IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

FEDERATION OF AMERICANS FOR CONSUMER CHOICE, INC.; JAMES HOLLOWAY; JAMES JOHNSON; TX TITAN GROUP, LLC; PROVISION BROKERAGE, LLC; and V. ERIC COUCH, *Plaintiffs,* v. UNITED STATES DEPARTMENT OF LABOR and JULIE SU, in her official capacity as ACTING SECRETARY OF LABOR, *Defendants.*	§ § § § § § § § § § § § § § § § §	C.A. No. 6:24-cv-00163

COMPLAINT

Plaintiffs Federation of Americans for Consumer Choice, Inc. ("FACC"), James Holloway, James Johnson, TX Titan Group, LLC, ProVision Brokerage, LLC, and V. Eric Couch (collectively, "Plaintiffs"), for their Complaint against Defendants United States Department of Labor ("DOL") and Julie Su, in her official capacity as Acting Secretary of the United States Department of Labor, allege as follows:

I. INTRODUCTION

1. On April 25, 2024, the DOL promulgated a new rule that purports to redefine and significantly broaden who is considered an "investment advice fiduciary" for purposes of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, and the Internal Revenue Code ("Code"), 26 U.S.C. § 1, *et seq.* (the "2024 Fiduciary

Rule"). 89 Fed. Reg. 32122, *et seq*. (April 25, 2022). At the same time, the DOL amended several related "prohibited transaction exemptions" ("PTEs"),[1] including an amendment to PTE 84-24, which directly relates to the compensation that insurance agents may receive if they are deemed to be fiduciaries under the new 2024 Fiduciary Rule. 89 Fed. Reg. 32302, *et seq*. (April 25, 2024). As described below, the 2024 Fiduciary Rule and PTE amendments are just the latest salvos by the DOL in its almost 15-year quest to re-define what it means to be an ERISA fiduciary in contravention of the will of Congress. Moreover, it blatantly defies the prior ruling of the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") striking down a rule package that was effectively indistinguishable from the 2024 Fiduciary Rule. Accordingly, Plaintiffs have brought this action to vacate the 2024 Fiduciary Rule and amendment to PTE-84-24 under the Administrative Procedures Act ("APA") on the grounds that they are contrary to law and arbitrary and capricious. *See* 5 U.S.C. §§ 702, 706. Plaintiffs also seek preliminary and permanent injunctive relief to prevent the DOL from attempting to enforce these unlawful rules and regulations.

2. The DOL's efforts to redefine the concept of an "investment advice fiduciary" date back to 2010. After initially proposing but then withdrawing one rule package, in 2016 the DOL promulgated a series of new rules and PTEs (the "2016 Fiduciary Rule") that significantly reinterpreted and broadened who would be considered an investment advice fiduciary under ERISA and the Code. The stated purpose of the 2016

[1] The DOL has limited statutory authority to grant PTEs, which allow investment advice fiduciaries to receive compensation in transactions that would otherwise violate the prohibited transactions provisions of ERISA and the Code.

Fiduciary Rule was "to regulate in an entirely new way hundreds of thousands of financial service providers and insurance companies in the trillion dollar markets for ERISA plans and individual retirement accounts (IRAs)." *Chamber of Commerce. of United States of Am. v. United States Dep't of Labor*, 885 F.3d 360, 363 (5th Cir. 2018) (hereinafter, "*Chamber of Commerce*"). The 2016 Fiduciary Rule replaced the longstanding five-part test for defining investment advice fiduciaries that was set forth in a rule adopted by the DOL in 1975 and had been in place for over four decades.

3. In *Chamber of Commerce*, the Fifth Circuit vacated the 2016 Fiduciary Rule *in toto*. Specifically, the court held that the 2016 Fiduciary Rule significantly expanded and conflicted with the statutory definition of fiduciary in ERISA and the Code, and the DOL therefore lacked the authority to promulgate the 2016 Fiduciary Rule. *Id*. at 379. The court likewise held that the 2016 Fiduciary Rule was an unreasonable interpretation of the statutory text, even under the deferential standard of *Chevron, USA, Inc. v. Nat. Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The court reasoned that, in using the term fiduciary in ERISA and the Code, Congress intended to incorporate the well-established meaning of that common-law term, which turns on the existence of a "special relationship of trust and confidence." *Chamber of Commerce*, 885 F.3d at 369-71. The court explained that the five-part test set out in the DOL's prior rule "captured the essence of a fiduciary relationship" as it was known at common law. *Id*. at 364-65.[2] The 2016 Fiduciary Rule, on

[2] The 1975 rule provided that an investment advice fiduciary is one who: (1) "renders advice...or makes recommendation[s] as to the advisability of investing in, purchasing, or selling securities or other property;" (2) "on a regular basis;" (3) "pursuant to a mutual agreement...between such person and the plan;" and the advice (4) "serve[s] as a primary basis for investment decisions with respect to plan assets;" and (5) is "individualized ... based on the particular needs of the plan regarding such matters as . . . investment policies

the other hand, improperly encompassed sales conduct on the part of stockbrokers and insurance agents that had historically never been considered as fiduciary in nature. *Id*. at 372-76.

