No. 17-10238

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; FINANCIAL SERVICES INSTITUTE, INCORPORATED; FINANCIAL SERVICES ROUNDTABLE; GREATER IRVING-LAS COLINAS CHAMBER OF COMMERCE; HUMBLE AREA CHAMBER OF COMMERCE, doing business as Lake Houston Chamber of Commerce; INSURED RETIREMENT INSTITUTE; LUBBOCK CHAMBER OF COMMERCE; SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION; TEXAS ASSOCIATION OF BUSINESS,

Plaintiffs – Appellants,

v.

UNITED STATES DEPARTMENT OF LABOR; R. ALEXANDER ACOSTA, SECRETARY, U.S. DEPARTMENT OF LABOR,

Defendants – Appellees.

AMERICAN COUNCIL OF LIFE INSURERS; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS - TEXAS; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS - AMARILLO; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS - DALLAS; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS - FORT WORTH; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS - GREAT SOUTHWEST; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS - WICHITA FALLS;

Plaintiffs – Appellants,

v.

UNITED STATES DEPARTMENT OF LABOR; R. ALEXANDER ACOSTA, SECRETARY, U.S. DEPARTMENT OF LABOR,

Defendants – Appellees.

INDEXED ANNUITY LEADERSHIP COUNCIL; LIFE INSURANCE COMPANY OF THE SOUTHWEST; AMERICAN EQUITY INVESTMENT LIFE INSURANCE COMPANY; MIDLAND NATIONAL LIFE INSURANCE COMPANY; NORTH AMERICAN COMPANY FOR LIFE AND HEALTH INSURANCE,

Plaintiffs – Appellants,

v.

R. ALEXANDER ACOSTA, SECRETARY, U.S. DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF LABOR,

Defendants – Appellees.

On Appeal from the United States District Court
for the Northern District of Texas

BRIEF FOR APPELLEES

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STATEMENT REGARDING ORAL ARGUMENT

This Court has scheduled these appeals for oral argument on July 31, 2017.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes:

Regulations:

Rules:

Legislative Materials:

Other Authorities:

INTRODUCTION

This appeal concerns a package of agency actions, known as the "fiduciary rule," issued by the Department of Labor ("DOL") in the exercise of its broad and express authority to address the issue of conflicts of interest in the marketplace for retirement-investment advice. The fiduciary rule amends DOL's prior regulations implementing the Employee Retirement Income Security Act ("ERISA") and the Internal Revenue Code ("Code") by reasonably expanding DOL's interpretation of the statutory definition of "fiduciary" to reach certain investment advisers who fall within that definition's literal terms but outside the more restrictive definition adopted in DOL's prior regulations. These advisers are now subject to the duties and restrictions set forth in ERISA and the Code—which Congress imposed on fiduciaries to safeguard the Nation's retirement security.

One such restriction, present in both statutes, requires fiduciaries to refrain from engaging in transactions in which they have personal economic interests. To offer fiduciaries relief from these prohibited-transaction provisions, Congress vested DOL with broad authority to issue administrative exemptions to them. In the fiduciary rule, DOL exercised that authority, on the basis of the record before it, to condition certain exemptions on compliance with a variety of procedural safeguards that DOL deemed warranted to mitigate the harmful effects on retirement investors of conflicted investment advice in the modern investment marketplace.

Plaintiffs' members are participants in that market who may qualify as fiduciaries under the new rule. Objecting to the imposition of that status, plaintiffs assert that DOL lacked authority both to revise its interpretation of the statutory definition of investment-advice fiduciary and also to condition relief from the prohibited-transaction provisions on the terms that it did. Plaintiffs further claim that the agency's policy judgments were arbitrary and capricious. And plaintiffs lastly mount a sweeping constitutional attack, arguing that imposing fiduciary-conduct standards on investment advisers is an impermissible restriction of speech.

The district court was correct to reject plaintiffs' arguments, with one narrow exception. First, because the statutory definition of an investment-advice "fiduciary"—which covers individuals "to the extent" they "render[] investment advice for a fee or other compensation, direct or indirect," 29 U.S.C. § 1002(21)(A)(ii); 26 U.S.C. § 4975(e)(3)—does not unambiguously adopt or reject a common-law "trust and confidence" standard, DOL acted reasonably in interpreting the definition's literal terms to reach more broadly in the context presented. Second, DOL also acted reasonably in exercising its broad discretion to condition exemptions from the prohibited-transaction provisions on safeguards that the agency found to be "administratively feasible," "in the interests of," and "protective" of the "rights" of retirement investors. 29 U.S.C. § 1108(a); 26 U.S.C. § 4975(c)(2). The sole exception is a condition that excludes an adviser who enters into an arbitration agreement that prevents investors from participating in class-action litigation. The government no longer defends that condition in light of the Acting Solicitor General's construction of the Federal Arbitration Act in a case pending before the Supreme Court, but that condition is severable from the remainder of the fiduciary rule, as the rule itself makes clear. Third, DOL did not act arbitrarily or capriciously when it provided a detailed rejection of plaintiffs' policy arguments during the notice-and-comment process. Finally, plaintiffs' First Amendment arguments are not properly before this Court and, in any event, rest on the discredited and radical premise that investment advisers can evade regulation of conflicts of interest in the conduct of their business simply because that business is conducted with words.

In sum, plaintiffs have failed to identify any reason why the fiduciary rule, including its associated exemptions, should be vacated in full, and the judgment of the district court should be affirmed in all but the one narrow respect identified above.

STATEMENT OF JURISDICTION

This appeal involves three consolidated lawsuits: *Chamber of Commerce of the United States of America v. Perez*, No. 3:16-cv-1476 ("Chamber plaintiffs"); *American Council of Life Insurers v. U.S. Department of Labor*, No. 3:16-cv-1530 ("ACLI plaintiffs"); and *Indexed Annuity Leadership Council v. Perez,* No. 3:16-cv-1537 ("IALC plaintiffs"). All plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. The district court entered final judgment on February 9, 2017. ROA.9954.

All plaintiffs filed timely notices of appeal: the *Chamber* plaintiffs on February 24, 2017, ROA.9955, and the *ACLI* and *IALC* plaintiffs on February 28, 2017, ROA.9959, 9962. *See* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

The fiduciary rule has two components. One component revises DOL's interpretation of statutory language defining individuals as fiduciaries "to the extent" they "render[] investment advice for a fee or other compensation, direct or indirect." 29 U.S.C. § 1002(21)(A)(ii); 26 U.S.C. § 4975(e)(3). The only issue presented with respect to this component of the rule is whether DOL reasonably interpreted this statutory definition.

The other component revises the system of administrative exemptions issued by DOL to the prohibited-transaction provisions in ERISA and the Code. This appeal focuses on the conditions of one exemption—the Best-Interest Contract ("BIC") Exemption—in particular. The issues presented are: (1) whether the exemption is a lawful exercise of DOL's exemption authority; (2) whether the exemption impermissibly creates a cause of action; (3) whether one of the exemption's conditions is precluded by the Federal Arbitration Act; and (4) whether DOL's decision to require prohibited transactions involving certain annuities to satisfy the exemption was arbitrary or capricious.

Finally, plaintiffs allege that the fiduciary rule violates the First Amendment. The issues presented are: (1) whether plaintiffs' constitutional claim is properly before this Court; (2) whether the fiduciary rule is a valid restriction on conduct that only incidentally burdens speech; and (3) whether, assuming that the fiduciary rule restricts speech, the rule survives constitutional scrutiny.

STATEMENT OF THE CASE

I. Statutory Background

The Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 ("ERISA"), is a "comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). Before ERISA, "federal involvement in the monitoring of pension funds . . . was minimal." *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682, 689 (7th Cir. 1986). ERISA's predecessor statute provided only for "limited disclosure of information and filing of reports for … pension funds"; "primary responsibility for supervising the pension funds was left to the beneficiaries, 'reserving to the states the detailed regulations relating to insurance and trusts.'" *Id.* Congress determined that this existing regulatory system had failed to effectively "monitor[] and prevent[] fraud and other pension fund abuses." *Id.* It enacted ERISA to establish nationwide "standards . . . assuring the equitable character" and "financial soundness" of retirement-benefit plans. 29 U.S.C. § 1001(a).

This case concerns regulations issued to implement Titles I and II of ERISA. Title I applies to retirement plans "established or maintained" by employers or unions. 29 U.S.C. § 1003(a). The Secretary of Labor has broad and express authority to "prescribe such regulations as he finds necessary or appropriate to carry out [its] provisions." *Id.* § 1135.

To protect the participants and beneficiaries in Title I plans, ERISA imposes duties and restrictions on individuals who qualify as "fiduciaries" under the statute. As relevant here, an individual is defined as a fiduciary "to the extent . . . he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so." 29 U.S.C. § 1002(21)(A)(ii).[1] This statutory definition "express[ly] . . . depart[s]" from the common law of fiduciary relationships. *See Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 n.5, 262 (1993). By speaking "not in terms of formal trusteeship but in *functional* terms," Congress "expand[ed] the universe of persons subject to fiduciary duties." *Id.* at 262.

Fiduciaries to Title I plans must adhere to the duties of loyalty and prudence. *See* 29 U.S.C. § 1104(a)(1)(A)-(B). To supplement these duties, Congress "categorically barr[ed]" such fiduciaries from engaging in certain transactions deemed "likely to injure the pension plan." *Harris Trust Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 241-42 (2000) (citation omitted). These prohibited transactions include

[1] ERISA contains two other definitions of fiduciary. These define individuals as fiduciaries to the extent they "exercise[] any discretionary authority or discretionary control respecting management of such plan or exercise[] any authority or control respecting management or disposition of its assets," 29 U.S.C. § 1002(21)(A)(i), or to the extent they "ha[ve] any discretionary authority or discretionary responsibility in the administration of such plan," *id.* § 1002(21)(A)(iii).

"deal[ing] with the assets of the plan in his own interest or for his own account," and "receiv[ing] any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan." 29 U.S.C. § 1106(b)(1), (3). Congress, however, also gave DOL expansive authority to "grant a conditional or unconditional exemption" from the prohibition-transaction provisions to any fiduciary or transaction, or class of fiduciaries or transactions. *Id.* § 1108(a). DOL must find that the exemption is (1) "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." *Id.*

Congress authorized DOL, plan participants, and plan beneficiaries to bring civil actions to enforce Title I's provisions. 29 U.S.C. § 1132(a). However, ERISA generally preempts "any and all State laws insofar as they . . . relate to any" plan Title I governs. *Id.* § 1144(a).

Title II of ERISA, codified in the Internal Revenue Code ("Code"), governs the conduct of fiduciaries to some plans not covered by Title I—including individual retirement accounts ("IRAs"), which Title II created. 26 U.S.C. § 4975(e)(1)(B); *see* ERISA, Pub. L. No. 93-406, § 408, 88 Stat. at 959-64.[2] Although Title II does not

[2] Title II also covers individual retirement annuities, health savings accounts, and certain other tax-favored trusts and plans. *See* 26 U.S.C. § 4975(e)(1)(C)-(F). For simplicity, this brief will refer to all such plans as "IRAs," and will refer to Title II of ERISA interchangeably with the Code.

impose the specific duties of prudence and loyalty on such fiduciaries, it prohibits fiduciaries from engaging in conflicted transactions on the same terms as Title I, 26 U.S.C. §§ 4975(c)(1), (e)(3), and gives DOL the same sweeping authority to issue administrative exemptions.[3] Although Title II does not contain a civil-action provision akin to 29 U.S.C. § 1132(a), the statute imposes excise taxes on fiduciaries who violate its prohibited-transaction provisions. Because Title II does not preempt state law, the statute also exposes fiduciaries to suit on state-law theories of liability. *See National Ass'n for Fixed Annuities v. Perez* ("*NAFA*"), 217 F. Supp. 3d 1, 37 (D.D.C. 2016) (listing cases).

II. Regulatory Background

This appeal principally concerns DOL's interpretation of the parallel definitions of investment-advice fiduciary in ERISA and the Code. DOL initially construed the definition's language narrowly. Its original interpretation, issued in 1975, established a five-part test for fiduciary status. To qualify, an adviser had to (1) "render[] advice . . . or make[] recommendation[s] as to the advisability of

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[3] Congress originally vested responsibility for administering Title II's prohibited-transaction provisions in the Secretary of the Treasury. 26 U.S.C. § 4975(c)(2). In 1978, to harmonize administration of the parallel provisions in Title I and Title II, the President transferred to the Secretary of Labor all interpretive, rulemaking, and exemption authority regarding the fiduciary definition and prohibited-transaction provisions in both titles. Reorganization Plan No. 4, 43 Fed. Reg. 47713 (Oct. 17, 1978). Congress ratified this transfer in 1984. *See* Pub. L. No. 98-532, 98 Stat. 2705 (1984) (codified at 29 U.S.C. § 1001 note).

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." 29 C.F.R. § 2510.3-21(c)(1) (2015). The advice itself had to (4) "serve as a primary basis for investment decisions with respect to plan assets"; and be (5) "individualized . . . based on the particular needs of the plan." *Id.* DOL did not regulate an adviser who failed to satisfy even one of these conditions as an investment-advice fiduciary under ERISA and the Code.

"The market for retirement advice has changed dramatically since the Department promulgated the 1975 regulation." ROA.330. At the time, IRAs had only recently been created (by ERISA itself), and participant-directed 401(k) plans did not yet exist. ROA.330. Retirement assets were principally held in pensions controlled by large employers and professional money managers. ROA.330. Today, "IRAs and participant-directed plans, such as 401(k) plans, have supplanted . . . pensions" as the retirement vehicles of choice. ROA.330. Individuals have thus become "increasingly responsible" for their own retirement savings. ROA.330.

The shift toward individual control has been accompanied by a dramatic increase in the "variety and complexity of financial products," which has "widen[ed] the information gap between advisers and their clients." ROA.330. Investors "are often unable to assess the quality of the expert's advice" or to "guard against the adviser's conflicts of interest." ROA.331. This is especially true of individuals who purchase IRA assets in the retail marketplace. ROA.735.

In 2016, DOL determined to revisit its 1975 regulation in light of the changes to the retirement-investment marketplace. ROA.331. DOL found that the five-part test allowed advisers to "play a central role in shaping plan and IRA investments[]" without being subject to the fiduciary safeguards "for persons having such influence and responsibility." ROA.331. For example, many "baby boomers" are now "mov[ing] money from [Title I] plans, where their employer has both the incentive and the fiduciary duty to facilitate sound investment choices, to IRAs, where both good and bad investment choices are more numerous and much advice is conflicted." ROA.325. These rollovers will involve assets worth up to $2.4 trillion over the next five years, and the question of how to invest those assets will often be "the most important financial decision[] that investors make in their lifetime[s]." ROA.325. But because rollovers are typically one-time transactions, the regular-basis requirement of the five-part test could immunize advisers to such transactions from fiduciary obligations, including concerning conflicts. ROA.325.

Similarly, the five-part test requires, as a condition of fiduciary status, a mutual understanding that the advice given serve as a "primary basis" for investment decisions. ROA.330. As a result, DOL found, "[i]nvestment professionals in today's marketplace frequently market [their] . . . services in ways that clearly suggest the provision of tailored or individualized advice, while at the same time disclaiming in fine print the requisite 'mutual' understanding that the advice will be used as a primary basis for investment decisions." ROA.331.

The narrowness of the five-part test allowed many investment advisers, who did not qualify as ERISA fiduciaries, to "receive compensation from the financial institutions whose investment products they recommend." ROA.332. DOL determined that this compensation structure creates "a strong reason, conscious or unconscious," for advisers "to favor investments that provide them greater compensation rather than those that may be most appropriate for the participants." ROA.332. After surveying the economic evidence available before April 2016, DOL found that the impact of conflicted advice "is large and negative." ROA.326. Some advisers would frequently recommend investments that earned them or their firms "substantially more" compensation, even if those products were "not in investors' best interests." ROA.326. Moreover, investors who followed such biased advice often chose "more expensive" or "poorer performing investments." ROA.326. The available evidence indicated that "[a]n ERISA plan investor who rolls her retirement savings into an IRA could lose 6 to 12 and possibly as much as 23 percent of the value of her savings over 30 years of retirement by accepting advice from a conflicted financial adviser." ROA.325.

III. The Fiduciary Rule

After six years of deliberation, two notice-and-comment rulemakings, and multiple public hearings, DOL promulgated the fiduciary rule challenged in this appeal. The rule has two components.

A. Interpretation of Investment-Advice Fiduciary

The fiduciary rule replaces the five-part test from the 1975 regulation with a revised interpretation of ERISA's definition of an investment-advice fiduciary.[4] The rule provides that an individual "renders investment advice for a fee" whenever he is compensated in connection with a "recommendation as to the advisability of" buying, selling, or managing "investment property." ROA.373.

Importantly, not all recommendations trigger this definition. To qualify, the recommendation must arise under one of three circumstances: (1) when given by an adviser who "[r]epresents or acknowledges that it is acting as a fiduciary within the meaning of [ERISA] or the Code"; (2) when rendered "pursuant to a written or verbal . . . understanding that the advice is based on the particular investment needs of the advice recipient"; or (3) when directed "to a specific advice recipient . . . regarding the advisability of a particular investment or management decision with respect to" the recipient's investment property. ROA.373.

Moreover, not all communications are recommendations. Drawing on existing guidance issued by federal securities regulators, DOL defined "recommendation" as a "communication that . . . would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action." ROA.373; *see* *NAFA*, 217 F. Supp. 3d at 23. This objective inquiry turns on "content, context, and

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[4] 81 Fed. Reg. 20946 (Apr. 8, 2016), *amended by* 82 Fed. Reg. 16902 (Apr. 7, 2017).

presentation"; a communication is more likely to be a recommendation "the more individually tailored [it] is to a specific advice recipient." ROA.373. DOL also gave examples of communications that are not recommendations, such as general marketing activities. ROA.373.

Finally, the revised interpretation excludes certain categories of investment advice that, as DOL explained, "are not appropriately regarded as fiduciary in nature." ROA.324. For example, an adviser is not regulated as a fiduciary if he offers investment advice at arm's length to an independent fiduciary that is a bank, insurance company, registered investment adviser, broker-dealer, or that otherwise manages more than $50 million in plan and IRA assets. ROA.375. This "'counterparty' carve-out" is limited to investment professionals and experienced investors who can be expected to understand that the advice they receive will not "necessarily be based on [their] best interests." ROA.356. DOL determined that such investors require less protection than individual retirement investors and small-plan providers—who are not "financial experts" and who are more likely to be "unaware of the magnitude and impact of conflicts of interest" on their investment advisers. ROA.357.

The revised interpretation became applicable to regulated entities on June 9, 2017. 82 Fed. Reg. 16902 (Apr. 7, 2017).

