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,	§	C.A. No. 3:22-cv-00243-K-BN
Plaintiffs,	§	
v.	§	
UNITED STATES DEPARTMENT OF LABOR and MARTIN J. WALSH, SECRETARY OF LABOR,	§	
Defendants.	§	

PLAINTIFFS' MOTION FOR RECONSIDERATION AND TO ALTER OR AMEND JUDGMENT AND BRIEF IN SUPPORT THEREOF

Pursuant to Fed. R. Civ. P. 59(e), Plaintiffs Federation of Americans for Consumer Choice, Inc. ("FACC"), 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 (collectively, the "Agents" and together with FACC the "Plaintiffs") file this Motion for Reconsideration and to Alter or Amend Judgment and state:

I. INTRODUCTION

In 2016, the United States Department of Labor ("DOL") jettisoned its then 40-year old regulation that defined who is an investment advice fiduciary under the Employee Retirement Income Security Act of 1974 ("ERISA") and Internal Revenue Code (the "Code").[1] In its place, the DOL promulgated a new rule (the "2016 Rule") designed to turn everyday stockbrokers and insurance agents into investment advice fiduciaries when they sell investment products to investors in employer-sponsored retirement plans and Individual Retirement Accounts ("IRAs"). The United States Fifth Circuit Court of Appeals struck down the 2016 Rule, holding that it represented an unacceptable overreach on the part of the DOL contrary to the intent of Congress and an arbitrary and capricious interpretation of ERISA and the Code. *See Chamber of Commerce of United States of Am. v. United States Dep't of Labor*, 885 F.3d 360 (5th Cir. 2018). Undaunted, in 2020 the DOL tried again, this time by reinstating the 1975 rule's five-part test for determining fiduciary status but radically reinterpreting how that test would be applied (the "New Interpretation"). Administrative Record ("AR") 1-69.[2]

[1] 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"; (4) "that such services will serve as a primary basis for investment decisions with respect to plan assets"; and (5) "such person will render individualized investment advice to the plan based on the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments." 40 Fed. Reg. 50840, 50841 (Oct. 31, 1975).

[2] The relevant portions of the AR are included in the parties' Joint Appendix [Doc. 58] on December 30, 2022.

Plaintiffs brought this suit under the Administrative Procedures Act to vacate the New Interpretation, which effectively accomplished the same result as the 2016 Rule by stripping each of the elements of the five-part test of any meaning in derogation of the text of ERISA and the Code and the holdings of *Chamber*. The New Interpretation, if allowed to stand, would turn every insurance agent into a fiduciary even in his or her initial interaction with a retirement investor—a so-called cold call—based on nothing more than the agent's hope or expectation of a future ongoing relationship with the client.[3] As explained below and in Plaintiffs' prior briefing, this stands *Chamber* on its head, and Plaintiffs respectfully ask the Court to reconsider its decision to sanction this outcome in light of more recent developments described *infra*. In this regard, the Court's judgment in this case is grievously out of step with recent decisions of other courts that have been similarly called upon to construe ERISA, the DOL's definition of fiduciary, and *Chamber*.

THE MAGISTRATE JUDGE'S RECOMMENDATIONS

On June 30, 2023, United States Magistrate Judge Rebecca Rutherford entered her Findings, Conclusions, and Recommendations of the United States Magistrate Judge [Doc. 69] (the "Recommendations") with respect to Plaintiffs' Motion for Summary Judgment [Doc. 19] ("Plaintiffs' Motion") and Defendants' Cross-Motion to Dismiss for Lack of

[3] As pointed out in prior briefs, the DOL's assertion that the expectation of an ongoing relationship described in the New Interpretation constitutes any type of meaningful condition for who will be deemed a fiduciary is illusory because every salesperson desires an ongoing relationship with a client. This pretense is betrayed by the DOL's explanation that such an "expectation" is satisfied, for example, merely by "agreeing to check-in periodically on the performance of the customer's post-rollover financial products," AR 9, which is a minimal task of any competent broker or agent.