4. Undeterred by the Fifth Circuit's rebuke in *Chamber of Commerce*, in December 2020, the DOL tried to resurrect and repackage the substance of the vacated 2016 Fiduciary Rule with the adoption of a new PTE 2020-02. 85 Fed. Reg. 82798, *et seq*. (Dec. 18, 2020). PTE 2020-02 purported to leave the 1975 five-part test for investment advice fiduciaries unchanged. However, the text of the revised PTE was accompanied by a 64-page preamble, much of which was devoted to a newly devised interpretation of who will be categorized as an investment advice fiduciary under the 1975 rule (the "New Interpretation"). The New Interpretation carried forward the core problem the Fifth Circuit identified in vacating the 2016 Fiduciary Rule: DOL's impermissible effort to rewrite and expand the definition of a fiduciary under ERISA and the Code.

5. The New Interpretation was met with at least two APA challenges and has already been vacated in part by one court while the other case remains pending. Undaunted, the DOL has now gone even further and promulgated the 2024 Fiduciary Rule, which is virtually indistinguishable from the 2016 Fiduciary Rule the Fifth Circuit struck down, and has radically revised PTE 84-24, which previously allowed insurance agents who actually served as investment advice fiduciaries as defined by the five-part test to receive

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or strategy, overall portfolio composition, or diversification of plan investments." 29 C.F.R. § 2510.3-21(c)(1).

commissions and other compensation for the sale of annuities to ERISA plans and IRAs subject to certain disclosure requirements.

6. Moreover, in its zeal to reach the desired result of turning every financial product salesperson who deals with a retirement investor into a fiduciary, the DOL has rushed this latest rule package through at extraordinary speed and without any substantial consideration of the consequences or the effect it will have on the insurance industry in particular. In this regard, the DOL first proposed the new rule and PTE amendments on October 31, 2023 (collectively, the "Proposal"). *See* 88 Fed. Reg. 75890, *et seq*. (Nov. 3, 2023) (definition of fiduciary); 88 Fed. Reg. 76004, *et seq*. (Nov. 3, 2023) (amendments to PTE 84-24). The DOL provided an unreasonably short 60-day time period for comments on these lengthy proposals, which crossed over four federal holidays (Veterans Day, Thanksgiving, Christmas, and New Year's), and hastily held its public hearing in the midst of the 60-day comment period, with the result that interested parties could not review and react to other parties' comments. The DOL rebuffed multiple requests to allow more time for public comments, frankly acknowledging that its latest rulemaking "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, leading the Chair of the House Committee on Education and the Workforce to remark that the DOL's actions appeared "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) .

7. As discussed below, the 2024 Fiduciary Rule is inconsistent with the intent of Congress as expressed in ERISA, and the DOL has exceeded its authority and acted arbitrarily and capriciously in promulgating both the 2024 Fiduciary Rule and amended PTE 84-24. Plaintiffs have therefore brought this action requesting that the Court vacate the 2024 Fiduciary Rule and amended PTE 84-24 in their entirety, and to preliminarily and permanently enjoin the DOL from enforcing either of them.

II. PARTIES

8. Plaintiff FACC is a nonprofit corporation organized and existing under the laws of the State of Texas. FACC is a trade organization whose members are independent marketing organizations, insurance agents, and agencies that market fixed insurance products including traditional fixed rate annuities and fixed indexed annuities. The primary purpose of FACC is to ensure that regulation affecting the sale of fixed products is fair and even-handed so consumers can continue to benefit from guaranteed rates of return, lifetime income benefits, and other protective features offered by fixed insurance products which are especially valuable to the growing number of seniors approaching or in retirement for increasingly longer periods of time and facing unpredictable financial markets.

9. Plaintiff James Holloway ("Holloway") is a resident of Anderson County, Texas. Holloway is a licensed insurance agent in Texas, authorized to solicit the sale of, among other products, annuities. As part of the services he provides, Holloway regularly makes recommendations regarding the purchase of annuity products in IRAs, including in connection with rollovers from 401ks and other employer benefit plans under ERISA.

10. Plaintiff James Johnson ("Johnson") is a resident of Smith County, Texas. Johnson is a licensed insurance agent in Texas, authorized to solicit the sale of, among other products, annuities. As part of the services he provides, Johnson regularly makes recommendations regarding the purchase of annuity products in IRAs, including in connection with rollovers from 401ks and other employer benefit plans under ERISA. TX Titan Group, LLC ("TTG") is an insurance agency owned by Johnson and his wife with its principal place of business in Smith County, Texas. Johnson provides his services to customers, including the sale of annuity products, through TTG.

11. Plaintiff ProVision Brokerage, LLC ("ProVision") is an independent insurance marketing organization with its principal place of business in Denton County, Texas. Plaintiff V. Eric Couch ("Couch") is the sole member of ProVision and a licensed insurance agent residing in Denton County, Texas. ProVision assists financial advisors, insurance agents, and clients with retirement planning, specializing in annuities and life insurance products. As part of those services, ProVision and Couch provide guidance and support with respect to the purchase of annuity products in IRAs, including in connection with rollovers from 401ks and other employer benefit plans under ERISA. While IMOs like ProVision do not always directly participate in the sale of annuities to customers, they are nevertheless adversely affected by the newly promulgated rules and regulations as set forth below.

12. Defendant DOL is an agency of the United States government subject to the APA. *See* 5 U.S.C. § 551(1).

13. Defendant Julie Su is the Acting Secretary of Labor and is subject to the APA. *See* 5 U.S.C. § 551(1). Ms. Su is sued in her official capacity as the acting head of the DOL.

III. JURISDICTION AND VENUE

14. This action arises under the U.S. Constitution, the APA, 5 U.S.C. § 500, *et seq.,* ERISA, 29 U.S.C. § 1001, *et seq.*, and the Code, 26 U.S.C. § 1, *et seq.* Jurisdiction therefore lies in this Court under 28 U.S.C. § 1331.

