IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, FINANCIAL SERVICES INSTITUTE, INC., FINANCIAL SERVICES ROUNDTABLE, GREATER IRVING-LAS COLINAS CHAMBER OF COMMERCE, HUMBLE AREA CHAMBER OF COMMERCE DBA LAKE HOUSTON AREA CHAMBER OF COMMERCE, INSURED RETIREMENT INSTITUTE, LUBBOCK CHAMBER OF COMMERCE, SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, and
TEXAS ASSOCIATION OF BUSINESS,

Plaintiffs,

v.

EDWARD C. HUGLER, SECRETARY OF LABOR,
and
UNITED STATES DEPARTMENT OF LABOR,

Defendants.

Civil Action No. 3:16-cv-1476-M
Consolidated with:
3:16-cv-1530-C
3:16-cv-1537-N

CHAMBER OF COMMERCE PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO ENJOIN THE FIDUCIARY RULE PENDING APPEAL

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I. INTRODUCTION

Absent immediate relief, the Fiduciary Rule will bring about the most sweeping changes to the retirement savings system since the adoption of the Employee Retirement Income Security Act ("ERISA")—even as the Fifth Circuit Court of Appeals examines whether the Rule is lawful and the Department of Labor considers whether to revise or rescind it. The Rule would require a wholesale reordering of the financial-services and insurance industries. The Department has estimated that the cost to the industry of engaging in that reordering will be $5 billion in the first year and could exceed $30 billion over ten years.[1] Industry participants have already begun incurring this expense, and the financial costs and operational burdens will proliferate as we draw closer to April 10, 2017—the date on which the Department's expansive new definition of "fiduciary" will become applicable. Immediate, temporary relief is necessary to stay the applicability date pending appeal, allowing the Fifth Circuit to consider the legality of the Rule and also allowing the Department itself to complete the review of the Rule mandated by the President, before many of its most costly and irreversible consequences take hold. Accordingly, Plaintiffs respectfully ask the Court to exercise its authority under Federal Rule of Civil Procedure 62(c) to enter an injunction pending appeal that stays the applicability date of the Fiduciary Rule until the appeal in this matter has concluded. **Because of their urgent need for relief, Plaintiffs respectfully ask the Court to issue a ruling on the motion by March 20, 2017.**

With the Rule's applicability date less than five weeks away, many industry participants must now commit to fundamental choices about how they will attempt to comply with the Rule. Those choices will trigger a cascade of consequences that will be substantial and in some cases irreversible: financial costs, changes to business operations, disruptions to business relationships,

[1] AR 6.

and upheaval in the relationships between retirement savers and service providers. And once those compliance decisions have been made, sunk costs and the risk of customer confusion will make it impracticable for many firms to revert to the status quo ante.

There is now an even greater likelihood that all of these costs and disruptions will be incurred for naught. On February 3, 2017, the President directed the Department of Labor to examine the Fiduciary Rule and reassess whether it "is likely to harm investors due to a reduction [in] Americans' access to certain retirement savings offerings," result in "dislocations or disruptions within the retirement services industry," or cause "an increase in [] prices."[2] If the Department answers any of those questions in the affirmative, it must publish a proposed rule revising or rescinding the Rule.

Recognizing the impracticability of completing the review ordered by the President before the Fiduciary Rule becomes applicable on April 10, the Department recently issued a Notice of Proposed Rulemaking in which it proposes to extend the Rule's applicability date by 60 days, to June 9, 2017.[3] The Notice explains that "absent an extension of the applicability date, if the examination prompts the Department to propose rescinding or revising the rule, affected advisers, retirement investors and other stakeholders might face two major changes in the regulatory environment rather than one," which "could unnecessarily disrupt the marketplace, producing

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[2] ECF 135-1, Presidential Memorandum on Fiduciary Duty Rule § 1(a) (Feb. 3, 2017) (available here) (hereinafter, "Presidential Memo").

