ORAL ARGUMENT NOT YET SCHEDULED
Case No. 16-5345

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE NATIONAL ASSOCIATION FOR FIXED ANNUITIES,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF LABOR *et al.*,

Defendants-Appellees.

On Appeal from an Order of the U.S. District Court
for the District of Columbia
Case No. 1:11-cv-1035-RDM (Moss, J.)

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GLOSSARY

APA	Administrative Procedure Act
BICE	Best Interest Contract Exemption
DOL	Department of Labor
ERISA	Employee Retirement Income Security Act of 1974
FIA	Fixed indexed annuity
FINRA	Financial Industry Regulatory Authority
IRA	Individual retirement account
NAFA	National Association for Fixed Annuities
NOPR	Notice of Proposed Rulemaking
PTE	Prohibited transaction exemption
SEC	Securities and Exchange Commission

INTRODUCTION

DOL refuses to acknowledge limits on its authority to promulgate a Rule that fundamentally alters the retail IRA marketplace in ways that Congress could never have contemplated or intended when it passed ERISA in 1974 and created IRAs. Instead, DOL takes great liberties with its regulatory authority, supported only by its lofty policy ambitions and a misplaced argument that it may issue any rule not "unambiguously foreclosed" by the text of ERISA.

DOL is not free to depart from the settled, common-law meaning of the term "fiduciary," because ERISA does not *require* DOL to adopt its expansive definition. *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) (emphasis added). DOL concedes that its definition is at odds with common law, sweeping in many financial professionals who do not have a special, fiduciary relationship of trust and confidence with their clients.

Even more fundamentally, DOL is not free to issue a regulation that "would bring about an enormous and transformative expansion in [its] regulatory authority *without clear congressional authorization*." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (emphasis added). Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). "[I]t does not, one might say, hide elephants in mouseholes." *Id.*

Plainly, a labor agency lacks "clear congressional authorization" to expand the definition of fiduciary far beyond its common-law meaning and then use its limited authority to issue conditional exemptions (*i.e.*, "mouseholes") to assert plenary authority over financial professionals who service the multi-trillion dollar retail IRA marketplace. In doing so, DOL arrogates unto itself broad new authority (*i.e.*, "elephants"), extending fiduciary duties Congress designed for employment-based pension plans to IRA transactions and giving IRA owners brand new litigation rights found nowhere in ERISA.

STANDARD OF REVIEW

As explained in NAFA's opening brief (at 14-16), this case can begin and end with *Chevron* Step One, because it involves major questions about DOL's newfound power to regulate IRAs. DOL of course disagrees (at 20-22), invoking *Chevron* deference and arguing that it has "sweeping authority" to take any action that is not unambiguously foreclosed by ERISA.

As is clear from a string of recent decisions, however, there is no reason to defer to an agency that relies on implicit authority to fundamentally alter the scope of a statue and discover expansive new regulatory power. *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231-32 (1994); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000); *Whitman*, 531 U.S. at 465; *Util. Air*, 134 S. Ct. at 2444; *King v. Burwell*, 135 S. Ct. 2480, 2488-89 (2015); *Loving v. IRS*, 742 F.3d

1013, 1016-22 (D.C. Cir. 2014).[1]

In each of these cases, the court gave no deference to the agency and struck down the regulation. The common thread is that there must be "clear congressional authorization" for a regulation that "would bring about an enormous and transformative expansion" in any agency's "regulatory authority." *Util. Air*, 134 S. Ct. at 2444. In addition, "skepticism" is due when such power is "discover[ed] in a long-extant statute," *id.*, or when an agency that lacks "expertise" in the relevant area, *King*, 135 S. Ct. at 2488-89.

Here, DOL is a labor agency with no expertise in regulating the retail IRA marketplace, and its only relevant authority under Title II is to interpret the term fiduciary and issue exemptions from the prohibited transaction rules. Because DOL lacks clear congressional authorization to reject a longstanding interpretation of fiduciary and asserts massive new powers over IRAs, the Rule should be met with the same skepticism that has led courts to strike down other regulations concerning major questions.