15. Holloway, Johnson, ProVision and Couch (collectively, the "Agent Plaintiffs") are all licensed independent insurance agents in the State of Texas. All of the Agent Plaintiffs are members of FACC. The Agent Plaintiffs are actively engaged in assisting clients with, among other things, the purchase of financial products in connection with retirement planning. The Agent Plaintiffs oftentimes make rollover recommendations for purchase of annuities to IRA owners and participants in employer-sponsored 401k and similar benefit plans, for which they receive commissions or other compensation from annuity issuers. The Agent Plaintiffs will thus be directly and adversely affected by the DOL's New Interpretation suddenly categorizing their status as investment advice fiduciaries under ERISA or the Code, as applicable.

16. In addition, FACC has associational standing to bring this suit on behalf of its various members because those members will be directly and adversely affected by the DOL's New Interpretation and thus would have standing to sue in their own right. The interests FACC seeks to protect are germane to its corporate purposes, and neither the claims asserted nor the relief requested herein require an individual member to participate

in this suit. *See, e.g., Ass'n of Am. Physicians & Surgeons, Inc. v. Tex. Med. Bd.*, 627 F.3d 547, 550 (5th Cir. 2010).

17. Venue is proper in this Court under 28 U.S.C. § 1391(e) because this is an action against an officer and an agency of the United States, Plaintiffs Holloway and Johnson reside in this judicial district and division, and no real property is involved in this action.

IV. FACTUAL BACKGROUND

A. THE LONG-STANDING REGULATORY POLICY

18. The Fifth Circuit's opinion in *Chamber of Commerce* meticulously describes the long-settled test for determining who will be deemed an investment advice fiduciary under ERISA and the Code, which was explicated in the DOL's 1975 rule. In this regard, Title I of ERISA gives the DOL regulatory authority over union and employer sponsored retirement and welfare benefit plans. *See* 29 U.S.C. §§1108(a) and (b), 1135. ERISA provides that a party is a fiduciary with respect to an ERISA plan to the extent that party (a) exercises discretionary authority or control over the management of the plan or its assets, (b) renders advice for a fee or other compensation with respect to the assets of the plan, or (c) has discretionary authority or control of the plan administration. *Id*. § 1002(21)(A). The second of these three subparts describes what is often referred to as an investment advice fiduciary and is the prong at issue here.

19. An ERISA plan fiduciary under Title I is subject to duties of loyalty and prudence. *Id*. § 1004(a)(1). Such fiduciaries cannot engage in "prohibited transactions," which include receiving commissions paid by a third party or compensation that varies

based on the advice given. *Id*. § 1106(b)(3). The statute gives DOL authority to regulate Title I ERISA plans, including the ability to audit and sue fiduciaries, and also subjects fiduciaries to private right of action liability and other regulatory burdens. *Id*. § 1132(a).

20. Title II of ERISA created individual retirement accounts and similar tax advantaged accounts (collectively, "IRAs") as part of the Code. 26 U.S.C. § 4975(e)(1)(B). Notably, the DOL does not have supervisory regulatory authority with respect to IRAs comparable to its authority over ERISA Title I plans, and the Code does not impose statutory duties of loyalty and prudence on fiduciaries. Instead, the Code allows the IRS to impose an excise tax on prohibited transactions involving either ERISA or IRA fiduciaries. *Id*. § 4975. The only role granted to the DOL with respect to IRAs is to define "accounting, technical and trade terms," 29 U.S.C. § 1135, and to grant exemptions from the Code's prohibited transaction provisions (*i.e.*, PTEs). *Id*. §1108(a), 26 U.S.C. § 4975(c)(2).

21. As noted above, in 1975 the DOL promulgated a five-part test for determining who is an investment advice fiduciary under ERISA and the Code. That test defined a fiduciary as one who (a) renders investment advice or recommendations; (b) on a regular basis; (c) pursuant to a mutual agreement between such person and the plan; (d) the advice is a primary basis for investment decisions relating to plan assets; and (e) the advice is individualized to the needs of the plan regarding such matters as investment policies or strategy, overall portfolio composition, or diversification of plan investments. 29 C.F.R. § 2510.3-21(c)(1) (2015).

22. The 1975 rule "captured the essence of a fiduciary relationship known to the common law as a special relationship of trust and confidence between the fiduciary and his

client." *Chamber of Commerce*, 885 F.3d at 365. The 1975 rule also recognized an historical dichotomy between investment advisers and salespeople as explained by the Fifth Circuit:

> The regulation also echoed the then thirty-five-year old distinction drawn between an "investment adviser," who is a fiduciary regulated under the Investment Advisers Act, and a "broker or dealer" whose advice is "solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor." 15 U.S.C. § 80b-2(a)(11)(C). Thus, the DOL's original regulation specified that a fiduciary relationship would exist only if, *inter alia*, the adviser's services were furnished "regularly" and were the "primary basis" for the client's investment decisions. 29 C.F.R. § 2510.3-21(c)(1) (2015).

Id.

23. This long-standing understanding of who is a fiduciary, as well as the settled expectations of financial and insurance professionals, were suddenly overthrown however when the DOL promulgated the 2016 Fiduciary Rule.

B. THE 2016 FIDUCIARY RULE

24. The 2016 Fiduciary Rule was actually a "package of seven different rules that broadly reinterpret[ed] the term 'investment advice fiduciary' and redefine[d] exemptions to provisions concerning fiduciaries" for purposes of ERISA and the Code. *Id*. at 363. Specifically, the DOL replaced the 1975 rule and effectively sought to redefine who was an "investment advice fiduciary" to include anyone who rendered investment advice for a fee to an ERISA plan or beneficiary. *Id*. at 369.