[3] *Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice; Best Interest Contract Exemption (Prohibited Transaction Exemption 2016-01); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Prohibited Transaction Exemption 2016-02); Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, 84-24 and 86-128*, 82 Fed. Reg. 12,319, 12,320, 12,325 (Mar. 2, 2017) ("Proposed Postponement of Fiduciary Rule") (available here).

frictional costs that are not offset by commensurate benefits."[4]

The Department's reasons for proposing to extend the applicability date are sound and lend strong support to the relief Plaintiffs request here. Yet a stay of the Rule is needed even before that proposed extension could take effect. The comment period for the rulemaking is 15 days and does not close until March 17, 2017.[5] The Department may be unable to finalize its rulemaking before the beginning of April. In the meantime, industry participants will have no choice but to continue to sink extensive resources into developing their compliance capabilities—and continue to incur irreversible financial costs and operational disruptions. Moreover, a 60-day extension is unlikely to be long enough for this litigation to run its course.[6]

The same concerns that moved the Department to propose its stay of the Rule warrant an injunction of the Rule pending appeal in this case. Plaintiffs have presented a compelling case on the merits and raised a number of serious legal challenges to the Fiduciary Rule. If the Court of Appeals accepts one or more of those challenges, the result would be to strike down or substantially limit the Rule's scope. That relief will be incomplete if it comes after industry participants have incurred substantial and irreparable financial costs, operational burdens, employment changes, and disruptive transformations of their relationships with many retirement savers. As the Department

[4] *Id.* at 12,320.

[5] *Id.*

[6] For this and other reasons, adequate relief is not provided by the "Temporary Enforcement Policy on Fiduciary Duty Rule" issued by the Department shortly before this motion was filed. Department of Labor, Employee Benefits Security Administration, *Temporary Enforcement Policy on Fiduciary Duty Rule*, Bulletin No. 2017-01 (Mar. 10, 2017) (available here). The Bulletin—whose issuance confirms the current uncertainty, confusion, and need for injunctive relief—is concerned principally with just one of the concerns identified in this motion (mailing timely disclosures to investors). Id. at 2-3. Further, the Bulletin addresses only the policy of the Labor Department, not the Treasury Department, which has enforcement authority over IRAs.

itself has already acknowledged, there is no good reason why "advisers, investors and other stakeholders" should be forced to bear "the risk and expenses of facing two major changes in the regulatory environment."[7] There would be no hardship in the Court's postponing the Rule for a few more months until this litigation is resolved, leaving in place for those few months a regulatory framework that the Department had deemed satisfactory for decades. And with the Department itself seeking to extend the Rule's applicability date while it considers whether to rescind or revise the Rule, the public interest heavily favors an injunction so that the serious questions about the Rule's validity can be resolved without further wasteful, unwarranted, and unrecoverable costs being incurred first. Under such circumstances, district courts in this Circuit routinely find that an injunction is in the public interest. For all of these reasons, and as more fully explained below, Plaintiffs respectfully ask the Court to enjoin the Rule while the appeal of this action is pending.[8]

II. ARGUMENT

The traditional four-part preliminary injunction test applies to a motion for an injunction pending appeal, and all four prongs of that test support an injunction staying the Fiduciary Rule here. An injunction pending appeal is warranted where (1) the movant is likely to succeed on the merits on appeal, (2) the movant will be irreparably harmed by denial of the injunction, (3) the opposing party will not be harmed by the injunction, and (4) the public interest favors an injunction. *See, e.g., Fla. Businessmen for Free Enter. v. City of Hollywood*, 648 F.2d 956, 957 (5th Cir. 1981); *see also Fath v. Tex. Dep't of Transp.*, No. 16-51281, 2016 WL 6574088, at *1 (5th Cir. Nov. 4, 2016) (per curiam) (unpublished). This test is flexible. A "movant need not

[7] *Proposed Postponement of Fiduciary Rule*, 82 Fed. Reg. at 12,320.

