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

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 MARTIN J. WALSH, SECRETARY OF LABOR, *Defendants.*	§ § § § § § § § § § § § § § § § § § §	C.A. No. 3:22-cv-00243-K-BN

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

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Plaintiffs[1] file this supplemental brief and state:

I. INTRODUCTION

From the beginning of this lawsuit, Plaintiffs alleged that in promulgating its New Interpretation of the five-part test the DOL was "[p]ouring the same old wine into a new bottle"[2] and hoping for a different result. Specifically, the DOL has been attempting since 2010, through successive rulemakings, to impose a fiduciary duty on stockbrokers and insurance agents when selling retirement products to ERISA plan members and IRA owners. The first iteration of these efforts, the 2016 Fiduciary Rule, was vacated by the Fifth Circuit in *Chamber of Commerce*,[3] which held that the imposition of a fiduciary relationship in ordinary sales transactions is contrary to ERISA, and the DOL has no authority to override the intent of Congress by regulatory fiat. Unhappy with the Court's ruling, the DOL countered with the New Interpretation in 2020. When Plaintiffs challenged the New Interpretation in this action, arguing it robbed the five-part test of its settled meaning to get to the same place as the 2016 Fiduciary Rule, the DOL repeatedly argued that Plaintiffs were misreading it.

While it was denying the New Interpretation was a covert attack on the five-part test and *Chamber of Commerce*, the DOL was also preparing another full-frontal assault, and

[1] Defined terms and conventions used herein shall have the same meaning as in Plaintiffs' Objections to Findings, Conclusions, and Recommendation of the United States Magistrate Judge (the "Objections") [Doc. 72] and supporting brief ("Plaintiffs' Brief") [Doc. 73.] Unless otherwise stated, all emphases are supplied by counsel.

[2] Doc. 1 at 3-4.

[3] *Chamber of Commerce of United States of Am. v. United States Dep't of Labor*, 885 F.3d 360 (5th Cir. 2018).

on October 31, 2023, it unveiled a new proposed rule that again tries to redefine who is an investment advice fiduciary under ERISA (the "Proposed Rule"). 88 Fed. Reg. 75890, *et seq*. (Nov. 3, 2023).[4] Like the 2016 Fiduciary Rule, the Proposed Rule jettisons the five-part test entirely. In its place, the DOL seeks to impose fiduciary status on any financial professional who makes an investment recommendation if making such recommendations constitutes a regular part of his or her business and the recommendation is made under circumstances indicating that it is based on the particular needs of, and may be relied upon by, a retirement investor. *Id*. at 75977. Gone are key requirements of the five-part test (regular basis, mutual agreement, and primary basis) that the Fifth Circuit held captured the essence of a common law fiduciary relationship.

The Proposed Rule is materially indistinguishable from the 2016 Fiduciary Rule the Fifth Circuit emphatically rejected, and it is difficult to conceive how the DOL could believe this latest effort will pass judicial muster.[5] That fight, however, is for another day. What is significant here is that the Proposed Rule highlights the disingenuousness of the DOL's denials in this case concerning the actual intent and reach of the New Interpretation. The DOL has complained that "Plaintiffs repeatedly contend that the Court should assume that the [New Interpretation] means something other than what it actually says," and argued

[4] Available at https://www.govinfo.gov/content/pkg/FR-2023-11-03/pdf/2023-23779.pdf. As discussed herein, the DOL simultaneously proposed to substantially revise PTE 84-24. *See* 88 Fed. Reg. 76004 (Nov. 3, 2023), available at https://www.govinfo.gov/content/pkg/FR-2023-11-03/pdf/2023-23781.pdf.

[5] *See* FACC Comment Letter dated Nov. 30, 2023, available at https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AC02/hearing-request-31.pdf.

that "Plaintiffs' doubts about the [DOL's] sincerity are not a sufficient reason to reject the Magistrate Judge's recommendations." [Doc. 74 at 38.] However, the new Proposed Rule confirms that Plaintiffs were right all along and that the DOL accords no deference to the Fifth Circuit decision nor believes itself to be constrained by ERISA.[6] While the Magistrate Judge's Recommendations bought into and relied upon the DOL's assurances, it should now be apparent that the mindset of the DOL is exactly as Plaintiffs have said—*i.e.*, to circumvent any legal barriers standing in the way of its desire to turn everyday insurance agents into fiduciaries. In this new light, there can be no question that Plaintiff's Objections to the Magistrate Judge's Recommendations should be granted.

