[ORAL ARGUMENT NOT YET SCHEDULED]

No. 16-5345

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

NATIONAL ASSOCIATION FOR FIXED ANNUITIES,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF LABOR, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

Plaintiff-appellant is the National Association for Fixed Annuities. Defendants-Appellees are the United States Department of Labor and R. Alexander Acosta in his official capacity as Secretary of the United States Department of Labor.

The MV Group and the Fidelity & Guaranty Life Insurance Company have filed an amicus curiae brief in support of appellant.

B. Rulings Under Review

Plaintiff-Appellant seeks review of the district court's order entering summary judgment for the government. See JA401.

C. Related Cases

This case has not previously been before this Court. Challenges to the agency actions at issue in this appeal are currently pending in three other courts. See *Chamber of Commerce of the U.S.A.* v. *U.S. Dep't of Labor*, No. 17-10238 (5th Cir.); *Market Synergy Grp., Inc.* v. *U.S. Dep't of Labor*, No. 17-3038 (10th Cir.); *Thrivent Financial for Lutherans* v. *U.S. Dep't of Labor*, No. 0:16-cv-03289 (D. Minn.).

/s/Michael Shih
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GLOSSARY

Advisers Act	Investment Advisers Act of 1940
BIC Exemption	Best-Interest Contract Exemption
Code	Internal Revenue Code
DOL	Department of Labor
ERISA	Employee Retirement Income Security Act of 1974
IMO	Independent Marketing Organization
IRA	Individual Retirement Account
PTE	Prohibited Transaction Exemption
Senate Report	S. Rep. No. 93-127 (1973)

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 conflicts of interest in the market for retirement-investment advice. The fiduciary rule amends DOL's regulations implementing the Employee Retirement Income Security Act (ERISA) by 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, which Congress imposed on fiduciaries to safeguard the Nation's retirement security.

One such restriction prohibits fiduciaries to tax-preferred plans and IRAs 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. DOL exercised that authority, on the basis of the record before it, to condition certain exemptions on compliance with certain investor safeguards the agency deemed warranted to mitigate the harms of conflicted advice on retirement investors.

Plaintiff's members are participants in the retirement-investment market who may qualify as fiduciaries under the new rule. Plaintiff asserts that DOL lacked authority both to revise its interpretation of the statutory definition of fiduciary and also to condition relief from the prohibited-transaction provisions on the terms that it did. Plaintiff further claims that the agency's policy judgments were arbitrary and capricious. Plaintiff lastly claims that DOL cannot condition an exemption on the receipt of "reasonable compensation" because that standard is unconstitutionally vague.

The district court correctly rejected all of plaintiff's arguments. *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 reasonably interpreted the definition's literal terms to reach more broadly in the context presented. *Second*, DOL reasonably exercised its discretion to condition exemptions from the prohibited-transaction provisions on safeguards that the agency found to be "administratively feasible," and "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). *Third*, DOL did not arbitrarily or capriciously reject plaintiff's policy arguments during the notice-and-comment process. *Finally*, DOL's decision to adopt the reasonable-compensation standard—which is informed by the common law of trusts, and which has existed in ERISA and in DOL's regulations for four decades—does not violate the Constitution. The judgment of the district court should therefore be affirmed.

STATEMENT OF JURISDICTION

Plaintiff invoked the district court's jurisdiction under 28 U.S.C. 1331. The district court entered final judgment on November 4, 2016. JA92. Plaintiff timely appealed. See JA402. 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 concerns two exemptions in particular: the Best-Interest Contract (BIC) Exemption and Prohibited-Transaction Exemption (PTE) 84-24. The issues presented are (1) whether PTE 84-24 and the BIC Exemption are lawful exercises of DOL's exemption authority; (2) whether the "reasonable compensation" condition to the exemptions is unconstitutionally vague; (3) whether the BIC Exemption impermissibly creates a cause of action; and (4) whether DOL's decision to require prohibited transactions involving fixed-indexed annuities to satisfy the BIC Exemption (as opposed to PTE 84-24) was arbitrary or capricious.

PERTINENT STATUTES

Pertinent statutes are reproduced in the addendum to this brief.

