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

THE NATIONAL ASSOCIATION FOR FIXED ANNUITIES,

Plaintiff-Appellant,

v.

U.S. DEPARTMENT OF LABOR, et al.,

Defendants-Appellees.

No. 16-5345

RESPONSE TO APPELLANT'S EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

This appeal concerns three final rules the Department of Labor issued in response to evidence that conflicts of interest in the market for retirement-investment advice are placing retirement savings at risk. The rules update decades-old regulations implementing the Employee Retirement Income Security Act ("ERISA") and the Internal Revenue Code ("Code"). By broadening the Department's interpretation of the statutory term "fiduciary" to include individuals whom the Department had not previously deemed fiduciaries, and by strengthening the regulatory exemptions under which fiduciaries may engage in transactions otherwise prohibited by ERISA and the Code, the rules ensure that investment advisers are acting in their customers' best interests. The rules' provisions will not govern the activities of regulated entities until April 10, 2017—and some provisions will not apply until January 1, 2018.

Plaintiff, an association that represents part of the annuity industry, challenged these rules on statutory and constitutional grounds. The district court entered summary judgment for the Department, and denied plaintiff an injunction pending appeal. Plaintiff now renews in this Court its request that the rules' April 10, 2017 applicability date be enjoined until at least ten months and as many as twenty-four months after appellate proceedings conclude.

The Court should deny plaintiff's motion. As the district court correctly ruled, plaintiff has failed to demonstrate any likelihood of success on the merits of its claims, in view of the Department's broad statutory authority and its reasoned justifications for each regulation at issue. Plaintiff's assertions of irreparable harm are speculative and contradicted by its own declarations. And any economic injuries plaintiff's members might sustain are outweighed by the harm to retirement investors whose savings are threatened by conflicted advice. This Court should not take the extraordinary step of enjoining lawful regulations issued after six years of public comment and consideration, whose continued operation is essential to the Nation's retirement security.

STATEMENT

1. Congress enacted ERISA to establish "standards . . . assuring the equitable character" and "financial soundness" of retirement-benefit plans. 29 U.S.C. § 1001(a). Title I of the statute, 29 U.S.C. § 1001 *et seq.*, governs employer-sponsored retirement plans. Fiduciaries to such "Title I plans" must behave in accordance with the duties of loyalty and prudence. *Id.* § 1104. Title II, codified in the Code at 26 U.S.C. §§ 401-415 & 4972-4975, contains requirements retirement plans must meet to receive tax benefits. These requirements apply not only to Title I plans but also to individual-retirement accounts ("IRAs") and other plans controlled by the employee, not the employer. *Id.* § 4975(e)(1)(C). Title II does not impose standards of prudence and loyalty on fiduciaries to plans it covers.

Both titles contain provisions prohibiting fiduciaries from "deal[ing] with the assets of the plan in his own interest or for his own account." 29 U.S.C. § 1106(b)(1); *see* 26 U.S.C. § 4975(c)(1)(E). Both titles also contain provisions vesting the Secretary of Labor with discretion to issue administrative exemptions from these prohibited-transaction rules if the exemption is "administratively feasible," "in the interests of the plan and of its participants and beneficiaries," and "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). Finally, both titles contain identical definitions of "fiduciary." A person is a "fiduciary" with respect to a plan if, among other things, 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); 26 U.S.C. § 4975(e)(3). This definition expressly departs from the common-law understanding of the term, reflecting Congress's desire to "expand[] the universe of persons subject to fiduciary duties." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993).

At first, the Department construed this broad definition narrowly. Its original interpretation, issued in 1975, set forth a five-part test under which a person would be deemed a fiduciary only if, among other things, he rendered investment advice "on a regular basis." 29 C.F.R. § 2510.3-21(c)(1)(B) (2015). Additionally, the Department allowed investment advisers who qualified as fiduciaries under this test to obtain relief from ERISA's prohibited-transaction rules under a regulatory exemption of similar vintage. That exemption, referred to as PTE 84-24, permitted an insurance agent or broker to receive a commission on the sale of all varieties of annuities so long as the conditions of the exemption were satisfied—including that the compensation received was "reasonable." 49 Fed. Reg. 13,208, 13,211 (Apr. 3, 1984).

