IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

AMERICAN COUNCIL OF LIFE INSURERS, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF LABOR and JULIE SU, in her official capacity as ACTING SECRETARY OF LABOR, Defendants.	Civil Action No. 4:24-cv-00482-O

BRIEF IN SUPPORT OF UNOPPOSED MOTION TO INTERVENE AS PLAINTIFFS

On April 25, 2024, the Department of Labor (the "Department") issued a new rule significantly expanding the definition of "fiduciary" under the Employee Retirement Income Security Act of 1974 ("ERISA") and the Internal Revenue Code ("Tax Code"). 89 Fed. Reg. 32,122 (Apr. 25, 2024) ("fiduciary" definition). Shortly thereafter, the Complaint was filed in this case against the Department and Acting Secretary Julie Su, asking the Court to vacate the rule and grant injunctive relief under the Administrative Procedure Act ("APA") (Doc. 1). Plaintiffs in the case are American Council of Life Insurers, the National Association of Insurance and Financial Advisors-Fort Worth, the National Association of Insurance and Financial Advisors-Dallas, the National Association of Insurance and Financial Advisors-Pineywoods of East Texas, the National Association of Insurance and Financial Advisors-Texas, the National Association of Insurance and Financial Advisors, the National Association for Fixed Annuities, the Insured Retirement Institute, and Finseca. In their Complaint, Plaintiffs also moved to preliminarily enjoin and stay the effective

date of the Department's Fiduciary Rule (Docs. 11-12), and this Court ordered a briefing schedule to resolve that motion (Doc. 29).

The Financial Services Institute ("FSI") and Securities Industry and Financial Markets Association ("SIFMA") (collectively, "Intervenors") move to intervene in this case to protect their members' interests. Intervenors easily satisfy the requirements for intervention as of right under Rule 24(a)(2). They may intervene as of right because (i) their motion is timely, filed five weeks after Plaintiffs' complaint; (ii) they have an indisputable interest in the subject matter of this case; (iii) their ability to protect that interest may be impaired by the disposition of this action; and (iv) their interests are not adequately represented by the existing Plaintiffs.

Even if the Court disagreed with Intervenors on any of those points, permissive intervention under Rule 24(b) would be appropriate. Intervenors challenge the same rule, press the same claims, and make many of the same arguments as Plaintiffs here.

Intervenors do not expect that their participation will require any change to the existing case schedule, a point Intervenors have discussed with Plaintiffs and Defendants.

BACKGROUND

The Department is responsible for administering Title I of ERISA, which was enacted to protect participants and beneficiaries of employee benefit plans. Title I of ERISA defines who is a "fiduciary" to those plans and imposes heightened standards of conduct, responsibility, and obligation on plan fiduciaries, in addition to establishing civil enforcement remedies and sanctions against them. 29 U.S.C. §§ 1002(21)(A), 1104, 1132. In Title II of ERISA, Congress added to the Tax Code a parallel "fiduciary" definition applicable to tax-favored saving plans like Individual Retirement Accounts (or "IRAs") that are not sponsored by employers. 26 U.S.C. § 4975(e)(3)(B). Both Title I employee-benefit-plan fiduciaries and Title II IRA fiduciaries are prohibited from engaging in certain prohibited transactions, such as transactions in which the fiduciary is paid a

commission for each transaction it executes. 29 U.S.C. § 1106(b) (prohibited transactions for Title I fiduciaries); *id.* § 4975(c) (prohibited transactions for Title II fiduciaries).

The Department has no enforcement authority with respect to IRAs, which are governed by Title II. It has no power to regulate IRAs directly, and no power to regulate firms or individuals for services they provide in connection with IRAs. Rather, the Department only has limited authority to interpret the statutory definition of "fiduciary" for purposes of Title II (and Title I), and to issue prohibited transaction exemptions under section 4975 of the Tax Code. *See* Reorganization Plan No. 4 of 1978, § 102, 43 Fed. Reg. 47,713 (Aug. 10, 1978), *reprinted in* 5 U.S.C. app. 1 (2016), *and in* 92 Stat. 3790 (1978).