25. Recognizing its new definition of an investment advice fiduciary would encompass "virtually all financial and insurance professionals who do business with ERISA plans and IRA holders," the DOL also promulgated as part of the 2016 Fiduciary

Rule a new PTE, known as the Best Interest Contract Exemption (the "BIC Exemption"). *Id.* at 366-67. To qualify for the BIC Exemption, "providers of financial and insurance services must enter into contracts with clients that, *inter alia,* affirm their fiduciary status; incorporate 'Impartial Conduct Standards' that include the duties of loyalty and prudence; 'avoid[ ] misleading statements;' and charge no more than 'reasonable compensation.'" *Id.* at 367. Finally, the DOL also amended PTE 84-24, which covered transactions involving insurance and annuity contracts and permitted payment of reasonable and customary sales commissions. *Id*. As amended, PTE 84-24 subjected such transactions to the same Impartial Conduct Standards as the BIC Exemption and removed fixed indexed annuities from the scope of the exemption. *Id.*

26. A number of business groups and trade organizations filed suit in the Northern District of Texas challenging the 2016 Fiduciary Rule. The district court granted summary judgment for the DOL, but the Fifth Circuit reversed and vacated the rule *in toto*. The Fifth Circuit held that the 2016 Fiduciary Rule significantly expanded and conflicted with the statutory definition of fiduciary in ERISA and the Code, and the DOL therefore lacked the authority to promulgate it. *Id*. at 379. The Fifth Circuit likewise held that the 2016 Fiduciary Rule was an unreasonable interpretation of the statutory text under *Chevron, USA, Inc. v. Nat. Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Fifth Circuit reasoned that, in using the term fiduciary in ERISA and the Code, Congress intended to incorporate the well-established meaning of that common-law term, which turns on the existence of a relationship of trust and confidence. *Id*. at 369-71.

27. While the five-part test of the 1975 rule "captured [this] essence of a fiduciary relationship" as it was known at common law, *id*. at 364-65, the Fifth Circuit held that the 2016 Fiduciary Rule improperly encompassed sales conduct on the part of financial professionals, including insurance agents, historically never considered to be fiduciary in nature. *Id*. at 372-76. As the Fifth Circuit explained, under the 2016 Fiduciary Rule, even a broker or agent who merely makes a sales call on an IRA owner or ERISA plan participant with whom he or she had *no* preexisting relationship would nevertheless be deemed an investment advice fiduciary based on that single sales transaction. *Id*. at 369.

28. Beyond condemning the DOL's overly expansive definition of investment advice fiduciary, which was the central focus of the opinion in *Chamber of Commerce*, the Fifth Circuit also rejected the related BIC Exemption provisions and the amendment of PTE 84-24. Specifically, the Court held that the overbroad fiduciary definition could not be saved by the simultaneous enactment of the BIC Exemption, which the DOL unsuccessfully argued provided an exemption to financial professionals who complied with its requirements. The Fifth Circuit explained that "agencies 'are not free to adopt unreasonable interpretations of statutory provisions and then edit other statutory provisions to mitigate the unreasonableness.'" *Id*. at 383 (quoting *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 328 (2014)). Moreover, the BIC Exemption contained its own unreasonable provisions, including a requirement that the person providing investment advice enter into a contract with the plan or participant agreeing to be a fiduciary and thereby be subject to potential liability as such. *Chamber of Commerce*, 885 F.3d at 382-85. Finally, the Fifth Circuit rejected the amendment to PTE 84-24 as arbitrary and capricious for the additional

reason that it singled out fixed indexed annuities for exclusion from the scope of the exemption. *Id*. at 385-86.

29. In short, the Fifth Circuit roundly rejected the DOL's effort to "fundamentally transform[ ] over fifty years of settled and hitherto legal practices in a large swath of the financial services and insurance industries" with its sweeping new Fiduciary Rule. *Id*. at 363. The DOL chose not to further appeal the Fifth Circuit's decision at that time. As discussed below, however, rather than accept the rationale and import of the Fifth Circuit decision, the DOL has proceeded undeterred in its efforts to override the statutory text of ERISA to reshape the concept of an investment advice fiduciary. The DOL has pursued its agenda to expand who is considered an investment advice fiduciary in ways both direct and indirect. The DOL first attempted to resurrect the substance of the 2016 Fiduciary Rule with the promulgation of PTE 2020-02 and New Interpretation in December 2020.

C. PTE 2020-02 AND THE NEW INTERPRETATION

30. On July 7, 2020, the DOL proposed a new PTE to be made available to "registered investment advisers, broker-dealers, banks, and insurance companies (Financial Institutions) and their individual employees, agents, and representatives (Investment Professionals) that provide fiduciary investment advice to Retirement Investors." 85 Fed. Reg. at 82799. The same day, the DOL issued a technical amendment to 29 C.F.R. 2510-3.21 to remove the amendments to the 1975 rule that it had made in the Fiduciary Rule and to reinstate the text of the five-part test. *Id*. Thereafter, on December

18, 2020, following a notice and comment period, the DOL promulgated PTE 2020-02 and accompanying New Interpretation.

