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Mr. Lyle W. Cayce
Clerk of Court
U.S. Court of Appeals for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130

Re: *Chamber of Commerce of the United States of America et al. v. United States Department of Labor et al.*, No. 17-10238

Dear Mr. Cayce:

On behalf of all Appellants, we write in response to the Court's invitation to the parties to file letter briefs addressing the provisions of the Pension Protection Act of 2006 ("PPA") codified at 26 U.S.C. §§ 4975(d)(17) and (f)(8). Specifically, the question arose at oral argument whether those provisions reflect Congress's recognition of a distinction between sales and advice, contrary to the position of the Department of Labor ("DOL") that "sales and advice go hand in hand in the retail market," and that in interpreting the term "fiduciary," it may "reject[ ] the purported dichotomy between a mere 'sales' recommendation, on the one hand, and advice, on the other." ROA 357.

As explained below, those provisions do indeed further illustrate that Congress recognized the distinction between sales and advice in ERISA and the Tax Code—just as it did in the Investment Advisers Act, and just as DOL *itself* did in one portion of the Fiduciary Rule. DOL may not base its Rule on rejection of a distinction recognized by Congress, and accordingly, this error—among others—requires that the Fiduciary Rule be vacated.

Discussion

As explained in the parties' briefs, the Tax Code and ERISA contain essentially identical definitions of "fiduciary." 26 U.S.C. § 4975(e)(3); 29 U.S.C. § 1002(21)(A). Both statutes forbid fiduciaries from engaging in certain prohibited transactions, *see* 26 U.S.C. § 4975(c); 29 U.S.C. § 1106(a), and provide certain exemptions from these prohibitions, *see* 26 U.S.C. § 4975(d); 29 U.S.C. § 1108(b).

As part of the PPA, Congress sought to increase access to professional investment assistance for individually-directed retirement accounts through an additional prohibited transaction exemption in both ERISA and the Tax Code. So long as certain statutory

conditions are met, the exemption permits "fiduciary advisers" to engage in otherwise prohibited transactions that involve:

> (i) *the provision of the investment advice* to the participant or beneficiary of the plan with respect to a security or other property available as an investment under the plan,
>
> (ii) *the acquisition, holding, or sale of a security* or other property available as an investment under the plan pursuant to the investment advice, or
>
> (iii) the direct or indirect receipt of fees or other compensation by the fiduciary adviser or an affiliate thereof (or any employee, agent, or registered representative of the fiduciary adviser or affiliate) in connection with *the provision of the advice or* in connection with *an acquisition, holding, or sale of a security* or other property available as an investment under the plan pursuant to the investment advice.

26 U.S.C. § 4975(d)(17) (emphases added); *accord* 29 U.S.C. § 1108(b)(14) (providing the same exemption to ERISA fiduciaries).[1]

In referring separately to "the provision of . . . advice" and the "sale of a security," all three of these subsections reflect clear congressional recognition that providing investment advice and selling securities or other property are different activities.[2]

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[1] "Fiduciary adviser" is a defined term under the PPA, referring to certain professionals who qualify as fiduciaries under the so-called "investment advice" prong of ERISA's fiduciary definition. *See* 26 U.S.C. § 4975(f)(8)(J)(i) (defining "fiduciary adviser" for purposes of the Tax Code exemption); *accord* 29 U.S.C. § 1108(g)(11)(A) (same for ERISA). Of course, the PPA's reference to these professionals as "*fiduciary* advisers" is further evidence that the word "fiduciary" was not—as DOL suggests—essentially written out of the statute when Congress defined "fiduciary" in ERISA and the Code.