2. This case concerns three final rules—issued after six years of deliberation, two notice-and-comment rulemakings, and two public hearings—to modernize the Department's decades-old regulations. As the Department explained, "individuals, rather than large employers and professional money managers, have become increasingly responsible for managing retirement assets as IRAs and participant-directed plans, such as 401(k) plans, have supplanted defined-benefit pensions." 81 Fed. Reg. 20,946, 20,954 (Apr. 8, 2016). As noted, Title II of ERISA does not impose the fiduciary duties of prudence and loyalty on fiduciaries to IRAs.

Due to the five-part test's narrow interpretation of "fiduciary," many people paid for investment advice can "play a central role in shaping . . . IRA investments" without the safeguards Congress intended to apply to individuals with "such influence and responsibility." 81 Fed. Reg. at 20,955. For example, many "baby boomers" are "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." *Id.* at 20,949. 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." *Id.* Yet because advice on rollovers is typically rendered in a one-time transaction, the regular-basis requirement immunized such advisers from ERISA's prohibitions on conflicted advice—even when they purported to be acting as fiduciaries.

Compounding these problems, the Department found that investment advisers paid by commission frequently recommend investments that earn them or their firms "substantially more" compensation, even if those products "are not in investors' best interests." 81 Fed. Reg. at 20,950. Worse still, "conflicted advice is widespread" across the marketplace. *Id.* A Title I plan investor who rolls retirement savings into an IRA risks losing "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." *Id.* at 20,949.

In response to these concerns, the Department promulgated a new interpretation of "fiduciary" that gives full effect to ERISA's text. Under this interpretation, an individual "renders investment advice" whenever he is compensated in connection with a "recommendation as to the advisability of" buying, selling, or managing "investment property." 29 C.F.R. § 2510.3-21(a). A "recommendation" is 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." *Id.* § 2510.3-21(b)(1). This recommendation must be made under at least one of three circumstances: when the recommender represents himself as a fiduciary, when his advice is "specifically directed" at the recipient, or when there exists an "understanding that the advice is based on" the recipient's "particular investment needs." *Id.* § 2510.3-21(a). The new interpretation does not tie fiduciary status to the frequency with which advice is given.

To provide relief to the newly expanded universe of fiduciaries from application of ERISA's prohibited-transaction rules, the Department created the Best Interest Contract Exemption. This exemption permits fiduciary investment advisers to continue receiving otherwise-prohibited commissions so long as they comply with the exemption's conditions, which include following "Impartial Conduct Standards" replicating the duties of prudence and loyalty in Title I of ERISA. 81 Fed. Reg. 21,002, 21,003 (Apr. 8, 2016). Fiduciaries to IRAs must comply with an additional condition: They must conclude a written contract with their customers that commits to adhering to these standards and that must contain certain other terms. *Id.* at 21,022. The rule dictates what these terms may and may not say to gain the benefit of the exemption. But any lawsuit to enforce such a "best-interest contract" will arise under state law, and may be brought only by the parties to the contract.

The Department also amended PTE 84-24 to require compliance with identical Impartial Conduct Standards as a condition of qualification. 81 Fed. Reg. 21,147, 21,176 (Apr. 8, 2016). Because the amended exemption does not contain a best-interest-contract requirement, the Department restricted the types of products that conflicted fiduciaries may use it to recommend. Originally, transactions involving all annuity products could occur under PTE 84-24. But the Department reasoned that only fixed-rate annuities—whose "benefits do not vary" with "the investment experience of a separate account," an "index," or an "investment model"—should remain subject to the amended exemption. *Id.* at 21,176-77. These annuities "provide payments that are . . . predictable" and "more understandable to consumers." *Id.* at 21,152. The same cannot be said for variable and fixed-indexed annuities, whose terms are more complex and more "susceptible to abuse." *Id.* at 21,154. The Department thus determined that "recommendations to purchase such annuities should be subject to the greater protections of the Best Interest Contract Exemption." *Id.* at 21,153.