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) (en banc). 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.'" *Ibid.* Congress determined that this existing regulatory system had failed to effectively "monitor[] and prevent[] fraud and other pension fund abuses." *Ibid.* 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 regulates 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] ERISA's "artificial definition of 'fiduciary'" incorporates "*some* common-law 'nonfiduciaries.'" *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 255 n.5 (1993). But 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). Additionally, Congress "categorically barr[ed]" such fiduciaries from engaging in certain transactions deemed "likely to injure the pension plan." *Harris Tr. & Sav. Bank* v. *Salomon Smith Barney Inc.*, 530 U.S. 238, 241-42 (2000). These prohibited transactions include "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

[1] ERISA contains two other definitions of fiduciary covering individuals who exercise certain authority or responsibility over management and administration of the plan. 29 U.S.C. 1002(21)(A)(i), (iii); see *infra* pp. 18-19.

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 prohibited-transaction provisions to any fiduciary or transaction, or class of fiduciaries or transactions. *Id.* § 1108(a). Before DOL can grant an exemption, it 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." *Ibid.* The statute does not otherwise constrain DOL's discretion to craft protective exemptions.

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 preempts "all State laws insofar as they * * * relate to any" plan that 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, sec. 2002(b), § 408, 88 Stat. at 959-64.[2] Title II does not impose the specific duties of prudence and loyalty on such fiduciaries. But it prohibits fiduciaries from

[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.

engaging in conflicted transactions in tax-preferred plans and IRAs 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 and interpret the fiduciary definition, *id.* § 4975(c)(2).[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 covering tax-preferred plans and IRAs. Because Title II does not preempt state law, the statute also exposes fiduciaries to suit on state-law theories of liability. See JA364 (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, establishing a five-part test for fiduciary status in 1975. To qualify, an adviser had to (1) "render[] advice * * * or make[] recommendation[s] as to the advisability of 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

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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, the President transferred that authority to DOL. See Reorganization Plan No. 4 of 1978, 43 Fed. Reg. 47713 (Oct. 17, 1978), codified at 29 U.S.C. 1001 note, ratified by Pub. L. No. 98-532, 98 Stat. 2705 (1984).

respect to plan assets"; and be (5) "individualized * * * based on the particular needs of the plan." *Ibid.* DOL did not regulate an adviser who failed to satisfy even one of these conditions as an investment-advice fiduciary under ERISA.

DOL determined, on the basis of the record, that "[t]he market for retirement advice has changed dramatically since [DOL] promulgated the 1975 regulation." JA521. At the time, IRAs had only recently been created (by ERISA itself), and participant-directed 401(k) plans "did not yet exist." JA521. Most retirement assets were held in pensions controlled by large employers and professional money managers. JA521. Today, "IRAs and participant-directed plans, such as 401(k) plans, have supplanted * * * pensions" as the retirement vehicles of choice. JA521. Individuals have thus become "increasingly responsible" for their own retirement savings. JA521. That 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." JA521. Investors "are often unable to assess the quality of the expert's advice" or to "guard against the adviser's conflicts of interest." JA522. DOL found this especially true of individuals who purchase IRA assets in the retail market. JA866. DOL thus determined to revisit its 1975 regulation. JA522.

III. The Fiduciary Rule

After six years of deliberation, two notice-and-comment rulemakings, and multiple public hearings, DOL issued the fiduciary rule. The rule has two components.

A. Interpretation of Investment-Advice Fiduciary

The fiduciary rule replaces the five-part test 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 or other compensation" whenever he is compensated in connection with a "recommendation as to the advisability of" buying, selling, or managing "investment property." JA564. 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. JA564.

Not all communications are recommendations. Drawing on existing guidance issued by federal securities regulators, DOL defined "recommendation" as a

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

"communication that * * * would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action." JA564; see JA332. This objective inquiry turns on "content, context, and presentation"; a communication is more likely to be a recommendation "the more individually tailored [it] is to a specific advice recipient." JA564. DOL also gave examples of communications that are not recommendations, such as general marketing activities. JA564-65.

Finally, the rule excludes certain categories of investment advice that, as DOL explained, "are not appropriately regarded as fiduciary in nature." JA515. 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 manages $50 million or more in plan and IRA assets. JA515, 566.

B. Revised Exemption Structure

The fiduciary rule also amended six existing exemptions, and created two new exemptions, to ERISA's prohibited-transaction provisions. JA558-59 & nn.53-54 (listing amendments and revisions). The revised exemption structure allows fiduciaries to engage in otherwise prohibited transactions if they comply with conditions designed to mitigate their conflicts of interest. JA513.

Two exemptions warrant specific mention. The rule created a new exemption called the Best-Interest Contract (BIC) Exemption. The rule also narrowed the scope of an existing exemption called Prohibited-Transaction Exemption (PTE) 84-24.