[8] Plaintiffs conferred with Defendants in an attempt to reach agreement on temporary relief. However, the government has indicated that it intends to oppose this motion, pending review of the motion.

always show a 'probability' of success on the merits; instead, the movant need only present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting" relief. *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981) (opining upon the "stay procedure of Fed. R. Civ. P. 62(c) and Fed. R. App. P. 8(a)"). This makes good sense, because "[i]f a movant were required in every case to establish that the appeal would probably be successful, the Rule would not require as it does a prior presentation to the district judge whose order is being appealed." *Id.*

A. Plaintiffs Will Be Irreparably Injured Absent an Injunction

The Fiduciary Rule has already inflicted and will continue to inflict irreparable harm on Plaintiffs' members and the rest of the retirement-services industry. The Rule promises to initiate the largest restructuring of the retirement services industry since the enactment of ERISA and the advent of 401(k) plans and similar vehicles for retirement investments. Central elements of that restructuring must be in place by April 10, 2017, when the Department's vastly expanded definition of "fiduciary" becomes applicable. Under the Department's new definition, even brokers and insurance agents engaging in ordinary sales activity will be treated as fiduciaries, upending a status quo that has been in place for decades. The April 10, 2017 applicability date also begins the countdown to the deadline by which providers who wish to rely on the Best Interest Contract exemption must comply with the exemption's requirements (that deadline is currently set for January 1, 2018).

If this Court does not enjoin the Rule in advance of its applicability date industry participants will suffer massive, unrecoverable costs and implement irreversible changes that could prove entirely unnecessary. These impending costs, burdens, and risks are among the key reasons

why the parties previously moved jointly for expedited briefing.[9] Specifically, firms in the financial-services and insurance industries will incur massive financial costs, enormous operational burdens, disruptive changes to business relationships, and upheaval in their relationships with retirement savers. The insurance industry will be especially hard-hit.

To start, the expenses incurred as a result of ongoing and upcoming compliance efforts will be gigantic. The Department itself estimated that the cost over 10 years will be between $10.0 billion and $31.5 billion.[10] Those costs tend "to be front-loaded" because "start-up costs" are "substantial."[11] The Department estimated that the Rule will cost $5.0 billion in the first year alone and recognized that some of those costs "may be incurred in advance" of the Rule's April 10 applicability date.[12] Research by one organization "found reported compliance costs of at least $106 million in 2016, likely representing up-front costs from just four companies."[13] An industry expert who surveyed eight insurance carriers offering Fixed Indexed Annuities ("FIAs") reports that those carriers' average compliance costs as of November 2016 were between $8 and $10 million.[14] With every day that goes by without a stay of the Rule, those compliance costs continue

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[9] Joint Motion to Establish a Schedule for Summary Judgment Proceedings, ECF 44, ¶ 8 (June 24, 2016).

[10] AR 6.

[11] *Id.*

[12] *Id.*

[13] Sam Batkins, *Fiduciary Rule Has Already Taken Its Toll: $100 million In Costs, Fewer Options*, American Action Forum (Feb. 22, 2017) (available here). These mere first-step costs in and of themselves would make the Rule a "significant regulatory action" requiring the Department to engage in careful cost-benefit analysis. *See* Exec. Order No. 12,866, Regulatory Planning and Review §§ 3(f)(1), 6(a)(3)(C), 58 Fed. Reg. 51,735 (Sept. 30, 1993) (available here).

[14] Exhibit 2, Affidavit of Jack Marrion, filed in *Nat'l Ass'n for Fixed Annuities v. U.S. Dep't of Labor*, No. 1:16-cv-1035, ECF 49-1, ¶¶ 17, at App. 20 (D.D.C. Nov. 14, 2016) (hereinafter, "Marrion Affidavit"). Marrion is Director of Research for the National Association for Fixed

to mount. If the April 10 applicability date passes without an injunction, the rate at which industry participants have incurred compliance costs—all of which will be unrecoverable losses—will only have accelerated.[15] The more those start-up costs accumulate, the more the Rule will become priced into financial products and the industry as a whole, and the harder it will become for the courts to provide meaningful relief to Plaintiffs' members, the industry, and retirement savers (who ultimately will suffer as a result).

