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.

Civil Action No. 6:24-cv-00163-JDK

DEFENDANTS' SUR-REPLY BRIEF IN OPPOSITION TO
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

The Department of Labor's Retirement Security Rule is consistent with ERISA's plain text and the Fifth Circuit's decision in *Chamber of Commerce v. Department of Labor*, 885 F.3d 360 (5th Cir. 2018). At their core, Plaintiffs' arguments advance the radical premise that insurance industry professionals should be treated differently than other financial professionals who advise retirement investors, and that they should be considered as mere salespeople, incapable of acting as trusted advisers, even when they hold themselves out as acting in their customers' best interests and even when they make individualized investment recommendations involving a retirement investor's lifetime savings. Neither ERISA nor *Chamber* countenances (much less requires) that anomalous result. The Court should deny the Motion.

ARGUMENT

A. The Retirement Security Rule Is Supported By ERISA's Statutory Text.

ERISA sought to protect retirement investors by making anyone a fiduciary "to the extent" they "render[] investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property" of either a Title I ERISA plan, 29 U.S.C. § 1002(21)(A)(ii), or a Title II ERISA plan (frequently called an IRA), 26 U.S.C. § 4975(e)(3)(B). The starting point for statutory interpretation "lies in a careful examination of the ordinary meaning and structure of the law itself," *Food Marketing Inst. v. Argus Leader Media*, 588 U.S. 427, 436 (2019), yet Plaintiffs have little to say about the text of ERISA's definition of "fiduciary." Instead, they fault the Department for relying on the Supreme Court's holding that ERISA "defines 'fiduciary' not in terms of formal trusteeship, but in functional terms . . . thus expanding the universe of persons subject to fiduciary duties." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993). As the Fifth Circuit acknowledged in *Chamber*, 885 F.3d at 371, Congress "addressed fiduciary status for ERISA purposes in terms of enumerated functions." Here, the relevant function is providing compensated "investment advice" regarding ERISA plan

assets. And Plaintiffs cannot dispute that insurance professionals routinely provide advice to retirement investors, regarding plan assets, and receive compensation when a transaction is made.[1]

The Rule elaborates on ERISA's "render[ing] investment advice" formulation by identifying two paths that satisfy the statutory language: (1) "represent[ing] or acknowledg[ing] . . . acting as [an ERISA] fiduciary . . . with respect to the recommendation" (a prong that Plaintiffs do not dispute), or (2) for an investment professional who "makes professional investment recommendations to investors on a regular basis as part of their business," making a recommendation "under circumstances that" objectively indicate that the recommendation "may be relied upon by the retirement investor as intended to advance the retirement investor's best interest" and is "based on review of the retirement investor's particular needs or individual circumstances" and that "professional or expert judgment" has been applied. *See* 29 C.F.R. § 2510.3-21(c)(1)(i)-(ii), 89 Fed. Reg. at 32,256. In this regard, the regulatory text follows logically from the statutory text's use of "render investment advice."

Grasping for a reason that their investment advice should escape ERISA's coverage, Plaintiffs ask the Court to preserve the 1975 regulation's loopholes that have no basis in the statutory text—such as the requirement that the advice be provided on a "regular basis" to the same plan[2]—but which

[1] In citing Supreme Court precedent that *Chamber* attempted to distinguish, the Department is preserving potentially broader arguments than are available in district court. In any event, the broader textual argument does not diminish the Department's care in "craft[ing] a definition that is consistent with both the statutory text and with the Fifth Circuit's focus on relationships of trust and confidence." 89 Fed. Reg. at 32,141. *See also id.* at 32,147 ("In those circumstances in which the person recommending the investment meets the final rule's terms, they occupy a position of trust and confidence with respect to the recommendation[.]"). Put differently, the Department's defense of the Rule does not depend on a conclusion that the Fifth Circuit was mistaken in its statutory analysis, since the Rule complies with the *Chamber* opinion's "trust and confidence" standard.

[2] Indeed, in its currently pending lawsuit against the Department in the Northern District of Texas, where it has raised similar issues, the Magistrate Judge rejected Plaintiff FACC's argument that the 1975 regulation was commanded by the text of ERISA itself. *See* M.J. R. & R., *FACC I*, 2023 WL 5682411, at *17 n.10 ("The Court emphasizes that the five-part test requires a 'regular basis' but that ERISA itself does not."); *id.* at 18 & n.11 (noting that "the analysis for consistency with ERISA and consistency with the DOL's regulations is distinct").

the Department found could be used by insurance professionals to improperly evade ERISA responsibilities, even as they hold themselves out as trusted advisers. *See* Pls.' Reply at 4 (calling it "[n]onsense" to suggest that ERISA's text is "broader than the five-part test").[3] They also ask the Court to upend the Department's consistent understanding since ERISA's enactment that "for a fee or other compensation, direct or indirect" includes commissions and any other means of compensation to a financial professional for their advice. *See* 40 Fed. Reg. at 50,842; *Chamber*, 885 F.3d at 373. After all, courts have long recognized that it is unreasonable to imagine that the advice is free. *See Farm King Supply, Inc. v. Edward D. Jones & Co.*, 884 F.2d 288, 293 (7th Cir. 1989); *Ellis v. Rycenga Homes, Inc.*, 484 F. Supp. 2d 694, 710 (W.D. Mich. 2007). Indeed, the SEC recognizes that broker-dealers are often compensated *for their advice* through commissions, *see* 89 Fed. Reg. at 32,157-58, and it is equally reasonable to conclude that the same is true of insurance commissions, *see id.* at 32,158.