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." JA575. Under these standards, fiduciaries must adhere to the duties of loyalty and prudence, "avoid misleading statements," and "receive no more than reasonable compensation." JA575. The exemption—and this condition—became applicable on June 9, 2017. 82 Fed. Reg. 16902 (Apr. 7, 2017).

On January 1, 2018, fiduciaries must comply with additional conditions to qualify for the exemption. 82 Fed. Reg. at 16902; but see 82 Fed. Reg. 41365 (Aug. 31, 2017) (proposing an eighteen-month delay of this applicability date). For instance, contracts between advisers and IRA clients must include an acknowledgment of fiduciary status, a guarantee of compliance with the Impartial Conduct Standards, and various warranties and disclosures. JA571. The contracts may not include

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

exculpatory or certain liability-limiting provisions, or class-action waivers.[6] JA647. The rule does not create a cause of action to enforce any of the contractual conditions specified in the exemption; however, because Title II of ERISA does not preempt state-law remedies concerning IRAs, enforcement actions under state contract law would remain available. JA363-64.

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 covered transactions involving mutual-fund shares and annuity contracts. *Ibid.*

Annuities take three relevant forms. **Fixed-rate annuities** guarantee investors a minimum rate of interest on their investment. JA808. These annuities allocate all investment risk to insurers because investors are sure to earn at least that minimum specified rate. JA808. **Variable annuities** invest premium payments in "a variety of

[6] DOL has announced an enforcement policy regarding this class-action-waiver condition as applied to arbitration agreements. U.S. Dep't of Labor, *Field Assistance Bulletin No. 2017-03* (Aug. 30, 2017), https://go.usa.gov/xRMZU.

underlying investment options[,] such as mutual funds." JA808. These annuities do not guarantee future income; their payouts depend on the success of the underlying investment strategy. JA808. This structure allocates investment risk to investors by offering them the opportunity to realize higher returns, but with the chance of losing both principal and interest. JA808.

Fixed-indexed annuities include attributes of both fixed-rate and variable annuities. These annuities link interest rates to an external market index. JA314. However, investors may not reap the full benefit should the index increase in value; many fixed-indexed contracts limit gains by deducting administrative fees, crediting investors with only a portion of the designated index's increase in value, or imposing upper limits on returns. JA887, 891. At the same time, fixed-indexed contracts guarantee investors that their rate of return will never fall below zero. JA314. Such guarantees shield investors from investment losses during downturns in the market—although investors may still lose principal because of surrender charges imposed by termination of an annuity before a certain amount of time elapses. JA1052. This structure allocates investors "more risk (but more potential return) than a fixed-rate annuity but less risk (and less potential return)" than a variable annuity. JA585 (quotation marks omitted).

The fiduciary rule modified PTE 84-24 in two important respects.[7] First, PTE 84-24 is now conditioned on the additional requirement that fiduciaries comply with the same Impartial Conduct Standards set forth in the BIC Exemption. JA748. 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 rather than variable and fixed-indexed annuities. JA728-29. DOL did so because it determined, on this record, that fixed-rate annuities "provide payments that are * * * predictable" under terms that are "more understandable to consumers." JA726. Variable and fixed-indexed annuities, by contrast, may require investors "to shoulder significant investment risk and do not offer the same predictability of payments." JA726-27. They are also "quite complex and subject to significant conflicts of interest at the point of sale." JA727. Because these latter products are more complicated and may be more "susceptible to abuse," DOL concluded that "recommendations to purchase such annuities should be subject to the greater protections of the Best Interest Contract Exemption." JA727-28. 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.[8]

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

[8] The President has directed DOL to reexamine the fiduciary rule and to "prepare an updated economic and legal analysis" of its provisions. 82 Fed. Reg. 9675, 9675 (Feb. 3, 2017). The agency postponed the applicability dates of certain

IV. Prior Proceedings

Plaintiff, an industry association representing sellers of fixed-rate and fixed-indexed annuities, challenged the fiduciary rule in district court. The court, like every court to consider the rule's legality, entered judgment for DOL on all of plaintiff's claims. JA309-400, 401.[9] Plaintiff moved for an injunction pending appeal, but its motion was denied—first by the district court and then by this Court.