II. ARGUMENT

The Proposed Rule echoes the very problems with the New Interpretation that Plaintiffs have challenged, and which the DOL has repeatedly denied was its intent.

A. DISREGARDING THE REQUISITE RELATIONSHIP OF TRUST AND CONFIDENCE.

The centerpiece of the Fifth Circuit's decision in *Chamber of Commerce* is that Congress's use of the term "fiduciary" in ERISA incorporates its common law meaning, which reflects the well understood distinction between investment advisors, who have a

[6] The DOL all but admits its stance has not changed since 2010. When asked about granting more time for public comments, a high-ranking official with the DOL's Employee Benefits Security Administration ("EBSA") responded it was "important to put this proposal in context," that "[t]his is not the first bite of this particular apple," and there "really have been 15 years of work on this." https://www.asppa-net.org/news/newly-proposed-fiduciary-rule-%E2%80%98-more-standard-approach%E2%80%99. *See also* Letter from Lisa M. Gomez, Assistant Sec'y., EBSA, to Lisa J. Bleir, SIFMA (Nov. 14, 2023) (denying the extension request as there had already been "significant input…from public engagement with this project since 2010"). The Chair of the House Committee on Education and the Workforce chastised the DOL, saying this appears "to confirm that the public is being served a regurgitation of the same old rule." Letter from Virginia Foxx to Hon. Julie A. Su dated Nov. 17, 2023 (https://edworkforce.house.gov/uploadedfiles/11.17.23_final_fiduciary_rule_comment_period_letter_to_dol.pdf).

special relationship of trust and confidence with their clients, and financial salespeople, who ordinarily do not. *Chamber of Commerce*, 885 F.3d at 369-76. Undaunted by the Fifth Circuit's unequivocal holding, the DOL doubles down with the Proposed Rule, stating in terms nearly identical to those in its 2016 proposal: "More fundamentally, the Department rejects the purported dichotomy between a mere 'sales' recommendation to a counterparty, on the one hand, and advice, on the other, in the context of the retail market for investment products," because "sales and advice typically go hand in hand in the retail market." 88 Fed. Reg. at 75907.[7] According to the DOL, whenever retirement investors talk to a financial professional "about investments they should make, they commonly pay for, and receive advice within the meaning of the statutory definition." Id.

Like the 2016 Fiduciary Rule and the Proposed Rule, the New Interpretation was also designed by the DOL to eliminate any distinction between financial advisers and ordinary salespeople. Thus, it comes as no surprise that the New Interpretation fails to focus on the key issue of whether there exists a special relationship of trust and confidence. Instead, the continuing and unshakeable focus of the DOL in all its regulatory efforts over many years is the effect a financial professional's recommendation may have on a retirement investor's "very consequential financial decision." AR 5. As the DOL's briefing in this case acknowledged: "The [New] Interpretation aligns the definition of investment advice with today's marketplace realities and ensures, consistent with ERISA's text and congressional intent, that fiduciary status applies to 'persons whose actions affect the

[7] In promulgating the 2016 Fiduciary Rule, the DOL stated that it "***rejects the purported dichotomy*** between a mere 'sales' recommendation, on the one hand, and advice, on the other in the context of the retail market for investment products," and that "sales and advice go hand in hand in the retail market." 81 Fed. Reg. 20946, 20981 (April 8, 2016).

amount of benefits retirement plan participants will receive.'" [Doc. 40 at 39-40.] The through line from 2010 to the present is thus simple: if the DOL believes a retirement investor should be protected in a transaction, a stockbroker or agent is deemed a fiduciary.

The Proposed Rule now shines a light on what the DOL tried to obscure in the New Interpretation, namely that the DOL rejects any distinction between "investment advice for a fee" versus advice that is merely incidental to the sale of an investment product.[8] As the Fifth Circuit held, however, that is the line of demarcation Congress incorporated in ERISA. *Chamber of Commerce,* 885 F.3d at 365, 373-74. The DOL's concept of who is a fiduciary under ERISA is irreconcilable with the Fifth Circuit's ruling, and the Court now needs to filter the New Interpretation's vague assurances that fiduciary status will be determined based on "facts and circumstances" with that in mind.