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[1] DOL responds (at 20-21) with a misleading quotation from *City of Arlington v. FCC*, 569 U.S. 290 (2013), where the Court rejected a different standard that would withdraw deference for "big, important" questions implicating an agency's *jurisdiction*, but not other "humdrum, run-of-the-mill stuff." *Id.* at 297. *City of Arlington* is inapposite. The Court's subsequent decisions in *Util. Air* and *King* confirm that the *City of Arlington* situation is different from—and the outcome consistent with—cases concerning major questions.

I. DOL Exceeded Its Authority In Defining The Term "Fiduciary."

A. DOL Cannot Retract Its Admission Of Overbreadth.

In its opening brief (at 19), NAFA highlighted DOL's admission that its definition of fiduciary is a "broad test" that "could sweep in some relationships that *are not appropriately regarded as fiduciary in nature* and that the Department *does not believe Congress intended to cover as fiduciary relationships*." JA515 (emphasis added). DOL stated in the rulemaking that it adopted exceptions "designed to draw an appropriate line between fiduciary and non-fiduciary communications and activities." JA516. Put differently, the exceptions were needed to avoid an unduly broad definition of the term fiduciary.

That regulatory approach is not permitted. An *ultra vires* base definition cannot be corrected with exceptions. *Util. Air*, 134 S. Ct. at 2446 ("Agencies are not free to adopt … unreasonable statutory provisions and then edit other statutory provisions to mitigate the unreasonableness."); *Hearth, Patio & Barbeque Ass'n v. U.S. Dep't of Energy*, 706 F.3d 499, 508 (D.C. Cir. 2013) ("The means may change, but the *ultra vires* end remains the same. Agencies don't get a free pass simply because they've kept their definitional house in order.").

Recognizing its problem, DOL responds with an expedient attempt to retract its admission. DOL argues (at 27-29) that it is free to regulate "*all* individuals" who "render[] investment advice for a fee," because the definition in ERISA "is

not unambiguously limited to advice given in a relationship of trust and confidence." Thus, DOL contends (at 29) that its three exceptions were gratuitous, because "ERISA does not prohibit DOL from treating any of those entities as fiduciaries." DOL admitted in its rulemaking that its definition includes three types of relationships it "does not believe Congress intended to cover as fiduciary relationships," JA515, and it cannot change its mind in an appeal brief.[2]

B. DOL's Authority Is Constrained By Common Law.

DOL tries to prove too much when it argues (at 18-20 & 23-26) that it is free to adopt any "reasonable construction" of fiduciary not "unambiguously foreclose[d]" by ERISA. As set forth in NAFA's opening brief (at 21-23 & 26-27), the term "fiduciary" has developed "a legal meaning to which, [courts] normally presume, Congress meant to refer" when it enacted ERISA. *Varity*, 516 U.S. at 502. Common-law principles must guide the interpretation of the term in ERISA, unless "the language of the statute, its structure, or its purposes *require* departing from common-law trust requirements." *Id.* at 497 (emphasis added).

DOL ignored this rule of construction and deliberately deviated from

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[2] DOL asserts (at 28) the truism that "agencies regularly promulgate definitions with exceptions," citing *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 242-45 (2004). In that case, the Court upheld a regulation that was "in no way manifestly contrary" to the enabling statute. Here, DOL admitted that its definition is directly contrary to congressional intent, in at least three instances.

common law. Indeed, DOL concedes (at 28 and JA557) that it "emphatically rejected" a common-law definition. DOL's vaporous argument (at 18-19 & 23-26) that the "structure" and "purpose" of ERISA "require departing from common-law" is to no avail. *Varity*, 516 U.S. at 498.