SUMMARY OF ARGUMENT

1. DOL interpreted ERISA's investment-advice fiduciary definition to reach certain investment advisers who fall within the definition's terms but outside the more restrictive construction previously adopted by DOL. That interpretation is reasonable in light of ERISA's text, structure, and purposes, and thus is entitled to judicial deference under *Chevron*.

Plaintiff's counterarguments are unavailing. 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

exemption conditions until January 1, 2018. 82 Fed. Reg. at 16902. DOL, the Treasury Department, and the IRS have issued non-enforcement policies covering the transitional period between June 9, 2017, and January 1, 2018. See U.S. Dep't of Labor, *Field Assistance Bulletin No. 2017-02* (May 22, 2017), https://go.usa.gov/xNH3k. DOL has proposed to extend the transitional period from January 2018 to July 2019. 82 Fed. Reg. at 41365-76.

[9] See *Market Synergy Grp., Inc.* v. *DOL*, No. 16-cv-4083, 2017 WL 661592 (D. Kan. Feb. 17, 2017); *Chamber of Commerce of the U.S.* v. *Hugler*, 231 F. Supp. 3d 152 (N.D. Tex. 2017).

individuals who give advice in the context of a relationship of trust and confidence. 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 its revised interpretation was an appropriate response to changes in the market for retirement-investment advice.

2. DOL lawfully conditioned eligibility for the revised PTE 84-24 and the BIC Exemption on compliance with Impartial Conduct Standards that reflect fundamental obligations of fair dealing. On appeal, plaintiff does not dispute that DOL made the required statutory findings for a conditional exemption. Plaintiff instead argues that DOL's authority is limited by two extra-textual restrictions. But ERISA does not unambiguously constrain DOL's authority in the manner plaintiff suggests.

Plaintiff separately argues that DOL's decision to condition eligibility for those exemptions on the receipt of "reasonable compensation" is unconstitutionally vague. But that standard—which is informed by the common law of trusts, and which has existed in ERISA and in DOL's regulations for four decades—does not violate the Due Process Clause.

Finally, plaintiff argues that the BIC Exemption impermissibly creates a cause of action. But the exemption merely specifies, as a condition of eligibility, certain provisions that 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. Thus, DOL did not create a cause of action.

3. DOL reasonably determined, on the basis of this record, that conflicted transactions involving fixed-indexed annuities should be required to satisfy the BIC Exemption. DOL concluded that the exemption's conditions are warranted to protect retirement investors from the harms posed by conflicted transactions involving these complicated products. This Court should decline plaintiff's invitation to second-guess DOL's policy judgments.

STANDARD OF REVIEW

This Court reviews a grant of summary judgment de novo. See *Silver State Land, LLC* v. *Schneider*, 843 F.3d 982, 989 (D.C. Cir. 2016). 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 ambiguous statutory provisions must be upheld if they are reasonable. *Chevron U.S.A. 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.

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); 26 U.S.C. 4975(e)(3)(B). 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, which is susceptible to multiple readings. It defines investment advice as a "recommendation as to the advisability of acquiring, holding, disposing of, exchanging," or "managing" "securities or other investment property." JA564. It defines a recommendation as a "communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action." JA564. There can be no serious dispute that these definitions, which "all but replicate" the ordinary meaning of the statute, are permissible under ERISA. JA340.

The fiduciary rule also reasonably reflects ERISA's broader structure, which extends fiduciary status to anyone who exercises "any discretionary authority or discretionary control" respecting management of a retirement plan or exercises "any authority or control" respecting management or disposition of 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 "expand[ed] the universe of persons subject to fiduciary duties," *ibid.*, 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 Tr. & Sav. Bank*, 510 U.S. 86, 96 (1993).

Finally, DOL's interpretation is reasonable in light of ERISA's history and purpose. ERISA's system of duties and obligations was crafted to confer special protections for retirees beyond those provided by then-existing federal and state laws. 29 U.S.C. 1001(a); 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." 120 Cong. Rec. 3983 (1974) (statement of Rep. Perkins). But Congress deemed this departure "necessary to the proper protection" of retirement-investment plans. *Ibid.*

DOL reasonably determined, on this record, that the fiduciary rule advances these legislative purposes because the modern market for retirement advice bears little resemblance to the market of 1975 (when DOL adopted the five-part test). Today, individuals increasingly shoulder the burden of preparing for their own retirement, rendering them increasingly reliant on the advice of expert investment advisers. JA521. DOL concluded that the five-part test permitted advisers to "play a central role in shaping plan and IRA investments[]" without safeguards appropriate "for persons having such influence and responsibility." JA522. 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). JA522. DOL also found that many retirement investors now engage in significant one-time transactions that would not be protected by ERISA because the advice on which they relied was not given on a "regular basis" (a third prong of the five-part test). JA516. DOL further found that the problems posed by these regulatory gaps were compounded by the prevalence of conflicted recommendations, JA523, with "large and negative" implications for the security of investors' retirements, JA517.