B. Revised Exemption Structure

The fiduciary rule also amended six existing exemptions, and created two new exemptions, to the prohibited-transaction provisions in ERISA and the Code. *See*

ROA.367-68, nn.53-54 (listing amendments and revisions). The revised exemption structure "preserve[s] beneficial business models for delivery of investment advice" by "permit[ting] firms to continue to receive many common types of fees, as long as they are willing to adhere to . . . standards aimed at ensuring that their advice is impartial and in the best interest of their customers." ROA.322. In other words, the specific exemptions allow fiduciaries to engage in otherwise prohibited transactions if they comply with conditions designed to mitigate their conflicts of interest.

Two exemptions warrant specific mention here. The rule narrowed the scope of an existing exemption called Prohibited Transaction Exemption ("PTE") 84-24, and it created a new, more stringent exemption called the Best-Interest Contract ("BIC") Exemption. We address these two exemptions below, in reverse order.

1. Best-Interest Contract Exemption

The new BIC Exemption[5] may be invoked by fiduciaries to Title I plans or IRAs. The exemption is conditioned on compliance with "Impartial Conduct Standards" that reflect "fundamental obligations of fair dealing and fiduciary conduct." ROA.384. Under these standards, fiduciaries must adhere to the duties of loyalty and prudence, "avoid misleading statements," and "receive no more than

[5] 81 Fed. Reg. 21002 (Apr. 8, 2016), *corrected at* 81 Fed. Reg. 44773 (July 11, 2016), *and amended by* 82 Fed. Reg. 16902 (Apr. 7, 2017).

reasonable compensation." ROA.380. This condition to the exemption, and the exemption itself, became applicable on June 9, 2017. 82 Fed. Reg. at 16902.

On January 1, 2018, fiduciaries to IRAs must comply with additional conditions to qualify for the exemption. 82 Fed. Reg. at 16902; *but see* Dep't of Labor, Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions (June 29, 2017) (requesting comment on whether this date should be extended), https://go.usa.gov/xNH38 ("Request for Information"). In particular, these fiduciaries must meet conditions turning on the presence and absence of certain provisions in contracts between them and their clients. ROA.379. These contracts must include an acknowledgment of fiduciary status, a guarantee of compliance with the Impartial Conduct Standards, and various warranties and disclosures. ROA.379. The contracts may not include exculpatory or certain liability-limiting provisions, or class-action waivers. ROA.455. The rule does not purport to provide a federal cause of action to enforce any of the contractual conditions specified in the exemption, but contract actions under state law would be available because Title II of ERISA does not preempt state-law remedies concerning IRAs. *See* ROA.9909.[6]

[6] The fiduciary rule also created the new Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs. 81 Fed. Reg. 21089 (Apr. 8, 2016), *corrected at* 81 Fed. Reg. 44784 (July 11, 2016), *and amended by* 82 Fed. Reg. at 16902. This exemption contains a functionally identical condition that turns on the presence or absence of the contract provisions discussed here. *See* ROA.479-80, 508-09. Where plaintiffs challenge

2. Prohibited Transaction Exemption 84-24

PTE 84-24, originally issued in 1977, can also be invoked by some fiduciaries to Title I plans or IRAs. 49 Fed. Reg. 13208, 13211 (Apr. 3, 1984); *see* 42 Fed. Reg. 32395, 32398 (June 24, 1977) (precursor to PTE 84-24). When issued, the exemption applied to the receipt of sales commissions by fiduciaries in certain transactions, which had terms "at least as favorable" as offered at arm's length, which paid no more than "reasonable" compensation to the adviser, and which contained various disclosures. 49 Fed. Reg. at 13211.

At its inception, the exemption applied to transactions involving mutual-fund shares and annuities.[7] 49 Fed. Reg. at 13211. Annuities take three relevant forms. *Fixed-rate annuities* guarantee investors a minimum rate of interest on their investment. ROA.9875-76. These products allocate all investment risk to insurers because investors are sure to earn at least that minimum specified rate. ROA.9875-76. *Variable annuities* invest premium payments in "a variety of underlying investment options[,] such as mutual funds." ROA.677. These products do not guarantee any future income to investors; their payouts instead depend on the success of the

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provisions common to both exemptions, this brief will refer to both exemptions as the "BIC Exemption."

[7] Annuities are insurance contracts with two sequential phases. During the accumulation phase, investors pay premiums to insurers; during the payout phase, insurers make payments—at set intervals and according to a predetermined formula—to investors. ROA.9875.

underlying investment strategy. ROA.9876. This structure allocates all risk to investors by offering them the opportunity to realize higher returns at the cost of losing both principal and interest should their investment strategy fail. ROA.9876; ROA.677.

Fixed-indexed annuities include attributes of both fixed-rate and variable annuities. These products link interest rates to an external market index, such as the S&P 500. However, investors may not reap the full benefit should the index increase in value; many fixed-indexed contracts limit gains by deducting administration fees, crediting investors with only a portion of the designated index's increase in value, or imposing upper limits on returns. ROA.756, 760. At the same time, fixed-indexed contracts guarantee investors that their rate of return will never fall below zero, even if the designated index loses value. ROA.9876. Such guarantees shield principal but not interest from downturns in the market—although contractual surrender charges may still cause investors to lose principal if they try to terminate the annuity early. This structure allocates investors more risk (and more potential return) than fixed-rate annuities but less risk (and less potential return) than variable annuities. ROA.9876.

The fiduciary rule modified PTE 84-24 in two respects.[8] First, PTE 84-24 is now conditioned on the additional requirement that fiduciaries comply with the same

[8] 81 Fed. Reg. 21147 (Apr. 8, 2016), *amended by* 82 Fed. Reg. 16902 (Apr. 7, 2017).

Impartial Conduct Standards set forth in the BIC Exemption. ROA.575. That modification became applicable on June 9, 2017. 82 Fed. Reg. at 16902.

Second, DOL limited PTE 84-24 to transactions involving fixed-rate annuities. ROA.555-56. DOL did so because it determined, on the basis of the record before it, that these products "provide payments that are . . . predictable" under terms that are "more understandable to consumers." ROA.553. Variable and fixed-indexed annuities, by contrast, may require investors "to shoulder significant investment risk and do not offer the same predictability of payments." ROA.553-54. They are also "quite complex and subject to significant conflicts of interest at the point of sale." ROA.554. Because these latter products are more complicated and may be more "susceptible to abuse," DOL determined that "recommendations to purchase such annuities . . . should be subject to the greater protections of the Best Interest Contract Exemption." ROA.554-55.[9] This modification is currently scheduled to become applicable on January 1, 2018; until then, PTE 84-24 will continue to apply to transactions involving variable and fixed-indexed annuities. 82 Fed. Reg. at 16902.

C. Subsequent Regulatory Developments

DOL published the fiduciary rule on April 8, 2016. ROA.322. The rule was originally scheduled to become applicable on April 10, 2017, as was its revised

[9] For similar reasons, DOL removed mutual-fund transactions involving IRAs from PTE 84-24's coverage.

exemption structure. ROA.377. DOL delayed application of certain conditions in the BIC Exemption, including the contract-provisions condition, until January 1, 2018. ROA.461.

In February 2017, the President directed DOL to reexamine the fiduciary rule and to "prepare an updated economic and legal analysis" of its provisions. 82 Fed. Reg. 9675 (Feb. 7, 2017). Consistent with the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* ("APA"), DOL began implementing the President's directive by soliciting public comment on elements of that analysis.[10]

On April 7, 2017, DOL issued a final rule designed to phase in the fiduciary rule's requirements. 82 Fed. Reg. at 16902. Under this rule, DOL's interpretation of "fiduciary" and its revised exemption structure became applicable to regulated entities on June 9, 2017. However, DOL delayed the applicability date of certain conditions to new exemptions and of certain amendments to existing exemptions until January 1, 2018. The changes made by this rule are reflected in the discussion above.

On May 22, 2017, the Department issued a temporary non-enforcement policy covering the transitional period between June 9, 2017, and January 1, 2018. Under this policy, DOL "will not pursue claims against fiduciaries who are working diligently and in good faith to comply with the fiduciary . . . rule and exemptions," and will not

[10] The Presidential Memorandum, and DOL's ongoing reexamination of the fiduciary rule, may result in a new assessment of the rule's costs and benefits upon review of the updated record.

"treat those fiduciaries as being in violation of the . . . rule and exemptions." Dep't of Labor, Field Assistance Bulletin No. 2017-02 (May 22, 2017), https://go.usa.gov/xNH3k. The Treasury Department and the IRS have announced a similar non-enforcement policy covering excise taxes and related reporting obligations. *Id.*

On June 29, 2017, DOL issued a request for information seeking additional comment on, among other things, whether to further extend the transitional period beyond January 1, 2018, and whether the fiduciary rule's revised exemption structure should be modified. *See* Request for Information, *supra*.

IV. Prior Proceedings

In 2016, three groups of plaintiffs challenged the fiduciary rule in the Northern District of Texas. They alleged that the rule violates: (1) the APA, (2) the First Amendment, (3) the Supreme Court's private-right-of-action jurisprudence, and (4) the Federal Arbitration Act. Like every court to consider the legality of the fiduciary rule, the district court rejected plaintiffs' claims and entered judgment for DOL. ROA.9873.[11]

All three groups of plaintiffs appealed. Two groups moved to enjoin the fiduciary rule pending appeal, but their motions were denied—first by the district

[11] *See Market Synergy Grp., Inc. v. DOL*, No. 16-4083, 2017 WL 661592 (D. Kan. Feb. 17, 2017); *NAFA*, 217 F. Supp. 3d 1. In every case, the courts also declined to enter an injunction pendente lite. *See* Order, *Market Synergy*, 2016 WL 6948061 (D. Kan. Nov. 28, 2016); *NAFA*, 219 F. Supp. 3d 10 (D.D.C. 2016); Order, *NAFA*, No. 16-5345 (D.C. Cir. Dec. 15, 2016).

court and then by this Court. Order, *Chamber of Commerce of the United States v. Hugler*, No. 3:16-cv-1476-M, 2017 WL 1062444 (N.D. Tex. Mar. 20, 2017); Order, No. 17-10238, 2017 WL 1284187 (5th Cir. Apr. 5, 2017).

SUMMARY OF ARGUMENT

1. ERISA confers fiduciary status on individuals "to the extent" they "render[] investment advice for a fee or other compensation, direct or indirect." 29 U.S.C. § 1002(21)(A)(ii); 26 U.S.C. § 4975(e)(3). DOL interpreted this definition—in light of its text, structure, and purposes—to reach certain investment advisers who fall within the definition's literal terms but outside a more restrictive construction previously adopted by DOL. That reasonable interpretation must be upheld under *Chevron*.

Plaintiffs' counterarguments fail to overcome *Chevron* deference. DOL reasonably determined, notwithstanding the presumption that Congress incorporates the meaning of common-law terms into statutes, that this definition does not limit fiduciary status to individuals who give advice in the context of a relationship of trust and confidence. DOL reasonably construed this definition to encompass commission-based compensation arrangements, as indeed DOL has done for more than forty years. DOL reasonably declined to exclude salespeople from fiduciary status as a categorical matter, especially in light of industry representations during the notice-and-comment process. And DOL reasonably determined that adoption of a different interpretation was not compelled by the federal securities laws, which regulate securities transactions in general rather than those involving retirement investors in particular.

2. Plaintiffs' specific challenges to DOL's authority to issue the BIC Exemption also fail, with one narrow exception.

a. The BIC Exemption is a lawful exercise of DOL's statutory authority to issue administrative exemptions from the prohibited-transaction provisions in ERISA and the Code. A "conditional" exemption may be issued so long as DOL finds it to be (1) "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 the plan." 29 U.S.C. § 1108(a); 26 U.S.C. § 4975(c)(2). DOL made those findings when it adopted the BIC Exemption, and plaintiffs have not challenged them on appeal.

Plaintiffs argue instead that DOL's authority is limited by four extra-textual restrictions. They argue that DOL's exemption authority does not extend to imposing a condition of compliance with fiduciary duties on IRA investment advisers; that DOL's exemption authority is limited to reducing regulatory burdens; that DOL's exemption authority cannot be used to adopt conditions whose violation could give rise to collateral consequences beyond those set forth in ERISA; and that DOL's exemption authority does not apply if the results would significantly impact the market for IRAs. But nothing in the statute unambiguously requires DOL to follow those extra-textual limitations when exercising its authority to grant conditional exemptions.

b. The BIC Exemption also does not impermissibly create a cause of action. The exemption merely specifies, as a condition of qualification, certain provisions fiduciaries to IRAs must include in contracts with clients. Investors can vindicate their rights under these provisions only by suing under a preexisting state-law cause of action, and thus no federal cause of action has been created by DOL.

c. Fiduciaries are deprived of the benefits of the BIC Exemption to the extent they enter into an arbitration agreement that prevents investors from participating in class-action litigation. In light of the Acting Solicitor General's recent construction of the Federal Arbitration Act in a case pending before the Supreme Court, the government is no longer defending this specific condition. However, DOL clearly indicated that it would have adopted the exemption even without its anti-arbitration condition. And severance of the condition would not impair the function of the exemption or of the fiduciary rule in general. Thus, invalidation of this condition does not mandate invalidation of the remainder of the BIC Exemption, let alone the entire fiduciary rule.

3. DOL reasonably determined, on the basis of the extensive record before it, that conflicted transactions involving certain annuities should be required to satisfy the BIC Exemption. DOL concluded that the exemption's conditions are necessary to protect retirement investors from the harms posed by conflicted transactions

involving these complicated products. This Court should decline plaintiffs' invitation to second-guess DOL's policy judgment.

Plaintiffs allege that DOL did not adequately explain why additional regulation was necessary in light of existing regulations governing these annuity products. But they have identified no authority unambiguously foreclosing DOL from exercising its authority to interpret and implement ERISA's fiduciary requirements for retirement investment advisers absent a determination that existing regulations are insufficient. In any event, DOL's detailed discussion of the inadequacies in the existing regulatory landscape more than satisfies the deferential arbitrary-and-capricious standard.

Plaintiffs also allege that DOL did not adequately assess the impact of its decision on investors' access to certain annuity products. Contrary to their assertions, DOL reasonably concluded that any contraction in the market share of such products as a result of the fiduciary rule would reflect not harm to consumers but a reduction in mismatched recommendations of products to investors.

4. Plaintiffs' First Amendment claims are not properly before this Court. To the extent that their constitutional challenge sounds in the APA, plaintiffs forfeited that claim by failing to raise it during the notice-and-comment process. And to the extent their constitutional challenge is a pre-enforcement challenge to application of the rule against them, they have not alleged that they intend to engage in conduct the rule would arguably and imminently proscribe—or that the threat of future enforcement of the rule against them is substantial.

In any event, plaintiffs' arguments fail on the merits because the fiduciary rule is a quintessential regulation of commercial conduct that only incidentally burdens speech. Plaintiffs' contrary view rests on the discredited and radical premise that investment advisers can evade regulation of conflicts of interest in their conduct of their business simply because that business is conducted with words. *See Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). That view, if accepted, would call into question the constitutionality of myriad securities laws as well as ERISA itself—which plaintiffs have sensibly not challenged.

Finally, plaintiffs cannot prevail even if the fiduciary rule is construed as a restriction on speech. In service of the concededly substantial government interest in protecting retirement investors from conflicts of interest, the government may lawfully impose substantive responsibilities on individuals that extend beyond requirements of truthful disclosure. DOL reasonably determined, on the basis of the record before it, that plaintiffs' proposed regulatory alternatives would not effectively advance the government's interest in limiting the harms of conflicts of interest in the market for retirement-investment advice. The rule thus survives intermediate scrutiny.

STANDARD OF REVIEW

This Court reviews a grant of summary judgment de novo. *See Coastal Conservation Ass'n v. U.S. Dep't of Commerce*, 846 F.3d 99, 105 (5th Cir. 2017). DOL's actions may be set aside only if they were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). DOL's interpretations of the statutory provisions at issue must be upheld so long as they are reasonable. *See Chevron USA Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-44 (1984).

ARGUMENT

I. The Fiduciary Rule's Interpretation of ERISA's Definition of an Investment-Advice Fiduciary Is Reasonable.

The district court correctly ruled that DOL's interpretation of ERISA's definition of an investment-advice fiduciary was reasonable, and thus must be upheld under *Chevron*.

A. DOL reasonably interpreted the fiduciary definition.

ERISA's definition of an investment-advice fiduciary includes individuals "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 such plan." 29 U.S.C. § 1002(21)(A)(ii) (Title I); 26 U.S.C. § 4975(e)(3)(ii) (Title II). ERISA does not define the phrase "renders investment advice." But its ordinary meaning is broad: "advice" is "an opinion or recommendation offered as a guide to action [or] conduct," and "investment" is "the investing of money or capital in order to gain profitable returns." *See Random House Dictionary of the English Language* (2d ed. 1987).

The fiduciary rule is a reasonable construction of this text. It defines investment advice as a "recommendation as to the advisability of acquiring, holding, disposing of, exchanging," or "managing" "securities or other investment property." ROA.373. It defines a recommendation as a "communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advisee engage in or refrain from taking a particular course of action." ROA.373. There can be "no serious dispute" that these definitions, which track the statute's ordinary meaning, are permissible under ERISA. ROA.9888; *accord NAFA*, 217 F. Supp. 3d at 23.

The reasonableness of DOL's interpretation is reinforced by the context in which the definition of an investment-advice fiduciary appears. ERISA extends fiduciary status to anyone who exercises "any discretionary authority or discretionary control" respecting management of a retirement plan or its assets, 29 U.S.C. § 1002(21)(A)(i); 26 U.S.C. § 4975(e)(3)(A), and to anyone who holds "any discretionary authority or discretionary responsibility in the administration of such plan," 29 U.S.C. § 1002(21)(A)(iii); 26 U.S.C. § 4975(e)(3)(C). These definitions link fiduciary status not to "formal trusteeship" but to "*functional*" concepts of "control and authority." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993). ERISA thus "expand[ed] the universe of persons subject to fiduciary duties," *id.*, to "commodiously impose[] fiduciary standards on persons whose actions affect the amount of benefits retirement plan participants will receive," *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 96 (1993). The placement of ERISA's definition of an investment-advice fiduciary alongside these other expansive definitions further illustrates that DOL's interpretation of the phrase "renders investment advice" is reasonable.

Finally, DOL's interpretation is reasonable in light of ERISA's history and purpose. Congress enacted ERISA to ensure the "continued well-being and security of millions and employees and their dependents . . . affected by" retirement plans, and declared it "desirable . . . that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans." 29 U.S.C. § 1001(a). ERISA's system of duties and obligations were crafted to confer protections beyond those provided by then-existing federal and state laws. *Id.*; *see Commissioner v. Keystone Consol. Indus.*, 508 U.S. 152, 160 (1993). Congress recognized that imposing fiduciary obligations on "any person with a specific duty" described "by th[e] statute" represented a "departure from current judicial precedents." *See* 120 Cong. Rec. 3977, 3983 (1974) (statement of Rep. Perkins). But Congress deemed this departure "necessary to the proper protection" of retirement-investment plans. *Id.*

DOL reasonably determined, on the record before it, that the fiduciary rule advances these objectives. As DOL found, *supra* pp. 9-11, the modern retirement-investment marketplace bears little resemblance to the one that existed when DOL issued the five-part test that the fiduciary rule supplanted. Today, individuals are increasingly shouldering the burden of preparing for their own retirement, rendering them increasingly reliant on the advice of expert investment advisers. ROA.330. In 2016, DOL thus concluded that, under the five-part test, advisers could "play a central role in shaping plan and IRA investments[]" without the fiduciary safeguards "for persons having such influence and responsibility." ROA.330.