Efforts to comply with the Rule will also create significant operational burdens. As industry experts have explained, the Rule will "irreversibly" affect innumerable "business practices" and "business relationships."[16] Many independent marketing organizations ("IMOs") that support independent insurance agents who sell FIAs already "are being forced to invest heavily in infrastructure such as computer programming, licensing programs, new compliance staff, and legal fees."[17] Many IMOs will "have to attempt, at great cost, to reconstruct [their] entire business and operational model[s] and assume potentially massive new legal and financial exposure which may not even be insurable."[18] Insurance carriers also will be forced to begin changing their FIA product offerings to comply with the BIC exemption.[19] By the time the Rule

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Annuities.

[15] Exhibit 1, Declaration of Lisa Bleier ¶ 7, at App. 5–6 (March 7, 2017) (hereinafter, "Bleier Declaration"). Bleier is Managing Director for Public Policy and Advocacy and Associate General Counsel for Plaintiff Securities Industry and Financial Markets Association.

[16] Marrion Affidavit ¶ 4, at App. 16.

[17] *Id.* ¶ 11, at App. 18.

[18] Exhibit 3, Declaration of David Callanan, filed in *Market Synergy Grp., Inc. v. U.S. Dep't of Labor*, No. 5:16-cv-4083, ECF 11-7, ¶ 23, at App. 30–31 (D. Kan. June 17, 2016). Callanan co-founded and works for Advisors Excel, which is a member of Plaintiff Insured Retirement Institute.

[19] *See* Marrion Affidavit ¶ 16, at App. 19–20.

becomes applicable on April 10, 2017, the entire distribution system through which fixed annuities are sold will be changed in ways that, in some instances, will be irreversible even if the Rule ultimately is vacated.[20]

Similarly, firms that provide brokerage services, "are fast approaching the drop-dead point when [they] have to make" a fundamental choice about how they will try to comply with the Rule: either by attempting to shift all their customers to flat fee-based accounts, or by trying to implement the Best Interest Contract ("BIC") exemption and continue to service commission-based accounts.[21] Regardless of which path firms choose, they will be forced to bear the expense and disruption of "restructuring their businesses."[22] Brokerage firms that have chosen to retain commission-based accounts face a variety of immensely costly barriers to implementing the BIC exemption. They have to identify products—such as many mutual funds—that they can no longer offer on IRA platforms and rewrite contracts with the providers of those products.[23] These companies "will have to put in place complicated new compliance and surveillance programs" that require the development of new software code and training on the new programs for all personnel involved, including not just brokers and financial advisors, but also call center employees and secretaries.[24] Because it is "extremely difficult" to separate oversight of commission-based and flat fee-based accounts, these new compliance and surveillance systems (and the resulting costs) will cover *all* accounts.[25] In other words, because of the impracticability of maintaining two

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[20] *See Id.* ¶ 4, at App. 16.

[21] Bleier Declaration ¶¶ 8, 12, at App. 6, 7–8.

[22] *Id.* ¶ 10, at App. 7.

[23] *Id.* ¶¶ 16–17, at App. 9–10.

[24] *Id.* ¶ 20, at App. 11.

[25] *Id.* ¶ 21, at App. 12.

separate sets of practices and procedures for retirement and non-retirement accounts, the ultimate consequences of the Rule will extend not just to retirement investment services but to all investment services. Simply put, "[t]he coming changes to individual businesses and to the financial-services industry as a whole will be extensive and, in many instances, irreversible."[26]

In addition, allowing the Rule's applicability date to pass without an injunction would cause significant disruption to longstanding business relationships in both the insurance and the financial-services industries. For example, some "annuity carriers will end existing relationships with IMOs and independent agents and forge new business relationships with broker-dealers."[27] Independent insurance agents will be frozen out of these new relationships unless they obtain previously unnecessary securities licenses.[28] Likewise, brokerage firms that have announced they will eliminate commission-based accounts face huge costs related to training personnel and assisting brokers in becoming registered as financial advisors.[29] Those firms also face a serious risk that the restructuring the Rule compels might cause key personnel—skilled brokers who prefer to work on commission—to leave and pursue employment elsewhere as a result of their firm's decision to move away from a commission-based model.[30] Firms that are retaining commission-based accounts will have to spend significant time and energy drafting new training manuals and providing training to brokers, financial advisors, and other personnel such as call-center employees.[31]

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[26] *Id.* ¶ 10, at App. 7.