31. The New Interpretation left the text of the 1975 rule intact. However, it "reinterpreted" that five-part test in a way that was impossible to square with the Fifth Circuit's decision in *Chamber of Commerce*. The Fifth Circuit's opinion in that case catalogued numerous ways in which the 2016 Fiduciary Rule ran afoul of DOL's statutory authority under ERISA, the first and most important of which was that it failed to adhere to the presumptive common-law meaning of fiduciary that Congress incorporated into ERISA. While professing adherence to the five-part test, the New Interpretation perpetuated this fundamental flaw 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. As such, it swept within its reach many financial salespeople, such as everyday insurance agents and stockbrokers, who inarguably are ***not*** fiduciaries at common law.

32. The New Interpretation distorted the language of the five-part test beyond recognition to turn virtually all financial salespeople into fiduciaries. Among other things, this sleight of hand included interpreting the requirement that investment advice is provided on a "regular basis" to encompass one-time sales transactions if the salesperson and retirement investor have any "expectation" of continued dealings in the future. Similarly, other critical features of the five-part test, such as the mutual agreement and primary basis prong, were stripped of any meaning by the New Interpretation's

presumption that they are satisfied in virtually any transaction in which an ERISA plan member or IRA owner accepts a recommendation to purchase an investment. Finally, the New Interpretation flouted the Fifth Circuit's holdings by (1) treating sales commissions as equivalent to the "fee for investment advice" required by the text of ERISA, and (2) conflating ERISA plans (over which the DOL has regulatory authority) with IRAs (where it does not) for purposes of determining whether a financial professional has provided investment advice to an investor on a regular basis.

33. Not surprisingly, the New Interpretation was challenged by a number of parties, including FACC and one of the Agent Plaintiffs herein. On February 2, 2022, FACC and others filed an APA suit, *Federation of Americans for Consumer Choice, Inc., et al. v. United States Department of Labor, et al.*, in the United States District Court for the Northern District of Texas, alleging that the New Interpretation is contrary to law and arbitrary and capricious for multiple reasons and should be vacated in its entirety. In another case filed in the Middle District of Florida, *American Securities Association v. United States Department of Labor*, the plaintiff challenged that portion of the New Interpretation concerning what constitutes "regular basis" in connection with rollover transactions from an ERISA plan to an IRA.

34. The Florida district court granted the plaintiffs' motion for summary judgment in the *ASA* case and vacated the New Interpretation in part on the ground that the DOL's expanded interpretation of fiduciary was inconsistent with ERISA and the 1975 rule. Specifically, the court held the DOL's newly devised interpretation in the context of rollovers unlawfully conflated a financial professional's interaction with a participant in a

Title I employer plan with any subsequent dealings between those parties in connection with a separate Title II IRA following the rollover. *See Am. Sec. Ass'n v. United States Dep't of Lab.*, No. 8:22-CV-330-VMC-CPT, 2023 WL 1967573 (M.D. Fla. Feb. 13, 2023). The DOL initially filed, but then withdrew its appeal of the ruling in the *ASA* case, which is now final. *See Am. Sec. Ass'n v. U.S. Dep't of Lab.*, No. 23-11266-F, 2023 WL 4503923 (11th Cir. May 17, 2023) (dismissing appeal at the request of the DOL). The United States Magistrate Judge in the ongoing *FACC* case has similarly recommended that the plaintiffs' motion for summary judgment seeking to nullify the New Interpretation be granted in part on the same basis as the *ASA* decision. *Fed'n of Americans for Consumer Choice, Inc. v. United States Dep't of Lab.*, No. 3:22-CV-00243-K-BT, 2023 WL 5682411 (N.D. Tex. June 30, 2023). The plaintiffs in the *FACC* case have filed objections to the Magistrate Judge's report and recommendation to the extent it disallowed other challenges seeking to nullify the New Interpretation in its entirety, which objections have not yet been ruled upon by the District Judge. The DOL filed no objection to the Magistrate Judge's recommendation that the New Interpretation be vacated in part.

D. THE 2024 FIDUCIARY RULE AND AMENDED PTE 84-24

35. The DOL has readily acknowledged that its efforts to redefine investment advice fiduciary over the last 15 years have been motivated by, and targeted at, ensuring that any financial professional who recommends a product to an investor in the course of rolling over assets from an employer-based ERISA plan to an IRA will be considered a fiduciary with respect to that recommendation. The DOL refuses in this relentless policy

driven quest to be constrained by ERISA and clear-cut decisions by the courts. The courts have already vacated the lynchpin of the New Interpretation and refused to allow the DOL to conflate employer plans and IRAs for purposes of the regular basis prong of the five-part test. Nevertheless, the DOL now reverts to yet another direct assault on the five-part test by promulgating the 2024 Fiduciary Rule which, like the 2016 Fiduciary Rule, forsakes any pretense of reinterpreting the five-part test. Instead, the DOL has simply jettisoned that long-standing test so carefully designed to reflect common law consistent with ERISA in favor of a self-serving formula that it can be assured will treat any recommendation made by a stockbroker or insurance agent as fiduciary investment advice in the context of rollover transactions.