First, DOL argues (at 18-19) that the "broader structure" of ERISA justifies its departure from the common law, relying on the following passage from *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993): "ERISA … defines 'fiduciary' not in terms of formal trusteeship, but in *functional* terms of *control and authority* over the plan." (emphasis added). NAFA does not dispute that ERISA adopts a functional test for fiduciary status, dispensing with the need for formal trusteeship and focusing instead on actual control and authority, which are the key underlying elements of a common-law fiduciary relationship of trust and confidence. But DOL's new definition includes any commissioned insurance agent who suggests that a client purchase an annuity, even if the salesperson *has no functional control or authority* over an IRA or its owner's decision. *Mertens* is of no help to DOL.[3]

Second, DOL's platitudes (at 18-19) about the "history and purpose" of

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[3] DOL's citation to *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank.*, 510 U.S. 86, 95-96 (1993), reinforces that ERISA fiduciary status is typically defined by reference to authority and control over a plan or its assets. If DOL's overly-literal approach were applied to other prongs in the definition of fiduciary, it would lead to absurd results (*e.g.*, an individual with "discretionary authority" over printing plan documents could be deemed a fiduciary).

ERISA are "inadequate to overcome the words of its text regarding the *specific* issue under consideration." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 220 (2002) (citation omitted). Moreover, even if vague concepts of purpose could override statutory construction, DOL's argument founders on its concession (at 19-20 & JA513) that the purpose of its expanded definition is to protect *individual IRA owners*, who "increasingly shoulder the burden of preparing for their own retirement." DOL's authorities demonstrate that the purpose of ERISA was to protect *beneficiaries of employment-based pension plans*, who lack control over their funds held in such plans. *See* 29 U.S.C. §1001(b) ("[P]olicy of this chapter [is] to protect … the interests of participants in employee benefit plans and their beneficiaries…."); *Commissioner v. Keystone Consol. Indus.*, 508 U.S. 152, 160 (1993) (Section 4975 intended to curb "pension plan" abuse).

Thus, DOL has it backwards when it says (at 24) it "is not required to adopt a semantically possible interpretation merely because it would comport with common-law standards." As stated in *Varity*, "[i]n some instances, trust law will offer only a starting point, after which courts must go on to ask whether, or to what extent, the language of the statute, its structure, or its purposes *require* departing from common-law trust requirements." 516 U.S. at 497 (emphasis added).

DOL admits (at 2) that ERISA "does not unambiguously adopt or reject a common-law 'trust and confidence' standard" and (at 36) that NAFA "has

identified support for why DOL reasonably could have adhered to its prior interpretation of the fiduciary-investment-advice definition." Thus, DOL *concedes* that ERISA does not "require" it to depart from the common-law meaning of fiduciary, which has never encompassed individuals who are not in a relationship of trust and confidence, such as commissioned salespersons. The fact that the agency conjured up an interpretation of fiduciary at odds with the common law—and not required by ERISA—means that its definition is foreclosed under *Varity*.[4]

C. Insurance Salespersons Are Not Paid For Advice.

In its opening brief (at 23-25), NAFA pointed out that ERISA fiduciary status attaches only when rendering "investment advice *for a fee or other compensation*," and fixed annuity sales commissions are not payments for investment advice. An insurance agent receives a commission only for selling a product—there is no additional commission for providing advice, nor is the commission reduced when an agent offers no advice. Thus, agents are not fiduciaries—unlike investment advisors, who are in the business of giving advice

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[4] DOL relies (at 23-24) on *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 94 (1995) to support its definition, but the Court in that case concluded that the agency's definition of "employee" was consistent with the common law. Nor does DOL find support in its cases interpreting terms in criminal statutes. *See Moskal v. U.S.*, 498 U.S. 103, 116-17 (1990) (interpreting "falsely made," for which "no fixed usage existed at common law"); *Taylor v. U.S.*, 495 U.S. 575, 592-93 (1990) ("burglary" not limited to antiquated common-law definition).

and are "compensated specifically for that advice." *Thomas v. Metro. Life Ins. Co.*, 631 F.3d 1153, 1166 (10th Cir. 2011).

In lieu of a direct response, DOL concocts a straw-man by recasting NAFA's point (at 29-30) into an argument that agents are not paid "primarily" for investment advice. NAFA's point, however, is that agents receive *no compensation at all* for advice when they earn commissions, because agents are not in the advice-giving business. They are paid only if and when they sell a product. To that, DOL has no response.