The Department elaborated the definition of an "investment-advice fiduciary" in a 1975 rulemaking one year after ERISA's enactment. 29 C.F.R. § 2510.3-21(c). That definition stated that a person is an investment-advice fiduciary if she (1) renders investment advice to a plan (2) "on a regular basis" (3) "pursuant to a mutual agreement, arrangement or understanding" (4) that the investment advice "will serve as a primary basis for investment decisions with respect to plan assets" and (5) that the investment advice will be "individualized" "based on the particular needs of the plan." 29 U.S.C. § 2510.3-21(c)(1)(ii)(B). That definition remained in effect for more than forty years, until the Department sought to greatly expand its scope in a 2016 rulemaking. The 2016 Rule would have deemed financial professionals such as broker-dealers and insurance agents to be investment-advice fiduciaries even if they did not provide investment advice to their customers on a regular basis, or did not have any agreement or understanding with their customers that their advice would be individualized and the primary basis for their investment decisions. *Chamber of Com. of U.S.A. v. DOL*, 885 F.3d 360, 382 (5th Cir. 2018). This sweeping definition had the effect of converting "nearly any broker or insurance salesperson who deals with IRA

clients" into an investment-advice fiduciary. *Id.* The Fifth Circuit vacated the Department's 2016 rule for violating the plain text and structure of ERISA. *Id.* at 388. Subsequently, the Department formally reinstated the 1975 definition. 85 Fed. Reg. 40,589 (July 7, 2020).

With its latest rule, the Department seeks once again to expand the definition of fiduciary to encompass financial professionals who have long been understood to be outside ERISA's scope. If the 2024 rule goes into effect, a one-off investment recommendation by a broker-dealer or other financial professional, including a recommendation to purchase the broker-dealer's own product, will once again transform the financial professional into an "investment-advice fiduciary," even in the absence of an ongoing, mutually recognized relationship of heightened trust and confidence. That classification will fundamentally disrupt how financial professionals interact with IRAs.

Because the Department's expansive definition of "investment advice fiduciaries" would have the effect of prohibiting broker-dealers and insurance agents who make incidental recommendations to their customers from employing the commission-based compensation models that are staples of those industries, these financial professionals will either have to stop providing recommendations to their customers, or satisfy the requirements to qualify for one of the Department's prohibited-transaction exemptions. The applicable exemption for most broker-dealers would be PTE 2020-02, which requires broker-dealers to, among other things: (1) provide its customer a written acknowledgement of its fiduciary status; (2) abide by fiduciary standards of care, prudence, and loyalty; (3) provide extensive disclosures; (4) implement internal controls to ensure compliance with the care and loyalty requirements of the exemption; and (5) conduct an annual retrospective review to detect and prevent violations of the exemption. 89 Fed. Reg. 32,260, 32,296 (Apr. 25, 2024). Accordingly, as in 2016, the Department has again exploited its

power to define "fiduciary" to force financial professionals to rely on prohibited-transaction exemptions that have requirements the Department has no power to impose on them directly.*

The Department's overbroad definition of "fiduciary" also does not reflect reasoned decisionmaking. For example, after the Fifth Circuit vacated the Department's 2016 rule, the SEC promulgated a new "Regulation Best Interest," 84 Fed. Reg. 33,491 (July 12, 2019), which the Department itself admits largely instituted the standards for broker-dealers that the Department's 2016 rule had (illegally) sought to impose and thereby substantially eliminated any basis for its new attempt at redefining "fiduciary." Particularly in light of the SEC's regulation, the Department has fundamentally failed to justify the need to subject broker-dealers to an unnecessary, duplicative, and inevitably conflicting regulation by multiple agencies.

The new "fiduciary" rule and exemption amendments take effect on September 23, 2024.

ARGUMENT

A. This Court Should Allow Intervention As Of Right.

Rule 24(a)(2) provides that this Court must allow intervention when (i) the motion for intervention is timely; (ii) the movant has "an interest relating to the property or transaction which is the subject of the action"; (iii) the movant is "so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest"; and (iv) the movant's interest is "inadequately represented by the existing parties to the suit." *Texas v. United States*, 805 F.3d 653, 657 (5th Cir. 2015) (quotation marks omitted).

Timeliness. A motion to intervene is timely when it is filed reasonably soon after the movant learned of its interest in the case and no party is prejudiced by the timing of the motion. *See Stallworth v. Monsanto Co.*, 558 F.2d 257, 264-66 (5th Cir. 1977). Intervenors have filed this

* Intervenors challenge the 2024 Rule only, and not the various amendments to prohibited transaction exemptions the Department promulgated along with the 2024 Rule.

motion five weeks after Plaintiffs filed their complaint. *See, e.g.*, *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994) (motion found timely when made "within two months" of becoming aware that interests were affected); *U.S. Bank Tr. Nat'l Ass'n v. Kingman Holdings LLC*, 2024 WL 818337, at *3 (E.D. Tex. Feb. 26, 2024) (motion found timely when made "less than two months after this lawsuit was initiated"). And the Court has made no substantive rulings in this case.