DOL found, for example, that many advisers frequently market themselves as experts rendering tailored advice while "disclaiming in fine print the requisite 'mutual' understanding" (one prong of the five-part test) "that the[ir] advice will be used as a primary basis for investment decisions" (another prong of the five-part test). ROA.331. DOL also found that many retirement investors now engage in significant one-time transactions that would not be protected by ERISA if the advice on which they relied was not given on a "regular basis" (a third prong of the five-part test). ROA.325. DOL further found that the problems posed by these regulatory gaps were compounded by the prevalence of conflicted recommendations in the market, *see* ROA.332, with "large and negative" implications for the security of investors' retirements, ROA.326.

In light of all that, DOL reasonably concluded that a revised interpretation of investment-advice fiduciary was warranted. And under *Chevron*, "rules that are reasonable in light of the text, nature, and purpose of the [relevant] statute" must be upheld. *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2142 (2016).

B. Plaintiffs' rejoinders are unpersuasive.

1. The *Chevron* framework applies to DOL's revised interpretation.

Plaintiffs first fault the district court for applying the *Chevron* framework to a question of "economic and political significance." Chamber Br. 25. That criticism is misguided. *Chevron* deference is not limited to "humdrum, run-of-the-mill" questions, and it may be applied to "big, important" questions. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013). In all cases, the guiding inquiry as to *Chevron*'s applicability is whether Congress intended to delegate interpretive authority over the question presented to the agency asserting deference. *Id.*

Here, Congress has made its intentions clear. When Congress enacted ERISA, it granted DOL sweeping authority to "prescribe such regulations as [it] finds necessary or appropriate to carry out" the provisions of Title I, 29 U.S.C. § 1135, including authority to issue administrative exemptions to Title I's prohibited-transaction provisions, *id.* § 1108. Four years later, the President assigned DOL the Treasury Department's similarly sweeping authority to administer the fiduciary-definition and prohibited-transaction provisions of Title II. *See supra* p. 8 n.3. Congress ratified that transfer, *id.*, knowing full well that these broad delegations expressly vested DOL with interpretive authority over statutory provisions critical to "the continued well-being and security of [the] millions of employees" participating in the retirement-investment marketplace, *see* 29 U.S.C. § 1001(a). Although the consequences of DOL's revised interpretation are undeniably significant, that significance reflects the breadth of DOL's delegated authority. Indeed, plaintiffs conceded in district court that DOL's "interpretive authority" includes "the Code's definition of 'fiduciary.'" ROA.2660-61.

King v. Burwell, 135 S. Ct. 2480 (2015), lends no support to plaintiffs' position. That case involved an interpretation of a different statute (the Affordable Care Act) issued by a different agency (the IRS). Moreover, the IRS's rule did not concern tax policy, but rather the conditions under which the federal government could subsidize health insurance in certain States. *Id.* at 2488. Especially given that the IRS "has no expertise in crafting health insurance policy," the Supreme Court declined to extend *Chevron* deference to the IRS's conclusion that the subsidies were available, reasoning that if Congress had wished to delegate to the IRS "a question of deep 'economic and political significance' that [was] central to th[e] statutory scheme [of the Affordable Care Act], … it surely would have done so expressly." *Id.* at 2488-89.

DOL's interpretation, like the IRS's interpretation, has major economic and political implications. But there the similarities end. The district court correctly ruled that, unlike the IRS's limited interpretive role under the Affordable Care Act, ERISA "clearly envision[s]" that DOL may exercise interpretive authority over the provisions at issue here and "specifically empower[s]" the agency to issue "necessary rules and regulations." ROA.9897. The district court also correctly ruled that, unlike the IRS's health-policy experience, DOL has "almost forty years" of experience in "defin[ing] what it means to render investment advice" under ERISA, "regulat[ing] investment advice to IRAs and employee benefit plans, and grant[ing] conditional exemptions from conflicted transactions." ROA.9897. For these reasons, the district court's application of *Chevron* deference was proper.[12]

2. ERISA does not unambiguously foreclose DOL's interpretation of the fiduciary definition.

Plaintiffs also contend that DOL's interpretation of the fiduciary definition fails even with *Chevron* deference. To prevail, they must show that the statutory text "unambiguously foreclose[s]" DOL's interpretation. *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005). Plaintiffs have failed to meet that "demanding" threshold. *Id.*

a. Plaintiffs argue principally that Congress intended to incorporate a common-law understanding of the term "fiduciary" into ERISA's statutory definition.

[12] Plaintiffs contend in passing (Chamber Br. 26) that *Chevron* deference is inapplicable because it is superseded by the rule of lenity. This argument is forfeited because plaintiffs did not raise it before the district court. It is also incorrect. "The rule of lenity requires interpreters to resolve ambiguity in criminal laws in favor of defendants." *Whitman v. United States*, 135 S. Ct. 352, 353 (2014) (Scalia, J., statement respecting the denial of certiorari). It "has no role to play in interpreting . . . regulatory statutes" that "contemplate civil rather than criminal enforcement." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 730 (6th Cir. 2013) (Sutton, J., concurring). Although some jurists have expressed the view that the rule of lenity supersedes *Chevron* deference when interpreting a statutory provision with both civil and criminal applications, that principle—which has never been endorsed by the Supreme Court or by this Court—is inapposite here, where plaintiffs have failed to identify any criminal application of the statutory provisions directly interpreted in the fiduciary rule.

At common law, they assert, only relationships characterized by a "relationship of trust and confidence" could qualify as fiduciary relationships—and the fiduciary rule applies to advice given outside those contexts. *See* Chamber Br. 27-38; IALC Br. 19-31.

ERISA does not unambiguously restrict its definition of an investment-advice fiduciary in this manner. Although plaintiffs reasonably rely on the interpretive presumption that Congress intends to incorporate a common-law term's meaning, that presumption may be rebutted by "the language of the statute, its structure, or its purposes," *see Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996), especially where "the task of defining the term … has been assigned primarily to [an administrative] agency," *see NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 94 (1995) (emphasizing that an agency's "construction of [a common-law] term is entitled to considerable deference," while recognizing that, "[i]n some cases, there may be a question about whether … departure from the common law … with respect to particular questions and in a particular statutory context[] renders [the] interpretation unreasonable"). Indeed, in the particular context of ERISA, controlling precedent recognizes that "the law of trusts often will inform, but will not necessarily determine the outcome of, an effort to interpret" the statute's terms. *Id.*; *see Donovan v. Cunningham*, 716 F.2d 1455, 1464 n.15. (5th Cir. 1983). And here, as explained, DOL reasonably interpreted ERISA's language, structure, and purpose to go beyond the trust-and-confidence standard. *See supra*, pp. 26-29.

Plaintiffs respond that there is nothing inherently inconsistent between the trust-and-confidence standard and ERISA's definition of fiduciary investment advice. IALC Br. 20-22. But the canon they deploy is not so rigid. An agency does not necessarily act unreasonably merely because it reasonably declines to adopt a semantically possible interpretation that would reconcile a statutory term with a common-law meaning. *See Town & Country Elec.*, 516 U.S. at 94. Moreover, in deciding whether to depart from a common-law meaning, DOL may reasonably consider, not only ERISA's text, but also ERISA's "structure" and "purposes," "bearing in mind the special nature and purpose of employee benefit plans." *Varity*, 516 U.S. at 497; *see Mertens*, 508 U.S. at 262 (noting that ERISA "expand[ed] the universe of persons subject to fiduciary duties"). Again, those traditional tools of statutory interpretation support the reasonableness of the fiduciary rule.

With respect to structure, plaintiffs suggest that Congress unambiguously intended to incorporate the trust-and-confidence limitation into the investment-advice prong of ERISA's fiduciary definition because that limitation is consistent with the alternative prongs of the definition. One prong defines individuals as fiduciaries to the extent they exercise "any discretionary authority or . . . control" over the management of a retirement plan or its assets; the other defines individuals as fiduciaries to the extent they possess "any discretionary authority or . . . responsibility" in a plan's administration. 29 U.S.C. § 1002(21)(A)(i), (iii). Plaintiffs assert that these definitions entail "a substantial relationship of trust and confidence," so ERISA's definition of investment-advice fiduciary must incorporate such a relationship as well. Chamber Br. 31; IALC Br. 23-24 & n.3. But plaintiffs do not cite any authority compelling that reading of those alternative prongs, let alone compelling DOL to impose a limit on the investment-advice prong that is not inherent in its language merely because the other prongs allegedly do reflect such a limit.

Indeed, plaintiffs do not reconcile their reading of the alternative prongs of the definition with the text of those provisions—which extend fiduciary status to "anyone who exercises 'any' authority or control" over a plan or its assets, *Bannistor v. Ullman*, 287 F.3d 394, 411 (5th Cir. 2002) (Garza, J., specially concurring) (citation omitted)—or with the Supreme Court's decisions in *Mertens* and *Varity*. As for *Mertens*, plaintiffs claim it merely held that ERISA's definitions depart from the common law only by extending fiduciary status to individuals who are not "named . . . in a written trust document," but who possess all other indicia of common-law fiduciary status. Chamber Br. 36. This cramped reading is refuted by *Mertens* itself, which did not mention written trust documents at any point in the relevant discussion. *See* 508 U.S. at 262. It also ignores cases endorsing other departures from the common law concerning fiduciaries. *E.g.*, *Varity*, 516 U.S. at 498 (holding that an individual who is both an employer and a plan administrator can be an ERISA fiduciary); *Pegram v. Herdrich*, 530 U.S. 211, 224 (2000) (holding that an individual with financial interests adverse to plan beneficiaries can be an ERISA fiduciary). As for *Varity*, plaintiffs claim it stands only for the proposition that courts must "look[] to the common law to determine whether fiduciary functions [are] being performed." Chamber Br. 36. But *Varity* recognized that, when construing ERISA, the common law is the starting point, but not the finish line. *See* 516 U.S. at 497.

Plaintiffs alternatively argue (IALC Br. 23) that, by omitting the word "any" from the investment-advice prong of the fiduciary definition but including it in the definition's other prongs, Congress intended to limit the former prong to advice given in a relationship of trust and confidence. This argument, raised for the first time on appeal, rests on the implausible assertion that, merely through differential use of the word "any," Congress unambiguously incorporated a trust-and-confidence requirement into the definition of investment-advice fiduciary despite having rejected that requirement when defining the other two categories of fiduciaries. Plaintiffs have not identified any reason to think Congress intended that counterintuitive result, much less any basis for compelling DOL to adopt it.

At any rate, plaintiffs cannot prevail even if their textual and structural arguments were correct, because they still falter under ERISA's purposes. *See Varity*, 516 U.S. at 497 (explaining that a common-law meaning is displaced if inconsistent with "the language of the statute, its structure, *or* its purposes") (emphasis added). Plaintiffs cannot show that DOL acted unreasonably in determining that their proposed trust-and-confidence requirement would "undermine[] rather than promote[]" ERISA's goals. ROA.331 (concluding that, under plaintiffs' interpretation, many investment advisers would be able to "play a central role in shaping" retirement investments without the fiduciary safeguards "for persons having such influence and responsibility"). Such inconsistency with statutory purposes is alone sufficient to displace the common law, as *Varity* reflects and this Court has held in other contexts. *E.g.*, *United States v. Guidry*, 456 F.3d 493, 510-11 (5th Cir. 2006) (listing cases).

Plaintiffs instead fall back on quotations from three substantively identical passages in ERISA's legislative history that describe a fiduciary as someone occupying "a position of confidence or trust." IALC Br. 24-25 (citing S. Rep. No. 93-127, at 28-29 (1973); H.R. Rep. No. 93-533, at 11 (1973); 120 Cong. Rec. at 3982-83). These excerpts demonstrate only that Congress was aware of a common-law definition of the term. In the very next sentence, each source distinguishes between that definition and fiduciary "[a]s defined by" ERISA. *E.g.*, S. Rep. No. 93-127, at 28-29. And in the next two paragraphs, each source reveals Congress's concern that "it is unclear whether the traditional law of trusts [would be] applicable" to a number of retirement plans—and that, "even assuming that the law of trusts is applicable," it would offer insufficient protection to retirement investors ill-equipped "to safeguard either [their] own rights or the [retirement] plan['s] assets." *E.g.*, *id.* at 28-29. Insofar as this legislative history is relevant at all, it underscores the reasonableness of DOL's interpretation rather than unambiguously foreclosing it.

Finally, plaintiffs assert (Chamber Br. 34; IALC Br. 31-32 & n.6) that DOL itself has conceded that its revised interpretation of fiduciary would cover relationships lacking trust and confidence that Congress did not intend ERISA to reach. In actuality, DOL emphatically rejected the premise that ERISA limits fiduciary status to those relationships that "have the hallmarks of a trust relationship" at common law. ROA.366. And DOL declined to adopt proposals to include that limitation in the fiduciary rule. ROA.357.

The statements cited by plaintiffs arise in the context of DOL's decision to exclude from the fiduciary rule certain recommendations that, although potentially covered by its revised interpretation, did not present the same policy concerns as the conduct ERISA was enacted to prevent. The counterparty carve-out, for example, reflects DOL's decision not to regulate certain paid recommendations to independent fiduciaries who are investment professionals or who are charged with managing at least $50 million in assets. ROA.324. DOL described these transactions as "not implicat[ing] relationships of trust." ROA.356. But that was not why DOL created the counterparty carve-out. The carve-out instead reflects DOL's determination that, when an independent and experienced fiduciary is representing the interests of the investor, "neither party expects that recommendations will necessarily be based on the buyer's best interests, or that the buyer will rely on them as such." ROA.356. At no point in this discussion did DOL suggest that it lacks authority over *any* transaction that cannot meet the trust-and-confidence standard. The fact that DOL elected not to extend the fiduciary rule to some relationships that do not satisfy that standard is not a concession that the standard is a prerequisite to fiduciary status under ERISA.[13]

b. Plaintiffs additionally contend (Chamber Br. 36-37) that the fiduciary rule is foreclosed by a different part of ERISA's definition of fiduciary investment advice: the requirement that an individual render investment advice "for a fee." This phrase, plaintiffs argue, unambiguously limits fiduciary status to advisers who are paid "primarily" for the advice they give. *Id.* And this "primary-purpose" interpretation would purportedly exclude from fiduciary status any adviser who is compensated by sales commissions.

This argument has nothing to do with—and is substantially narrower than—plaintiffs' core argument: that ERISA's fiduciary definition is unambiguously limited to relationships of trust and confidence. By way of illustration, imagine an investment adviser who *is* primarily paid for the advice he renders. Should such an adviser give advice to an investor outside the bounds of a relationship of trust and confidence,

[13] Plaintiffs argue (Chamber Br. 47) that the fiduciary rule is *per se* unlawful because the existence of these exemptions renders the rule a "backdoor regulation" of areas into which Congress did not intend DOL to venture. That argument assumes its conclusion: that DOL lacks authority to regulate investment advice rendered outside the context of a relationship of trust and confidence. To the extent plaintiffs are asserting, more broadly, that an agency may never promulgate a general definition with exemptions, they are incorrect: Agencies regularly promulgate definitions with exceptions, and those definitions are regularly upheld by courts. *E.g.*, *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 242-45 (2004) (upholding the Federal Reserve Board's definition of the statutory term "finance charge" in a manner that "specifically excludes" eight types of charges).

plaintiffs' reasoning would still preclude DOL from extending fiduciary status to him even though he indisputably gave advice "for a fee." Thus, even if plaintiffs' primary-purpose argument were correct, it would not support their requested relief of vacatur of the rule as a whole.

Regardless, the phrase "for a fee" does not unambiguously incorporate plaintiffs' primary-purpose limitation. ERISA extends fiduciary status to anyone who renders investment advice for a fee "or other compensation, *direct or indirect*." 29 U.S.C. § 1002(21)(A)(ii) (emphasis added). This language can reasonably be construed to encompass compensation structures in which advisers are paid by commission in part for recommending certain products to their clients. Indeed, DOL has interpreted the statute in this manner for more than forty years. *See* 40 Fed. Reg. 50842, 50842 (Oct. 31, 1975) (explaining that ERISA's definition includes advice rendered in the context of "brokerage commissions, mutual fund sales commissions, and insurance sales commissions"). DOL's interpretation has been repeatedly upheld by courts. *E.g.*, *Farm King Supply, Inc. Integrated Profit Sharing Plan & Trust v. Edward D. Jones & Co.*, 884 F.2d 288, 291-92 (7th Cir. 1989); *Eaves v. Penn*, 587 F.2d 453, 458 (10th Cir. 1978). Indeed, plaintiffs themselves have recognized the import of ERISA's reference to "direct or indirect" compensation: Shortly after ERISA was enacted, plaintiff ACLI petitioned DOL for an exemption covering "receipt of sales commissions from an insurance company, directly or indirectly, by an insurance agent or broker." 41 Fed.

Reg. 56760, 56760-61 (Dec. 29, 1976). The requested exemption would be necessary only if advisers compensated in this manner could be regulated as fiduciaries. *See id.*

Finally, plaintiffs' argument fails on its own terms, because their submissions to DOL contradict their present assertion that advisers paid by commission are not receiving compensation for the advice they render. For example, plaintiff ACLI informed DOL that "insurers, agents[,] and brokers . . . must introduce" investors "to annuities, help them to understand the value proposition, and educate them on the variety of annuities available." ROA.7337. "Given the need for a high level of education about annuities," ACLI urged DOL to "recognize that these elements led to the customary compensation practices in place which differ from those that govern the sale of other types of investments." ROA.7337. Such statements make clear that commissions are paid, at least in part, to compensate advisers for the advice they give—meaning that DOL reasonably determined that advisers paid by commission fall within ERISA's definition of fiduciary investment advice.

c. Plaintiffs also contend (Chamber Br. 38-43; IALC Br. 31-32 & n.6) that, even accepting that ERISA's definition of fiduciary investment advice does not depend on the existence of a relationship of trust and confidence, the fiduciary rule unreasonably erases the common-law distinction between salespeople and fiduciaries. This argument fails as well.

As a logical matter, the fiduciary rule does not "equat[e]" "sales relationship[s]" with "fiduciary relationship[s]." Chamber Br. 38-39. An individual who sells a product to an investor is not a fiduciary under the rule if he has not rendered investment advice in the course of the transaction, or if he has not received direct or indirect compensation for such advice. *See* ROA.360. The fact that, in some segments of the market, compensation often takes the form of a commission does not mean that rule has deemed all salespeople to be fiduciaries.