DOL next argues (at 30-31) that ERISA does not "unambiguously exclude individuals compensated by commission," because the definition applies to individuals who render "investment advice" for "*indirect*" compensation. But again, while insurance agents are paid indirectly via sales commissions from carriers, *they are not paid by clients for advice*. None of the authorities DOL cites begin to establish that sales commissions are "indirect" payments for advice.

DOL says (at 31) it "has interpreted this definition to cover commissions for more than forty years." To support this claim, DOL cites to the commentary *accompanying its five-part test*, which states as follows:

> Although this matter is still under consideration by the Department and the Service, as a general guideline until more definitive statement is issued, a fee or other compensation, direct or indirect, for the rendering of investment advice to a plan by a fiduciary, within the meaning of section 3(21)(A)(ii) of the Act, should be deemed to include … brokerage commissions, mutual fund sales commissions, and insurance sales commissions.

40 Fed. Reg. 50,842. Thus, DOL relies on "a general guideline" included in commentary in 1975, pending a "more definitive statement." Critically, the five-part test DOL actually adopted in 1975 did not treat commissioned salespersons as fiduciaries unless they (1) rendered investment advice (2) on a regular basis, (3) pursuant to a mutual understanding that the advice (4) will serve as the primary basis for investment decisions and (5) will be individualized for the plan. *Id.*[5]

DOL cites *Eaves v. Penn*, 587 F.2d 453, 458 (10th Cir. 1978), to argue that its position on commissions "has been repeatedly upheld by courts." Commissions were not at issue in *Eaves*. Instead, the question was whether an officer of a company was a fiduciary with respect to an employee stock ownership plan, and the court cited a passage from a law review article that happened to contain the following line at the end: "The term (fiduciary) includes … stock brokers or dealers who recommend certain securities and then participate in the acquisition or

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[5] Similarly, DOL cites a proposed rule that would have granted an exemption from the prohibited transaction rules for "[t]he receipt of sales commissions" by an insurance agent who *already qualified* as a "fiduciary with respect to the plan." 41 Fed. Reg. 56,760, 56,760-61 (Dec. 29, 1976).

disposition of those securities and receive a commission for their services." *Id.*[6]

II. DOL Exceeded Its Exemptive Authority.

After over-defining the term fiduciary to subject insurance salespersons and other non-fiduciaries to the prohibited transaction rules, DOL relies on its limited power to issue exemptions to take two more giant leaps beyond its authority. First, through PTE 84-24 and the BICE, DOL requires all salespersons who suggest fixed annuities to IRA owners to adhere to the same duties of loyalty and prudence that Congress created for fiduciaries to employment-based ERISA plans subject to Title I. Second, through the BICE, DOL requires that fixed indexed annuity ("FIA") carriers and agents enter into "Best Interest Contracts," in which they warrant compliance with the fiduciary duties copied from Title I. Consequently, IRA owners will for the first time be able to sue insurance carriers and their agents for breach of Title I fiduciary duties.

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[6] DOL also contends (at 31 n.10) that "[f]ederal securities law has long recognized that brokers charge commissions in part for the investment advice they render." The case DOL cites states as follows: "Discount brokers execute trades on behalf of their customers but do not offer investment advice. As a result, the commissions they charge are substantially lower than those charged by full-service brokers." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 390-91 n.1 (1987). Here again, insurance agents do not receive greater commissions for offering advice.

A. Congress Does Not Hide Elephants In Mouseholes.

Again, DOL mistakenly asserts authority to take any regulatory action not "unambiguously foreclosed" by the statute. Specifically, DOL argues (at 37-38 & 45) that it has "expansive authority" to grant any conditional exemption that is "administratively feasible," (2) "in the interests of the plan and of its participants and beneficiaries," and (3) "protective of the rights of participants and beneficiaries of such plan." But DOL is *not* free to adopt an exemption that results in "an enormous and transformative expansion in [its] regulatory authority *without clear congressional authorization*." *Util. Air*, 134 S. C.t at 2444 (emphasis added).