Nor would any party to this case be prejudiced by the timing of Intervenors' motion. Intervenors do not at this time intend to file their own preliminary injunction motion, because Fifth Circuit case law is clear that preliminary relief for APA claims is not restricted to the parties who filed the relevant motion. *See Career Colls. & Schs. of Tex. v. Dep't of Educ.*, 98 F.4th 220, 255-56 (5th Cir. 2024). If for any reason the Court issues a narrower order, Intervenors would then promptly move for preliminary relief, but in no event should intervention disrupt the briefing and consideration of Plaintiffs' pending motion. *See* Docs. 11-12. Moreover, this Court has not yet set a schedule for dispositive briefing. Courts routinely find motions to intervene timely under similar circumstances. *See, e.g.*, *Rostain v. Trustmark Nat'l Bank*, 2012 WL 12930084, at *1 (N.D. Tex. Dec. 6, 2012) (finding intervention motion timely where litigation was "still at a relatively early stage"); *Lincoln Gen. Ins. Co. v. Autobuses Tierra Caliente Inc.*, 2005 WL 8158376, at *1 (N.D. Tex. Feb. 17, 2005) (a motion to intervene is timely if "made at an early stage in the litigation and there will be no prejudice to the parties if it is granted").

Intervenors' interests. To demonstrate an interest in a pending case, an intervenor must "sho[w] a direct, substantial, legally protectable interest in the proceedings." *Field v. Anadarko Petroleum Corp.*, 35 F.4th 1013, 1018 (5th Cir. 2022). Intervenors' interests in this case are clear: FSI advocates on behalf of the independent financial-services industry, supporting more than 30,000 independent financial advisers and over 80 independent financial-services firms, and

SIFMA is the leading trade association for broker-dealers, investment banks, and asset managers operating in the U.S. and global capital markets. As with the 2016 Rule—which both Intervenors successfully challenged as party plaintiffs—the Department's expanded definition of "fiduciary" sweeps in significantly greater numbers of FSI and SIFMA members, forcing them to either forgo traditional, transaction-based compensation models or comply with an exemption that, among other things, imposes ERISA's fiduciary duties on conduct with respect to IRAs. Ex. A, ¶¶ 6-7. Both Intervenors have standing to set aside the Department's rule to prevent immediate and severe harm to their members. Intervenors' interests thus easily clear the bar required for intervention as of right. *See Wal-Mart Stores v. Tex. Alcoholic Beverage Comm'n*, 834 F.3d 562, 569 (5th Cir. 2016) (association may intervene because it has a "'legally protectable' interest" in a regulatory scheme); *see also Nat'l Ass'n of Priv. Fund Managers v. SEC*, -- F.4th --, 2024 WL 2836655, at *8 (5th Cir. June 5, 2024) (standing present "when all the members of [an] organization are affected" because rule "targets an entire industry") (quotation marks omitted).

Impairment of intervenors' interests. Upon showing an interest in the pending lawsuit, an intervenor must show that the "disposition of the action may, as a practical matter, impair or impede [its] ability to protect that interest." *La Union del Pueblo Entero v. Abbott*, 29 F.4th 299, 306-307 (5th Cir. 2022). That test is met so long as "there is *a possibility* that [the movant's] interest could be impaired or impeded." *Id.* at 307 (emphasis added). Intervenors satisfy this requirement. If the Department's rule is upheld, Intervenors' members will either have to jettison their longstanding business models or shoulder the costs of complying with the requirements of PTE 2020-02. Furthermore, Intervenors' members will face significant compliance costs to comply with PTE 2020-02, including the exemption's disclosure, internal-controls, and retrospective-review requirements.

Inadequate representation. Intervention as of right is appropriate when representation by the existing parties "*may* be inadequate." *Texas*, 805 F.3d at 661 (emphasis in original). The "burden of making that showing" is "minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972). Even when an existing party shares the same "ultimate objective," intervention is appropriate when the parties' interests may not align precisely. *Brumfield v. Dodd*, 749 F.3d 339, 345 (5th Cir. 2014); *see Wal-Mart Stores, Inc.*, 834 F.3d at 569 (granting intervention as of right where association's narrow interest in protecting its members' businesses differed from the government's broad interest in serving the public).