The Department published all three rules on April 8, 2016. As a formal matter, all took effect on June 7, 2016. But the rules will not impose their requirements on regulated entities until April 10, 2017, more than four months after the date of this filing. Recognizing that the industry may need time to come into compliance, the Department further delayed the full applicability of certain conditions to the Best Interest Contract Exemption—including the best-interest-contract requirement—until January 1, 2018. Between April 10, 2017 and January 1, 2018, investment advisers may obtain relief from the prohibited-transaction rules by complying with less-stringent "transitional" conditions. *See* 81 Fed. Reg. at 21,069-70, 21,084-85.

3. Plaintiff is an industry association representing sellers of fixed-rate and fixed-indexed annuities. Alleging that the Department had violated the Administrative Procedure Act ("APA") and the Constitution, plaintiff sought vacatur of the entire rulemaking and moved for a preliminary injunction. The district court construed this filing as both a preliminary-injunction and a summary-judgment

motion, and the Department cross-moved for summary judgment. The court entered judgment in the Department's favor on all of plaintiff's claims. App. 1-93.

Plaintiff then renewed its request for an injunction staying the rules' April 10, 2017 applicability date for at least ten months and for as many as twenty-four months after all appeals are concluded. App. 513-35. The court denied the motion. App. 94-103. The court noted that it had already rejected plaintiff's arguments on the merits. App. 97. It ruled that plaintiff had failed to make the "extraordinary showing of irreparable injury" required of it, expressing doubt as to whether plaintiff's "more dramatic predictions will occur." App. 99-100. And although it recognized that plaintiff's members "will incur significant, unrecoverable costs if the rules take effect," it concluded that these costs are not "so extraordinary that preliminary relief is warranted" in light of plaintiff's unpersuasive merits arguments and the danger conflicted advice poses to retirement investors. App. 102-03.

ARGUMENT

Injunctions pending appeal are "never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). The party requesting this "extraordinary" form of relief must make a "clear showing" along four familiar lines: "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20-24.[1] Plaintiff has failed at every turn.

1. The district court entered summary judgment against plaintiff on each of its six claims. Plaintiff's motion discusses only four. None is likely to succeed on the merits.

a. Plaintiff argues (Mot. 9-14) that the Department lacks authority under ERISA to adopt its new interpretation of "fiduciary." The district court properly rejected this argument under the framework of *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

At step one, the court concluded that ERISA does not "unambiguously foreclose[]" the Department's interpretation. ERISA defines "fiduciary" as anyone who "renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of [a] plan." 29 U.S.C. § 1002(21)(A)(ii); 26 U.S.C. § 4975(e)(3). The new interpretation implements this functional definition by classifying as a fiduciary any person who makes a "recommendation as to the advisability of acquiring . . . investment property" in three circumstances, including

[1] Plaintiff invokes an older test for granting an injunction pending appeal that turns on whether the movant has raised "serious legal questions" about the merits of its case. Mot. 7 & n.5. Plaintiff acknowledges that the *Winter* Court may have abrogated this approach. This Court need not decide the question, however, because the serious-legal-questions standard applies only when "each of the other three factors clearly favors granting the injunction." *Davis v. PBGC*, 571 F.3d 1288, 1292 (D.C. Cir. 2009). As none of the other factors favors an injunction, plaintiff is not entitled to relief even under the lower standard.

when advice is rendered on the "understanding that the advice is based on the particular investment needs of the advice recipient." 29 C.F.R. § 2510.3-21(a). This interpretation "all but replicates" the "ordinary usage" of the phrase "investment advice." App. 32-33. "[I]f anything, it is the five-part test"—whose regular-basis requirement appears nowhere in ERISA—"that is difficult to reconcile with the statutory text." App. 33.