As explained in NAFA's opening brief (at 27-35), DOL lacks such authorization to use its exemptive authority to exert plenary authority over the IRA marketplace. Congress did not apply Title I fiduciary duties to transactions involving IRAs when it enacted Title II and created IRAs, and "it is generally presumed that Congress acts intentionally and purposely" when it "includes particular language in one section of a statute but omits it in another section of the same Act." *Stovic v. R.R. Ret. Bd.*, 826 F.3d 500, 503 (D.C. Cir. 2016). Congress also did not include a private right of action for IRA owners among the "carefully integrated civil enforcement provisions" in ERISA, opting instead for an excise tax. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985).

More than 40 years later, however, DOL has made "creative" use of its

authority to craft exemptions to impose massive new requirements in the IRA marketplace. Congress does not "alter the fundamental details of a regulatory scheme in … ancillary provisions," *Whitman*, 531 U.S. at 468, nor does it delegate "a decision of such economic and political significance to an agency in so cryptic a fashion," *Brown & Williamson*, 529 U.S. at 160. DOL attempts to distinguish these cases on the facts (at 41), but it does not contest that it used its mundane exemptive authority to effect "enormous and transformative expansion" in its regulatory authority, "without clear congressional authorization." *Util. Air*, 134 S. Ct. at 2444.[7]

DOL recognized in rulemaking that fixed annuity sellers have no practical way to avoid the onerous conditions imposed by PTE 84-24 and the BICE, because "all are paid by commissions." JA898-99. DOL now argues (at 40) that it "reasonably determined that regulated entities can adopt alternative compensation systems." The record material it cites, however, deals with technological innovation in financial services (*e.g.*, robo-advisers) and says nothing about insurance commissions. *See* JA1086-92. As explained in NAFA's opening brief (at 6), the commission-based system exists because other forms of payment (*e.g.*,

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[7] DOL argues (at 37-40) that it has actually *reduced* regulatory burdens by creating conditional exemptions for transactions that would otherwise be "categorically" prohibited by ERISA. Of course, the IRA transactions at issue are barred only because of DOL's improper definition of the term fiduciary.

fees for assets under management) do not work in the sale of fixed annuities, which typically involve large initial deposits and little ongoing work by agents. JA78.[8]

B. DOL Is Not Free To Create A New Right Of Action.

DOL's attempt to create new litigation rights for IRA owners is perhaps its most egregious departure from its statutory authority. DOL not only lacks clear congressional authorization to create a private right of action, but doing so also violates the rule established in *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001).

DOL responds (at 45) that "fiduciary investment advisers to IRAs have always been subject to suit in state courts on state-law theories of liability, including breach of contract and breach of fiduciary duty," and investors who enter into BICs will merely sue "under a preexisting state-law cause of action, the same way they always have when advisers have not adhered to their agreements."

DOL's argument is misleading. Before the BICE, any claim by an IRA owner alleging that an insurance agent breached a fiduciary duty would be "frivolous," as the courts have made clear that there are no ERISA causes of action for "errant IRA fiduciaries." *E.g.*, *Burns v. Delaware Charter Guarantee & Tr. Co.*, 805 F. Supp. 2d 12, 19-20 (S.D.N.Y. 2011). When the BICE goes into effect,

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[8] The record material DOL cites also does not support its claim (at 40 n.11) that it gave a "reasoned explanation" concerning a "hypothetical fiduciary whose business model for some reason *requires* the receipt of commissions."

however, IRA owners will for the first time be able to bring viable claims alleging that insurance agents breached Title I fiduciary duties imposed by federal law. This is a clear violation of *Sandoval*, which holds that "private rights of action to enforce federal law must be created by Congress." 532 U.S. at 286.[9]

Indeed, the rule stated by the Supreme Court in *Sandoval* would be eviscerated if federal agencies could require private parties to enter into agreements that incorporate statutory standards Congress chose not to make enforceable through a private cause of action. DOL's principal response (at 35) is that NAFA waived this argument, but that is simply untrue.[10]