[2] Salespersons would not require an exemption to engage in mere sales activity, which is why this exemption only covers sales activity conducted by persons who are otherwise deemed to be fiduciary advisers. Indeed, Congress has never indicated that ordinary sales conversations—which are constitutionally protected "commercial expression," *Edenfield v. Fane*, 507 U.S. 761, 765 (1993); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557–558 (2011)—can trigger fiduciary status. *See, e.g.*, ACLI Opening. Br. 14–31. The distinctions Congress has long drawn (in the securities laws, ERISA, and elsewhere) between sales speech and fiduciary advice reflect Congress's decision to give consumers the flexibility

This distinction between advice and sales was codified in two other places by the PPA. First, in defining the "[e]ligible investment advice arrangement[s]" that qualify for the PPA exemption, Congress recognized that the "fiduciary adviser" may receive fees *either* "for investment advice *or* with respect to the sale, holding, or acquisition of any security or other property." 26 U.S.C. § 4975(f)(8)(B)(i)(I) (emphasis added); 29 U.S.C. § 1108(g)(2)(A)(i) (emphasis added). Second, the Act's accompanying disclosure requirements refer to fees received "in connection with the provision of the advice or in connection with the sale, acquisition, or holding of the security." 26 U.S.C. § 4975(f)(8)(F)(i)(III); 29 U.S.C. § 1108(g)(6)(A)(iii).

Congress's recognition in the PPA of the distinction between sales and advice is consistent with the distinction it drew in the Investment Advisers Act; with the common law understanding on which ERISA was based; and with the "seller's carve-out" (ROA.356) in the Fiduciary Rule itself. *See* Chamber Opening Br. 29, 39–41; Chamber Reply Br. 10–11. Yet DOL premised its Rule in substantial part on the rejection of that distinction. *See* ROA.357; DOL Br. 32–33. A regulation premised on the rejection of a principle expressly acknowledged in the very statute it purports to interpret is patently unreasonable. And by denying the existence of the "purported dichotomy" between sales and advice for most of the Rule, but then making it the basis for the seller's carve-out, DOL was "internally inconsistent and therefore arbitrary" and capricious. *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1153 (D.C. Cir. 2011); *see also id.* at 1148–49.[3]

Finally, to the extent DOL suggests that the PPA exemption somehow shows that it has significant authority to regulate the IRA marketplace, that is plainly mistaken. The provision

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to learn about products through lower cost sales interactions or more expensive fiduciary advice relationships.

[3] There is another respect in which § 4975(d)(17) demonstrates that the investment-advice prong of the Tax Code's "fiduciary" definition is narrower than the novel interpretation DOL adopted in the Rule. The introductory clause to § 4975(d)(17) refers to "the provision of investment advice *described in subsection (e)(3)(B)*," which is the investment-advice prong. *See* 26 U.S.C. § 4975(d)(17), (e)(3)(B) (emphasis added). Yet under DOL's sweeping interpretation of "fiduciary," the reference to advice "described in subsection (e)(3)(B)" serves no purpose in the clause, since (according to DOL) the provision of virtually any investment advice, including advice incidental to a one-time sale, constitutes fiduciary conduct. As Appellants have explained, the investment-advice prong necessarily refers to advice that is provided in a relationship of trust and confidence (IALC Br. 20–26; IALC Reply Br. 6–11) and that is the basis for paying a fee (Chamber Br. 36–38; Chamber Reply Br. 4–7).

is a narrow exemption, not a grant of affirmative regulatory power to DOL; like the exemptive authority given to DOL at 26 U.S.C. § 4975(c)(2), this "ancillary provision[ ]" is far too "subtle [a] device" to confer the elephantine regulatory power DOL has claimed. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001); *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994). Moreover, DOL's implementing regulation merely "tracks the requirements" in the statute, and "[e]xcept for the relief afforded by the statutory exemption, the final rule does not change the manner or extent to which Code section 4975 applies to an IRA." 76 Fed. Reg. 66,136, 66,137 (Oct. 25, 2011).

* * *

For these reasons, as well as the reasons set forth in Appellants' briefs and at oral argument, this Court should reverse the judgment of the district court; hold that the Fiduciary Rule and its related prohibited-transaction exemptions are unlawful; and direct the entry of a judgment in favor of Appellants vacating the Rule in its entirety and enjoining DOL from enforcing, implementing, or giving effect to the Rule in any manner.

Respectfully submitted,

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