In these circumstances, DOL reasonably concluded that its revised interpretation of investment-advice fiduciary was warranted. 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. Plaintiff's rejoinders are unpersuasive.

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

Plaintiff incorrectly faults the district court for applying the *Chevron* framework to a question of "major economic and political significance." Br. 36 (quotation marks omitted). *Chevron* deference is not limited to "humdrum, run-of-the-mill" questions, however, and it may be applied to "big, important" questions. *City of Arlington* v. *FCC*, 569 U.S. 290, 297 (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. *Ibid.*

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. *Supra* p. 7 n.3. Congress ratified that transfer, *ibid.*, 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 tax-preferred retirement investments, see 29 U.S.C. 1001(a). Although the consequences of DOL's revised interpretation are significant, that significance reflects the breadth of DOL's delegated authority.

King v. *Burwell*, 135 S. Ct. 2480 (2015), does not support plaintiff's position. That case involved a different statute (the Affordable Care Act) and a different agency (the IRS). Furthermore, the IRS's challenged interpretation concerned not tax policy but 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 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. By contrast, ERISA grants DOL interpretive authority over the statutory provisions at issue, and specifically *empowers* DOL to implement them. And unlike the IRS, DOL has over four decades of experience in regulating the market for retirement-investment advice. See JA319 (noting that DOL "issued regulations defining when a person 'renders investment advice' so as to fall within ERISA's definition of 'fiduciary' in 1975").

Similarly, plaintiff derives no support from *Loving* v. *IRS*, 742 F.3d 1013 (D.C. Cir. 2014). That case, like *King*, involved a different statute (authorizing the "regulat[ion of] the practice of representatives of persons before the Department of the Treasury," 31 U.S.C. 330(a)(1)) and a different agency (the IRS). The Court reiterated the principle that *Chevron* deference is inappropriate when contrary to congressional intent as expressed by "the statute's text or the legislative record." *Loving*, 742 F.3d at 1021. That principle, to reiterate, does not apply here.

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

Plaintiff erroneously contends that DOL's interpretation of the fiduciary definition fails even with *Chevron* deference.

a. Plaintiff argues principally (Br. 21-23) that Congress incorporated a common-law understanding of the term "fiduciary" into the statutory text at issue: the "render[ing]" of "investment advice for a fee or other compensation, direct or indirect." Plaintiff asserts that, at common law, only relationships of "trust and confidence" can qualify as fiduciary relationships—and the fiduciary rule is unlawful because it applies to advice given by salespeople whom the common law would not ordinarily regard as fiduciaries.

ERISA does not unambiguously restrict the definition of an investment-advice fiduciary in this manner. Plaintiff reasonably invokes the interpretive presumption that Congress intends to incorporate a common-law term's meaning. But that presumption may be rebutted by "the language of the statute, its structure, or its purposes," *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," *NLRB* v. *Town & Country Elec., Inc.*, 516 U.S. 85, 94 (1995). Indeed, an agency's "construction of [a common-law] term is entitled to considerable deference"—and that deference does not evaporate simply because, "[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." *Ibid.*

In the context of ERISA, controlling precedent holds that "the law of trusts often will inform, but will not necessarily determine the outcome of, an effort to interpret" the statute's terms. *Varity*, 516 U.S. at 497. ERISA's "artificial definition of 'fiduciary'" expressly departs from the common-law understanding of that term. *Mertens*, 508 U.S. at 255 n.5. As discussed, DOL reasonably interpreted ERISA's language, structure, and purpose to go beyond the trust-and-confidence standard.