36. The DOL's new definition of investment advice fiduciary is virtually indistinguishable from the 2016 Fiduciary Rule that was struck down by the Fifth Circuit. The 2024 Fiduciary Rule blatantly defies the holdings in *Chamber of Commerce* by ignoring what constitutes a "special relationship of trust and confidence" under common law and making the circular assumption that such a relationship exists in ordinary commercial dealings between a financial professional and client. The 2024 Fiduciary Rule pays mere lip service to these words with an empty consideration of whether an investor expects that he or she can place trust in a financial professional—a far cry from the rigorous elements and searching inquiry demanded by courts in order to find a fiduciary relationship under common law. Where the Fifth Circuit held that it would ordinarily be "inconceivable that financial salespeople or insurance agents will have an intimate relationship of trust and confidence with prospective purchasers," the new rule indefensibly provides that even one-

time recommendations will be treated as fiduciary investment advice by sweeping within its scope any sale recommendations made in the ordinary course of a broker or agent helping clients. That is, the new rule defines fiduciary investment advice to be coterminous with standard sales practices—*i.e.*, whenever a broker or agent "makes professional investment recommendations to investors on a regular basis as part of their business and the recommendation is made under circumstances that would indicate to a reasonable investor in like circumstances that the recommendation is based on review of the retirement investor's particular needs or individual circumstances, reflects the application of professional or expert judgment to the retirement investor's particular needs or individual circumstances, and may be relied upon by the retirement investor as intended to advance the retirement investor's best interest."

37. This new rule is designed to ensure that every investment recommendation made by a stockbroker or insurance agent that is accepted by a retirement investor will be considered a fiduciary transaction. As the DOL recognizes, those financial professionals are required by their own regulatory requirements, promulgated by the SEC in the case of brokers and state insurance commissioners in the case of insurance agents, to satisfy sales conduct standards and procedures analogous to the above-quoted provision of the 2024 Fiduciary Rule. Consistently with established common law, however, those regulatory regimes expressly recognize that compliance with their respective standards and procedures does not make brokers and insurance agents fiduciaries. The 2024 Fiduciary Rule, on the other hand, will now transform those brokers and agents into fiduciaries whenever they deal with a Title I or II investor. Thus, an insurance agent who sells an

annuity to a retirement investor in a rollover transaction will always be deemed to be a fiduciary, regardless of whether he or she has had any other dealings with the investor—either before or after—that are indicative of a fiduciary relationship under common law. This completely defies the legal standards articulated by the Fifth Circuit by instead setting the bar on who is a fiduciary so low that it would be satisfied in any transaction in which an investor accepts a salesperson's recommendation of a particular investment.

38. Remarkably, the DOL could not be clearer in its disregard for the Fifth Circuit's prior decision. As the Proposal stated: "More fundamentally, the [DOL] 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." 88 Fed. Reg. at 75907. Notably, the DOL took the same position, using almost identical language, when it promulgated the 2016 Fiduciary Rule. The Fifth Circuit, however, categorically rejected the DOL's thesis, holding that the 2016 Fiduciary Rule was at odds with the settled understanding of the term investment advice for a fee used in ERISA, which recognizes the "dichotomy between mere sales conduct, which does not usually create a fiduciary relationship under ERISA, and investment advice for a fee, which does." *Chamber of Commerce*, 885 F.3d at 374. While the DOL professes to have considered the numerous comments that pointed out its blatant defiance of the Fifth Circuit's holding, the substance of the 2024 Fiduciary Rule on this point remains unchanged.

39. Furthermore, the DOL's assault on insurance agents selling annuities does not stop at unlawfully turning them into fiduciaries; instead, the DOL also tries to subject

insurance agents and indeed the entire insurance industry to an onerous new regime that promises to upend longstanding business practices already subject to comprehensive state insurance regulation. The process of implementing and complying with the requirements of amended PTE 84-24 will require all levels of the annuity distribution chain to transform their businesses, compensation models, and disclosures. Indeed, there is no certainty various participants in the annuity distribution chain—including agents, agencies, and insurers—will even be able to meet the requirements of revised PTE 84-24 or, in some cases, survive its impact. And the DOL is requiring that such changes be implemented within 150 days of the publication of amended PTE 84-24, which is September 23, 2024.[3] Both the DOL's utter disregard for existing industry business models and practices, and the cavalier manner in which it has ignored the legitimate concerns of the insurance industry in rushing the amendment through the rulemaking process, evidence the arbitrary and capricious nature of the entire endeavor.

40. The PTE 84-24 amendments reflect deep-rooted misunderstandings and bias on the part of the DOL against annuities and the insurance sales channel through which they are sold. Amended PTE 84-24: (1) creates unrealistic requirements for insurance companies to implement compliance and supervisory programs over insurance agents who are not captive and sell annuities on behalf of multiple insurers; (2) foists impractical requirements upon insurance agents to comply with loyalty and prudence standards

[3] Revised PTE 84-24 provides a one-year phase-in period beginning September 23, 2024, for insurers to establish the new supervisory procedures that will be required of them. However, during the phase-in period, insurance agents who are deemed fiduciaries can avail themselves of PTE 84-24 protection only by complying with its Impartial Conduct Standards and satisfying the fiduciary acknowledgement requirement. These interim requirements alone will be costly, burdensome, and cause irreparable harm.

designed for ERISA trust officers, not retail insurance professionals; and (3) creates compensation restrictions and conflict disclosure requirements that are incompatible with and unworkable for insurance agents operating in the independent distribution channel. And perhaps most significantly, amended PTE 84-24 establishes illogical rollover disclosure requirements that fail to recognize the "apples and oranges" nature of any comparison between guaranteed annuity products and yield driven investments in stocks or mutual funds. Insurance agents typically are neither trained nor in a position to obtain and interpret the information about employer retirement plans that is demanded of them under these new rules–*i.e.*, comparative fees and expenses, whether an employer pays administrative expenses, and levels of fiduciary protection, services, and investments available under such plans. In short, the DOL is ramming through amendments to PTE 84-24 that create stifling new rules and requirements that disregard the realities of how insurance agents operate in the independent distribution channel and will be highly disruptive and bring harm to industry and consumers. It is the epitome of arbitrary and capricious rulemaking.