Jurisdiction or, in the Alternative, for Summary Judgment [Doc. 39] ("Defendants' Motion"). Thereafter, on July 9, 2025, the Court entered its Order Accepting Findings and Recommendations of the United States Magistrate Judge [Doc. 86] (the "Order"), thereby granting in part and denying in part each of Plaintiffs' Motion and Defendants' Motion.[4] Specifically, per the Magistrate Judge's Recommendations, the Court vacated the New Interpretation only to the extent it allowed, in the context of a rollover from a Title I employer retirement plan to an individual IRA, a financial professional's post-rollover dealings with the IRA investor to be considered in determining whether that professional was an ERISA fiduciary under Title I at the time of the rollover recommendation. The Order otherwise permits the rest of the New Interpretation to stand.

BASIS FOR THE MOTION

For all the reasons set out in their objections to the Recommendations and supporting briefs, Plaintiffs contend that the Magistrate Judge's blessing of certain parts of the New Interpretation is fundamentally inconsistent with the governing statutes and *Chamber*, and that the Court therefore erred in adopting the Recommendations in their entirety. For purposes of this motion, however, Plaintiffs wish to focus the Court on recent developments that further buttress their position. In this regard, in the two years that elapsed between the entry of the Magistrate Judge's Recommendations in 2023 and the

[4] Although the Order was not expressly titled as a final judgment, it nevertheless disposed of all claims and issues in the case. *See Cunningham v. Hamilton Cnty., Ohio*, 527 U.S. 198, 204, 119 S. Ct. 1915, 1920 (1999) (district court's decision is final for purposes of appeal if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment"). Accordingly, to ensure compliance with Rule 59(e), Plaintiffs are filing this motion within 28 days after the entry of the Order.

Court's Order adopting those Recommendations, the United States Supreme Court and two District Judges in the Northern and Eastern Districts of Texas issued rulings that have a significant impact here. First, in *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024), the Supreme Court overruled *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), a decision the Magistrate Judge relied on to give deference to the New Interpretation. Second, in *Fed'n of Americans for Consumer Choice, Inc. v. United States Dep't of Lab.*, 742 F. Supp. 3d 677, 683 (E.D. Tex. 2024) (the "2024 FACC Case"), and *Am. Council of Life Insurers v. United States Dep't of Lab.*, No. 4:24-CV-00482-O, 2024 WL 3572297 (N.D. Tex. July 26, 2024) (the "2024 ACLI Case"), the district courts issued rulings staying the effectiveness of the DOL's newest fiduciary rule, promulgated in 2024 (the "2024 Rule"), which is the sequel to the New Interpretation in the DOL's continuing efforts to turn everyday stockbrokers and insurance agents into investment advice fiduciaries.[5]

Plaintiffs submit that these rulings are irreconcilable with the Magistrate Judge's Recommendations and this Court's Order upholding a substantial portion of the New Interpretation. In particular, the district courts' analyses of the *Chamber* opinion in rejecting the DOL's 2024 Rule persuasively demonstrate the error in this case. Because all of these rulings occurred well after the issuance of the Recommendations here, Plaintiffs have not had an opportunity to fully present to the Court the arguments explaining their

[5] *See* 89 Fed. Reg. 32122, *et seq*. (Apr. 25, 2024).

relevance and application to the issues in this case.[6] Plaintiffs therefore request that the Court reconsider, alter, or amend its Order accepting the Recommendations in light of these recent decisions and rule consistently therewith by granting Plaintiffs' Motion in full and denying Defendants' Motion in all respects.

II. ARGUMENT

A. THE RULINGS IN THE RELATED CASES HIGHLIGHT THE ERRORS IN THE MAGISTRATE JUDGE'S RECOMMENDATIONS.

The New Interpretation must be viewed in full context amid the DOL's relentless efforts to elude the ruling in *Chamber* and once again drastically expand the definition of an "investment advice fiduciary" beyond its common law meaning and the DOL's statutory authority. After the Magistrate Judge issued the Recommendations, the next stage of DOL's plan emerged when it issued the 2024 Rule, which, like the 2016 Rule, again scrapped key elements of the five-part test and explicitly redefined the term "fiduciary" to expand its coverage to financial salespeople who may render advice that is merely incidental to the sale of an investment product.