[27] Marrion Affidavit ¶ 9, at App. 17.

[28] *Id.* ¶ 31, at App. 22.

[29] Bleier Declaration ¶¶ 10, 14, at App. 7–9.

[30] *Id.* ¶ 14, at App. 8–9.

[31] *Id.* ¶¶ 10, 20, at App. 7, 11.

The Rule will also inject upheaval, confusion, and frustration into relationships between the industry and retirement savers. Brokerage firms that plan to eliminate commission-based accounts will face "significant problems directing people to other flat fee-based accounts" because their customers want to keep their accounts as they are.[32] Firms that are retaining commission-based accounts will have to send detailed, potentially confusing notifications to their customers explaining why the Rule requires certain investment products to be removed from their accounts and prohibits the customers from purchasing certain products or making certain changes to their accounts.[33] Once these changes have been communicated to customers, "they will be difficult to retract or alter;" attempts to walk back or reverse these changes would cause customer confusion and damage the relationship between customers and their brokers.[34] Any customers who were lost in the transition would be highly unlikely ever to bring their business back.[35]

In the insurance industry, the Rule will cause IMOs that rely heavily on sales of FIAs to suffer significant revenue losses.[36] This "decline in revenue will force many of those IMOs to go out of business."[37] As a consequence, many independent insurance agents who sell FIAs will be left without "a readily ascertainable and economically viable choice" for continuing their

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[32] *Id.* ¶ 13, at App. 8.

[33] *Id.* ¶¶ 15–16, 18, at App. 9–11.

[34] *Id.* ¶ 18, at App. 10–11.

[35] *Id.*

[36] Marrion Affidavit ¶¶ 22–23, at App. 21.

[37] *Id.* ¶ 23, at App. 21; *see also* Exhibit 4-A, Declaration of Michael Tripses, filed in *Market Synergy Grp.*, No. 5:16-cv-4083, ECF 11-5, ¶ 25, at App. 43–44 (D. Kan. June 17, 2016) (hereinafter, "Tripses 2016 Declaration"). Tripses is a principal of CreativeOne Marketing Corp. CreativeOne is a member of Plaintiff Insured Retirement Institute.

businesses.[38] Indeed, as many as 20,000 independent insurance agents who currently sell FIAs could be forced out of the fixed-annuity business.[39] If the Rule is allowed to take effect, the result will be to "reduc[e] the availability and value of guaranteed retirement income products for millions of consumers."[40]

An injunction postponing the Rule's applicability date would prevent these imminent and irreparable harms from occurring while the Rule's ultimate fate is still very much uncertain. That uncertainty stems not just from this litigation, but from President Trump's recent directive to the Department of Labor. That directive requires the Department to examine whether the Rule will result in "a reduction of Americans' access to" retirement savings options, "dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees," or "an increase in litigation" and "the prices that investors and retirees must pay to gain access to retirement services."[41] If the Department "make[s] an affirmative determination as to any of th[ose] considerations," or if the Department finds that the Rule will impair Americans' ability "to make their own financial decisions," "save for retirement," or "withstand unexpected financial emergencies," the Department must publish a proposal to rescind or revise the Rule, as appropriate.[42] A decision by the Department to rescind the Rule would stanch the Rule's ongoing compliance costs, but unrecoverable costs will continue to mount until the Rule is rescinded by the Department or stayed by this Court.

The Department has proposed to postpone the Rule's April 10 applicability date, but that

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[38] Tripses 2016 Declaration ¶ 22, at App. 42–43.

[39] Marrion Affidavit ¶ 28, at App. 22.

[40] *Id.*, at App. 16.

[41] Presidential Memo § 1(a).