Nor did DOL unreasonably reject the existence of a "purported dichotomy between a mere 'sales' recommendation . . . and advice . . . in the context of the retail market for investment products." ROA.357. DOL reasonably concluded that this market bears little resemblance to the market for goods such as appliances or cars because "sales and advice go hand in hand" where retirement-investment advice is concerned. ROA.357. DOL reached that conclusion after reviewing industry marketing materials and the industry's own comment letters. *See* ROA.357. For example, plaintiff ACLI explained to DOL that "insurers, agents[,] and brokers . . . must introduce" investors "to annuities, help them to understand the value proposition, and educate them on the variety of annuities available." ROA.7337. It was therefore reasonable for DOL to rely on the unique characteristics of this market when interpreting ERISA.

The reasonableness of DOL's rejection of the salesperson-fiduciary dichotomy is underscored by its historical practice. Contrary to plaintiffs' assertions (Chamber Br. 41), DOL has never accepted the view that salespeople are categorically exempt from ERISA's fiduciary obligations. The agency made that clear as early as 1976, when insurers asked the agency to interpret ERISA to exclude salespeople who made "normal sales presentation[s]" and "recommendations" while selling insurance products. 41 Fed. Reg. at 56762. DOL refused to do so, explaining that the question of whether salespeople had acted as fiduciaries should instead be evaluated on a case-by-case basis. *Id.* The fiduciary rule is consistent with that fact-dependent approach. *See* ROA.373. And plaintiffs have not suggested that DOL's previous interpretation was unreasonable. For these reasons, DOL's "reasonable policy choice" warrants deference notwithstanding plaintiffs' preference for a different outcome. *See Chevron*, 467 U.S. at 845.[14]

Plaintiffs' cited authorities do not change this conclusion. Plaintiffs contend (Chamber Br. 40) that ERISA and the Code codify the salesperson-fiduciary dichotomy because their prohibited-transaction provisions bar fiduciaries from selling investment products in which they have a conflict of interest. Plaintiffs argue that these provisions mean that advisers who already engage in conflicted transactions may not be regulated as fiduciaries. That gets the statute backwards. The fact that the

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[14] Plaintiffs assert (Chamber Br. 39-40), inaccurately, that the fiduciary rule "recognized a sales exclusion" for some transactions while rejecting it for others. Their evidence is the counterparty carve-out. To reiterate, DOL did not adopt that exclusion to endorse the purported distinction between salespeople and fiduciaries, but because DOL reasonably determined that the fiduciary rule should be applied only to transactions in which an independent and expert fiduciary is representing an investor's interests. As explained in the preamble to the fiduciary rule, DOL expressly rejected proposals to "provide a broad 'seller's' exemption for investment advice in the retail market." ROA.358.

fiduciary rule prohibits certain advisers from continuing to engage in conflicted transactions absent an applicable exemption says nothing about the question of whether DOL properly characterized those advisers as fiduciaries to begin with.

Plaintiffs likewise gain no traction from common-law cases suggesting that buyer-seller relationships are not fiduciary in nature. *See* Chamber Br. 40-41. Again, those cases do not unambiguously foreclose DOL from reasonably interpreting ERISA's fiduciary definition more broadly than the common law. Plaintiffs also invoke a decision of this Court holding, under DOL's prior five-part test, that an insurance company does not become an ERISA fiduciary simply by urging the purchase of its products. Chamber Br. 33 (citing *American Fed'n of Unions Local 102 Health & Welfare Fund v. Equitable Life Assurance Soc'y of the United States*, 841 F.2d 658, 664 (5th Cir. 1988)). That holding is irrelevant because it does not prevent DOL from reasonably adopting a broader interpretation in the fiduciary rule. *See Brand X*, 545 U.S. at 982.

d. Finally, plaintiffs assert that the fiduciary rule is unreasonable in light of the Investment Advisers Act of 1940 ("Advisers Act"), 15 U.S.C. § 80b-1 *et seq.*, and the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). Neither statute compels DOL to adopt plaintiffs' position.

Plaintiffs observe (Chamber Br. 7) that the Advisers Act defines the term "investment adviser" to exclude any "broker or dealer" who renders investment advice in a manner "solely incidental to the conduct of his business as a broker or dealer, and who receives no special compensation" for that advice. 15 U.S.C. § 80b-2(a)(11). But DOL was not required to incorporate that limitation into ERISA's fiduciary definition, because the statutory comparison is inapt. Whereas the Advisers Act imposes disclosure obligations on all advisers regardless of the nature of their clients, *see* 15 U.S.C. § 80b-6(3), ERISA and the Code impose different obligations on advisers to retirement investors in particular, *see Secretary of Labor v. Fitzsimmons*, 805 F.2d 682, 689 (7th Cir. 1986). It was therefore reasonable for DOL to construe, for retirement investors only, the fiduciary-responsibility provisions of ERISA and the Code more expansively than existing securities laws. Insofar as the Advisers Act *is* relevant, it arguably reinforces DOL's interpretation. Although ERISA refers to the Act, *see* 29 U.S.C. § 1108(g)(11), the Act's limitations on the meaning of "investment advice" are absent from ERISA's definition of that very term, which could reasonably support the conclusion that Congress did not mean to incorporate similar restrictions into ERISA. *See FCC v. NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 302 (2003).

As for Dodd-Frank, like the Advisers Act, it concerns all securities transactions covered by federal law. ERISA, as noted, concerns a narrower subset of transactions. Moreover, Dodd-Frank was enacted more than three decades after ERISA, and "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price*, 361 U.S. 304, 313 (1960). Dodd-Frank thus is hardly capable of rendering DOL's interpretation of ERISA unreasonable. *Cf. Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 839 (1988).

Regardless, Plaintiffs cannot prevail even assuming Dodd-Frank is a reliable gauge of congressional intent with respect to ERISA. Neither of the provisions cited by plaintiffs forecloses the fiduciary rule. Plaintiffs note (Chamber Br. 41) that § 913(g) prohibits the SEC from creating a fiduciary standard that would be violated by the receipt of a sales commission in and of itself. But DOL is not the SEC, and DOL has not banned commissions; indeed, the fiduciary rule contains exemptions from the prohibited-transaction provisions in ERISA and the Code so investment advisers may continue to receive commissions.

Plaintiffs also note (IALC Br. 43) that § 989J removes from the scope of federal securities laws those fixed-indexed annuities issued in conformity with suitability standards adopted by the National Association of Insurance Commissioners ("NAIC"). *See infra* p. 76-80 (discussing these standards). But they again ignore the fact that Dodd-Frank concerns the treatment of *all* fixed-indexed-annuity transactions covered under federal securities laws, while ERISA accords heightened protections only to those investors in a subset of retirement-related (and tax-advantaged) transactions involving Title I plans or IRAs. A determination that existing suitability standards satisfy the securities laws' standards does not compel DOL to conclude that Congress deemed suitability standards sufficiently protective of retirement investors' interests for purposes of ERISA.

In sum, as with their other arguments, plaintiffs have identified support for why DOL reasonably could have adhered to its prior interpretation of the fiduciary investment advice definition, but they have failed to identify any basis for concluding that DOL's contrary interpretation is unreasonable. The definition adopted by DOL in the fiduciary rule must therefore be upheld under *Chevron*.

II. The Best-Interest Contract Exemption Is, on the Whole, a Lawful Exercise of DOL's Authority To Issue Administrative Exemptions.

In addition to their broad challenge to the fiduciary rule, plaintiffs bring several specific challenges to the BIC Exemption. Their broadest challenge argues that the exemption is, on the whole, an unlawful exercise of DOL's authority to issue administrative exemptions. The district court correctly concluded otherwise.

a. Title I of ERISA prohibits fiduciaries to Title I plans from engaging in conflicted transactions that do not qualify for a statutory or administrative exemption. 29 U.S.C. § 1106(b). Title II of ERISA contains a comparable prohibition on fiduciaries to transactions involving IRAs. 26 U.S.C. § 4975(c)(2). Congress enacted these parallel provisions, conspicuously absent from federal or state laws regulating securities and insurance products, "to bar categorically a transaction that [is] likely to injure" a retirement plan. *Commissioner v. Keystone Consol. Indus.*, 508 U.S. 152, 160 (1993).

Congress also vested DOL with expansive authority to grant administrative exemptions to both provisions. An exemption, including a "conditional" exemption, may be issued so long as DOL finds it to be (1) "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." 29 U.S.C. § 1108(a); *see* 26 U.S.C. § 4975(c)(2). This authority is discretionary: DOL need not issue any exemption at all, but *must not* issue an exemption unless it can make the requisite findings.[15]

In light of these provisions, DOL has clear authority to regulate prohibited transactions involving IRAs through conditional exemptions. Since 1978, the agency has been solely responsible for administering Title II's prohibited-transaction provisions and granting exceptions to them. *See supra* p. 8 n.3. In that time, DOL has issued numerous conditional exemptions that govern fiduciary conduct with respect to IRAs. Congress specifically recognized DOL's critical role in regulating fiduciaries to IRAs in the Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780. That statute directed DOL to issue regulations implementing a statutory exemption to ERISA under which investment-advice fiduciaries to IRA investors may receive conflicted compensation upon satisfaction of certain conditions. DOL implemented that exemption in 2011, and its regulations remain in place today. *See* 29 C.F.R. §§ 2550.408g-1, .408g-2.

[15] The statute also prohibits DOL from issuing exemptions until it gives notice and an opportunity to comment to interested parties. 29 U.S.C. § 1108(a). DOL complied with that requirement here.

The BIC Exemption is a lawful exercise of DOL's exemption authority. It permits investment-advice fiduciaries who recommend investment products to receive conflicted compensation so long as they comply with certain conditions. One condition, applicable to fiduciaries to Title I plans or IRAs, is compliance with Impartial Conduct Standards reflecting the duties of prudence and loyalty. DOL issued this exemption to avoid unduly interfering with a broad range of common compensation practices, while at the same time ensuring that conflicted investment recommendations—which Congress categorically barred under ERISA and the Code—would occur only with the appropriate safeguards. After an extensive rulemaking process, DOL made the requisite statutory findings. ROA.386. That is all ERISA and the Code require.

b. Plaintiffs do not contest the accuracy or necessity of DOL's findings on appeal.[16] They argue instead that the BIC Exemption is unlawful because DOL "has no regulatory authority over IRAs." *E.g.*, Chamber Br. 12, 40, 47, 50. But while DOL has no *enforcement* authority over fiduciaries to IRAs, DOL does have sweeping *interpretive* authority over "regulations, rulings, opinions, and exemptions" related to fiduciaries to IRAs, especially where they engage in *prohibited transactions*. 43 Fed. Reg. 47713 (Oct. 17, 1978). Congress clearly empowered DOL to regulate such fiduciaries

[16] Although plaintiffs suggested in district court that the exemption was not administratively feasible, *see* ROA.4669, the district court rejected their argument, and Plaintiffs have abandoned it by failing to brief it here.

who receive conflicted compensation for providing investment advice to IRAs, which would otherwise be categorically barred by the prohibited-transaction provisions in the Code. *Supra* p. 7-8. Thus, plaintiffs are wrong to suggest (Chamber Br. 47) that DOL has unlawfully "manipulate[d]" its exemption authority to regulate IRAs, over which DOL allegedly lacks "jurisdiction." Simply put, the BIC exemption's conditions do not apply to IRA fiduciaries who refrain from engaging in the transactions prohibited by Congress.

With their broad argument unavailing, plaintiffs contend (Chamber Br. 48) that DOL's exemption authority is unambiguously limited by an implication derived from the structure of ERISA. As noted, fiduciaries to Title I plans must adhere to statutorily mandated duties of prudence and loyalty, but Title II of ERISA contains no such requirement for fiduciaries to IRAs. Plaintiffs believe this structure unambiguously prevents DOL from requiring, as a condition of the BIC Exemption, fiduciaries to Title II plans to comply with the duties of prudence and loyalty.

Congress's decision not to extend such duties to fiduciaries to IRAs in *all* circumstances, however, says nothing about whether DOL may require compliance with those duties as a condition of engaging in transactions Congress deemed so problematic that it otherwise categorically prohibited them by statute. ROA.9900. The latter question—the actual question presented—turns only on whether the exemption is administratively feasible, in the interests of retirement investors, and protects their rights. 26 U.S.C. § 4975(c)(2). The breadth of that delegation reflects

Congress's decision to vest DOL with "broad discretion to use its expertise and to weigh policy concerns when deciding how best to protect retirement investors from conflicted transactions." ROA.9905. The overall condition at issue is a reasonable exercise of DOL's delegated policy judgment. If anything, Congress's decision to employ duties of prudence and loyalty to protect the interests of investors in Title I plans supports DOL's decision to condition the BIC Exemption on adherence to those same duties.

Plaintiffs' expansive view of congressional silence is further undermined by its absurd implications. By their logic, any duty present in Title I but absent from Title II—such as the duty of a "financial institution not [to] employ individuals convicted of embezzlement or fraud"—could not be designated as a condition to any exemption applicable to fiduciaries to IRAs. ROA.9901 n.84; *see* 29 U.S.C. § 1111(a). There is no indication that Congress intended to constrain DOL's exemption authority in this bizarre manner, taking off the table the very duties that Congress deemed most important in the Title I context. At an absolute minimum, DOL's rejection of plaintiffs' upside-down interpretation was reasonable under *Chevron*, as the district court correctly ruled. ROA.9900-08. In short, "no rule of statutory interpretation" compels the "non-textual fourth limitation" plaintiffs have projected onto 29 U.S.C. § 4975(c)(2). ROA.9901.

c. Plaintiffs' remaining attempts to find mandatory extra-textual limits on DOL's exemption authority also fail.

Plaintiffs contend (Chamber Br. 49-50) that DOL's exemption authority is limited to "reducing regulatory burdens," which the BIC Exemption allegedly creates. Plaintiffs do not identify any statutory basis unambiguously foreclosing DOL from adopting conditions that mitigate conflicts by imposing some regulatory burdens. Moreover, plaintiffs have inaccurately described the BIC Exemption's effect. Because ERISA and the Code categorically prohibit fiduciaries from engaging in conflicted transactions, the BIC Exemption "reduces the industry's regulatory burden" by lifting this statutory bar and allowing such transactions to occur. ROA.9901. By definition, therefore, the BIC Exemption cannot impose greater regulatory burdens than the prohibited-transaction bans imposed by Congress. The fact that fiduciaries who wish to invoke the exemption must comply with its conditions does not convert those conditions into mandatory regulatory requirements. After all, if fiduciaries perceive these conditions to be too onerous, they can avoid them simply by restructuring their compensation models to avoid conflicted compensation.

Plaintiffs argue (Chamber Br. 51) that such restructuring would be impossible in some segments of the industry. But the evidence they cite indicates only that some advisers may find it difficult to shift from a *commission*-based compensation model to a *fee*-based compensation model. *See* Chamber Br. 14-15, 51. That does not refute DOL's detailed discussion of other alternative compensation systems advisers can adopt. *See* ROA.955-61. For instance, "[a]dvisory firms may compensate advisers . . . more by salary or via rewards tied to customer acquisition or satisfaction." ROA.959.

As the district court found, other financial professionals who have been subjected to similar standards continue to deploy "all types of [] compensation models and other innovative methods." ROA.9907 (alteration in original). That plaintiffs may not wish to engage in such innovation does not mean that advisers have no "viable choices." ROA.9901-02.[17]

Plaintiffs also contend that the BIC Exemption, unlike other exemptions, imposes "new consequences" on fiduciaries to IRAs that go beyond ERISA's sanctions. Chamber Br. 49-50 (emphasis omitted). But nothing in the statute indicates that Congress unambiguously barred DOL from imposing conditions on exemptions whose breach would give rise to collateral consequences beyond those set forth in ERISA. And plaintiffs again cite no authority supporting their view, and no reason why they cannot simply decline the exemption if they view those consequences as more onerous than the prohibited-transaction provisions themselves. In any event, the specific collateral consequence to which plaintiffs object—the prospect of a lawsuit brought by investors under a state-law cause of action (Chamber Br. 49)—is not inconsistent with ERISA. Because ERISA's preemption clause does not reach

[17] Even if plaintiffs did not have such choices, nothing in ERISA unambiguously requires DOL to accommodate a hypothetical fiduciary whose business model requires engaging in conflicted transactions. Thus, the APA at most required DOL to give a reasoned explanation concerning the rule's response to this fiduciary's dilemma—as DOL did. *See* ROA.728-29 (rejecting, on the basis of the record, commenters' arguments that the rule would drive advisers out of business in numbers significant enough to outweigh the rule's benefits).

state-law claims against advisers to IRAs, such fiduciaries are already subject to state litigation. Plaintiffs do not explain how the risk that an adverse decision might lead to additional liability, *see* Chamber Br. 49-50, renders the BIC Exemption an unlawful exercise of DOL's authority.

Finally, Plaintiffs argue (Chamber Br. 43-48) that DOL cannot rely on its exemption authority in a manner that would significantly impact the market for IRAs. But any such impact derives not from the BIC Exemption but from the prohibited-transaction provisions in ERISA and the Code, which bar the receipt of conflicted compensation for both Title I plans and for IRAs. Once again, the BIC Exemption mitigates market disruptions those provisions otherwise would cause.

More fundamentally, the breadth of a rulemaking does not render it unreasonable if the rule was promulgated under an equally broad delegation of statutory authority. *See Batterton v. Francis*, 432 U.S. 416, 425 (1977). That principle controls here. DOL's exemption authority is broad, not narrow. For nearly four decades, DOL has used this expansive authority to issue exemptions conditioned on affirmative obligations that fiduciaries to IRAs must meet. Although the BIC Exemption may affect the market for IRAs to a greater extent than the exemptions that preceded it, the exemption's significance does not in and of itself demonstrate that DOL lacked power to issue it. *See* ROA.9905.

Plaintiffs attack this conclusion by citing cases rejecting an agency's "discover[y,] in a long-extant statute[, of] an unheralded power to regulate a significant portion of the American economy." Chamber Br. 44-45 (quoting *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014)). But each of the cited cases involved agencies issuing unprecedented affirmative regulations with sweeping economic consequences in contravention of statutory text. In *Utility Air*, 134 S. Ct. at 2444, EPA attempted to regulate greenhouse-gas emissions from millions of cars, thus "seizing expansive power that it admit[ted] the [Clean Air Act] [wa]s not designed to grant." In *Whitman v. American Trucking Associations*, 531 U.S. 457, 471 (2001), EPA attempted to set national air-quality standards by considering economic considerations its enabling statute "unambiguously bar[red]" it from examining. In *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 146-47 (2000), FDA attempted to regulate the tobacco industry despite having disavowed that authority for nearly a century and despite Congress having repeatedly enacted legislation based on that premise. And in *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994), FCC attempted to construe the unambiguous statutory term "modify" as authorizing a "fundamental revision" of the statutory scheme.