Astra USA, Inc. v. Santa Clara Cty., 563 U.S. 110, 113-18 (2011), further undermines DOL's position, because the Supreme Court rejected an attempt to use

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[9] DOL argues (at 45) that "[s]uch a claim would not even present a federal question for jurisdictional purposes." This issue is not clear-cut and raises the "litigation-provoking" question of whether "the presence of a federal issue in a state-created cause of action" is sufficient to confer federal question jurisdiction. *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 819-10 (1986); *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 13-14 (1983) ("Even though state law creates appellant's causes of action, its case might still 'arise under' the laws of the United States if a well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties.").

[10] The issue was clearly presented to the district court. Dkt. 32 at 32 ("The rule set forth in *Sandoval* would be meaningless if agencies could simply 'conjure up a private cause of action that has not been authorized by Congress' by grafting federal statutory rights into state-law claims. 532 U.S. at 291.").

contract law to create a private right of action that Congress did not authorize. The Supreme Court held that "[t]he absence of a private right to enforce the [statute] would be rendered meaningless" if private parties "could overcome that obstacle by suing to enforce [contractual] obligations instead." *Id.* DOL attempts (at 45) to avoid the clear import of *Astra* by distinguishing the facts, but it is of no moment that *Astra* involved suits by third-party beneficiaries rather than parties to BICs. Contract rights cannot be used as an end run around a congressional decision not to allow a private right of action.[11]

III. The Rule, PTE 84-24, And The BICE Are Unreasonable.

DOL makes no effort to account for the enormous collective impact of the Rule, PTE 84-24, and the BICE—focusing instead on each step in isolation. Even if ERISA could be construed to authorize each of these steps—and it cannot—they would still be individually and collectively unreasonable. *See Goldstein v. SEC*, 451 F.3d 873, 880-81 (D.C. Cir. 2006) ("The 'reasonableness' of an agency's construction depends, in part, on the construction's 'fit' with the statutory language, as well as conformity to its statutory purposes.") (citation omitted). Thus, even if deference were appropriate, the Rule fails at *Chevron* Step Two for many of the same reasons already set forth. *See Am. Library Ass'n v. FCC*, 406

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[11] The other regulations DOL cites (at 46-47) do not create substantive litigation rights Congress omitted from the underlying statutes.

F.3d 689, 699 (D.C. Cir. 2005) ("Our judgment is the same whether we analyze the FCC's action under the first or second step of *Chevron*").

In addition, the Rule fails at Step Two because DOL offers no "reasoned analysis" for its "materially changed interpretation of a statute." *Alabama Educ. Ass'n v. Chao*, 455 F.3d 386, 392, 396 (D.C. Cir. 2006). Most notably, DOL cannot distort statutory meaning simply because "much has changed [in] the last 40 years." *Id.* DOL offers no direct response to the point that there has been no change to the *relationship between insurance salespersons and IRA owners* that justifies reinterpreting ERISA to treat salespersons as fiduciaries. DOL's main response (at 33-34) boils down to the notion that changing times require greater regulation of IRAs. As in *Goldstein*, DOL improperly manipulates statutory terms to regulate a marketplace otherwise outside its reach under ERISA.

IV. DOL's Last-Minute Decision To Move FIAs To The BICE Was Arbitrary and Capricious.

A. DOL Failed To Address Distribution Problems It Identified.

At the threshold, DOL has not created a "level playing field" for FIA sellers. Under the Harkin Amendment, FIAs are not regulated as securities and are not sold through the securities distribution system. Because the BICE effectively requires insurance carriers and agents to use a new securities distribution model for FIAs, it leaves them at a distinct competitive disadvantage.

DOL completely failed to take account of this distribution problem. In its

NOPR, DOL placed FIAs under PTE 84-24 because it was "not certain … that the distribution methods and channels of insurance products that are not securities would fit within the [BICE]." JA1235. Nevertheless, in the final rule, DOL lumped FIAs with security products, without explaining or resolving the distribution issue it identified in its NOPR.