Plaintiff responds (Br. 26-27), for the first time on appeal, that ERISA must be presumed to incorporate *all* common-law definitions of "fiduciary" unless those definitions are "unequivocally" displaced. But an agency is not required to adopt a semantically possible interpretation merely because it would comport with common-law standards. *Town & Country*, 516 U.S. at 94; see also *Railway Express Agency, Inc.* v. *Railroad Ret. Bd.*, 250 F.2d 832, 837 (7th Cir. 1958) ("If there is any real difference between the generally accepted common law tests and the statutory definition, the latter must prevail."). To the contrary, an agency "possesses a degree of legal leeway" when interpreting common-law terms in "its governing statute, particularly where Congress * * * intended an understanding" of the agency's subject-matter expertise "to guide [that statute's] application." *Town & Country*, 516 U.S. at 90. That principle applies to DOL's interpretation of ERISA. In *Varity*, the Supreme Court held that the common-law meaning of "fiduciary" may be displaced when inconsistent not only with ERISA's text but also its "structure" and "purposes," "bearing in mind the special nature and purpose of employee benefit plans." 516 U.S. at 497; *cf. Mertens*, 508 U.S. at 262 (confirming that ERISA "expand[ed] the universe of persons subject to fiduciary duties"). When construing ERISA, therefore, the common law is the starting point—not the finish line. *Varity*, 516 U.S. at 497.

Plaintiff cannot prevail even if its interpretive methodology were correct. DOL reasonably determined, on the basis of the administrative record, that confining the statutory definition to the old five-part test would "undermine[] rather than promote[]" ERISA's goals. JA522 (concluding that, under plaintiff's interpretation, many investment advisers would be able to "play a central role in shaping" retirement investments without fiduciary safeguards appropriate "for persons having such influence and responsibility"). Such inconsistency with statutory purposes is alone sufficient to displace the common law, as *Varity* explained and as the Supreme Court has in other contexts held. *E.g.*, *Moskal* v. *United States*, 498 U.S. 103, 117 (1990) (recognizing that "Congress' general purpose in enacting a law may prevail over" a term's common-law meaning); *Taylor* v. *United States*, 495 U.S. 575, 594 (1990) (rejecting the "rule that a statutory term is to be given its common-law meaning[] when that meaning is obsolete or inconsistent with the statute's purpose").

Plaintiff responds (Br. 26), relying on *Mertens*, that ERISA departs from the common law only to the extent that it "dispens[es] with the common-law requirement of formal trusteeship." But *Mertens* did not hold that ERISA departed from the common law in that respect and no other. See 508 U.S. at 251. Nor can plaintiff's strained reading of *Mertens* be reconciled with the interpretive methodology articulated in *Varity*, which the Supreme Court likewise did not restrict to the formal-trusteeship context. For similar reasons, plaintiff gains no traction from common-law cases suggesting that buyer-seller relationships are not fiduciary in nature, see Br. 22, or from DOL's previous five-part test for fiduciary status (which plaintiff has not shown to be mandated by the common law's trust-and-confidence requirement, see Br. 24-25). Those authorities do not unambiguously foreclose DOL from interpreting ERISA's fiduciary definition more broadly than the common law. *Cf. National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005).

Plaintiff next cites (Br. 23) two statements in ERISA's legislative history that purportedly show that Congress intended to restrict fiduciary status to individuals in a relationship of trust and confidence with their clients. See H.R. Rep. No. 93-533, at 11 (1973); S. Rep. No. 93-127, at 28-29 (1973) (Senate Report). However, plaintiff has excised these quotations from their context. The statements acknowledge that "[a] fiduciary is one who occupies a position of confidence or trust." *E.g.*, Senate Report 28. But Congress in the very next sentence made clear that the term fiduciary, "[a]s defined by" ERISA, extends beyond such relationships to encompass any "person who exercises any power," or "who has authority or responsibility," over a retirement plan's property. *E.g.*, *id.* at 28-29. Congress then expressed 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 29. If anything, this history only emphasizes the reasonableness of DOL's interpretation.

Plaintiff also derives no support from further statements in the legislative history indicating that ERISA "codifies and makes applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts." *E.g.*, Senate Report 29. Such statements refer not to the common-law understanding of what *people* may be ERISA fiduciaries—which, per *Varity*, does not tell the whole story—but to the common-law understanding of what *duties* ERISA fiduciaries must obey. *Id.* at 30 ("[ERISA] incorporate[s] the core principles of fiduciary *conduct* as adopted from existing trust law") (emphasis added).