[42] *Id.* § 1(b).

postponement has not been finalized and, in any event, would only be for 60 days (to June 9, 2017). The Department's proposal includes a 15-day comment period, and there is substantial uncertainty as to when, if ever, after the comment period closes the Department's proposed extension of the Rule's applicability date will take effect. In the shadow of this uncertainty, firms will have no choice but to continue incurring compliance costs and reordering their affairs—including their customer and employee relationships—in the meantime. Even assuming the 60-day extension takes effect, this litigation is certain to continue beyond June 9. Because there is no guarantee that the Department would further postpone the Rule, industry participants would be forced to begin incurring compliance costs again before the end of the 60-day stay.[43] Many decisions and costs, such as providing notices to customers and personnel about upcoming changes to customers' accounts, can only be deferred for so long in the absence of a longer (and dependable) stay of the Rule's applicability date.[44] Only a judicial stay of the Rule pending appeal will prevent the unrecoverable costs that the Department itself predicted would occur at the time it adopted the Rule. An injunction pending appeal also would prevent any "frictional costs" that would result from allowing the Rule to go into effect, only to have it rescinded by DOL or set aside by the Court of Appeals.[45]

B. An Injunction Pending Appeal Would Benefit the Department

The balance of hardships weighs heavily in favor of a temporary injunction. There is no colorable argument that an injunction staying the Rule will harm the Department. The Rule imposes radical and unprecedented changes to the retirement-services industry, whereas an

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[43] Bleier Declaration ¶ 9, at App. 6–7.

[44] *Id.* ¶¶ 9, 12, at App. 6–8.

[45] *Proposed Postponement of Fiduciary Rule*, 82 Fed. Reg. at 12,320.

injunction would merely maintain for a short period longer the status quo that has been in place for decades. In the absence of an injunction staying the Rule, compliance efforts over the coming weeks and months will impose huge financial costs and operational burdens on Plaintiffs and other members of the financial-services industry. An injunction, by contrast, would cost the Department nothing.

In fact, the Department will likely *benefit* from an injunction staying the Rule. The Department has proposed postponing the Rule's applicability date so that the Department will have enough time to conduct the thorough and careful reassessment of the Rule that the President has directed. An injunction of the Rule pending appeal would advance the same goal without prejudicing the Department's own consideration of deferring the applicability date. A judicial stay has the additional virtue of ensuring that the Department has the benefit of appellate review of the Rule's legality before the Department could become responsible for enforcing the Rule.

C. The Public Interest Strongly Favors Granting an Injunction

An injunction staying the Rule is in the public interest. The Supreme Court has recognized the wisdom of preserving the status quo during the pendency of litigation challenging a potentially industry-reshaping rule. *See West Virginia v. EPA*, 136 S. Ct. 1000 (2016) (order staying the EPA's clean power plan pending judicial review). A tide of authority from district courts within this Circuit confirms that where, as here, there are serious questions about the validity or continuing viability of a rule proposed by the Department of Labor, the public interest favors an injunction so that those questions can be resolved without needless and costly disruption to the status quo. *See, e.g.*, *Nevada v. U.S. Dep't of Labor*, No. 4:16-cv-731, ECF 60, at 17-18 (E.D. Tex. Nov. 22, 2016) (preliminarily enjoining enforcement of DOL's overtime rule); *Associated Builders & Contractors of Se. Tex. v. Rung*, No. 1:16-cv-425, ECF 22, at 30 (E.D. Tex. Oct. 24, 2016) (preliminarily enjoining enforcement of DOL's blacklisting rule); *Nat'l Fed'n of Indep. Bus.*

v. Perez, No. 5:16-cv-66, ECF 85, at 83 (N.D. Tex. June 27, 2016) (preliminarily enjoining enforcement of DOL's persuader rule).

Here, the Executive Branch is considering undoing or scaling back the Rule. In a formal memorandum, the President has expressed serious concerns about the Rule's severe costs and its potential negative impact on investors and on the industry. In light of this explicitly declared policy of the Executive Branch, the public interest would not be served by the Rule's substantive requirements becoming applicable on April 10. Just the opposite: It is in the public's interest for the Rule to be enjoined pending appeal so that the Department's reexamination of the Rule can be conducted in a thorough and meaningful way and with the benefit of appellate review of Plaintiffs' legal challenges. A court-ordered postponement of the Rule's applicability date will be efficient for all involved. It will save the Department from an accelerated review process, and it will ensure that "advisers, investors and other stakeholders would be spared the risk and expenses of facing two major changes in the regulatory environment" if the Rule goes into force and is subsequently rescinded or set aside.[46]