Because DOL did not address the FIA distribution structure at all, it "entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). DOL attempts to sidestep this issue (at 53) by citing a bare assertion that it revised the BICE to be "less burdensome and more readily complied with by … distributors of insurance products." JA586. In the commentary surrounding this conclusory statement, however, DOL makes no further mention of the distribution problem facing FIA sellers. DOL's "fleeting" reference does not constitute reasoned decisionmaking under the APA. *Ass'n of Private Sector Coll. & Univs. v. Duncan*, 681 F.3d 427, 448 (D.C. Cir. 2012).

B. The BICE Requirements Are Unworkable.

As NAFA explained in its opening brief (at 47-48), it is impossible for insurance carriers to warrant that independent agents who work with other carriers have recommend FIA products without regard for their own financial interests.

DOL responds (at 54-55) that NAFA "forfeited" this argument, because it

was not raised in a comment letter. After DOL issued a NOPR placing FIAs in PTE 84-24, JA1230, NAFA (and others) commented that DOL had "appropriately categorized fixed annuities as covered transactions eligible for an exemption under PTE 84-24," JA1519, and the BICE "would impose onerous and, frankly, unworkable conditions on the sale of [FIAs]," JA1521. *See also* JA1525-27 (IALC comment letter). NAFA had no reason to give a more detailed explanation about an unexpected change DOL made *after* the comment period.

DOL further argues (at 55) that a financial institution need only adopt "policies and procedures reasonably and prudently designed to ensure that [its agents] adhere to the Impartial Conduct Standards," JA588, and DOL's FAQs clarify that the BICE "does not require insurance companies to exercise supervisory responsibility" over "unrelated and unaffiliated insurance companies." DOL suggests this guidance removes any requirement for carriers to supervise agent activity relating to other company's products.

But that is a canard invented by DOL after promulgating an unworkable regulation. DOL's "guidance" is completely at odds with the BICE requirement that a carrier provide contractual warranties that its agents make recommendations without regard for their own financial interests, and the supervision requirement in the BICE is not limited to any insurer's own products. JA645. DOL's guidance might have meant something if DOL were the sole enforcer of the BICE, but it has

outsourced enforcement to the plaintiffs' bar.[12]

DOL speculates that courts will give "controlling" weight to its FAQs, but such deference typically is not appropriate when agency guidance is "inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997). Indeed, courts have repeatedly declined to apply *Auer* deference to DOL's interpretation of its own regulations. *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 159-60 (2012) (DOL's "new interpretation" of regulations was "flatly inconsistent" with the regulations); *Rhea Lana, Inc. v. DOL*, 824 F.3d 1023, 1030-31 (D.C. Cir. 2016) ("[*Auer*] deference is unwarranted when it appears that the interpretation is nothing more than a convenient litigating position, or a *post hoc* rationalization advanced by an agency seeking to defend past agency action against attack.").

DOL continues to demand the impossible, placing the FIA industry in an unworkable position and offering "guidance" that contradicts the regulation itself.

C. DOL Had No Evidence Of Harm Related to FIAs.

DOL argues (at 51-53) that it made "qualitative" conclusions about FIAs and also "examined and discussed a wide body of evidence" limited to *mutual fund*

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[12] Notably, one of the *amici curaie* supporting DOL is the Public Investors Arbitration Bar Association, which speaks for plaintiffs' attorneys who represent investors in disputes with the securities industry. Another is the AARP, which sponsors a fixed annuity that competes with FIAs offered by independent agents (https://www.nylaarp.com/annuities/gfi#/onestep).

studies, anecdotal evidence, and dated SEC and FINRA guidance.[13]

To justify its "qualitative" conclusions, DOL argues (at 51) that "the APA requires only a 'reasoned explanation,' not a specific quantum of data," citing *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009). In *Stilwell*, however, the Court upheld a rule that resulted from the agency's "long experience of supervising" an industry. DOL has no experience regulating the retail IRA marketplace, and the key requirements of the BICE apply only to IRAs, not ERISA plans.[14] Moreover, DOL's "qualitative" conclusions are *contradicted* by a study showing very few consumer complaints about FIAs, compared to securities and other types of annuity products. JA1520.