At step two, the court concluded that the Department's interpretation is "reasonable" and "reasonably explained." App. 41. The new interpretation "better comports with the [statutory] text" than the five-part test or plaintiff's preferred interpretations, *id.*, and "fits comfortably" with ERISA's "commodious[] impos[ition]" of "fiduciary standards on persons whose actions affect" employees' retirement savings. *Id.* The Department "reasonably concluded" that its outdated interpretation of "fiduciary" "risked leaving retirement investors inadequately protected—particularly when one-time transactions like rollovers will involve *trillions* of dollars over the next five years." *Id.*

Plaintiff's motion does not clearly address either part of the court's analysis, but most of its rejoinders were presented to the district court under the step-one rubric. None withstands scrutiny. Plaintiff asserts first (Mot. 9-10) that individuals who render investment advice in the course of selling annuity products are "salespersons" who are not fiduciaries at common law and who cannot be deemed fiduciaries under ERISA. Because Congress expressly departed from the common-law of trusts when defining fiduciary in ERISA, *see Mertens*, 508 U.S. at 262, this claim fails even granting for argument's sake that annuity salespersons are never common-law fiduciaries. Plaintiff also suggests that annuity-sellers do not "render[] investment advice for . . . compensation," as required to be a fiduciary under ERISA, because they are paid not for the advice they give but for the products they sell. But the premise of this argument is contradicted by plaintiff's own declarants. App. 34-35 (listing examples); *see, e.g.*, App. 282 ("I know to . . . teach [my clients] about risks, fees, 'safe' versus 'risky' money, and probate and non-probate issues.") (Engels Aff.).

Plaintiff further contends (Mot. 10) that the Department's interpretation contradicts a definition of "investment adviser" in a different statute—the Investment Advisers Act—that excludes securities brokers who render advice "solely incidental to the conduct of [their] business." 15 U.S.C. § 80b-2(a)(11). Despite being familiar with this definition, Congress did not incorporate an incidental-conduct exception into ERISA. The narrow definition in the Act only underscores the breadth of the sweeping definition in ERISA.

Finally, plaintiff argues (Mot. 10 n.6) that Congress ratified the five-part test when it defined "fiduciary adviser" in a statutory exemption to ERISA's prohibited-transaction rules without disavowing that test. But this Court has emphasized that an administrative interpretation becomes statutorily mandated only with "express congressional approval, lest "a regulation interpreting a provision" "become[] frozen

. . . merely by reenactment of that provision." *See AFL-CIO v. Brock*, 835 F.2d 912, 915 (D.C. Cir. 1987). Congress has not expressly approved the five-part test.

With its general challenge to the Department's interpretation unavailing, plaintiff suggests (Mot. 11-12) that the Department at least lacked authority to craft regulatory exemptions in a way that subjects fiduciaries to IRAs to duties of prudence and loyalty. But plaintiff ignores the Department's capacious statutory authority to adopt exemptions, which places minimal restrictions on the Department's power to condition exemptions on prerequisites that, in its judgment, protect retirement investors. 26 U.S.C. § 4975(c)(2); *see Chamber of Commerce of U.S. v. SEC*, 412 F.3d 133, 138-39 (D.C. Cir. 2005) (interpreting a similar provision expansively). Indeed, plaintiff does not contend the Department exercised its authority in violation of those restrictions. Plaintiff instead asserts that, because Congress declined to mandate fiduciary duties in the IRA context, the Department is implicitly barred from requiring adherence to those duties as a condition of an exemption to the prohibited-transaction rules. As the district court concluded, this assertion fails both "as a matter of logic" and under "the rules of statutory interpretation." App. 53. ERISA's structure suggests only that Congress did not mean to *require* compliance with fiduciary duties in the IRA context. *Id.* Nothing about this structure precludes the Department from determining that, should fiduciaries to IRAs wish to engage in conflicted transactions so risky as to be prohibited by default, such transactions must contain safeguards that protect investors from their advisers' divided loyalties.