It is, moreover, difficult to understand how an injunction could *not* be in the public interest when the Department itself has proposed to stay the Rule. In its proposal to postpone the Rule's applicability date, the Department speculated that deferring the Rule's effectiveness *might* cause "investor losses," but it conceded that any "actual impact" on investors "is unknown" and that any attempt to put a number on those losses is "uncertain and incomplete."[47] The Department did not try to explain how a proposed postponement of the effectiveness of an agency rule—that is, maintenance of the status quo *before* regulatory action—can be the cause of legally cognizable

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[46] *Id.*

[47] *Id.*

harm. In contrast, the Rule itself predicts that it will cause $5 billion in costs in just the first year following the applicability date.[48] Postponing the Rule's effective date will further benefit the public by providing a respite from the uncertainty that plagues the Rule. The industry and consumers alike do not know whether the Rule's newly expanded definition of "fiduciary" will become settled law on April 10, sometime thereafter, or not at all, or whether instead materially different terms, requirements, prohibitions, and exemptions will ultimately be established. An injunction of the Rule pending appeal cannot eliminate that uncertainty entirely, but it will provide a more solid foundation on which the public and the industry may base their expectations.

D. Plaintiffs Have Raised Serious Legal Questions

Plaintiffs have demonstrated "that the balance of equities weighs heavily in favor of granting" relief. *Ruiz*, 650 F.2d at 565. The imminent irreparable harm is enormous, there is no harm to the Department, and the public interest decidedly favors an injunction. Plaintiffs, thus, "need only present a substantial case on the merits when a serious legal question is involved." *Id.*

There can be no doubt that Plaintiffs have presented a substantial case on the merits involving a number of serious legal questions about the validity of the rule. Through the Rule and its exemptions, the Department has arrogated to itself an enormous amount of new regulatory authority that Congress did not intend it to have. The Rule unmoors the definition of "fiduciary" from its established common law meaning and in contravention of ERISA's plain text by interpreting that term to include persons engaged in ordinary sales activity. The Rule oversteps the Department's authority to grant *exemptions* from fiduciary status because it uses that exemptive authority to impose substantive and enforceable *obligations* on IRAs despite having no authority under the Internal Revenue Code to impose such obligations. The Rule creates a private right of

[48] AR 6.

action where Congress did not intend or authorize one in direct contravention of *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). And with the conditions the Rule's exemptions impose with respect to class actions and individual arbitration agreements, the Rule runs afoul of the Federal Arbitration Act.[49]

At the very least, Plaintiffs have "present[ed] a substantial case on the merits" involving "a serious legal question." *Ruiz*, 650 F.2d at 565. Given that "the balance of the equities weighs heavily in favor of granting" relief, this factor weighs in favor of injunctive relief. *See id.* Simply, given the Rule's sweeping changes to a regulatory framework the Department considered appropriate for decades—and given the Department's own recognition that those changes should be reconsidered—it makes all the sense in the world to wait a few months longer until Plaintiffs' *bona fide* legal objections are resolved.

III. CONCLUSION

For all of these reasons, this Court should grant Plaintiffs' motion and enter an injunction staying enforcement of the Fiduciary Rule pending appeal.

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[49] The Rule's legal deficiencies are many and varied. The issues listed above do not represent all the arguments Plaintiffs have brought to bear against the Rule and intend to raise before the Court of Appeals. Plaintiffs do not waive any argument on the merits not explicitly enumerated in this motion.

Respectfully submitted,

Dated: March 10, 2017

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CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that on March 9, 2017, I conferred with counsel for Defendants, Galen N. Thorp. Defendants' counsel communicated that the government intends to oppose, pending review of the motion. The undersigned further certifies that on March 9, 2017, I conferred with counsel for Co-Plaintiffs, Joseph Guerra and Kelly Dunbar. Co-Plaintiffs' counsel communicated that they concur in the relief requested.

s/ Jason J. Mendro

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 10, 2017, the foregoing document was electronically submitted with the clerk of the court for the United States District Court, Northern District of Texas, using the electronic case file system of the court. I hereby certify that I have served all counsel of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

s/ Eugene Scalia