By contrast, Congress has given DOL broad authority to construe the meaning of ERISA's definition of fiduciary investment advice and to grant conditional exemptions from the prohibited-transaction provisions applicable to fiduciaries.

Thus, *Utility Air* and similar cases—which concern interpretations of inapposite statutes adopted by different agencies—lack any application here.[18]

III. The BIC Exemption Does Not Impermissibly Create a Cause of Action.

Plaintiffs also challenge DOL's decision, currently due to become applicable on January 1, 2018, to condition eligibility for the BIC Exemption on the presence of certain provisions in fiduciaries' contracts with investors. These provisions include (1) an acknowledgment of fiduciary status, (2) a guarantee of adherence to the Impartial Conduct Standards; and (3) certain warranties and disclosures. ROA.379. Plaintiffs contend, incorrectly, that this condition creates a private cause of action in violation of *Alexander v. Sandoval*, 532 U.S. 275 (2001).

Investors often enter into contracts or agreements when purchasing investment products. Because Title II of ERISA does not preempt state law, fiduciary investment advisers to IRAs have always been subject to suit in state courts on state-law theories of liability, including breach of contract. *See NAFA v. Perez*, 217 F. Supp. 3d 1, 37 (D.D.C. 2016) (collecting cases). The BIC Exemption specifies certain terms fiduciaries to IRAs must include in their contracts if they wish to use the exemption to obtain relief from ERISA's prohibited-transaction provisions. ROA.385. This

[18] If this Court were to find the BIC Exemption unlawful, it should remand the case for the district court to consider, in the first instance, the complicated question of what remedy would be appropriate. *See Green Party of Conn. v. Garfield*, 616 F.3d 213, 248 (2d Cir. 2010).

condition cannot properly be characterized as creating a cause of action. It does not purport to authorize a federal-law claim to enforce ERISA, the Code, or the provisions specified in the BIC Exemption. Investors may only vindicate their rights under those specified provisions by suing under *a preexisting state-law* cause of action (*e.g.*, breach of contract), the same way they always have when advisers have not adhered to their agreements. ROA.9909.

Plaintiffs respond (Chamber Br. 55) that a state-law suit to enforce a contractual provision described in the BIC Exemption is a federal cause of action because a federal regulation sets forth the provision's contours. But a lawsuit brought to enforce a contractual provision specified in the exemption would not arise under a federal cause of action even assuming that a state court would interpret the provision in accordance with federal law. Indeed, such a claim would not even present a federal question for jurisdictional purposes. *See Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 813 (1986) ("[T]he mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction.").[19]

Finally, plaintiffs argue that this condition is unlawful in light of *Astra USA, Inc. v. Santa Clara County*, 563 U.S. 110 (2011). But the question in *Astra* was whether a

[19] Because an agency does not create a cause of action simply by specifying that a regulated entity can only benefit from an administrative exemption by including certain terms in its contracts with third parties, the BIC Exemption would not violate *Sandoval* even if recourse to the exemption were mandatory—which it is not. *See supra* p. 52-53.

third party beneficiary to a contract could bring a lawsuit to enforce the contract when its terms mirrored the terms of a federal statute that did not confer a private right of action. *Id.* at 118; *see* ROA.9911. That question has nothing to do with the question in this case, which is instead whether an agency may exercise its authority to grant conditional exemptions by specifying terms for contracts between advisers and investors that would be enforceable under state law by the contracting parties. *See* ROA.9912. Indeed, *Astra* specifically reserved the distinct but still inapposite question of "[w]hether a contracting agency may authorize third-party suits to enforce a Government contract." 563 U.S. at 119 n.4.[20]

Plaintiffs separately contend that, even if the challenged condition does not create a cause of action, it is unreasonable under the APA. They characterize (Chamber Br. 54) the condition as a nefarious "contrivance" designed to flout Congress's decision to create a private right of action against fiduciaries to Title I plans while omitting a private right of action against for fiduciaries to IRAs. Again, plaintiffs read too much into congressional silence. Congress unambiguously delegated to DOL authority to condition exemptions on a broad range of conduct so long as the agency determines that the conditions are feasible and protect investors'

[20] The other cases cited by plaintiffs are similarly irrelevant because none involved a remotely comparable exercise of agency authority. *See Umland v. PLANCO Fin. Servs., Inc.*, 542 F.3d 59 (3d Cir. 2008); *MM&S Fin., Inc. v. National Ass'n of Secs. Dealers, Inc.*, 364 F.3d 908, 912 (8th Cir. 2004); *Grochowski v. Phoenix Constr.*, 318 F.3d 80, 85-56 (2d Cir. 2003).

interests and rights. The fact that Congress did not deem private enforcement of fiduciary breaches necessary for IRA fiduciaries *in all circumstances*, as it did for Title I fiduciaries, does not unambiguously foreclose DOL's authority to require private enforcement for IRA fiduciaries *in the particular circumstance* of granting conditional exemptions from the prohibited-transaction provision.

IV. The BIC Exemption's Condition Restricting Class-Litigation Waivers Should Be Vacated Insofar as It Applies to Arbitration Clauses.

The BIC Exemption provides that, to qualify for relief from the prohibited-transaction provisions in ERISA and the Code, contracts concluded between fiduciaries to IRAs and investors cannot waive the investors' right to participate in class litigation. Fiduciaries are therefore deprived of the benefits of the exemption insofar as they enter into arbitration agreements that prevent investors from participating in class-action litigation. ROA.455, 472. Plaintiffs argue that this anti-arbitration condition violates the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2.

In light of the position adopted by the Acting Solicitor General in *NLRB v. Murphy Oil USA, Inc.* ("*Murphy Oil*"), Nos. 16-285, 16-300, and 16-307 (U.S. June 16, 2017), the government is no longer defending this specific condition. But given DOL's finding that it would have issued the exemption even without its arbitration-specific provisions, ROA.422, and given the fact that the exemption is otherwise a lawful exercise of DOL's exemption authority, *supra* pp. 47-59, invalidation of the anti-arbitration condition does not justify invalidation of the BIC Exemption or of the fiduciary rule as a whole.

a. The FAA provides that an arbitration agreement shall be "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As the Supreme Court has repeatedly held, this provision preempts state laws that are hostile to or that discriminate against arbitration. *E.g.*, *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 112 (2001). The FAA expressly preempts state laws invalidating arbitration agreements on grounds that discriminate against arbitration; such agreements may be invalidated only by recourse to arbitration-neutral contract defenses. *See DIRECTV*, 136 S. Ct. at 471. Moreover, even where state laws purport to invalidate arbitration agreements on arbitration-neutral grounds, conflict-preemption principles may still prevent their application. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341-43 (2011). In *Concepcion*, for example, the Supreme Court held that States cannot invalidate waivers of class-wide adjudication even where they neutrally apply to both arbitration and litigation, because forcing a party to arbitrate on a class-wide rather than individual basis is still an impermissible "obstacle to the accomplishment and execution of the full purposes and objectives of Congress" under the FAA. *Id.* at 352.

Taken together, these principles confirm that the FAA would forbid States from doing what the BIC Exemption has done: conditioning a regulatory exemption on a regulated party's refraining from entering into an arbitration agreement that would prevent class litigation. Indeed, such a condition arguably poses an even more serious obstacle to arbitration than the state law invalidated in *Concepcion*. Under that law, parties were at least able to seek class arbitration. Compliance with the type of regulatory condition at issue here, by contrast, would deny a fiduciary the ability to arbitrate at all where an investor sought to participate in class litigation. To be sure, a fiduciary could choose not to comply with the condition by entering into an agreement that included a binding arbitration provision applicable to class claims, so that the fiduciary could then insist on arbitration of the claims. But the fiduciary would then be subject to a regulatory disadvantage—here, losing the exemption and the associated relief from the prohibited-transactions provisions—for having entered into an arbitration agreement. Such a result is a significant obstacle to the FAA under *Concepcion*.

The policy in favor of arbitration applies to both federal- and state-law claims. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). Of course, the question of whether the enforcement of a given state law is conflict preempted under the FAA does not control the question of whether the enforcement of an analogous federal law would be precluded by the FAA. *See POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2236 (2014) (distinguishing between these two contexts). Even in that latter context, though, the Supreme Court has held that federal statutes may not be interpreted to displace FAA-protected rights absent a "contrary congressional command" that is "unmistakably clear." *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98, 117 (2012). For example, agencies may bar arbitration agreements that would violate countervailing substantive rights guaranteed by a federal statute. *See EEOC. v. Waffle House, Inc.*, 534 U.S. 279, 295 & n.10 (2002); *see, e.g.*, 12 U.S.C. § 5567(d)(2) ("[N]otwithstanding any other provision of law, no predispute arbitration agreement shall be valid or enforceable to the extent that it requires arbitration of a dispute arising under this section."); *id.* § 5518(b) ("The [Consumer Financial Protection] Bureau, by regulation, may prohibit or impose conditions or limitations on the use of an agreement . . . providing for arbitration of any future dispute between the parties."). In the absence of the requisite clarity, however, courts should harmonize the FAA with other federal statutes without deference to an agency's views. *See Hoffman Plastics Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002).

In light of these principles, the Acting Solicitor General recently argued that, although the National Labor Relations Act forbids employers from "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of" their right to engage in "concerted activities," 29 U.S.C. §§ 157, 158(a)(1), that language lacks the requisite clarity, and the National Labor Relations Board ("NLRB") could not supply it through agency action, to override employers' right under the FAA as interpreted in *Concepcion* to agree only to individual arbitration of a dispute concerning the Fair Labor Standards Act (which did not itself provide any basis for an override). *See* Brief for the United States as Amicus Curiae, *Murphy Oil*, Nos. 16-285, 16-300, and 16-307 (June 16, 2017).

Given the government's position in *Murphy Oil*, the government is no longer defending the BIC Exemption's condition restricting class-litigation waivers insofar as it applies to arbitration agreements. In *Murphy Oil*, the government has argued that it is contrary to the FAA and *Concepcion* for the NLRB to adopt a policy prohibiting employers from inducing waivers of class adjudication of substantive rights under the Fair Labor Standards Act, even though that policy is *neutral* between arbitration and litigation and even though it was promulgated pursuant to a federal statute that *specifically* protected employees' right to engage in "concerted activities." It follows that DOL may not interpret its *broad but general* exemption authority as conferring upon it the specific power to *discriminate against arbitration* by withholding the BIC Exemption unless fiduciaries consent to class litigation, where Title II of ERISA itself provides no countervailing substantive right to litigate rather than arbitrate here. Although plaintiffs are incorrect that fiduciaries are coerced to comply with this anti-arbitration condition (*compare* Chamber Br. 61, *with* ROA.9953; *see supra*, pp. 52-53), the condition is nevertheless a discriminatory obstacle to arbitration that cannot be harmonized with the FAA and *Concepcion* under the interpretation of those authorities adopted by the government in *Murphy Oil*.

b. Plaintiffs assert (Chamber Br. 62-63) that invalidation of the arbitration condition "requires vacatur of the Rule as a whole." This conclusory assertion fails to engage with the standards governing severability. An unlawful provision in a rule should be severed from the remainder of the rule if that result accords with the "intent of the agency" and if "the remainder of the regulation could function sensibly without the stricken provision." *See Verizon v. FCC*, 740 F.3d 623, 659 (D.C. Cir. 2014). This case meets both criteria.

With respect to intent, DOL clearly indicated that it would have adopted the BIC Exemption even if the exemption's anti-arbitration condition is severed. The exemption provides that, "[i]n the event that the provision on pre-dispute arbitration agreements for class or representatives claims . . . is ruled invalid," "this provision shall not be a condition of this exemption . . . but all other terms of the exemption shall remain in effect." ROA.455-56. The preamble to the exemption reiterates that the anti-arbitration condition is "severable if a court finds it invalid based on the FAA." ROA.421. Severance is improper where there is "substantial doubt" that the agency would have adopted the rule without the severed portion. *See Davis County Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1459 (D.C. Cir. 1997). Here, given DOL's unequivocal statements on this very issue, there is no doubt that the agency would have adopted the rule without the anti-arbitration condition.

Nor would severance "impair the function" of the BIC Exemption in particular or of the fiduciary rule in general. *See Davis County Solid Waste Mgmt.*, 108 F.3d at 1460. DOL designed the BIC exemption to "flexibly accommodate[] a wide range of compensation practices, while minimizing the harmful impact of conflicts of interest on the quality of advice." ROA.378. DOL determined that, "based on all the exemption's other conditions, it can still make the necessary findings to grant the exemption even without the" anti-arbitration condition. ROA.422. And DOL in fact found that, even though the exemption as shorn of the condition would confer "less protect[ion]" on investors, the modified exemption would remain "administratively feasible, in the interests of plans and their participants and beneficiaries, and protective of the rights of the participants and beneficiaries." ROA.422.

For these reasons, invalidation of the BIC Exemption's condition restricting class-litigation waivers insofar as it applies to arbitration agreements does not justify invalidation of the remainder of the BIC Exemption, let alone the entire fiduciary rule—both of which are lawful and reasonable exercises of DOL's authority to interpret and administer the fiduciary-definition and prohibited-transaction provisions in ERISA and the Code.

V. The Fiduciary Rule's Treatment of Certain Annuities Is Not Arbitrary or Capricious.

In their final challenge to the BIC Exemption, plaintiffs argue that DOL acted arbitrarily and capriciously by requiring conflicted transactions involving fixed-indexed annuities to satisfy the BIC Exemption rather than the amended PTE 84-24. The district court correctly rejected this argument, *see* ROA.9916-26, because DOL's judgment—based on the extensive record before it—more than satisfies the "highly deferential" arbitrary-and-capricious standard. *ConocoPhillips Co. v. United States*

EPA, 612 F.3d 822, 831 (5th Cir. 2010). Under that standard, "[t]he court is not to weigh the evidence in the record pro and con." *Louisiana ex rel. Guste v. Verity*, 853 F.2d 322, 327 (5th Cir. 1988). "[I]f the agency considers the [relevant] factors and articulates a rational relationship between the facts found and the choice made, its decision is not arbitrary or capricious." *Id.*[21]

A. DOL reasonably required conflicted transactions involving fixed-indexed annuities to satisfy the BIC Exemption.

DOL compiled a vast collection of "academic research, government and industry statistics, public comments, and consultations with various agencies and industry organizations." ROA.9933. After reviewing the available evidence, DOL determined that, "[g]iven the risks and complexities of these investments," fixed-indexed annuities should be subject to the same protective conditions of the BIC Exemption as apply to variable annuities and mutual funds. ROA.395. These annuities are complex products requiring careful consideration of their terms and

[21] The district court understood plaintiffs' challenge to encompass only DOL's treatment of fixed-indexed annuities, *see* ROA.9916-26, as do the IALC plaintiffs on appeal, *see* IALC Br. 35. The ACLI plaintiffs do not contest this understanding, notwithstanding their discussion of both fixed-indexed and variable annuities in arguing that DOL's analysis was deficient. In any event, a challenge to the inclusion of variable annuities in the BIC Exemption would lack merit for much the same reasons. Because variable annuities, like fixed-indexed annuities, are complex investments subject to significant conflicts of interest, DOL reasonably determined that advice regarding these products should be subject to the BIC Exemption. *See* ROA.553-54 (discussing features of variable annuities that require heightened safeguards); ROA.563 (explaining that existing suitability standards are insufficient to protect consumers from conflicted transactions).

risks. By including them in the same exemption that governs other retail-investment recommendations, "the final exemption creates a level playing field for variable annuities, [fixed-]indexed annuities, and mutual funds under a common set of requirements, and avoids creating a regulatory incentive to preferentially recommend [fixed-]indexed annuities." ROA.395. This Court should not second-guess that reasonable judgment on this record.

1. The record before DOL demonstrates that fixed-indexed annuities are complex and risky products. *See* ROA.777; *see also* ROA.760. Returns can vary widely because they are tied to the selection and performance of a crediting index. ROA.756. Moreover, investors generally do not receive returns that reflect the full amount of index-linked gains due to complicated methods of crediting interest that may not be apparent on the face of the annuity contract. ROA.756, 921 (describing contractual features that limit full crediting); *see supra* p. 17. These methods of crediting interest limit investors' ability to realize market gains and impose considerable risks on them. ROA.760.

Fixed-indexed annuities have other counterintuitive features. As DOL noted,

> [A]ssessing the prudence of a particular indexed annuity requires an understanding of surrender terms and charges; interest rate caps; the particular market index or indexes to which the annuity is linked; the scope of any downside risk; associated administrative and other charges; the insurer's authority to revise terms and charges over the life of the investment; and the specific methodology used to compute the index-linked interest rate and any optional benefits that may be offered, such as living benefits and death benefits. In operation, the index-linked interest rate can be affected by participation rates; spread, margin or asset fees;

> interest rate caps; the particular method for determining the change in the relevant index over the annuity's period (annual, high water mark, or point-to-point); and the method for calculating interest earned during the annuity's term (*e.g.*, simple or compounded interest).

ROA.555.

Relying on this evidence, DOL reasonably determined that retirement investors—particularly individual investors in the retail market—are "acutely dependent" on investment advice in the fixed-indexed-annuity context. ROA.395, 921; *see also* ROA.939. Without expert guidance, "[i]nvestors can all too easily overestimate the value of these contracts, misunderstand the linkage between the contract value and the index performance, underestimate the costs of the contract, and overestimate the scope of their protection from downside risk (or wrongly believe they have no risk of loss)." ROA.395.

The record before DOL demonstrates more generally that the retirement market's compensation practices create significant conflicts of interest. *See* ROA.658, 765-71. Advisers who are paid by commission may have incentives to recommend products from which they will earn larger commissions over products with smaller commissions that would make their clients more money. ROA.782; *see* ROA.764 (discussing incentive to recommend products proprietary to the adviser's employer or employer's affiliate). These conflicts were well documented in the record by regulators and outside groups, and have been acknowledged by the financial services industry. *See* ROA.767, 770 & n.315, 771.

DOL reasonably determined that the issue of conflicted advice is in many respects more problematic in the market for annuities. *See* ROA.759, 767-69. Commissions for insurance products are often substantially higher than those for mutual funds. ROA.766, 768. According to plaintiff IALC, the typical commission for the sale of a fixed-indexed annuity is "about six to eight percent give or take." ROA.9327. That is substantially higher than the average commission of 1.37% for the sale of shares in a mutual fund. ROA.982. Moreover, the record suggested that commissions are regularly associated with product features unfavorable to investors. *See* ROA.768. And investors often must incur heavy penalties to reverse annuities once purchased. *See* ROA.777. DOL thus concluded that conflicts of interest in the annuity market can be "even more detrimental" than in the mutual-fund market. ROA.768; *see also* ROA.777, 921.

