register on November 3, 2023, *see* 88 Fed. Reg. 75890.

Plaintiffs' supplemental brief argues that the Department's new Notice of Proposed Rulemaking somehow reveals the Department's true intentions for its 2020 Interpretive Rule. Plaintiffs are plainly wrong. The new Notice of Proposed Rulemaking would modify the 1975 regulation in significant ways, whereas the Magistrate Judge concluded that—with one undisputed exception—the 2020 Interpretive Rule at issue in this case reasonably interprets the text of the 1975 regulation. The Proposed Rule, of course, is not final agency action, is subject to change based on input from interested parties during the notice-and-comment period, and may or may not ultimately be finalized. Therefore, while Plaintiffs preview their planned attacks on the Proposed Rule if it is adopted, any dispute over that proposal is premature and the Department need not respond in this litigation. Regardless, the 2020 Interpretive Rule that is currently in effect must be analyzed on its own terms. If anything, the Department's promulgation of a Proposed Rule that would directly revise the 1975 regulation undermines Plaintiffs' effort to prove that the 2020 Interpretive Rule has an expansive meaning beyond its application of the text of the 1975 regulation to current circumstances in the marketplace.

For the reasons highlighted in the Department's earlier brief, and those that follow, 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.

## I. THE DOL'S INTERPRETIVE RULE IN THIS LITIGATION SHOULD BE EVALUATED ON ITS OWN TERMS.

In their supplemental brief, Plaintiffs address a Noticed of Proposed Rulemaking published in the Federal Register on November 3, 2023, under which the Department of Labor proposes to revise the regulation implementing ERISA's definition for an Investment Advice Fiduciary. *See* 88 Fed. Reg. 75890 *et seq*. While claiming that the fight over this Proposed Rule "is for another day," FACC Supp. Br. at 2, ECF No. 78, Plaintiffs nonetheless devote their entire brief to arguing that the 2023 Proposed Rule is essentially the same as both the 2020 Interpretive Rule and the 2016 Fiduciary Rule that was vacated by the Fifth Circuit. But the Interpretive Rule at issue *in this case* merely interprets the text of the 1975 regulation in the context of discrete market transactions—rollovers from Title I ERISA plans to Title II ERISA plans. It is axiomatic that regulations are interpreted "in the same manner as statutes, looking first to the regulation's plain language." *United States v. Fafalios*, 817 F.3d 155, 159 (5th Cir. 2016). Plaintiffs cannot rely on a proposal to amend the definition in the 1975 regulation at some time in the future to bolster their challenge to the Department's current interpretation of the existing regulatory definition.

As an initial matter, the Notice of Proposed Rulemaking is, of course, only a proposed rule. Public comments on the proposed rule were due by January 2, 2024.[1] The Department held a public hearing on the Proposed Rule over two days on December 12 and 13, 2023, and the timeline for publication of any final rule is uncertain.[2] The Proposed Rule is not final agency action and only any Final Rule that resulted from this rulemaking, once published, could be challenged in court. *See Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.,* 710 F.2d 842, 846 (D.C. Cir. 1983) ("[T]he issuance of a notice of proposed rulemaking, or other preliminary proceedings

[1] Plaintiffs highlight the fact that Plaintiff FACC has already submitted a comment letter opposing the Proposed Rule, raising many of the same arguments as they make in their supplemental brief and asserting that the Proposed Rule, if adopted, would likely be challenged in court. *See* FACC Supp. Br. at 2 n.5.

[2] A total of 43 different groups, including Plaintiff FACC, testified at these hearings. Transcripts and videos from these hearings are available at: https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AC02-hearing

undertaken to promote a proposed rule, often will not be ripe for review because the rule may or may not be adopted"); *Peoples Nat'l Bank v. Off. of Comptroller of Currency of the U.S.*, 362 F.3d 333, 337 (5th Cir. 2004) (an agency action that "does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action" is not final for purposes of this requirement).

In any event, Plaintiffs' attempt to invoke the Proposed Rule to bolster the challenge they bring in this case to the 2020 Interpretative Rule only highlights the weakness of their claims. On the one hand, Plaintiffs repeat their baseless argument that the 2020 Interpretive Rule at issue in this case "rob[s] the five-part test of its settled meaning to get to the same place as the 2016 Fiduciary Rule," FACC Supp. Br. at 1. On the other hand, Plaintiffs describe the Proposed Rule as doing away with "key requirements of the five-part test (regular basis, mutual agreement, and primary basis)" and argue that it "is materially indistinguishable from the 2016 Fiduciary Rule the Fifth Circuit emphatically rejected." *Id.* If Plaintiffs were correct that the 2020 Interpretive Rule at issue in this case, and the elements of it that survived the Magistrate Judge's recommended partial vacatur, already placed the Department in "the same place as the 2016 Fiduciary Rule," *id.*, it would be pointless for the Department to undertake a new rulemaking that, in Plaintiffs' estimation, has precisely the same purpose and effect.

Moreover, by arguing that the Proposed Rule is "materially indistinguishable" from the 2016 Rule because it proposes eliminating the regular basis, mutual agreement, and primary basis prongs of the 1975 Regulation, FACC Supp. Br. at 2, Plaintiffs highlight a crucial difference between the Interpretive Rule they have actually challenged here and the Proposed Rule: the test under the current rule *does contain those prongs*.[3] And under the plain text of the 2020 Interpretive Rule, "[t]he 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; *see also* 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.").