Plaintiff's arguments at *Chevron* step two are equally unpersuasive. Plaintiff claims (Mot. 10) that the Department cannot interpret "fiduciary" in a manner that, as the Department's commentary acknowledges, "sweep[s] in some relationships that are not appropriately regarded as fiduciary in nature and that the Department does not believe Congress intended to cover as fiduciary relationships." 81 Fed. Reg. at 20,948. But as the district court recognized and as plaintiff admitted, any "potential overbreadth relates solely to activities unrelated to the sale of annuities." App. 46. Even assuming that agencies may not issue definitions with exceptions designed to reflect the nuances in congressional intent, plaintiff lacks standing to raise this claim because "the asserted overbreadth . . . ha[s] no bearing" on its members. *Id.*

Plaintiff separately claims that the challenged rules are individually and collectively unreasonable because Congress did not intend to allow the Department to issue regulations with economic significance on this scale. Mot. 9, 13-14. But where Congress has expressly vested an agency with expansive power to define statutory terms and to craft administrative exceptions, *see AFL-CIO*, 757 F.2d at 341, 343, the breadth of a rule does not render it unreasonable. Here, "the Department has long exercised jurisdiction over those who provide investment advice to IRAs. . . . It has long asserted that [certain] compensation [structures] give[] rise to a conflict of interest. And it has long imposed conditions on the exercise of its exemption authority." App. 55-56. The Department does not act unreasonably simply by adopting an interpretation of "fiduciary" that "cover[s] more advisers and institutions" or by fashioning exemptions with more stringent conditions. *Id.* at 56.

b. Plaintiff argues (Mot. 12-13) that the Department cannot require, as a condition of qualifying for the Best Interest Contract Exemption, fiduciaries to IRAs to conclude written contracts with investors. Plaintiff does not suggest that this condition violates the statutory limits on the Department's exemptive authority. Plaintiff argues instead that the Department created a private cause of action in violation of *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001), and *Mertens*, 508 U.S. 248.

As the district court explained, however, the exemption "does not create a private cause of action"; it "dictates terms that otherwise-conflicted financial institutions must include in written contracts" as a condition of engaging in otherwise-prohibited transactions. App. 56. Any action to enforce these terms "would be brought under state law," where sellers of annuities held by IRAs may already be sued. App. 56-57. And as plaintiff has acknowledged, "state law would ultimately control the enforceability of any of the required contractual terms." App. 57. Nor are such requirements unusual. The Department has long required "qualified professional asset managers" to acknowledge their fiduciary status in a "written management agreement" as a condition of receiving a different regulatory exemption. 49 Fed. Reg. 9,494, 9,503 (Mar. 13, 1984). And other agencies have required entities to bind themselves to specific contractual provisions as a condition of undertaking certain actions. *See* App. 58-59. The exemption is thus consistent with the principle that only Congress may create federal causes of action.

Plaintiff maintains that the exemption remains in tension with *Sandoval*'s underlying principles. Mot. 13 (citing *Astra USA, Inc. v. Santa Clara Cnty.*, 563 U.S. 110 (2011)). As the district court correctly determined, this argument is forfeited: Plaintiff did not advance it until the hearing on its summary-judgment motion. App. 61 & n.10. It is in any event incorrect. As the court explained, *Astra*—which turned on "unique circumstances . . . not present here"—did not hold that "*Sandoval* or its progeny . . . preclude[s] agencies from conditioning the grant of a regulatory exemption on the execution of written agreements that are enforceable under state law." *Id.* The *Astra* Court "expressly declined to reach the closer—but still inapposite—question" of whether an "agency may authorize third-party suits to enforce a Government contract." *Id.* (quotation omitted).

c. Plaintiff argues (Mot. 14-16) that the Department violated the APA by requiring sellers of fixed-indexed annuities to comply with the Best Interest Contract Exemption as opposed to PTE 84-24. Plaintiff's motion does not assert, as plaintiff asserted below, that it lacked adequate notice of this requirement.[2] (Such an assertion

[2] Plaintiff summarily asserts (Mot. 16) that it lacked notice of the Department's decision to restrict this exemption to contracts authorizing arbitration for individual contract claims alone. But the final version of this restriction is unchanged from the Department's proposal, which noted that the exemption "would not affect the ability . . . to enter into a pre-dispute binding arbitration agreement with respect to individual

would be meritless: The Department expressly requested comment on the treatment of annuities "under PTE 84-24," and plaintiff "provided comments on that very issue." App. 76.) The motion contends only that the Best Interest Contract Exemption is arbitrary and capricious because it is "unworkable with the existing distribution system for fixed annuities." Mot. 15. The district court properly rejected all three iterations of this argument.