Finally, plaintiff asserts (Br. 19) that DOL "admit[ted]" that the fiduciary rule regulates "relationships that are not appropriately regarded as fiduciary in nature." See JA515. Plaintiff mischaracterizes DOL's actions. DOL referred to such relationships to explain its decision to exclude from the rule three types of recommendations that did not present the same policy concerns as the conduct Congress enacted ERISA to prevent. See JA566-67. DOL decided, for example, not to regulate certain paid recommendations to independent fiduciaries who are investment professionals. JA515. DOL did not adopt this exclusion because it believed itself bound by a trust-and-confidence requirement. DOL instead determined 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." JA547. DOL's decision not to extend the fiduciary rule to certain relationships that do not satisfy a trust-and-confidence standard is not a concession that the standard is a prerequisite to fiduciary status under ERISA. Indeed, DOL emphatically rejected the premise that ERISA limits fiduciary status to relationships with "the hallmarks of a trust relationship" at common law. JA557.

Plaintiff responds (Br. 19-21) that the fiduciary rule is per se unlawful because an agency cannot narrow an unlawfully broad definition by limiting that definition with exceptions. But 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 interpretation of the statutory term "finance charge" in a manner that "excludes" eight types of charges). A definition narrowed by exceptions is an impermissible "backdoor regulation" only when the entities covered by those exceptions could not lawfully be regulated at all. See *Hearth, Patio & Barbecue Ass'n* v. *U.S. Dep't of Energy*, 706 F.3d 499, 508 (D.C. Cir. 2013). To the extent plaintiff even has standing to bring this specific APA claim, see JA353, its argument lacks merit. DOL issued the fiduciary rule under its broad and express authority to regulate *all* individuals "to the extent" they "render[] investment advice for a fee or other compensation, direct or indirect." See 29 U.S.C. 1002(21)(A). This definition is not unambiguously limited to advice given in a relationship of trust and confidence—and the purported absence of such a relationship appears to be the only reason plaintiff believes DOL cannot regulate the entities to whom the rule's three exceptions *do* apply. See Br. 19-21. Because ERISA does not prohibit DOL from treating any of those entities as fiduciaries, DOL's definition is not an unlawful regulation-by-exception.

b. Plaintiff also contends (Br. 23-26) that the fiduciary rule impermissibly erases the distinction between salespeople and fiduciaries. But this Court has already rejected the argument that ERISA's broad definition of "fiduciary" categorically excludes "insurance salesm[e]n." *Chao* v. *Day*, 436 F.3d 234, 236 (D.C. Cir. 2006). Moreover, the fiduciary rule does not regulate mere salespeople. An individual who sells a product to an investor is not a fiduciary unless (1) that person renders investment advice in the course of the transaction, and (2) that person is compensated for the advice rendered. JA551.

Plaintiff responds (Br. 23-24) that DOL cannot regulate salespersons because ERISA unambiguously limits fiduciary status to advisers who are paid "primarily" for the advice they give. But DOL reasonably declined to incorporate this "primary-purpose" requirement into the fiduciary rule. The requirement appears nowhere in the text of ERISA, which applies to anyone who renders investment advice "for a fee or other compensation" without regard to whether the fee was primarily for investment advice or for the product the adviser recommended. 29 U.S.C.

1002(21)(A). Nor is the requirement a prerequisite for fiduciary status at common law that Congress might be presumed to have incorporated into ERISA.

The only authority plaintiff cites—the Investment Advisers Act of 1940 ("Advisers Act"), 15 U.S.C. 80b-1 *et seq.*—is inapposite. The Advisers Act defines the term "investment adviser" to exclude any "broker or dealer" who renders investment advice in a manner "incidental to the conduct of his business as a broker or dealer and who receives no special compensation" for that advice. *Id.* § 80b-2(a)(11). But DOL was not required to incorporate that limitation into its interpretation of ERISA. If anything, the Advisers Act reinforces DOL's position. Although ERISA refers to the Act in various places, see 29 U.S.C. 1108(g)(11), ERISA does *not* adopt the Act's exclusion of "incidental" advice. By treating persons as fiduciaries "to the extent" they give advice, incidental or otherwise, DOL reasonably interpreted ERISA's text—which is broader than the Advisers Act definition plaintiff prefers.

Plaintiff separately claims (Br. 24) that investment advisers paid by commission cannot be ERISA fiduciaries because they receive compensation only upon consummation of a sale. But ERISA—which, again, 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)—does not unambiguously exclude individuals compensated by commission from regulation.[10] DOL has interpreted this definition to cover commissions for more than forty years. See 40 Fed. Reg. 50842, 50842 (Oct. 31, 1975). That interpretation has been repeatedly upheld by courts. See, *e.g.*, *Eaves* v. *Penn*, 587 F.2d 453, 458 (10th Cir. 1978). And shortly after ERISA was enacted, an industry group asked the agency to issue an administrative 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). This exemption would be necessary only if advisers compensated in this manner could be regulated as fiduciaries.