In short, the DOL's professions of adherence to *Chamber of Commerce* and the five-part test in the New Interpretation are simply not credible. Plaintiffs' briefing has demonstrated that the facts and circumstances the New Interpretation says will satisfy the five-part test are not those that would give rise to a special relationship of trust and confidence—*i.e.*, a fiduciary relationship—at common law. Now seeing the recently unveiled Proposed Rule, it is hard to take seriously the DOL's prior attempts to deny or downplay that the New Interpretation was manipulated to undermine the elements of the five-part test in order to turn "cold calls" and "checking in" scenarios into fiduciary

[8] The Proposed Rule broadly defines "investment advice" to include any "recommendation" of an investment transaction. 88 Fed. Reg. at 75977. This framing expressly includes, of course, advice incidental to a sale transaction, which the Fifth Circuit held ERISA did not intend to capture.

relationships. With its new Proposed Rule, the DOL confirms that it does not recognize the legal boundaries that Congress and the Fifth Circuit have set for it.

B. RECHARACTERIZING SALES COMMISSIONS AS A FEE FOR INVESTMENT ADVICE.

The Proposed Rule sheds light as well on the DOL's quest to eliminate any distinction between a fee paid for investment advice and a commission paid for a completed sale. The Fifth Circuit explained at length that the difference between how salespeople and investment advisers are typically compensated is an important factor in determining fiduciary status and is reflected in ERISA, which covers only investment advice for a fee. *Id*. at 372-73. In defending the New Interpretation's deliberate blurring of the line between the two, the DOL pointed only to language in *Chamber of Commerce* acknowledging there could be situations in which a commission could constitute a fee for investment advice, ***but only if all five parts of the five-part test were met***. *Id*. at. 373-74. The New Interpretation dissembled by falsely suggesting that the Fifth Circuit held it is the norm rather than the exception that commissions could serve as advice compensation.[9] By doing so, the DOL effectively removed ERISA's "for a fee" requirement by decreeing that if a salesperson meets the five-part test, then any commission received automatically constitutes a fee for investment advice.

[9] Any objective reading of *Chamber of Commerce* shows that the Fifth Circuit intended that sales commissions could constitute "a fee for advice" only in limited situations where all five parts of the five-part test are met, including a mutual understanding by the parties that the compensation is intended to cover general investment advice, such as investment strategies, overall portfolio composition, or diversification, as opposed to an individual sales recommendation.

This sleight of hand is now exposed by the Proposed Rule, which erases any line between sales compensation and advice for a fee and is obviously not dependent on satisfaction of all of the elements of the five-part test that would no longer exist. The Proposed Rule simply provides that a financial professional receives a fee for investment advice if he or she either "receives any explicit fee or compensation, from any source, for the advice" ***or*** "receives any other fee or other compensation, from any source, in connection with or as a result of the recommended purchase" of an investment product. 88 Fed. Reg. at 75978. Here again, the DOL shows its true colors on another critical point of dispute in this lawsuit over the meaning of the New Interpretation, demonstrating that it does not believe it is constrained in any way by what ERISA provides or the Fifth Circuit has held. In this light, it is even clearer that the Magistrate Judge erred in concluding that the DOL had not eliminated the distinction between commissions for sales and fees for investment advice in the New Interpretation.

C. ELIMINATION OF REGULAR BASIS AND OTHER ELEMENTS OF THE FIVE-PART TEST.

The specifics of the new Proposed Rule further illuminate the DOL's intent to impose a fiduciary duty on financial salespeople in every transaction with a retirement investor. The Proposed Rule dispenses with the regular basis element of the five-part test, replacing it with only a requirement that the financial professional recommends investments as part of his or her regular business. The mutual agreement and primary basis elements are also eliminated, with the result that virtually any sales transaction will be deemed investment advice, which is precisely what the DOL intends. Indeed, the DOL

sought the same outcomes through its deconstruction of these elements in its New Interpretation, which, for example, redefines regular basis to the point of insignificance by saying it is satisfied if a salesperson or investor has any expectation of future dealings. The parties have sparred on all these elements, which has yielded nothing but circular and evasive responses by DOL in defending its reinterpretation of the five-part test.[10]

More generally, the DOL believes the five-part test reflects merely a self-imposed regulatory obstacle, which "narrowed the plain and expansive language" of ERISA's definition of investment advice fiduciary. 88 Fed. Reg. at 75892. However, the Fifth Circuit held the five-part test is not a narrowing of Congress's definition of an investment advice fiduciary but is instead a proper reflection of both the common law meaning of fiduciary and Congress's intent in enacting ERISA. The DOL's disregard for this binding authority demonstrates that its vision of what regular basis and other five-part test elements mean in the New Interpretation has no relationship to the exacting standard the Fifth Circuit articulated.