First, plaintiff argues that an insurance carrier cannot police the conduct of independent insurance agents recommending its products, as the exemption requires, because such agents may also sell other carriers' products. Mot. 15. At the threshold, this argument is forfeited because plaintiff did not present it to the agency. *See National Wildlife Fed'n v. EPA*, 286 F.3d 554, 562 (D.C. Cir. 2002). On the merits, the argument rests on a misunderstanding of the exemption, which requires only that an insurance carrier oversee agents' recommendations and sales of its *own* products. App. 82; *see also* Dep't of Labor, *FAQs About the Conflict of Interest Rule and Exemptions Part I* ("FAQs") (Question 22).[3]

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contract claims" and invited comments on that aspect of the proposal. *See* 80 Fed. Reg. at 21,973. Several stakeholders' comments objected to it. Thus, even accepting plaintiff's flawed argument that it lacked notice, this portion of the exemption should not be invalidated on account of a procedural defect that was, at worst, harmless. *See Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014).

[3] This document is available at http://go.usa.gov/x8EHv.

Second, plaintiff argues (Mot. 16) that the exemption is arbitrary and capricious because it permits a qualifying contract to include clauses providing for individual arbitration and for limitations on damages. Plaintiff asserts that the Department's decision to *allow* such clauses is a reason to invalidate the exemption because state regulators would prevent annuity-sellers from including them in their contracts. *Id.* Plaintiff believes these restrictions may not apply to contracts for products such as securities, granting sellers of those products a competitive edge. But an unquantified disadvantage that might result from the application of state regulations does not render compliance with the exemption "impossible" or the exemption itself irrational. App. 83-84. Moreover, any disadvantage exists independent of the Department's actions because it results from state regulations that would apply regardless of whether the exemption is in force. *Id.*

Finally, Plaintiff argues (Mot. 15) that the exemption is unworkable because annuity-sellers can only comply with it by recommending all prudent retirement options, which may include securities—and "insurance-only" agents cannot recommend securities without a separate license. Not so. As the exemption explains, regulated entities need not "identify the single 'best' investment for the Retirement Investor out of all the investments in the . . . marketplace." 81 Fed. Reg. at 21,029. To the contrary, the duty of prudence would forbid insurance-only agents from recommending products such as securities on account of their lack of expertise. *See FAQs* (Question 21).

d. Plaintiff argues (Mot. 16-17) that the Impartial Contract Standards are unconstitutionally vague because they require regulated entities to receive no more compensation than is "reasonable." But economic regulations survive due-process scrutiny if "a reasonably prudent person . . . would have fair warning of what [they] require." *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 736 (D.C. Cir. 2016). The district court correctly determined that the reasonable-compensation requirement satisfies this standard. That requirement—informed by the common law of trusts—has existed in ERISA since its enactment, 29 U.S.C. § 1108(b)(2), is defined by regulation, 29 C.F.R. § 2550.408c-2, and was included in the original version of PTE 84-24, 49 Fed. Reg. 13,208, 13211 (Apr. 3, 1984). More generally, the concept of reasonableness is "ubiquitous in the law" and appears even in the applicable constitutional test. App. 65. And this Court has consistently rejected vagueness challenges to the word "reasonable" and its ilk. App. 65-66 (listing cases).

Plaintiff's only response (Mot. 16-17) is that the Department's "contradictory guidance" has placed insurers in an "impossible quandary." The district court disagreed, and rightly so. For example, the court properly rejected plaintiff's assertion that the Department's embrace of "market-based" compensation is incompatible with the Department's rejection of "customary" compensation because the two concepts are distinct. *See* App. 69.