41. The amendments to PTE 84-24 fly in the face of *Chamber of Commerce*, which rebuffed the DOL's prior attempt to use its PTE granting authority to extend Title I fiduciary duties to financial professionals involved in the sale of investments to IRAs governed by Title II. Among other problems that led the Fifth Circuit to vacate the BIC Exemption along with the rest of the 2016 Fiduciary Rule, the court held that the DOL improperly failed to distinguish between its authority over employer-sponsored plans and IRAs. Specifically, the court explained that ERISA Title I requires plan fiduciaries to

adhere to statutory duties of loyalty and prudence, but the Internal Revenue Code imposes no such duties with respect to IRA accounts. This same problem infects amended PTE 84-24, which once again casts a wide net in order to turn all insurance agents into fiduciaries and then requires them, if they want protection under the revised PTE, to acknowledge and accept liability as a fiduciary bound by duties of loyalty and prudence when making investment recommendations. This is inconsistent with the express choice made by Congress that such duties of prudence and loyalty exist only in Title I and not Title II.

42. The amendments to PTE 84-24 also echo another strong concern expressed by the Fifth Circuit regarding Congress' intent. The Fifth Circuit took issue with the "DOL's regulatory strategy" in the 2016 Fiduciary Rule of forcing sellers of fixed-indexed annuities (FIAs) into compliance with the more stringent BIC Exemption as opposed to PTE 84-24. The court explained that this operated as an end-run around Congress, which in adopting the Dodd-Frank legislation had rejected an SEC initiative to regulate FIAs, choosing instead to defer to state insurance regulation. In particular, the Fifth Circuit expressed concern that the DOL was subjecting insurance agents to "stark alternatives" that threatened to create "entirely new compensation schemes" or be faced with "withdrawing from the market." As was the case in 2016, the 2024 Fiduciary Rule is "occupying the Dodd-Frank turf" in contravention of Congress' intent and purposely seeking to supplant state insurance regulation with the DOL's own regulatory regime in the same manner as the 2016 Fiduciary Rule, only this time with respect to all annuities, not just FIAs.

43. Even putting aside the DOL's overreach in outflanking Congress and state insurance commissioners, the fundamental problems of the 2024 Fiduciary Rule are not ameliorated, and certainly are not cured, by the limited protection from prohibited transaction liability provided by amended PTEs 84-24 and 2020-02. As the Fifth Circuit observed, any need to rely on PTEs "to blunt the overinclusiveness" of the new definition of investment advice fiduciaries merely reinforces the DOL's overreach in seeking to regulate actors and transactions in the Title II market that DOL has admitted Congress never intended to cover as fiduciaries. *Chamber of Commerce*, 885 F.3d at 381-82. The DOL is "not free to adopt unreasonable interpretations of statutory provisions and then edit other statutory provisions to mitigate the unreasonableness." *Util. Air Regulatory Grp.*, 134 S.Ct. at 2466 (internal quotations and alterations omitted).

44. Moreover, amended PTE 84-24 suffers from many of the same flaws as the BIC Exemption, which the Fifth Circuit held was irreconcilable with the statutory framework of ERISA. In this regard, like the BIC Exemption, the amended PTE requires an insurance agent to acknowledge being a fiduciary upfront to avail himself or herself of the exemption. This acknowledgment requirement makes clear that PTE 84-24 cannot be used conditionally so as to allow insurance agents to fall back on the exemptive relief if, based on the facts and circumstances, it is determined the advisor is in fact a fiduciary. Instead, as with the BIC Exemption, insurance agents can preserve their ability to receive commissions on the sale of annuities under PTE 84-24 or 2020-02 only by declaring themselves to be a fiduciary and exposing themselves to whatever other regulation and liabilities that may entail. *Chamber of Commerce*, 886 F.3d at 382. In the case of an

insurance agent, that additional regulation and liability is onerous, including another layer of oversight by a federal agency and private right of action liabilities under ERISA.

45. The DOL lamely asserts that requiring insurance agents to declare themselves fiduciaries in order to utilize amended PTE 84-24 does not create any new obligations on them or subject them to other potential liabilities. DOL even goes on to say that agents "could expressly disclaim any enforcement rights other than those specifically provided by Title I of ERISA or the Code, without violating any of the exemption's conditions." In reality, the DOL has no control over such matters, and indeed self-declared fiduciaries will find no protection from a client's breach of fiduciary duty claim by invoking as a defense that the DOL says the agent can supposedly disclaim fiduciary liability outside the context of ERISA and the Tax Code. Ironically, an agency that repeatedly expresses its purported concern about confusing consumers seemingly has no concerns about agents holding out as fiduciaries for some purposes but not others. But even more significantly, the DOL's position on this point is proof positive that it is not requiring agents to declare themselves fiduciaries because they actually are fiduciaries as that term is understood under common law and incorporated into ERISA. Instead, as has been the case since 2010, the DOL's only guiding star is that any financial professional who deals with a retirement plan investor must be deemed to be a fiduciary, regardless of whether they would be so characterized in any other setting.