Finally, the record demonstrates that unaddressed conflicts of interests can inflict significant harm on investors. *See, e.g.*, ROA.775, 786, 986 (econometric literature); ROA.831-32 (GAO report). Individual consumers lack the expertise of their advisers, and even financially sophisticated investors are frequently unaware of the nature and extent of these conflicts. *See* ROA.646, 758, 764, 779-80. DOL reasonably determined that this informational gap is exacerbated by the complexity of existing compensation schemes and the variety of investment products in the retail marketplace. *See* ROA.758, 767, 769, 775. DOL found the gap to be especially acute in the context of fixed-indexed annuities; indeed, other regulatory bodies have expressed concerns that sales materials for such products do not fully describe them, and could confuse or mislead investors. *E.g.*, ROA.680.

Empirical research shows that conflicted advisers choose to recommend products that benefit themselves over products that would benefit their clients more. ROA.782. The data available when DOL issued the fiduciary rule confirm that IRA holders receiving conflicted advice can expect their investments to underperform. *See* ROA.795 (estimating underperformance in that marker over the next 20 years); ROA.795-97 (summarizing nine empirical studies supporting this conclusion). That data suggested that advisers' bias towards mutual funds that pay higher compensation could cost IRA investors between $95 billion and $189 billion over the next 10 years, and the true cost may be much larger. ROA.795. DOL's estimate reflects just one of many types of losses that can arise from conflicted transaction; just one of many types of conflicts that advisers face; in just one of many segments of the retirement-investment market. ROA.795, 936. And DOL surveyed "strong evidence that advisory conflicts inflict more types of harm than are quantified in this analysis." ROA.939; *see* ROA.795.

2. DOL examined the record before it to determine whether existing laws governing annuity products could mitigate the harms of conflicts of interest. After "assess[ing] existing securities regulation for variable annuities, [and] state insurance regulation of all annuities," DOL reasonably concluded that those regulations did not adequately protect retirement investors. *See* ROA.9921.

Because fixed-indexed annuities are not securities, they are principally regulated by state-law suitability standards. *See* ROA.678-79. DOL explained, however, that these standards—which do not prohibit conflicted advice-giving—still "permit brokers to recommend investments that favor their own financial interests . . . in preference to better investments that favor the customers' interests." ROA.671. Moreover, these standards vary from State to State—a regulatory patchwork the Federal Insurance Office has described as "particularly concerning" and "increasingly problematic." ROA.679.

DOL then analogized the market for annuities to the market for mutual funds, whose sale is subject to analogous suitability standards and is characterized by a similarly conflicted compensation structure. *See* ROA.9924. Nine quantitative studies confirmed the substantial negative effect of conflicted compensation on mutual-fund investors notwithstanding the existence of a suitability regime. *See* ROA.733, 795-800, 809. As part of its response to concerns that these studies failed to account for recent changes in the mutual fund markets, DOL conducted a supplemental study of mutual-fund data from before and after those changes. ROA.967. The agency's analysis of this expanded dataset at the time confirmed the harms of conflicted advice. *See* ROA.967-68. And testimony at a public hearing significantly postdating those regulatory changes revealed "new research" demonstrating both that "conflicted investment advisers continue to act on their conflicts of interest," and that "the mutual fund market has *not* undergone a fundamental change." ROA.798.

On the basis of this evidence, DOL determined that the harms from conflicted advice in the market for annuities are not adequately mitigated by existing suitability standards. *See* ROA.747-48, 786. DOL further determined that, because fixed-indexed annuities are riskier and more complex than fixed-rate annuities, conflicted transactions involving them may only occur with the heightened safeguards of the BIC Exemption (as opposed to the less restrictive provisions of PTE 84-24). ROA.395, 760. In DOL's judgment, the BIC Exemption's conditions "serve as strong counterweights to the conflicts of interest associated with complex investment products, such as variable and indexed annuities." ROA.555.

Based on these studies, the district court found that DOL reasonably extended its conclusion to the annuity market where the commissions are larger and less transparent, and where products are more complex, leaving consumers more vulnerable to bad advice. *See* ROA.9933; ROA.758-60, 768-69, 795.

B. Plaintiffs' counterarguments are erroneous.

1. DOL reasonably determined that existing laws do not mitigate the harms of conflicted advice in the market for certain annuities.

Plaintiffs argue (ACLI Br. 44; IALC Br. 44) that the fiduciary rule was arbitrary and capricious because DOL allegedly failed to discuss whether existing laws governing fixed-indexed and variable annuities are sufficient to protect retirement investors. That is incorrect.

a. To begin with, plaintiffs have identified no authority requiring DOL to assess the sufficiency of existing regulation as a precondition to issuing regulations interpreting and implementing Titles I and II of ERISA. Neither the statutory definitions of "fiduciary," nor the prohibited-transaction bans and their accompanying exemptions, expressly provide, much less unambiguously require, that DOL must find existing regulation of particular investment products insufficient before subjecting them to those general statutory provisions.

Plaintiffs' reliance (IALC Br. 37; ACLI Br. 44) on *American Equity Investment Life Insurance Co. v. SEC*, 613 F.3d 166, 179 (D.C. Cir. 2010), is therefore misplaced. Although the D.C. Circuit there reversed an SEC rule because the agency had "fail[ed] to determine whether, under the existing regime, sufficient protections existed" for annuities, *id.*, the court based its holding on a specific provision of the SEC's enabling statute requiring the agency to analyze the effects of its rule on "efficiency, competition, and capital formation," *see id.* at 177 (quoting 15 U.S.C. § 77b(b)). ERISA contains no analogous requirement.

b. In any event, DOL did in fact discuss the regulatory structure governing fixed-indexed and variable annuities, and the agency's conclusions were reasonable. As plaintiffs acknowledge, DOL—after describing the "existing regulations" governing fixed-indexed annuities—determined that existing laws "do not always limit or mitigate potentially harmful adviser conflicts as robustly" as the fiduciary rule would. IALC Br. 38 (citing ROA.747). DOL justified that conclusion by reference to the extensive record before it. *See supra* pp. 70-72. Because DOL's rationale is supported by "substantial evidence" and "conform[s] to minimum standards of rationality," "its actions . . . must be upheld." *See Texas Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 934 (5th Cir. 1998).

Plaintiffs assert (IALC Br. 46) that DOL did not adduce specific evidence of harm to investors in the market for fixed-indexed annuities. They fault DOL for citing only one quantitative study to support its determination that conflicted advice is pervasive and harmful within that market. But the APA requires only a "reasoned explanation," not a specific quantum of empirical data. *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009). All the agency must do is examine the pertinent evidence and articulate a reasonable explanation for its decision. *Associated Builders & Contractors, Inc. v. NLRB*, 826 F.3d 215, 219 (5th Cir. 2016). An agency may even proceed "on the basis of 'imperfect' information . . . unless 'there is simply no rational relationship' between the means used to account for any imperfections and the situation to which those means are applied." *Texas Oil*, 161 F.3d at 935.

DOL's analysis of the fixed-indexed annuity market satisfies these standards. In addition to the study referred to by plaintiffs, DOL cited a wide array of studies and other evidence demonstrating the harm from conflicts of interest in the market for these and other insurance products. This includes evidence that (1) advisers recommending annuities receive commissions and other sales incentives, and face attendant conflicts of interest, that are larger and less transparent than those empirically demonstrated to harm mutual fund investors; (2) relative to other investments such as mutual funds, fixed-indexed annuities are far more complex and less transparently priced, leaving investors more vulnerable to advisers' conflicts; and (3) consumer protections applicable to annuity recommendations are uneven across states. *See* ROA.679-80, 766, 768-69, 775-77. DOL also examined the effects of conflicts on sales of annuities in foreign markets to supplement studies of the domestic market. ROA.783-86. These explanations more than satisfy the deferential arbitrary-and-capricious standard of review.

Plaintiffs also fault DOL (IALC Br. 39) for failing to cite any studies discussing the effect of suitability standards on conflicts of interest in the fixed-indexed annuity market itself. These standards, plaintiffs believe, largely mitigate the effects of conflicts-of-interest on that market. That claim is doubly flawed. First, the APA does not prohibit agencies from relying on "reasonable extrapolations from . . . reliable evidence." *Natural Res. Def. Council v. Thomas*, 805 F.2d 410, 432 (D.C. Cir. 1986). Nor does the APA prohibit agencies from drawing conclusions about an industry using data from one segment of it so long as the comparison is "reasonable," "[w]hether or not" the chosen segment is "fully representative of the whole industry." *National Small Shipments Traffic Conf. v. CAB*, 618 F.2d 819, 831 & n.27 (D.C. Cir. 1980). DOL noted that mutual funds and annuities are "[b]oth . . . subject to disclosure and suitability requirements, and agents selling both products are compensated with upfront commissions that depend on the product sold."

ROA.9924. Based on this and the above evidence, it was therefore reasonable for DOL to extrapolate data from the mutual-funds market to the fixed-indexed-annuities market.

Second, the APA does not prohibit an agency "faced with . . . informational lacunae" from "regulat[ing] on the basis of available information rather than . . . await[ing] the development of information in the future." *ConocoPhillips Co.*, 612 F.3d at 841. Here, DOL twice requested any and all data relating to conflicts of interest in the market for fixed-indexed annuities. *See* ROA.806; 80 Fed. Reg. 21928, 21931 (Apr. 20, 2015). Industry sources responded that such data would be prohibitively expensive to compile or obtain. *See* ROA.806 n.385. The fiduciary rule cannot be set aside under the APA because DOL did not "obtain[] the unobtainable." *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 519 (2009).

At bottom, plaintiffs' arguments reflect their policy-based disagreement with DOL as to the utility of existing suitability standards. They highlight, for example, a comment from an industry participant asserting that increased suitability standards are correlated with reduced customer complaints, ACLI Br. 46 (citing ROA.9242-43); an article speculating that suitability rules "can help to meaningfully mitigate the risk of . . . self-interested advice," IALC Br. 39 (citing ROA.4521, 4545); and a Treasury Department report urging States to adopt the NAIC Model Suitability Regulation, IALC Br. 39 (citing ROA.679). But these sources do not prove that suitability standards have eliminated the need for additional consumer protections from advisers' incentives to steer consumers toward inferior investment products. And the cited Treasury Department report itself acknowledges that "[i]n the absence of more uniform adoption and implementation of the Model Suitability Regulation, federal authorities should consider appropriate action." Federal Insurance Office, U.S. Department of the Treasury, *Annual Report on the Insurance Industry* 54 (Sept. 2015); ROA.679 n.111. To reiterate, conflicts of interest can inflict substantial harms on retirement investors notwithstanding the existence of suitability standards; conflicted advice in the mutual-fund sector alone may cost IRA investors between $95 billion and $189 billion over the next 10 years. ROA.795, 936. That plaintiffs would take a different view does not render DOL's conclusions irrational.

c. Plaintiffs attempt to undermine DOL's reasoning by nitpicking the agency's assessment of specific items in the record. They focus most of their attention on the nine mutual-fund studies DOL cited. Significantly, plaintiffs do not dispute the conclusions those studies reached. They argue only that the studies are outdated in light of recent revisions to the national suitability standards governing mutual-fund sales that the Financial Industry Regulatory Authority ("FINRA") administers.[22]

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[22] Plaintiffs argue in passing (ACLI Br. 49) that DOL improperly prevented plaintiffs from commenting on the supplemental study of the mutual-fund market DOL conducted. *See supra* p. 71. But the APA permits agencies to "update[] and expand[]" their "data sources" "in response to industry criticisms" without undergoing another notice-and-comment period. *Chemical Mfrs. Ass'n v. EPA*, 870 F.2d 177, 202 (5th Cir. 1989). That is precisely what DOL did here. Its supplemental analysis applied the methodology outlined in existing studies to an expanded data set

Plaintiffs' argument turns on the premise that the revised suitability standards sharply limits or eliminates the risk of harm to investors from conflicted compensation that existed prior to the revisions. But DOL rationally arrived at the opposite conclusion: that the revised standards do not adequately resolve the problem of conflicted advice. DOL explained, for example, that the standards often still permit recommendations that favor advisers' own financial interests. *See* ROA.671, 748. FINRA's revisions did not fundamentally alter this aspect of the suitability standards governing fixed-indexed and variable annuities even as they expanded the standards' applicability. *See* ROA.670-71 & n.62. As a result, the revised standards did not eliminate the impacts of conflicts of interest on the mutual-fund marketplace—which, evidence available at the time demonstrated, persisted well past the regulatory changes that allegedly resolved the problem. *See, e.g.*, ROA.771; ROA.8054, 8088, 8091-92, 8962.

Plaintiffs also dispute (IALC Br. 45) DOL's decision to compare the market for mutual funds to the market for fixed-indexed annuities by emphasizing distinctions

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to test commenters' concerns about the changing regulatory framework. ROA.795-98, 967. DOL disclosed the existing studies, and by extension the methodology used by those studies, with its notice of proposed rulemaking. ROA.1240-41. Commenters had ample opportunity to review and to critique the methodology applied by DOL—as some plaintiffs indeed did. As a result, DOL's decision was entirely proper. Moreover, plaintiffs were not prejudiced by DOL's reliance on this study. *See United States v. Johnson*, 632 F.3d 912, 931 (5th Cir. 2011). As DOL explained, "the evidence in the public record [wa]s more than sufficient to demonstrate" that criticisms of the mutual-fund studies were unfounded. ROA.967.

between those products. These distinctions did not preclude DOL from relying on the comparison on this record. Plaintiffs note, for example (IALC Br. 45), that mutual funds are actively managed while fixed-indexed annuities are not. But the absence of continuing management does not negate advisers' incentive to recommend, at the outset of a transaction, that investors purchase an annuity that maximizes the advisers' financial interest at the customer's expense. *See* ROA.646 ("As with mutual funds, advisers may steer investors to products that are inferior to, or costlier than, similar available products."). And the cost of reversing an unfavorable purchase can be prohibitive. *See* ROA.921 (SEC bulletin reflecting that surrender charges can "result in a loss of principal"); ROA.768 (citing study showing "intermediary who receives a commission more often include[s] surrender charges than annuities sold directly to customers").

In addition, plaintiffs note (ACLI Br. 46-47) that variable annuities are governed by FINRA regulations not applicable to mutual funds. They also note (*id.*) that variable and fixed-indexed annuities may be subject to standards set forth in the NAIC Model Suitability Regulation (which is similar in many respects to the FINRA standard). ROA.427, 678. Plaintiffs assert (IALC Br. at 41) that insurers who sell fixed-indexed annuities have a strong incentive to comply with the NAIC suitability standards to avoid being regulated as securities. But none of these standards undermines the validity of the comparison. *See* ROA.5602 n.28 (citing ROA.679). As the district court explained, mutual funds are also "subject to a suitability disclosure regime" whose core features are not significantly different from the standards discussed by plaintiffs. ROA.9924. "[I]f this [regime] proved insufficient to protect mutual fund consumers from the harms of conflicts," then "DOL could reasonably conclude the conflict would justify similar treatment for annuities." ROA.9924; *see also* ROA.678, 748 (emphasizing the similarities between the NAIC model and FINRA rules).[23]

d. Plaintiffs attack (IALC Br. 39) DOL's characterization of several studies demonstrating the harms that arise from conflicted advice in the marketplace for annuities and similar insurance products. These studies revealed that "commissions align the insurance agent['s] . . . incentive with the insurance company, not with the consumer," ROA.759 (studies of the domestic commercial-property casualty-insurance market); that insurance agents paid by commission tend to recommend products "that are clearly worse for consumers," ROA.785 (study of India's life-insurance market); and that "the extant empirical literature, considered as a whole, suggests that the problem of biased advice by insurance agents is likely to be significant," ROA.6073 (Schwarcz draft article); *see* ROA.4525 (final article). DOL concluded, from these findings, that insurance agents (like brokers selling mutual

[23] Plaintiffs would not be entitled to vacatur of the fiduciary rule even if their criticisms of these studies had merit. DOL justified the rule by reference not only to the nine challenged studies but also to a wide body of other evidence, quantitative and qualitative alike. For this reason, the district court ruled that it "would find that DOL satisfied the APA even without the mutual fund studies." ROA.9923.

funds) are motivated by the sales incentives that commissions provide. Plaintiffs do not dispute the studies' core findings; they argue only that the harms identified in those studies are not present—or at least significantly reduced—in the market for annuities due to the existence of suitability standards. But because DOL reasonably declined to rely on plaintiffs' assessment of those standards' effectiveness, it was reasonable for DOL to rely on these studies as additional evidence.

e. Finally, plaintiffs assert (IALC Br. 43) that DOL failed to discuss § 989J of Dodd-Frank, which exempts fixed-indexed annuities from federal securities laws if they are sold in compliance with state suitability requirements. But plaintiffs cannot explain why DOL was obliged to discuss a provision that, as explained, addresses the application of securities law to transactions involving fixed-indexed annuities, and not the application of ERISA's fiduciary provisions to the subset of retirement-related transactions ERISA regulates. *See supra* pp. 45-46. In any event, plaintiffs' characterization of the record is inaccurate. DOL discussed this provision in its final rulemaking and in its regulatory impact analysis. *See, e.g.*, ROA.557-58, 679, 922. DOL specifically noted that, "[a]s a result of" § 989J, fixed-indexed annuities "remain subject to state regulation under current law." ROA.679. DOL further explained that, on the basis of the record before it, those regulations were not sufficient to protect annuity investors from the risk of conflicted advice. *See supra* pp. 70-72.

2. DOL Adequately Addressed the Impact of the Fiduciary Rule on Investors' Access to Certain Annuity Products.

Plaintiffs also argue (ACLI Br. 38) that DOL required transactions involving fixed-indexed and variable annuities to satisfy the BIC Exemption without adequately addressing the impact of that decision on retirement investors' access to these products. But DOL's analysis of this issue, based on the record before it, satisfies the "highly deferential" arbitrary-and-capricious standard as well. *See ConocoPhillips Co.*, 612 F.3d at 831.[24]

a. DOL received extensive comments regarding the costs and benefits of the fiduciary rule. The agency found, on the record before it, that conflicts of interest had artificially skewed the market for retirement-investment advice toward "business practices that divert resources from enriching investors to rewarding advisers for promoting the products that profit financial firms most," and that financial products promoted by conflicted advisers "enjoy[ed] an inefficiently large market share." ROA.945. DOL issued the fiduciary rule to "mitigate these economic inefficiencies." ROA.945. DOL clarified, however, that the rule was not designed to disfavor certain investment products over others. *See* ROA.945. Indeed, DOL made clear that fiduciaries may still "recommend[]" any investment vehicle they choose "if they prudently determine that [such products] are the right investments for the particular

[24] Plaintiffs have abandoned their other challenges to DOL's cost-benefit analysis. *See* ROA.9932-38 (rejecting plaintiffs' arguments).

customer and circumstances." ROA.392; *see* ROA.406. The fiduciary rule simply ensures that those products—along with every other type of investment product—are recommended to investors only when they would be in those investors' best interests.