Lacking any quantitative evidence about FIAs, DOL argues (at 53) that it was "reasonable" to discount that study and instead "extrapolate data from the mutual-funds market to the fixed indexed annuities market," because both are subject to "*similar* regulatory regimes" and "sold under *similar* commission-based compensation regimes." (emphasis added). Of course, "similar" means different,

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[13] DOL cites to a 2005 FINRA Notice, JA811, a 2010 FINRA Investor Alert, JA585, and a 2011 SEC Investor Alert. All of these materials were issued before Congress enacted the Harkin Amendment, which effectively deprived the SEC and FINRA of the power to regulate FIAs.

[14] JA647 ("Section II(a) does not apply to recommendations to Retirement Investors regarding investments in Plans that are covered by Title I of ERISA.").

and FIAs and mutual funds are significantly different. "[O]ff-point studies" on mutual funds do not support "reasoned decisionmaking" as to FIAs. *Flyers Rights Educ. Fund, Inc. v. FAA*, 864 F.3d 738, 740-41 (D.C. Cir. 2017).[15]

V. The "Reasonable Compensation" Requirement Is Void For Vagueness.

Finally, DOL's brief does not meaningfully counter NAFA's argument that the "reasonable compensation" requirement in the BICE is void for vagueness, because it requires FIA sellers to make *ex ante* judgments about a nebulous standard that private parties will enforce *post hoc* in litigation, including class actions. Nor does DOL address the cogent arguments made by *amici curiae*. *See* Brief of *Amici Curiae* Fidelity & Guaranty Life Insurance Company and MV Group. As the *amici* explain (at 4-5), "the consequences of estimating wrong as to what constitutes 'reasonable compensation' could be disastrous."

The use of the phrase "reasonable compensation" in ERISA section 408(b)(2) and Code section 4975(d)(2) does not help clarify whether compensation is "reasonable" or "excessive." To the contrary, the corresponding regulations

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[15] The other cases DOL cites do not support its reliance on mutual fund studies. In *NRDC v. Thomas*, 805 F.2d 410, 432 (D.C. Cir. 1986), the agency issued a "technology forcing" rule requiring it to make "reasonable extrapolations" about *future* technology. DOL is not predicting the future. In *Nat'l Small Shipments Traffic Conference, Inc. v.CAB*, 618 F.2d 819, 831 (D.C. Cir. 1980), it was reasonable for an agency to rely on "the experience of the air taxi industry," which is a "segment of the air cargo transportation industry." Mutual funds are not a "segment" of the FIA industry.

each state that reasonableness "depends on the particular facts and circumstances of each case." 29 C.F.R. § 2550.408c-2(b)(1); 26 C.F.R. § 54.4975-6(e)(2). The inclusion of the phase "reasonable compensation" in the old version of PTE 84-24 is similarly unhelpful, because that standard did not apply to commissions for insurance salespersons.

NAFA's members cannot be "constitutionally subjected to penalties … by force of such indefinite legislation." *Louisville & N.R. Co. v. R.R. Comm'n*, 19 F. 679, 693 (M.D. Tenn. 1884). DOL chides NAFA (at 44) for failing to cite "any case incorporating such considerations into the test for constitutional reasonableness," but it makes no effort to address *Louisville* and cites no authority approving of regulatory action that imposes enormous *post hoc* penalties for failing to comply with a nebulous and undefined standard.

CONCLUSION

For all of the foregoing reasons, the Rule, the BICE, and amended PTE 84-24 should be vacated.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

1. The foregoing complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because, excluding those parts exempted by Fed. R. App. P. 32(f) and D.C. Cir. Rule 32(e)(1), because this document contains 6,468 words.

2. The foregoing complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because this document has been prepared in a proportionally-spaced typeface using Microsoft Word in Time New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of September 2017, I filed the foregoing Appellant's Reply Brief with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system. Service was accomplished on the following through the CM/ECF system:

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