D. CONFIRMATION THAT THIS IS A MAJOR QUESTIONS CASE.

The Proposed Rule also undermines the DOL's arguments that this is not a major questions case. The current administration has forcefully proclaimed this latest rulemaking a priority, which belies the DOL's assertion, adopted by the Magistrate Judge, that this is

[10] Examples of the back-and-forth arguments between the parties involved such issues as whether a fiduciary duty could arise in a "cold call" [Doc. 73 at 25; Doc. 74 at 46; Doc. 75 at 24-25], whether agreeing to "check in" following a sales call would satisfy regular basis [Doc. 73 at 20-21; Doc. 74 at 38-39; Doc. 75 at 23-24], and whether a unilateral or mutual expectation of a future relationship is required [Doc. 73 at 32; Doc. 74 at 40].

not a matter of political significance. Indeed, the President has directly called out the need to regulate annuity products as a justification for the Proposed Rule.[11] The federalism concerns raised by the New Interpretation (and now the Proposed Rule) are thus immense, as the DOL is attempting to circumvent Congress (in ERISA), the judiciary (in *Chamber of Commerce*), and the states (in their historical regulation of insurance agents). Moreover, the preamble to the Proposed Rule implies that the economic impact on the $1.7 trillion IRA marketplace, in the form of savings to retirement investors, may exceed $400 billion over the next 20 years. 88 Fed. Reg. at 75917. While Plaintiffs consider such projections hyperbole and mostly unjustified, the statistics hyped by the DOL in connection with its longstanding crusade illustrate the magnitude of these issues from the DOL's perspective. Under these circumstances, the DOL's insistence that its decade-plus efforts to redefine who is an investment advice fiduciary is permissible even without clear Congressional authorization rings hollow.[12]

E. SUBSTANTIAL REVISIONS TO PTE 84-24 TO MIRROR THE NEW EXEMPTION.

Finally, as anticipated in Plaintiffs' reply brief in this Court [Doc. 75 at 28-29], the DOL has also proposed a major overhaul of PTE 84-24 contemporaneously with the new Proposed Rule. Among other things, the sweeping changes to PTE 84-24 would require disclosures like those mandated in PTE 2020-02 (which mostly applies to broker dealers

[11] *See* https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/10/31/remarks-by-president-biden-on-protecting-americans-retirement-security/.

[12] *See VanDerStok v. Garland*, 86 F.4th 179, 189 (5th Circuit 2023) (vacating expansion of meaning of terms used in a long-extant statute by regulation and explaining "[o]nly where the statutory text shows that [the agency] has 'clear congressional authorization' to enact a regulation can such a regulation withstand judicial scrutiny").

and investment advisers), including a declaration by the insurance agent that he or she is a fiduciary, with all the obligations and liabilities that entails, and the creation of extensive new supervisory responsibilities for insurance companies. 88 Fed. Reg. at 76027-28. While the DOL has repeatedly touted in this case that, unlike the 2016 Fiduciary Rule, the New Interpretation preserved PTE 84-24 for use by insurance agents, that will no longer be the case if the proposed overhaul is adopted. Thus, if it were ever in doubt, the DOL's intent to transform all insurance agents into fiduciaries who will have to comply with the onerous requirements of a new PTE 84-24 (or, alternatively, exit the retirement marketplace entirely) is now crystal clear.

III. CONCLUSION

The Proposed Rule proves an important point, *i.e.*, the DOL's goal has remained unchanged over the past 15 years of rulemaking. While the DOL will likely insist that the Proposed Rule is different from the New Interpretation because the DOL is repealing the five-part test, that is an immaterial distinction. In fact, the Proposed Rule confirms, as Plaintiffs have correctly pointed out all along, the DOL does not respect the Fifth Circuit's decision and will do everything in its power to circumvent Congress's definition of an investment advice fiduciary in ERISA. The Magistrate Judge largely embraced a benign explanation of the problems Plaintiffs identified in the New Interpretation. The Court should not put on blinders to similarly indulge the DOL's fanciful reading of ERISA and the five-part test. What the DOL proposed explicitly in the 2016 Fiduciary Rule was struck down by the Fifth Circuit, and a similar fate surely awaits its latest Proposed Rule if adopted. In the meantime, the Court should vacate the New Interpretation in its entirety.

Dated: December 4, 2023

Respectfully submitted,

By: */s/ Don Colleluori*

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CERTIFICATE OF SERVICE

I hereby certify that, on December 4, 2023, this document was served by email on all parties and/or attorneys of record in this matter through the Court's CM/ECF filing system.

/s/ Don Colleluori
Don Colleluori