DOL acknowledged that "the frictions associated with market adjustments . . . may be significant and may pose a particular challenge to some parties in the near term," especially retirement-insurance providers "whose commission . . . structures" have historically been "laden with . . . acute conflicts of interest." ROA.945-46. All the same, DOL determined that "any frictional cost . . . will be justified by the rule's intended long-term effects of greater market efficiency and a distributional outcome that favors retirement investors over the financial industry." ROA.946. DOL also acknowledged commenters' predictions that the fiduciary rule would erode investors' "access to beneficial advice" by raising the compliance costs of regulated entities. ROA.949-50. To mitigate these concerns, DOL modified the rule to "reduce compliance costs" and "make advice affordable to small investors." ROA.350. As a result, DOL expected that the only advice the fiduciary rule would reduce was "conflicted investment advice"—the harms of which DOL documented at length. *See* ROA.952. Impartial advice was intended to remain fully accessible.

The district court correctly concluded that DOL's explanation satisfies the APA. ROA.9936.

b. Contrary to plaintiffs' assertions (ACLI Br. 38), DOL did not "wholly fail[] to consider" the impact of the fiduciary rule on investors' access to certain annuity products. DOL expressly recognized that the fiduciary rule would have a heightened impact on segments of the market that have been characterized by disproportionately high levels of conflicted investment advice—such as the market for fixed-indexed and variable annuities. ROA.945-46. Those products occupied a disproportionate share of the market because conflicts of interest in their commission-based distribution methods encouraged advisers to recommend them over more optimal products. ROA.945-46; *compare* ROA.9327 (6% to 8% average commission in the fixed-indexed annuity market), *with* ROA.982 (1.37% average commission in the mutual-fund market).

DOL reasonably concluded that any contraction in the market share of specific products as a result of the fiduciary rule would reflect not harm to consumers but a likely reduction in mismatched recommendations of products to investors for whom those products may not be the best investment. Because this "reasoned explanation" is all the APA requires, *see Stilwell*, 569 F.3d at 519, it was reasonable, as the government noted in district court, for DOL to "declin[e] to quantify reduction in access to [fixed-indexed and variable annuities] as a separate consideration" after analyzing the retirement-investment market at large. ROA.5012. Plaintiffs attempt to characterize this statement as a concession that DOL categorically failed to assess the disadvantages of decreased access to certain annuity products "as a 'separate consideration.'" ACLI Br. 38. That is inaccurate, as the full quote reveals. *See* ROA.5012.

Plaintiffs' arguments are in reality a challenge to DOL's policy judgment. But such judgments should be upheld under the APA if they satisfy "minimal standards of rationality." *Texas Oil*, 161 F.3d at 934. "Where an agency's particular technical expertise is involved, [courts] are at [their] most deferential in reviewing the agency's findings." *See Medina County Envt'l Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010). Those principles resolve this case in DOL's favor.

Plaintiffs assert (ACLI Br. 39) that fixed-indexed and variable annuities are good for consumers. But DOL has never disputed that "annuities can play a very important and beneficial role in retirement planning." ROA.777; *see* ROA.645. And the rule does not discourage or prohibit fiduciary investment advisers from recommending such products when doing so would be in the best interests of their customers. ROA.392, 406. The rule targets those circumstances in which conflicted advisers make imprudent or disloyal recommendations of fixed-indexed and variable annuities. The general utility of these products does not undermine DOL's assessment of the harms caused by advisers' conflicts of interest, or contradict DOL's conclusion that investors would be better protected by regulations preventing an adviser from subordinating an investor's interests to the adviser's own competing financial interest in the transaction.

Plaintiffs respond (ACLI Br. 40), without citing any record evidence, that the fiduciary rule will shift the market for annuities in a manner that reflects not the best interests of consumers but differential regulatory burdens. This argument ignores

DOL's determination that, to the extent that the fiduciary rule imposes different obligations on transactions involving different products, these differences are necessary to correct inefficiencies in the marketplace that result in "consumers spend[ing] too much and get[ting] too little." ROA.56. DOL found that requiring transactions involving fixed-indexed annuities to satisfy the BIC Exemption would "create[] a level playing field," ROA.395, in a manner designed to allow "more efficient models [to] gain market share" as consumers "migrate to . . . simple and inexpensive yet potentially effective strategies," ROA.956. Thus, DOL reasonably predicted that any marketplace adjustments that result from the fiduciary rule will benefit, not harm, investors. Such "predictive judgments about the likely economic effects of a rule" are entitled to particular deference. *See Newspaper Ass'n of Am. v. Postal Regulatory Comm'n*, 734 F.3d 1208, 1216 (D.C. Cir. 2013).[25]

[25] In its statement of the case, the Chamber plaintiffs' brief asserts as fact an argument the district court rejected: that, because IMOs cannot comply with the BIC Exemption, independent insurance agents affiliated with them "may be forced to exit the market." Chamber Br. 20. By failing to engage with the district court's analysis, *see* ROA.9926-28, plaintiffs have abandoned this argument. The argument is also incorrect. Contrary to plaintiffs' assertions, the fiduciary rule does not require insurance companies to supervise the sale of other companies' products; "insurers are only required to meet the" BIC Exemption's supervisory standards with respect to "their own products." ROA.9931-32; ROA.384. Moreover, "IMOs and independent agents" can "respond" to the fiduciary rule in "various ways"—including by petitioning DOL for permission to invoke the BIC Exemption, as "[t]he industry has already" started to do. ROA.9927; *see* Proposed Best Interest Contract Exemption for Insurance Intermediaries, 82 Fed. Reg. 7336, 7342 (Jan. 19, 2017). Finally, even if some fraction of such agents eventually exit the market, DOL reasonably determined on the basis of the record that this departure would not impair investors' access to investment advice. *See* ROA.452, ROA.944-48.

Plaintiffs speculate (ACLI Br. 39-40) that fiduciary investment advisers will avoid recommending fixed-indexed and variable annuities to avoid the burden of complying with the BIC Exemption—even when a fixed-indexed or variable annuity would be in the best interests of their clients. This amounts to an argument that fiduciaries will breach their duties of loyalty and prudence by recommending suboptimal investments to minimize their exposure to litigation. But it was not unreasonable for DOL to base its regulations on the assumption that regulated entities will comply. And to the extent that fiduciaries *are* inclined to flout their responsibilities, DOL reasonably determined that plaintiffs' preferred outcome—in which fixed-indexed annuities would be subject to the procedures of PTE 84-24 as opposed to the BIC Exemption, *see* IALC Br. 51—would give fiduciaries an equally strong incentive to breach their duties of loyalty and prudence, this time by recommending fixed-indexed annuities over more optimal products whose conflicted sale remains subject to the BIC Exemption.

Finally, plaintiffs cite a news article, published nearly a year after the fiduciary rule was issued, indicating that the market for variable annuities fell by around $28 billion in 2016. ACLI Br. 41 (quoting Greg Iacurci, *Department of Labor's Fiduciary Rule Blamed for Insurers' Massive Hit on Variable Annuity Sales*, InvestmentNews (Mar. 28, 2017), http://www.investmentnews.com/article/20170328/FREE/170329922 /department-of-labors-fiduciary-rule-blamed-for-insurers-massive-hit ("Iacurci Article")). That article is not properly before the Court because "the focal point for judicial review" under the APA is "the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam).

Nor does the article support plaintiffs' claim that reduced access to certain annuities has harmed investors. The fact that the annuity market has shifted from variable annuities toward other products does not show that consumers who wish to purchase such annuities now find it harder to do so—or that these market shifts have adversely affected investors in any other way. Additionally, the article suggests that losses in the variable-annuity market are attributable not only to the fiduciary rule (whose provisions had not yet become applicable to regulated entities at the time the article was published) but also to "[p]ersistently low interest rates" and increasingly "diversified . . . focus toward other product lines." Iacurci Article. Indeed, the article recognizes that the fiduciary rule "doesn't provide the whole story." *Id.*; *see* ROA.754-55 (documenting a steady decline in variable-annuity sales in the IRA market before the fiduciary rule was issued). To emphasize the point, the article contrasts the variable-annuity industry with the indexed-annuity industry, which gained nearly $6 billion in its "best year on record." Iacurci Article. Yet under the fiduciary rule, conflicted transactions involving fixed-indexed annuities, just like those involving variable annuities, will be required to satisfy the BIC Exemption and not PTE 84-24 after January 1, 2018.[26]

VI. Plaintiffs' First Amendment Challenge to the Fiduciary Rule Is Not Viable.

Finally, plaintiffs claim the fiduciary rule violates the First Amendment. Their arguments are not properly before this Court and fail on the merits in any event.

A. Plaintiffs' constitutional claims are not properly before this Court.

Plaintiffs tie their First Amendment claim to two causes of action. They allege principally that the fiduciary rule violates the APA's proscription on unlawful agency actions, requiring vacatur of the entire rule. *See* ROA.10436. In the alternative, they allege that the fiduciary rule is unconstitutional as applied to them, and seek as their remedy an injunction prohibiting DOL from enforcing its terms against them. ROA.10436. Neither claim is properly before this Court.

The district court correctly ruled that plaintiffs forfeited their APA claim by failing to raise their First Amendment objections during the notice-and-comment process. It is black-letter law that, when evaluating an APA challenge to agency action, "this [C]ourt will not consider questions of law which were neither presented

[26] The fiduciary rule should not be vacated even if plaintiffs' arguments on this score are correct. Remand without vacatur is appropriate when "there is at least a serious possibility" that the agency "will be able to substantiate its decision given an opportunity to do so, and when vacating would be disruptive." *Central & S.W. Servs., Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000) (quotation marks omitted).

to nor passed on by the agency." *BCCA Appeal Grp. v. EPA*, 355 F.3d 817, 828 (5th Cir. 2003). DOL promulgated the fiduciary rule after a notice-and-comment process in which plaintiffs participated actively. Yet plaintiffs have failed to identify any portion of the record that raises the First Amendment concerns they now believe warrant vacating the entire rulemaking. The claim is therefore forfeited.

Plaintiffs assert (ACLI Br. 31 n.8) that they presented this issue to DOL in two sentences from one comment. But neither refers to the First Amendment, freedom of speech, or any relevant case. *See* ROA.7339, 7343. The sentences instead make empirical claims relevant to plaintiffs' statutory arguments, which DOL addressed appropriately. *See* ROA.358. Plaintiffs cannot now paint a constitutional gloss on these isolated statements and demand that the fiduciary rule be vacated on this ground. *See Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 554 (1978).

Plaintiffs next propose (ACLI Br. 30) that the forfeiture doctrine does not apply to notice-and-comment rulemakings. That argument is foreclosed by *BCCA*, which explained that the doctrine encourages parties to be "meaningful participant[s]" in rulemakings and prevents such proceedings from becoming "'a game or forum to engage in unjustified obstructionism.'" 355 F.3d at 827-28 (quoting *Vermont Yankee*, 435 U.S. at 533). The doctrine also respects the APA's careful division of authority between agencies and courts. *See Advocates for Highway & Auto Safety v. FMCSA*, 429 F.3d 1136, 1150 (D.C. Cir. 2005). For these reasons, courts have "routinely applied" the forfeiture doctrine to notice-and-comment proceedings. *1000 Friends of Md. v.*

Browner, 265 F.3d 216, 228 n.7 (4th Cir. 2001); *see Universal Health Servs., Inc. v. Thompson*, 363 F.3d 1013, 1020 (9th Cir. 2004) (collecting cases).

Plaintiffs urge this Court to limit the forfeiture doctrine to two narrow circumstances: where issue exhaustion is mandated by statute and where the forfeiture occurs in the context of a trial-like agency adjudication. ACLI Br. 30-31 (citing *Sims v. Apfel*, 530 U.S. 103, 107-08 (2000), and *Delta Found., Inc. v. United States*, 303 F.3d 551, 561-52 (5th Cir. 2002)). But those cases did not arise in the context of a notice-and-comment rulemaking. And every Circuit to have considered the application of these limitations in the notice-and-comment context has rejected them. *See Advocates for Highway & Auto Safety*, 429 F.3d at 1149-50; *Universal Health Servs.*, 363 F.3d at 1020.

Finally, plaintiffs argue that their forfeiture must be excused on account of its constitutional dimensions. But the doctrine applies to constitutional claims with no less force. *See Nebraska v. EPA*, 331 F.3d 995, 997-98 (D.C. Cir. 2003) (holding that plaintiffs forfeited their Commerce Clause and Tenth Amendment challenges to a rule). The contrary cases identified by plaintiffs again arise in the issue-exhaustion context, but the two concepts are not the same: The forfeiture rule "only forecloses arguments that may be raised on judicial review; it is not an exhaustion of remedies rule that forecloses judicial review" altogether. *Universal Health Servs.*, 363 F.3d at 1020. And even in the issue-exhaustion context, courts have declined to excuse a litigant's failure to exhaust constitutional claims absent exceptional circumstances. *See*

SEC v. Waco Fin., Inc., 751 F.2d 831, 833-34 (6th Cir. 1985) (refusing to consider procedural-due-process arguments that litigants had failed to exhaust in a prior agency adjudication). Plaintiffs have not identified any exceptional circumstance justifying their failure to raise their constitutional objection before DOL.

Plaintiffs' separate declaratory-judgment claim is also not properly before this Court. Plaintiffs characterize this claim as a "pre-enforcement challenge to *prospective* application" of the fiduciary rule against their members. ACLI Br. 28. But courts may adjudicate such challenges only if plaintiffs allege that they intend to engage in conduct the challenged law would arguably proscribe, and only if "the threat of future enforcement" is substantial. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2345 (2014).

Plaintiffs cannot satisfy these preconditions for review in light of regulatory developments postdating the district court's decision. Although DOL's revised interpretation of fiduciary took effect on June 9, 2017, DOL has delayed full implementation of the fiduciary rule until January 1, 2018. *See supra* pp. 19-20. Under the provisions currently in effect, plaintiffs who qualify as fiduciaries under the rule must comply with ERISA's duties of loyalty and prudence to the extent they are fiduciaries to Title I plans. Plaintiffs have not alleged that they themselves intend to engage in conduct that would even arguably violate those duties. Additionally, plaintiffs who qualify as fiduciaries under the rule must comply with the rule's revised exemption structure to continue receiving conflicted compensation. But plaintiffs currently need only comply with the Impartial Conduct Standards set forth in those exemptions, not the additional conditions. Those standards require only that plaintiffs adhere to the duties of loyalty and prudence, make no misleading statements, and receive no more than reasonable compensation. ROA.380. Plaintiffs have not alleged that they themselves intend to engage in conduct that would even arguably violate these duties either.

Nor do plaintiffs labor under substantial threat of an enforcement proceeding against them. The agencies tasked with administering ERISA's enforcement provisions have announced that they "will not pursue claims against fiduciaries who are working diligently and in good faith to comply with the fiduciary duty rule and exemptions, or treat those fiduciaries as being in violation of the . . . rule and exemptions." *See supra* pp. 19-20. Furthermore, DOL has issued a Request for Information seeking comment on, among other matters, whether the January 1 applicability date should be further delayed and whether the fiduciary rule's revised exemption structure should be retained or modified. *Id.* These developments make clear that plaintiffs' pre-enforcement challenge is premature.[27]

[27] Plaintiffs contend (Chamber Br. 38 n.13; ACLI Br. 36) that, even if these First Amendment arguments are not properly before this Court, the doctrine of constitutional avoidance requires the Court to reject DOL's interpretation of ERISA's definition of investment-advice fiduciary. That is incorrect. The doctrine applies only to "serious" constitutional questions. *See INS v. St. Cyr*, 533 U.S. 289, 305 (2001). And "a comparatively high likelihood of unconstitutionality, or at least some exceptional intricacy of constitutional doctrine," is required to "abandon or qualify

B. The fiduciary rule does not violate the First Amendment.

The district court correctly ruled in the alternative that plaintiffs' First Amendment arguments fail on the merits. As discussed below, plaintiffs cannot show that the fiduciary rule is an unconstitutional restriction on speech either on its face or as applied to them.

1. The fiduciary rule is a restriction on conduct that only incidentally burdens speech.

a. "[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). Nor does every restriction on "conduct . . . initiated, evidenced, or carried out by means of language" implicate the First Amendment. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). The First Amendment applies only when a regulation's effect on speech is directly related "to its primary effect on conduct." *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151 (2017). This distinction explains why the First Amendment lacks any application to governmental regulation of a host of commercial communications, including "the exchange of information about securities, corporate proxy statements, [and] the

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Chevron deference" on this basis. *See Whitaker v. Thompson*, 353 F.3d 947, 952 (D.C. Cir. 2004). Because plaintiffs' constitutional challenge is insubstantial—not in the least because it is foreclosed by *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978)—the doctrine does not apply here. *See infra* pp. 94-102.

exchange of price and production information among competitors." *Ohralik*, 436 U.S. at 456 (citations omitted).

The district court correctly concluded that the fiduciary rule is a prototypical restriction on commercial conduct. ROA.9948-49 & n.234. It does not require fiduciaries to communicate their recommendations in a particular manner or give a particular recommendation at all. It simply requires fiduciaries to conduct themselves in accordance with the duties of loyalty and prudence. Fiduciaries must also comply with the prohibited-transaction provisions in ERISA and the Code, which prohibit fiduciaries from engaging in conflicted transactions unless they undertake the steps required to qualify for an exemption. The "primary effect" of the rule, in short, is to regulate how fiduciaries may perform the *act* of giving investment advice in exchange for the compensation. *See Expressions Hair Design*, 137 S. Ct. at 1151. The fact that the regulated conduct takes the form of "written or oral communications" is thus incidental to the fiduciary rule's purpose, as the district court correctly ruled. *See id.*; ROA.9948-49.

The history of ERISA underscores the point. ERISA itself imposes affirmative duties on the conduct of investment-advice fiduciaries, and ERISA itself prohibits such fiduciaries from engaging in conflicted transactions absent an applicable exemption. ROA.9949. Since 1974, DOL has issued administrative exemptions conditioned on compliance with additional affirmative acts. ROA.9949. But the government is not aware of, and plaintiffs have not cited, any case subjecting these ERISA provisions or regulations to any First Amendment scrutiny.

Plaintiffs have failed to show that the fiduciary rule regulates speech and not conduct. They rely principally on *Sorrell*, 564 U.S. 552. But *Sorrell* reaffirmed the rule that "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Id.* at 567. The state statute at issue prohibited pharmacies from selling, disclosing, or using their records for marketing purposes. *Id.* at 557. Although the State argued that the statute regulated only conduct, the Supreme Court disagreed, on the basis of cases holding that "the creation and dissemination of information are speech within the meaning of the First Amendment." *Id.* at 570. And the primary effect of the challenged statute was to entirely prohibit speech. The statute discussed in *Sorrell* thus bears little resemblance to the fiduciary rule.