46. In sum, just as surely as it attempted to do with the now-vacated 2016 Fiduciary Rule and the partially vacated New Interpretation, the DOL's 2024 Fiduciary rule is attempting to fundamentally reshape "over fifty years of settled and hitherto legal

practices in a large swath of the financial services and insurance industries." *Chamber of Commerce*, 885 F.3d at 363. Absent immediate intervention by the Court, the sea change in the market for qualified annuity sales that would occur under the 2024 Fiduciary Rule and revised PTE 84-24 is scheduled to go into effect on September 23, 2024. The Agent Plaintiffs and the annuities industry at large will therefore be subject to imminent and significant new regulations and compliance costs, as well as financial harm and potential legal liabilities that cannot later be remedied. Plaintiffs are therefore asking this Court to intervene to uphold the ruling of the Fifth Circuit in *Chamber of Commerce* and vacate the 2024 Fiduciary Rule.

V. CAUSES OF ACTION

A. THE DOL HAS EXCEEDED ITS AUTHORITY UNDER ERISA, THE CODE, AND THE APA IN PROMULGATING THE 2024 FIDUCIARY RULE AND AMENDMENTS TO PTE 84-24

47. Plaintiffs adopt and incorporate by this reference the allegations contained in paragraphs 1 through __ above.

48. Congress granted the DOL regulatory authority over ERISA Title I employee benefit plans, but not individual IRAs. The DOL's authority with respect to Title II is limited to defining technical and accounting terms and providing exemptions for prohibited transactions.

49. In promulgating the 2024 Fiduciary Rule and amended PTE 84-24, the DOL seeks to disregard Congress' intent and assert the right to regulate actors and transactions beyond its statutory authority by redefining the term "fiduciary" in an impermissibly broad

manner. This effort to assert new regulatory jurisdiction in the IRA market disregards Congress' distinction between the DOL's authority to interpret technical and accounting terms for purposes of Title II and its far broader regulatory authority over Title I employer benefit plans.

50. The 2024 Fiduciary Rule and amendment to PTE 84-24 are final agency actions subject to review under the APA. Because the DOL's promulgation of the 2024 Fiduciary Rule and amended PTE 84-24 was arbitrary, capricious, and not otherwise in accordance with ERISA and the Code, Plaintiffs are entitled to relief under 5 U.S.C. §§ 702, 706, for which they bring this suit, and Plaintiffs will suffer irreparable injury if the 2024 Fiduciary Rule and amended PTE 84-24 become effective. Accordingly, the 2024 Fiduciary Rule and amended PTE 84-24 should be declared unlawful and vacated, and the DOL should be preliminarily and permanently enjoined from enforcing, implementing, or otherwise giving them effect in any manner.

B. THE 2024 FIDUCIARY RULE AND AMENDMENTS TO PTE 84-24 VIOLATE THE APA BECAUSE THEY ARE ARBITRARY, CAPRICIOUS, AND IRRECONCILABLE WITH THE TEXT OF ERISA AND THE CODE

51. Plaintiffs adopt and incorporate by this reference the allegations contained in paragraphs 1 through __ above.

52. When Congress used the term "fiduciary" in the text of ERISA and the Code, it plainly intended to incorporate the traditional and historic meaning of that word as reflected in the common law, the law of trusts, and the Investment Advisers Act. A fiduciary duty does not exist in every commercial or financial relationship, but only in those where there exists a special relationship of trust and confidence between the parties.

And in the context of investment advice provided for a fee, it has long been recognized that only where it is the advice that is paid for, not the investment product being purchased or sold, that a fiduciary relationship may arise.

53. The interpretation of fiduciary provided in the 2024 Fiduciary Rule is fundamentally inconsistent with Congress' intent as expressed in the text of ERISA and the Code, as well as the historical and common law understanding of the term. The Fifth Circuit flatly rejected the DOL's attempt to rewrite the meaning of fiduciary and usurpation of regulatory authority in *Chamber of Commerce*. The DOL has now thumbed its nose at the court in promulgating the 2024 Fiduciary Rule which is analytically indistinguishable from the 2016 Fiduciary Rule.

54. The DOL's new definition of an investment advice fiduciary is not a permissible construction of ERISA or the Code and is unreasonable. The 2024 Fiduciary Rule and amended PTE 84-24 are final agency actions subject to review under the APA, and the DOL's promulgation of same was arbitrary, capricious, and not otherwise in accordance with ERISA and the Code. Plaintiffs are therefore entitled to relief under 5 U.S.C. §§ 702, 706, for which they bring this suit, and Plaintiffs will suffer irreparable injury if the 2024 Fiduciary Rule and amended PTE 84-24 become effective. Accordingly, the 2024 Fiduciary Rule and amended PTE 84-24 should be declared unlawful and vacated, and the DOL should be preliminarily and permanently enjoined from enforcing, implementing, or otherwise giving the New Interpretation effect in any manner.

VI. PRAYER FOR RELIEF

55. Plaintiffs pray that Defendants be summoned to appear and answer herein, and that judgment be entered:

a. Declaring that the 2024 Fiduciary Rule and amended PTE 84-24 were promulgated by the DOL in excess of its statutory jurisdiction, authority, or limitations within the meaning of 5 U.S.C. § 706(2)(C) and is arbitrary, capricious, or otherwise contrary to law within the meaning of 5 U.S.C. § 706(2)(A);

b. Vacating and setting aside the 2024 Fiduciary Rule and the amendments to PTE 84-24 in their entirety;

c. Preliminarily and permanently enjoining the DOL and all of its officers, employees and agents from implementing, applying, or taking any action of any type under the 2024 Fiduciary Rule or amended PTE 84-24 anywhere within the DOL's jurisdiction;

d. Awarding Plaintiffs their costs incurred in bringing this action; and

e. Granting such other and further relief as the Court determines is appropriate.

Dated: May 2, 2024

Respectfully submitted,

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