The Department's decision to propose a new and different rule and solicit the views of interested parties on that proposal provides no basis to infer hidden motives or implausible meanings in the 2020 Interpretive Rule at issue here particularly where 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, and the Proposed Rule has no bearing on the plain text of the regulation at issue in this case. Put another way, Plaintiffs fault the Magistrate Judge for having "bought into and relied upon the DOL's assurances," FACC Supp. Br. at 3, but in fact the Magistrate Judge interpreted the text of the regulation to evaluate its lawfulness, which is the first order of business for judges, who "must be faithful to text." *See Greenbrier Hosp., L.L.C. v. Azar,* 974 F.3d 546, 547 (5th Cir. 2020). By contrast, Plaintiffs encourage the Court to ignore the text and inquire into "the mindset of the DOL," FACC Supp. Br. at 3, treacherous waters that

[3] Moreover, Plaintiffs' argument that the Proposed Rule eliminates the regular basis prong is not accurate. Rather, the Proposed Rule shifts the focus of the Regular Basis element, proposing that an individual would be a fiduciary if, *inter alia*, "[t]he person either directly or indirectly (e.g., through or together with any affiliate) makes investment recommendations to investors *on a regular basis as part of their business*." *See* 88 Fed. Reg. 75890 (emphasis added).

courts should avoid when engaging in statutory or regulatory interpretation. *Cf. Bilski v. Kappos*, 561 U.S. 593, 608 (2010) (noting that "established rule[s] of statutory interpretation cannot be overcome by judicial speculation as to the subjective intent of various legislators").

## II. PLAINTIFFS' REMAINING ARGUMENTS ARE MERITLESS, AND THE COURT SHOULD ADOPT THE MAGISTRATE JUDGE'S RECOMMENDATIONS AND PARTIAL VACATUR.

Apart from the impropriety of relying on the Proposed Rule generally (in effect, invoking non-final agency action to support a challenge to a separate rule), Plaintiffs' remaining arguments in their supplemental brief provide no basis for rejecting the Magistrate Judge's Recommendations. First, they regurgitate their suggestion that the Department is somehow circumventing the Fifth Circuit's *Chamber of Commerce* decision, and even more brazenly—yet no less baselessly—argue that the Department does not "believe[] itself to be constrained by ERISA." *See* FACC Supp. Br. at 3. As repeatedly explained, the Department in fact took special pains to address the Fifth Circuit's concerns in promulgating the Interpretive Rule so as to bring the Department's regulation of fiduciary investment advice in line with the Fifth Circuit's interpretation of ERISA's text. Apart from the Magistrate Judge's proposed vacatur of one aspect of the 2020 Interpretive Rule's treatment of the regular basis prong, the Magistrate Judge found the rest of the 2020 Interpretive Rule consistent with both ERISA and the 1975 regulation, as well as with *Chamber of Commerce*. *See* MJ FCR at 41, 43, 49, 62-63.

Second, Plaintiffs again repeat their argument that the 2020 Interpretive Rule "fails to focus on the key issue of whether there exists a special relationship of trust and confidence." FACC Supp. Br. at 4. This is wrong, for as the Magistrate Judge recognized, the 2020 Interpretive Rule specifically applied the 1975 regulation's five-part test with consideration of that very issue. *See, e.g.,* MJ FCR at 43 ("the New Interpretation appears consistent with ERISA insofar as it covers rollover relationships of trust and confidence"); AR 7 (noting that Department's Interpretation "is more aligned with both the facts and circumstances approach taken by Congress in drafting the Act's statutory functional fiduciary test, and with an approach centered on whether the parties have entered into a *relationship of trust and confidence*").

Third, Plaintiffs' continued effort to insulate insurance agents entirely from ERISA's functional fiduciary standard, including through Plaintiffs' posited ironclad distinction between sales commissions and investment advice for a fee, FACC Supp. Br. at 6-7, is not supported by ERISA's text or the *Chamber of Commerce* decision. 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. *See Chamber of Commerce v. Dep't of Labor*, 885 F.3d 360, 373 (5th Cir. 2018) (quoting 40 Fed. Reg. 50842); *see also* 40 Fed. Reg. 50842 (Oct. 31, 1975) (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, and the 2020 Interpretive Rule makes no change to this longstanding, reasonable interpretation of compensation triggering ERISA fiduciary status.

Fourth, Plaintiffs invoke the Proposed Rule in an effort to bolster their flimsy argument that this case calls for application of the Major Questions Doctrine. *See* FACC Supp. Br. at 8. But that doctrine is limited to "certain extraordinary cases," *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022), such as where an agency invokes a little-used provision of a statute, or operates in an area not traditionally subject to regulation by that agency. *See 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."). Here, Plaintiffs rely on two arguments to invoke the Major Questions Doctrine, neither of which holds water.

First, as the Magistrate Judge correctly 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 Judge 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. Far from relying on a statutory "backwater," ERISA 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," which has never categorically excluded those who consider themselves salespeople.

Second, Plaintiffs rely on the Regulatory Impact Assessment for the *proposed rule*, and argue that it illustrates the economic ramifications of the *current rule*. *See* FACC Supp. Br. at 9. This argument simply mixes apples and oranges: the 2020 Interpretive Rule has been in effect for nearly three years, and Plaintiffs have not shown any regulatory impact comparable to that projected for the Proposed Rule. Just as Plaintiffs cannot rely on the proposed rule to change the currently-operative regulatory definition interpreted by the current rule, they cannot rely on economic projections for the proposed rule to suggest economic impact for the current rule. For these reasons, the Major Questions Doctrine is inapplicable.

**CONCLUSION**

For the reasons identified above, and those included in the Department's prior briefing, the Court should overrule Plaintiffs' Objections.

Dated: January 5, 2024

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that on January 5, 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will automatically send notifications of this filing to all attorneys of record.

*/s/ Alexander N. Ely*
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