Plaintiffs respond (ACLI Br. 20) that the fiduciary rule must regulate speech, not conduct, because its terms are triggered by communication. But the fact that a regulated act—giving investment advice in exchange for compensation—has a communicative component does not convert all regulation of that act into restrictions on speech, as the Supreme Court has consistently held. *See Ohralik*, 436 U.S. at 456. For example, regulations on corporate proxy statements are triggered by communication because a proxy statement cannot be issued without engaging in speech. *See id.* Yet such regulations have never been understood as implicating the

First Amendment. What matters, in short, is not what triggers a regulation but what the regulation accomplishes once it is triggered. And the fiduciary rule is an archetypal regulation of conduct.

Plaintiffs insist (ACLI Br. 15-18) that, even if the fiduciary rule is a conduct regulation, the rule still violates the First Amendment by imposing different requirements on transactions involving different speakers, listeners, and investment products. But the First Amendment's rules governing content- and viewpoint-based restrictions on speech do not apply to restrictions on conduct. The differences plaintiffs cast as invidious discrimination simply reflect the reality that conduct regulations impose different requirements on some market participants and some types of transactions.

The retirement-investment market is replete with these supposedly problematic distinctions. Federal securities laws impose different standards on investment recommendations made by registered investment advisers than on investment recommendations made by broker-dealers, thus purportedly distinguishing between speakers. ERISA's prohibited-transaction provisions apply only to investment advisers compensated for investment advice rendered to retirement investors, not to all investors, thus purportedly distinguishing between listeners. And state laws impose suitability requirements on recommendations to purchase insurance products, not on recommendations to purchase appliances or cars, thus distinguishing between products. Indeed, existing laws incorporate the precise distinctions identified by plaintiffs as evidence of invidious discrimination in the fiduciary rule. Federal suitability regulations exclude "institutional accounts" with total assets of at least $50 million. *See* ROA.359-60. And federal securities laws have differing application across variable, fixed-rate, and fixed-indexed annuities. *See* ROA.9876.

Plaintiffs' implausibly broad construction of the First Amendment would open all of these statutes and regulations to constitutional attack under some form of "heightened" scrutiny. *See Sorrell*, 564 U.S. at 572. The district court correctly deemed that position "untenable." ROA.9949; *cf. SEC v. Wall Street Publ'g Inst., Inc.*, 851 F.2d 365, 373 (D.C. Cir. 1988) ("If speech employed directly or indirectly to sell securities were totally protected, any regulation of the securities market would be infeasible—and that result has long since been rejected."). And plaintiffs have never suggested that ERISA's prohibited-transaction provisions—or any federal or state statute or regulation governing investment products—are constitutionally defective.

b. The district court bolstered its conclusion by applying a related and "robust line of doctrine" holding "that state regulation of the practice of a profession, even though that regulation may have an incidental impact on speech, does not violate the Constitution." *Hines v. Alldredge*, 783 F.3d 197, 201 (5th Cir. 2015) (citing *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, J., concurring)); *see* ROA.9946. This "professional-speech doctrine" applies when "a speaker takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances." *Moore-King v. County of*

Chesterfield, 708 F.3d 560, 569 (4th Cir. 2013). It does not apply to "speech by a professional to the general public," which is subject to greater First Amendment protection. *Serafine v. Branaman*, 810 F.3d 354, 359 (5th Cir. 2016).

The fiduciary rule falls into the former category, not the latter. The rule applies only to personalized and paid-for investment advice based on the recipient's specific needs or directed to a particular advisee. *See* ROA.373-74. This fact-specific inquiry turns on the extent to which a communication is "individually tailored . . . to a specific advice recipient." ROA.373. The rule expressly excludes "general" marketing communications from its definition of "recommendation." ROA.373-74. The professional-speech doctrine thus confirms that the fiduciary rule regulates only business conduct with an incidental and permissible impact on speech.

Plaintiffs have failed to show how the professional-speech doctrine is inapplicable. They propose (ACLI Br. 21-24), relying on Justice White's concurrence in *Lowe*, that the doctrine applies only to fiduciary relationships as the term is understood at common law. But the concurrence speaks in terms of government regulation of professions in general, not fiduciary professions in particular. Nor has this Court recognized plaintiffs' proposed limitation, having applied the doctrine to uphold restrictions on veterinarians, *see Hines*, 783 F.3d at 201-02, and tour guides, *see Kagan v. City of New Orleans*, 753 F.3d 560, 562 (5th Cir. 2014); *accord Moore-King*, 708 F.3d at 563 (applying the doctrine to uphold restrictions on fortune-tellers).

Plaintiffs (ACLI Br. 23) respond that this view of the doctrine would permit the government to evade the First Amendment simply by deeming speech "professional." This fear is illusory. As explained, the doctrine does not apply unless a "personal nexus between professional and client" exists. *Lowe*, 471 U.S. at 228-29, 232 (White, J., concurring). And even if the requisite nexus is present, the doctrine does not apply unless the speaker "purport[s] to be exercising judgment on behalf of a[] particular individual with whose circumstances he is directly acquainted." *Id.* at 232. Here, where plaintiffs are subject to suitability requirements that obligate them to base any recommendation on the specific goals and profile of the investor, plaintiffs' concerns are particularly unfounded.

Plaintiffs also argue (ACLI Br. 24-25), for the first time on appeal, that the doctrine should be restricted to licensing regulations only. But plaintiffs have again taken too narrow a view of the doctrine, which is premised on the principle that governments may prevent professionals from "follow[ing] a[] lawful calling . . . because of a failure to comply with conditions imposed . . . for the protection of society." *Lowe*, 471 U.S. at 228 (White, J., concurring) (quoting *Dent v. West Virginia*, 129 U.S. 114, 121-22 (1889)). Licensing is one of many ways in which this regulatory power may be exercised—as this Court confirmed in *Hines*, which concerned a restriction on the "practice of veterinary medicine" separate from the licensing requirements governing entry into the veterinary profession. 783 F.3d at 199; *compare*

Tex. Occ. Code § 801.351 (conduct requirements), *with id.* § 801.252 (eligibility requirements).

Finally, plaintiffs argue (ACLI Br. 25) that, if the professional-speech doctrine does apply, the challenged regulation must receive intermediate scrutiny under the test articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 561-62 (1980). That argument is also foreclosed by *Hines*, which held that "content-neutral regulation[s] of the professional-client relationship do[] not violate the First Amendment." 783 F.3d at 202. The district court faithfully applied that holding to this case. *See* ROA.9946-67.

c. The district court also correctly ruled that, even assuming the fiduciary rule restricts speech at all (which it does not), the only speech implicated is misleading speech. ROA.9950. The fiduciary rule merely expands the category of individuals subject to ERISA's fiduciary-duty and prohibited-transaction provisions, the constitutionality of which plaintiffs have never contested. Nor does DOL's revised exemption structure limit speech. The exemptions contain only one condition remotely comparable to a speech restriction: the requirement that, to qualify for them, a fiduciary must refrain from making materially misleading statements to investors. *E.g.*, ROA.454. As a result, the only speech the fiduciary rule "even arguably regulate[s]" is "misleading advice." ROA.9950. And inherently misleading advice is not protected by the First Amendment. *See American Acad. of Implant Dentistry v. Parker*, --- F.3d ---, 2017 WL 2627976, at *4 (5th Cir. June 19, 2017); ROA.5673-74 (explaining that conflicted investment advice has "deceived [investors] to their detriment").

Plaintiffs respond (ACLI Br. 25) that the fiduciary rule burdens speech by advisers "whether it is accurate or not," thus triggering the *Central Hudson* standard. But the only burdens on truthful and non-misleading advice they identify are the duties and obligations *ERISA* imposes on fiduciaries—whose provisions were regularly applied to fiduciaries well before DOL promulgated the fiduciary rule, and whose constitutionality (to reiterate) is not at issue.

2. The fiduciary rule survives intermediate scrutiny even assuming it burdens speech.

The district court's decision should be affirmed even if the fiduciary rule is construed as governing speech rather than conduct. As plaintiffs now concede, the rule is subject to no more than intermediate scrutiny. *See* ACLI Br. 32, 35. A restriction on speech survives this test if it directly advances a substantial government interest and is not more extensive than is necessary to serve that interest. *Central Hudson*, 447 U.S. at 563. The rule easily clears that bar.

a. The government has a substantial interest in protecting investors from conflicts of interest that threaten their retirement security. Plaintiffs conceded as much before the district court and on appeal. *See* ROA.1416 ("Protecting American retirement consumers is undoubtedly a substantial interest."); ACLI Br. 32 ("DOL has a legitimate interest in protecting retirement savers."). The only question is whether the fiduciary rule is no more extensive than necessary to serve that interest. The answer is yes, as evinced by ERISA itself.

The prohibited-transaction provisions of ERISA and the Code categorically ban advisers from engaging in transactions Congress deemed "likely to injure the pension plan." *Harris Trust Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 242 (2000). These include transactions in which a fiduciary is compensated by commission. *See* 29 U.S.C. § 1106(b)(3); 26 U.S.C. § 4975(c)(1). As a result, no fiduciary may engage in such transactions absent an applicable statutory or administrative exemption—and DOL is not obliged to grant any administrative exemptions at all. Plaintiffs have never suggested that these provisions of ERISA and the Code are unconstitutional.

It follows *a fortiori* that the fiduciary rule is not unconstitutionally broad. DOL designed the rule specifically to avoid "ban[ning] all conflicted compensation." ROA.384. At the same time, DOL crafted safeguards, such as the Impartial Conduct Standards and other conditions to the BIC Exemption, that are calibrated to the risks different types of conflicted transactions pose. *See* ROA.384. And DOL issued the rule only after determining, on review of the record before it, that a host of regulatory alternatives would not protect retirement investors as effectively or efficiently. *See* ROA.899-993. DOL paid especially close attention to the possibility of permitting conflicted transactions to proceed so long as existing conflicts are disclosed. ROA.905-08. DOL concluded, on this basis, that a disclosure-only regime "would be ineffective, . . . yield little to no investor gains[,] [and] . . . fail to justify its compliance cost." ROA.908.

For these reasons, the fiduciary rule—which is less restrictive than the undisputedly constitutional prohibited-transaction provisions in ERISA and the Code—survives intermediate scrutiny.

b. Plaintiffs' rejoinders rest on the assumption (ACLI Br. 32-33) that the government may not prevent consumers from making investment decisions on the basis of "accurate commercial information." But plaintiffs have misconceived the interest at stake, which does not lie merely in protecting consumers from making suboptimal investment decisions. It also lies in limiting conflicts of interest in the market altogether. And as the district court recognized, the government does not violate the First Amendment by restricting even accurate commercial information in service of that end. *See* ROA.9949. That indeed is the premise of ERISA, which imposes substantive standards of "conduct, responsibility, and obligation" on fiduciaries—including the prohibited-transaction provisions—extending well beyond requirements of truthful disclosure. *See* 29 U.S.C. § 1001(a)-(b). Congress deemed these standards necessary because ERISA's predecessor, which required "limited disclosure of information" for pension funds, had failed to "prevent[] . . . pension fund abuses." *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682, 689 (7th Cir. 1986). Yet under plaintiffs' constitutional theory, the imposition of even these fiduciary standards on investment advisers would amount to an unconstitutional burden on their asserted right to offer truthful advice to their clients.

An analogy makes the point. Attorneys are barred from rendering legal advice to a client if their representation involves a concurrent conflict of interest. *See* Model Rules of Prof'l Conduct R. 1.7(a). A concurrent conflict—even one that is disclosed to a client—cannot be waived if, among other things, "the representation . . . involve[s] the assertion of a claim by one client against another client represented by the lawyer in the same litigation." *Id.* R. 1.7(b)(3). These restrictions are justified because an attorney whose "loyalties are divided between adverse parties . . . can rarely represent either client adequately and is likely to guide the suit to an unsatisfactory resolution," notwithstanding the fact that the attorney may well offer truthful legal advice to both. *See Brown & Williamson Tobacco Corp. v. Daniel Int'l Corp.*, 563 F.2d 671, 673 (5th Cir. 1977). It is implausible that these well-established standards of professional conduct are unconstitutional merely because they prevent conflicted attorneys from giving truthful advice to informed clients. But that is precisely what plaintiffs' reasoning would entail.

c. Plaintiffs' arguments fail on their own terms as well. Plaintiffs first compare the fiduciary rule to laws deemed unconstitutional on account of imposing blanket prohibitions on different types of commercial solicitations. *See* ACLI Br. 18 n.3. That comparison is misleading. The rule does not "prevent[] an agent selling . . . [investment products] from picking up the phone to arrange a meeting to explain the agent's services or expertise." ROA.9947-48. And an agent who at that meeting "renders investment advice" as defined by the fiduciary rule will still not be deemed a fiduciary unless he is compensated for his recommendations.

Plaintiffs then contend (ACLI Br. 32-33) that the rulemaking reflects unwarranted "assumptions" about the harms of conflicted advice on inexperienced investors. But plaintiffs ignore the extensive record on which that conclusion was based. DOL compiled qualitative and quantitative evidence documenting the complex and risky nature of investment products, the prevalence of conflicted compensation practices and abusive marketing techniques, the harms those practices inflict, and the difficulty faced by investors in assessing both the quality of investments and of investment advice. *See supra* pp. 66-72. On the basis of that record, DOL permissibly concluded that the fiduciary rule advances the government's interest in an appropriately limited fashion. *See Edenfield v. Fane*, 507 U.S. 761, 771-72 (1993) (examining "studies," "anecdotal evidence," "report[s]," and academic literature to assess a challenged limitation on commercial expression).

Plaintiffs next restate (ACLI Br. 35-36) their argument that the fiduciary rule will diminish investors' access to investments that might benefit them. As explained above, however, this argument shows only that the market for retirement-investment products has shifted away from some products and toward others. *See supra* pp. 82-89. These shifting market dynamics do not prove that investors who wish to purchase these products have encountered difficulties in obtaining them.

Plaintiffs lastly argue (ACLI Br. 33-34) that DOL could have regulated less broadly. They speculate, for example, that DOL could have "undertaken to educat[e] consumers itself." ACLI Br. 34. But that ignores DOL's determination that the fiduciary rule will actually *improve* consumer access to educational resources. ROA.815. They also hypothesize that DOL could have adopted less burdensome disclosure-based regimes. ACLI Br. 34. But DOL considered and rejected those alternatives, *see* ROA.439—as indeed did Congress, which enacted ERISA to replace existing disclosure regimes with more extensive statutory obligations in a certain subset of the retirement-investment market. *See supra* p. 5.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed, except for the part that upholds the BIC Exemption's condition restricting class-litigation waivers insofar as it applies to arbitration agreements.

Respectfully submitted,

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July 2017

† The Acting Assistant Attorney General is recused in this case.

CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Michael Shih
MICHAEL SHIH

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32 because it was prepared using Microsoft Word in 14-point Garamond, a proportionally spaced font. The government has filed an unopposed motion for leave to file a brief that does not exceed 28,000 words. This brief contains 25,982 words by the count of Microsoft Word.

/s/ Michael Shih
MICHAEL SHIH

ADDENDUM

TABLE OF CONTENTS

26 U.S.C. § 4975

§ 4975. Tax on prohibited transactions.

* * * *

(c) Prohibited transaction.—

(1) General rule.—For purposes of this section, the term "prohibited transaction" means any direct or indirect—

(A) sale or exchange, or leasing, of any property between a plan and a disqualified person;

(B) lending of money or other extension of credit between a plan and a disqualified person;

(C) furnishing of goods, services, or facilities between a plan and a disqualified person;

(D) transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a plan;

(E) act by a disqualified person who is a fiduciary whereby he deals with the income or assets of a plan in his own interest or for his own account; or

(F) receipt of any consideration for his own personal account by any disqualified person who is a fiduciary from any party dealing with the plan in connection with a transaction involving the income or assets of the plan.

* * * *

26 U.S.C. § 4975

§ 4975. Tax on prohibited transactions.

* * * *

(c) Prohibited transaction.—

(2) Special exemption.—The Secretary shall establish an exemption procedure for purposes of this subsection. Pursuant to such procedure, he may grant a conditional or unconditional exemption of any disqualified person or transaction, orders of disqualified persons or transactions, from all or part of the restrictions imposed by paragraph (1) of this subsection. Action under this subparagraph may be taken only after consultation and coordination with the Secretary of Labor. The Secretary may not grant an exemption under this paragraph unless he finds that such exemption is—

(A) administratively feasible,

(B) in the interests of the plan and of its participants and beneficiaries, and

(C) protective of the rights of participants and beneficiaries of the plan.

Before granting an exemption under this paragraph, the Secretary shall require adequate notice to be given to interested persons and shall publish notice in the Federal Register of the pendency of such exemption and shall afford interested persons an opportunity to present views. No exemption may be granted under this paragraph with respect to a transaction described in subparagraph (E) or (F) of paragraph (1) unless the Secretary affords an opportunity for a hearing and makes a determination on the record with respect to the findings required under subparagraphs (A), (B), and (C) of this paragraph, except that in lieu of such hearing the Secretary may accept any record made by the Secretary of Labor with respect to an application for exemption under section 408(a) of title I of the Employee Retirement Income Security Act of 1974.

* * * *

26 U.S.C. § 4975

§ 4975. Tax on prohibited transactions.

* * * *

(e) Definitions.—

* * * *

(3) Fiduciary.—For purposes of this section, the term "fiduciary" means any person who—

(A) exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets,

(B) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or

(C) has any discretionary authority or discretionary responsibility in the administration of such plan.

Such term includes any person designated under section 405(c)(1)(B) of the Employee Retirement Income Security Act of 1974.

* * * *

29 U.S.C. § 1002

§ 1002. Definitions.

For purposes of this subchapter:

* * * *

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

* * * *

29 U.S.C. § 1106

§ 1106. Prohibited transactions.

* * * *

(b) Transactions between plan and fiduciary

A fiduciary with respect to a plan shall not—

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

* * * *

29 U.S.C. § 1108

§ 1108. Exemptions from prohibited transactions.

(a) Grant of exemptions

The Secretary shall establish an exemption procedure for purposes of this subsection. Pursuant to such procedure, he may grant a conditional or unconditional exemption of any fiduciary or transaction, or class of fiduciaries or transactions, from all or part of the restrictions imposed by sections 1106 and 1107(a) of this title. Action under this subsection may be taken only after consultation and coordination with the Secretary of the Treasury. An exemption granted under this section shall not relieve a fiduciary from any other applicable provision of this chapter. The Secretary may not grant an exemption under this subsection unless he finds that such exemption is--

(1) 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.

Before granting an exemption under this subsection from section 1106(a) or 1107(a) of this title, the Secretary shall publish notice in the Federal Register of the pendency of the exemption, shall require that adequate notice be given to interested persons, and shall afford interested persons opportunity to present views. The Secretary may not grant an exemption under this subsection from section 1106(b) of this title unless he affords an opportunity for a hearing and makes a determination on the record with respect to the findings required by paragraphs (1), (2), and (3) of this subsection.

* * * *