2. Plaintiff's motion should be denied for another, independent reason: Plaintiff cannot show that its members will suffer irreparable harm if an injunction

does not issue. Economic harm—the only harm alleged—justifies preliminary relief only in the most extreme circumstances. *See Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015). Such losses must also be "imminen[t]" and "certain to occur in the future." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

The statements in plaintiff's declarations fall well short of this high bar, as the government has explained. Dkt. No. 19, at 86-96; Dkt. No. 53, at 4-9. Most indicate only that the rules will require plaintiff's members to "overhaul . . . their distribution systems, resulting in permanent changes" and "unrecoverable expense." Mot. 20. As a matter of law, however, such transitional costs—even if truly irreparable—do not warrant the imposition of injunctive relief; otherwise, any challenger to any major regulatory action would be entitled to an injunction pending appeal. *See American Hosp. Ass'n v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980).

The district court also correctly rejected plaintiff's allegations of more substantial harm. For instance, the claim that "tens of thousands of [insurance] agents will leave the business" is both "speculative" and "in tension with" plaintiff's "own evidence," including one declarant's acknowledgment—after predicting in an earlier declaration that he would go out of business—that he "will obtain" a securities license to "ensure compliance with" the rules. App. 100. Similarly, plaintiff's claim that many "independent marketing organizations" will go out of business because they are not "financial institutions" that qualify for the Best Interest Contract Exemption is belied by the fact that the exemption permits such organizations to petition for financial-institution status—as many have done. *Id.*; *see FAQs* (Questions 21-23).

In any event, these harms are not sufficiently "imminent" to justify the extraordinary relief plaintiff requests. By April 10, 2017, plaintiff's members need only be ready to acknowledge fiduciary status, make minimal consumer disclosures, and provide investors with prudent and loyal advice. And the Best Interest Contract Exemption, which is the subject of many of plaintiff's arguments, will not be fully applicable until January 1, 2018—nearly thirteen months from today.

3. Finally, the public interest and the balance of equities weigh decisively in favor of the Department because enjoining the challenged rules will inflict significant harm to the Nation's retirement investors. The rules rest on a "large body of literature" proving that conflicts of interest in the retirement-investment market may cost investors hundreds of billions of dollars. 81 Fed. Reg. at 20,949 n.8. In the mutual-funds sector alone, conflicted transactions could cost IRA investors "between $95 billion and $189 billion over the next ten years." *Id.* at 20,950. Enjoining these rules would permit conflicted advice to be rendered unabated. Additionally, the industry is already taking steps to comply with the new rules. Suspending the April 10, 2017 applicability date (and, by extension, the January 1, 2018 deadline) could sow confusion in the market and delay the rules' much-needed reforms, to the detriment of retirees both present and aspiring.

Plaintiff downplays these harms by asserting (Mot. 20) that all fixed annuities are "competently regulated under state law." But state insurance regulators focus on the "suitability" of the annuity products sold by plaintiff's members. App. 98. This focus does not prevent conflicts of interest from infecting recommendations as to which of the range of "suitable" investment products a particular investor should purchase. *Id.* Nor are these harms outweighed by plaintiff's speculation (Mot. 19-20) that the final rules may induce investment advisers to leave the market, leaving low- and middle-income investors in the lurch. The Department has studied that question and concluded that investment advice will remain "readily available." 81 Fed. Reg. at 20,952. And the Department has properly concluded that whatever market adjustments will occur are the necessary consequence of reforms required to protect all retirement investors from conflicted advice rendered each and every day. Finally, these harms are not outweighed by the public's interest in ensuring that agencies act lawfully, in light of plaintiff's inability to prove that the challenged rules exceed the Department's statutory authority or are in any other respect unlawful.

CONCLUSION

For these reasons, plaintiff's motion for an injunction pending appeal should be denied.

Respectfully submitted,

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DECEMBER 2016

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing response complies with the requirements of Fed. R. App. P. 27(d) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this response complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because it contains 5,129 words according to the count of Microsoft Word.

/s/ Michael Shih
MICHAEL SHIH

CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2016, I caused four paper copies of the foregoing response to be delivered by hand to the Clerk of the Court. I further certify that all participants in this case are registered CM/ECF users and will be served through the CM/ECF system.

/s/ Michael Shih
MICHAEL SHIH