Here, Intervenors are associations that for purposes of this case predominantly represent the interests of broker-dealers, whereas Plaintiffs consist of trade associations that—while representing a range of interests—in the current case have a particular focus on the interests of insurance agents, financial-security professionals, and sellers and promoters of annuities. Intervenors are a central focus of the SEC's Regulation Best Interest and are thus especially susceptible to the cost and burden of overlapping and inconsistent requirements from the Department's overbroad definition of fiduciary. Intervenors are therefore positioned to advance arguments based on the effects of the Department's rule on their broker-dealer members—protected interests that are distinct from the interests of the insurance industry. *See Heaton v. Monogram Credit Card Bank of Ga.*, 297 F.3d 416, 425 (5th Cir. 2002) (holding that it "is enough" that intervenor's interests "may diverge in the future, even though … they appear to share common ground"). Absent intervention, Intervenors could not be assured that their members' interests would be adequately represented in this litigation.

B. Alternatively, This Court Should Grant Permissive Intervention.

Independent of Intervenors' entitlement to intervene as of right, permissive intervention under Rule 24(b) is also plainly appropriate. "[O]n timely motion, the court may permit anyone

to intervene who … has a claim or defense that shares with the main action a common question of law or fact." *United States ex rel. Hernandez v. Team Fin., L.L.C.*, 80 F.4th 571, 575 (5th Cir. 2023) (quoting Fed. R. Civ. P. 24(b)(1)). The Fifth Circuit has held that "Rule 24 is to be liberally construed," *Brumfield*, 749 F.3d at 341, and that "[f]ederal courts should allow intervention where no one would be hurt and the greater justice could be attained." *Espy*, 18 F.3d at 1205 (quotation marks omitted).

Indeed, Fifth Circuit precedent exhibits a "broad policy favoring intervention," *Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, 834 F.3d 562, 569 (5th Cir. 2016), and "[d]istrict courts are given broad discretion in granting motions to intervene" under Rule 24(b), *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 884 F.2d 185, 189 (5th Cir. 1989). As one court in this circuit has noted, "Rule 24(b) necessarily vests broad discretion in the district court to determine the fairest and most efficient method of handling a case with multiple parties and claims." *SEC v. Stanford Int'l Bank, Ltd.*, 2010 WL 11492410, at *2 (N.D. Tex. Jan. 6, 2010) (quotation marks omitted). A timely applicant for permissive intervention need only show a common question of law or fact between its claims or defenses and those in the main action, Fed. R. Civ. P. 24(b)(1)(B). If that "threshold requirement is met," the district court may "exercise its discretion" in determining whether permissive intervention would be helpful or efficient. *Stallworth v. Monsanto*, 558 F.2d 257, 269 (5th Cir. 1977).

Intervenors have a compelling case for permissive intervention. For the reasons explained above, Intervenors' motion is timely and would not cause any harm to the existing parties in this suit. Intervenors challenge the same rule and assert claims and arguments that significantly overlap with those asserted by Plaintiffs. Specifically, Intervenors and Plaintiffs both argue that the Department's rule is arbitrary and capricious, in excess of statutory authority, and foreclosed by

the Fifth Circuit's decision in *Chamber of Commerce*, 885 F.3d at 387. *Compare* Ex. A, ¶¶ 4, 59, *with* Doc. 1, ¶¶ 2, 6. Because Intervenors challenge the same rule as Plaintiffs and on many of the same grounds, this Court should grant permissive intervention.

Intervention in this suit—rather than, for example, initiating a new, separate action—will also promote "the interest of comity" and "avoid duplication of judicial effort, potentially inconsistent judgments, and piecemeal litigation of issues that call for a uniform result." *Chamber of Com. of United States v. FTC*, 2024 WL 1954139, at *4 (E.D. Tex. May 3, 2024); *see also Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967) (permissive intervention serves to promote judicial efficiency).

C. If Intervention Is Granted, Intervenors' Participation Will Not Delay The Case.

Intervenors' filing of a complaint would not delay this case. Defendants have not yet answered, and the case is likely to be decided on the merits on motions for summary judgment—no such motion has yet been filed. And as noted above, intervention should have no effect on the briefing and consideration of Plaintiffs' pending motion for preliminary relief. *See supra* at 6.

CONCLUSION

For the foregoing reasons, Intervenors respectfully request that this Court grant their unopposed Motion to Intervene.

Respectfully submitted,

Dated: June 28, 2024

/s/ Russ Falconer

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CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2024, a true and correct copy of the above and foregoing document has been served electronically using the CM/ECF system, which will subsequently send copies to all counsel of record registered to accept electronic service in this matter.

/s/ Russ Falconer
Russ Falconer

CERTIFICATE OF CONFERENCE

The undersigned counsel hereby certifies that he has complied with the meet-and-confer requirement in Local Rule CV-7(a)-(b), (h) and that the motion is **unopposed**.

/s/ Russ Falconer
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