Immediately after the 2024 Rule was published, FACC and several co-plaintiffs filed the 2024 FACC Case to stay the implementation of the 2024 Rule and to ultimately vacate it entirely. A few days later, another group of plaintiffs filed the 2024 ACLI Case

[6] Plaintiffs filed a Notice of Supplemental Authority [Doc. 80] on July 9, 2024, to bring the *Loper Bright* opinion to the Court's attention. In addition, Plaintiffs cited the two district court decisions in Plaintiffs' Reply to Defendants' Response Regarding Notice of Supplemental Authority [Doc. 82] filed on July 31, 2024. However, given that a notice of supplemental authority serves a limited purpose and is not customarily a platform for making arguments, Plaintiffs did not in those filings provide the Court with a fulsome analysis of the significance of those decisions to this case.

in the Northern District of Texas, also seeking to enjoin and vacate the 2024 Rule. On July 25, 2024, Judge Jeremy Kernodle issued a Memorandum Opinion and Order in the 2024 FACC Case staying the effective date of the 2024 Rule, holding that the plaintiffs were likely to succeed on the merits of their claims that the DOL lacked authority to issue the 2024 Rule and the rule was an unreasonable, arbitrary, and capricious interpretation of ERISA and the Code. *See FACC*, 742 F. Supp. 3d at 702. The next day, Judge Reed O'Connor followed suit in the 2024 ACLI Case by entering a Memorandum Opinion and Order that also stayed the 2024 Rule, in which he adopted Judge Kernodle's analysis in full and concluded it was "virtually certain" the plaintiffs in that case would prevail on the merits. *See ACLI*, 2024 WL 3572297 at *8.

For the reasons discussed below, Plaintiff's respectfully submit that the Court's ruling in this case is fundamentally inconsistent with the persuasive opinions of Judge Kernodle and Judge O'Connor in several significant respects. This disconnect highlights the flaws in the Recommendations and warrants the Court's reconsideration of its judgment.[7]

[7] The implications of upholding the New Interpretation—other than the limited vacatur of its allowance of consideration of client interactions across Title I employer plans and Title II IRAs in the case of rollovers—is very significant to the financial services industry. What remains standing in the New Interpretation is a liberalized definition of fiduciary that will essentially turn every stockbroker and insurance agent who sells securities or annuities to IRA owners into a fiduciary under the Code. While the limited vacatur recommended by the Magistrate Judge and adopted by the Court will typically spare such brokers and agents from being deemed ***ERISA*** fiduciaries in rollover transactions, it does not protect them from being considered fiduciaries under the ***Code*** whenever an initial sale is combined with any expectation of a future ongoing relationship with the client. Even in a rollover situation, once an agent or broker recommends a stock, annuity, or other investment for the funds rolled over to an IRA, the decision in this case will still expose that agent to being deemed a fiduciary for purposes of the Code under the reinterpreted five-part test.

B. THE ADOPTED RECOMMENDATIONS PERMITS FIDUCIARY DUTIES TO ARISE IN ORDINARY FIRST-TIME SALES TRANSACTIONS.

The Magistrate Judge's Recommendations adopted by the Court completely rejects the idea that the term "fiduciary" as used in ERISA and the Code inherently comprises the various requirements of the 1975 rule's five-part test. While the Magistrate Judge ultimately found that the New Interpretation impermissibly conflicts with the "regular basis" prong of the five-part test to the limited extent it permits consideration of Title II activities in determining fiduciary status under Title I, she nevertheless concluded that text of ERISA and the Code do not themselves include a "regular basis" element. Thus, as adopted by the Court, the Recommendations hold that fiduciary investment advice under ERISA and the Code does not necessarily exclude advice incidental to the initial sale of an investment product to a retirement investor. *See* Recommendations at 43 ("First-time advice may be sufficient to confer fiduciary status and is consistent with ERISA."). And the Magistrate Judge found no fault with the New Interpretation's position that the rule-based regular basis element can be satisfied based on nothing more than a mere expectation of future dealings between a financial professional and a retirement investor.