Because Plaintiffs' highly restrictive reading of ERISA lacks support in the text, Plaintiffs cannot demonstrate a likelihood of success on the merits.

B. The Rule Is Narrower In Scope Than The 2016 Rule Vacated by the Fifth Circuit, and is Otherwise Consistent With the *Chamber* Opinion.

Plaintiffs' argument that *Chamber* dooms the Rule fails for several reasons. *First*, and most obviously, the rules differ on their faces. The 2016 Rule treated "all investment recommendations directed to a specific retirement investor or investors regarding the advisability of a particular investment or management decision as fiduciary in nature, subject to a few carveouts." *Id.* at 32,141. The 2024 Rule focuses on whether the investment recommendation can be appropriately treated as trust-and-confidence advice, assigning fiduciary status where an investment professional makes

[3] For this reason, the Department correctly characterizes Plaintiffs as claiming that the 1975 regulation is fixed in stone. While Plaintiffs pay lip service to the possibility that DOL could enact some other regulation that fits the same atextual interpretation of the statute, *see* Pls.' Reply at 5, they seem to argue that every aspect of the 1975 regulation is commanded by the Fifth Circuit's reading of ERISA. Accordingly, this observation is not a "strawman." *Id.* at 5.

recommendations "under circumstances that" objectively indicate that the recommendation "may be relied upon by the retirement investor as intended to advance the retirement investor's best interest" and that it is "based on review of the retirement investor's particular needs or individual circumstances" and "professional or expert judgment" has been applied. *See* 89 Fed. Reg. at 32,256.

Indeed, Plaintiffs concede that the 2016 Rule swept more broadly and included any furnishment of investment advice to a retirement investor, including a broker's "cold call" merely saying that "[y]ou'll love the return on X stock in your retirement plan, let me tell you about it" to a potential customer, which the Fifth Circuit said was the hypothetical that "best explained" the 2016 Rule's "expanded coverage," 885 F.3d at 369. Here, as Plaintiffs acknowledge, Reply at 5-6, that same overbreadth is lacking in the Retirement Security Rule, which adopts a facts-and-circumstances test that imposes fiduciary status only where certain criteria are satisfied.

Second, Plaintiffs improperly dismiss the Department's regulatory authority over insurance agents that sell annuities to ERISA plans. As the Fifth Circuit noted, "[t]o the extent . . . that some brokers and agents hold themselves out as advisors to induce a fiduciary-like trust and confidence, the solution is for an appropriately authorized agency to craft a rule addressing that circumstance[.]" 885 F.3d at 379 n.13; *see also id.* (stating that *Chamber*'s holding "does not mean that any regulation of such transactions, or of IRA plans, is proscribed"). That is just what the Department has done here by crafting the Rule "to define, objectively, when a retirement investor would reasonably place their trust and confidence in the advice provider." 89 Fed. Reg. at 32,152. While Plaintiffs respond that the Department is not the "appropriately authorized agency," Pls.' Reply at 6, no other agency has responsibility for the ERISA fiduciary definition.

Third, Plaintiffs' argument for a bright-line dichotomy between salespeople and retained investment advisors, pushes far beyond *Chamber*. The Fifth Circuit concluded that the term "render[] investment advice for a fee or other compensation" only applied where the advice relationship was

one of "trust and confidence." 885 F.3d at 369 (concluding that "all relevant sources indicate that Congress codified the touchstone of common law fiduciary status—the parties' underlying relationship of trust and confidence"). But *Chamber* did not conclude that insurance agents could never be more than mere salespeople, incapable of acting from a position of trust and confidence. Nor could *Chamber* account for subsequent regulatory developments, which demonstrate the extent to which insurance agents and brokers do, in fact, hold themselves out as trusted advice providers.[4]

Fourth, Plaintiffs repeat their argument that the Department is improperly regulating Title II plans, Pls.' Reply at 11-12, failing to acknowledge that since 1978 the Department has had the sole interpretive, rulemaking, and exemptive authority for the fiduciary definition and most of the prohibited transaction provisions that apply to Title II plans. Reorg. Plan § 102; Pub. L. No. 98-532, 98 Stat. 2705 (1984). Nor did *Chamber* conclude that advice to roll assets out of a Title I ERISA plan was somehow not advice "with respect to any moneys or other property" of the plan. 29 U.S.C. § 1002(21)(A)(ii). The Rule respects the statutory overlap and differences between Title I and II of ERISA because, unlike the 2016 Rule, the Department has not sought to impose on Title II plans any obligation to enter into enforceable contracts or warranties.

CONCLUSION

For the foregoing reasons, and those stated in the Department's opposition brief, the Court should deny Plaintiffs' Motion for Preliminary Injunction and Stay of the Effective Date of the Rule.

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[4] Plaintiffs also err in suggesting that the Department's facts-and-circumstances test "will effectively turn sale every sale of an annuity to a retirement investor into a fiduciary encounter, just as the 2016 Rule did." Reply at 8. Not so: The Department treats a recommendation as fiduciary advice only if it meets each element of the regulatory text, all of which are focused on the nature of the relationship between the parties. In addition, the rule makes clear that the agent may disclaim the elements of the test to the extent permitted by other law and consistent with their other communications with the investor. This standard, in marked contrast to the 2016 Rule, specifically focuses on the nature of the relationship between the investor and the fiduciary. Plaintiffs have not explained why relationships that meet the regulatory test are not properly treated as relationships of trust and confidence.

Dated: July 10, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 10, 2024, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which sent e-mail notification of such filing to all CM/ECF participants.

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