The Magistrate Judge was equally dismissive of the notion that the "primary basis" and "mutual agreement" prongs of the five-part test are essential to ERISA's and the Code's conception of fiduciary investment advice. Most relevant for purposes of this

Plaintiffs contend this outcome is completely antithetical to the holding of *Chamber* and irreconcilable with the rationale employed by Judges Kernodle and O'Connor in their respective decisions staying the 2024 Fiduciary Rule.

motion, the Recommendations accept the DOL's newfound view that any advice that could determine the outcome of a retirement investor's decision is sufficient to satisfy the primary basis requirement. In doing so, the Magistrate Judge failed to even address Plaintiffs' argument that this renders the primary basis prong meaningless, as it is impossible to argue it is not satisfied whenever the investor has in fact accepted a recommendation to buy a particular financial product. Indeed, the Recommendations go so far as to acknowledge that "the mutual agreement and primary basis prong may be easy to satisfy under the DOL's present application." Recommendations at 62, The Magistrate Judge apparently believed the diminishment of these elements of the five-part test was acceptable because the DOL's abrupt reinterpretation of statutory terms was nonetheless entitled to deference under *Chevron*. As Plaintiffs pointed out in their Notice of Supplemental Authority [Doc. 80], however, *Chevron* was subsequently overruled by the United States Supreme Court in *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024), which undermines the Magistrate Judge's reliance thereon.

Plaintiffs objected to the Recommendations' efforts to divorce the elements of the five-part test from their statutory basis, relying on the Fifth Circuit's holding that those elements describe the "essence" of the common law fiduciary standard of a relationship of trust and confidence that Congress adopted in ERISA and the Code. *Chamber*, 885 F.3d at 365. The recent decisions by Judges Kernodle and O'Connor emphatically support Plaintiffs on this point. While Judge Kernodle declared that regular basis and primary basis criteria "are essential to the meaning of 'fiduciary' in ERISA," *FACC*, 742 F. Supp. 3d at

694, the Recommendations are fatally built on the opposite premise. *See* Recommendations at 43 ("ERISA does not include a regular basis requirement").[8]

Like the New Interpretation, the 2024 Rule tries to circumvent the regular basis and primary basis requirements to turn every sales recommendation to a retirement investor into fiduciary investment advice based upon "legitimate investor expectations." 89 Fed. Reg. at 32,144. Judge Kernodle noted, however, that it is generally inconceivable that a single investment recommendation could ever be characterized as creating the "intimate relationship of trust and confidence" required for a fiduciary relationship. *FACC*, 742 F. Supp.3d at 694-95 (quoting *Chamber*, 885 F.3d at 380). Judge Kernodle also explained that "the 'primary basis' criterion reflected that the fiduciary's advice would be the primary basis for the client's investment decisions—again, consistent with a well-established relationship between an adviser and client built on trust and confidence." *Id*. at 694 (citing *Chamber*, 885 F.3d at 366). Judge O'Connor fully agreed with Judge Kernodle and noted that contrary to the statutory requirements of ERISA, the 2024 Rule gave the DOL "discretion to recognize a fiduciary relationship where the common law would not." *ACLI*, 2024 WL 3572297 at *5.

The portions of the New Interpretation that this Court has allowed to stand do exactly what Judges Kernodle and O'Connor held the Fifth Circuit forbade. The idea that

[8] Indeed, the Recommendations go so far as relying on the analysis of a District of Columbia district court opinion that was clearly disavowed by the Fifth Circuit in *Chamber*. *See* Recommendations at 42 ("[n]othing in the phrase 'renders investment advice' suggests that the statute applies only to advice provided 'on a regular basis'" (quoting *Nat'l Ass'n for Fixed Annuities v. Perez*, 217 F. Supp. 3d 1, 23 (D.D.C. 2016)).

a first-time sales transaction with a new customer, even if coupled with some expectation or hope of an on-going future relationship, is sufficient to create fiduciary status would never be permitted under the common law. Yet this legal fallacy is a core premise of the New Interpretation. To resolve the New Interpretation's conflict with ERISA's and the Code's fiduciary definition and defiance of *Chamber*, which has now been underscored by the analytical discordance with two other Texas district courts, the Court should amend the judgment in this case to grant Plaintiffs' Motion in full, deny Defendants' Motion, and vacate the New Interpretation in its entirety.

C. THE ADOPTED RECOMMENDATIONS ERRONEOUSLY TRANSFORM NORMAL COMMISSIONS INTO THE STATUTORILY REQUIRED FEE FOR INVESTMENT ADVICE.

The cases staying the 2024 Rule also conflict with the Recommendations adopted by this Court on the issue of whether the requirement in ERISA and the Code that investment advice fiduciaries must render their advice "for a fee or other compensation" is satisfied whenever an agent or stockbroker receives a commission in connection with a transaction. As Judge Kernodle explained:

> This provision of ERISA uses "terms of art within the financial services industry" and recognizes the distinction between "investment advisers, who [are] considered fiduciaries, and stockbrokers and insurance agents, who generally assume[] no such status in selling products to their clients." *Chamber*, 885 F.3d at 372–74. This distinction turns on the method of compensation: stockbrokers and insurance agents "are compensated only for completed sales . . . not on the basis of their pitch to the client," while investment advisers "are paid fees because they 'render advice.'" *Id.* at 373. Thus, ERISA requires that the professional be paid for advice—not for a sale—to be a fiduciary. As the *Chamber* court explained, "the preposition 'for' [ ] indicates that the purpose of the 'fee' is not 'sales' but 'advice.'" *Id*.

FACC, 742 F. Supp. 3d at 695. The 2024 Rule ignores this distinction and provides that a "fee or compensation is paid 'in connection with or as a result of' such transaction or service if the fee or compensation would not have been paid but for the recommended transaction or the provision of investment advice," which Judge Kernodle held could not be squared with the text of the statute or the decision in *Chamber*. *Id*.

The New Interpretation contains this same fatal defect. As the DOL explained, its position is that the fee for advice requirement broadly covers "'all fees or other compensation incident to the transaction in which the investment advice to the plan has been rendered or will be rendered.'" AR 12. Thus, according to the DOL, as long as the watered down five-part test is met "[i]n the rollover context, fees and compensation received from transactions involving rollover assets would be incident to the advice to take a distribution from the Plan and to roll over the assets to an IRA." *Id*. The New Interpretation requires no further analysis or determination of whether an agent's commission or other compensation in that context is for the sale of a financial product as opposed to being for the provision of investment advice. This is precisely the type of "but for" test that Judge Kernodle held was inconsistent with ERISA and the *Chamber* opinion when it was adopted in the 2024 Rule; under the Recommendations adopted by the Court, however, it will remain the governing standard under the New Interpretation.[9]

[9] The fact that the New Interpretation has been vacated to the extent it conflates advice rendered regarding a rollover from a Title I employer plan with later anticipated advice regarding an IRA does not change the analysis. Even if the advice to take a rollover distribution from an employer plan is discounted, advice regarding the investment of the rolled over assets in an IRA will still be captured by the reimagined five-part test. Moreover, even setting aside rollovers, the

Although the Magistrate Judge's Recommendations ostensibly recognize the distinction the Fifth Circuit drew between a fee that is compensation paid ***for*** the provision of investment advice versus a commission that is paid for a completed sale, they ignore what the DOL has actually said in the New Interpretation. The DOL makes no pretense that it intends to examine what an agent or stockbroker's compensation is for if the revised five-part test has been satisfied. Instead, the DOL is clear that it views any commissions or other compensation a financial professional receives that is "incident" to the sale of a financial product to a retirement investor as a "fee" for the professional's "investment advice." As Judge Kernodle recognized, however, the Fifth Circuit was clear that, under longstanding statutory and common law, advice that is merely inherent in the sale of a product is not, by its very nature, fiduciary investment advice and, correspondingly, any compensation a salesperson may receive as a result of the transaction is not "advice for a fee." *FACC*, 742 F. Supp. 3d at 695-696 ("ERISA requires more than a mere link" between transaction-based compensation and the financial professional's recommendation) (citing *Chamber*, 885 F.3d at 373). For this reason as well, the Court should amend the judgment in this case to grant Plaintiffs' Motion in full, deny Defendants' Motion, and vacate the New Interpretation.

DOL's misreading of what constitutes advice for a fee under the New Interpretation will continue to apply to financial salespeople in any dealings with prospective or ongoing IRA owners.

III. CONCLUSION

For the foregoing reasons, the Court should amend its judgment and vacate the New Interpretation in its entirety.

Dated: August 6, 2025

Respectfully submitted,

By: */s/ Don Colleluori*

Andrew G. Jubinsky
Texas Bar No. 11043000
andy.jubinsky@figdav.com
Parker D. Young
Attorney-In-Charge
Texas Bar No. 22204050
Don Colleluori
Texas Bar No. 04581950
don.colleluori@figdav.com

FIGARI + DAVENPORT, LLP
901 Main Street, Suite 3400
Dallas, Texas 75202
T: (214) 939-2000
F: (214) 939-2090

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that, on August 6, 2025, 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