DOL reasonably declined to credit plaintiff's assertion that annuity salespeople are paid not for the advice they render but for the products they sell. As DOL explained, the line "between a mere 'sales' recommendation * * * and advice" is blurred in "the context of the retail market for investment products." JA548. Thus, DOL has *never* endorsed the view that salespeople are categorically exempt from ERISA's fiduciary obligations. The agency made that clear as early as 1976, when insurers asked DOL to interpret ERISA to exclude individuals who made "normal sales presentation[s]" and "recommendations" while selling insurance products. 41 Fed. Reg. at 56762. DOL refused, explaining that the question of whether

[10] Federal securities law has long recognized that brokers charge commissions in part for the investment advice they render. See *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 390 n.1 (1987).

salespeople had acted as fiduciaries should instead be evaluated on a case-by-case basis. *Ibid.*

The fiduciary rule is consistent with DOL's longstanding regulatory approach. DOL determined, after reviewing the industry's marketing materials and comment letters, that "sales and advice go hand in hand" where retirement-investment advice is concerned. JA548; see JA1456 (comment of industry group informing 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"). Plaintiff's own declarations "leave little doubt that those engaged in the annuities business do not simply dispense products but, rather, provide individualized investment advice." JA341. According to one declarant, "All of our clients rely on [us] * * * to help them navigate the financial market, answer all of their questions, and benefit from affiliates." JA111-12. Another declarant explained that he and his fellow advisers "meet individually with [their] clients, and, after discussing [the] client's financial goals and needs," "research the annuity market and recommend the best * * * plan available to meet [the] client's objectives." JA119; see JA341-42 (collecting quotes).

For these reasons, DOL properly rejected plaintiff's "suggestion that its members are merely engaged in the sale of 'a product' * * * no different than a grocer or brick-and-mortar retailer." JA341.

c. Lastly, plaintiff contends (Br. 37-40) that the fiduciary rule is unreasonable because DOL did not adequately explain its decision to abandon its preexisting five-part test. But the APA permits an agency to change course when "the new policy is permissible under the statute," "there are good reasons for it," and "the agency *believes* it to be better, which the conscious change of course adequately indicates." *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

DOL's explanation more than satisfies that standard. DOL found, on the existing and extensive record, 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." JA522. 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." JA516. 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]." JA516. 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. JA516.

Similarly, the five-part test required, as a condition of fiduciary status, a mutual understanding that the advice given serve as a "primary basis" for investment decisions. JA521. DOL found that, as a result, "[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." JA522.

The narrowness of the five-part test allowed many investment advisers, who were not ERISA fiduciaries, to "receive compensation from the financial institutions whose investment products they recommend[ed]." JA523. After surveying the available evidence, DOL found that the impact of conflicted advice "is large and negative." JA517. Some advisers frequently recommended investments that earned them or their firms "substantially more" compensation, even if those products were "not in investors' best interests." JA517. And investors who followed biased advice often selected "more expensive" or "poorer performing investments." JA517. Indeed, the record showed that "[a]n ERISA plan investor who rolls her retirement savings into an IRA could lose * * * as much as 23 percent of the value of her savings over 30 years of retirement by accepting advice from a conflicted financial adviser." JA516.

Plaintiff acknowledges (Br. 38) that "DOL g[ave] reasons" for its revised interpretation of "fiduciary." But plaintiff insists that the fiduciary rule is unreasonable because the DOL did not explain how the "underlying relationship between advisers and IRA investors * * * has changed." *Ibid.* That assertion mischaracterizes DOL's reasoning, which addressed that issue directly. Plaintiff also asserts, incorrectly, that the record is "devoid of evidence of harm to fixed annuity purchasers." *Ibid.* DOL cited a wide array of studies demonstrating the harm from conflicts of interest in the market for these and analogous investment products. See *infra* pp. 48-49, 51-52.

Plaintiff is left with its radical argument that market changes alone are *never* sufficient to justify modifying a preexisting regulation. The only case plaintiff cites for that proposition is *Goldstein* v. *SEC*, 451 F.3d 873 (D.C. Cir. 2006), which plaintiff has misread. *Goldstein* involved the SEC's attempt to regulate hedge funds under the Advisers Act. *Id.* at 876. Hedge funds are typically structured as limited partnerships. *Ibid.* Although hedge-fund managers are "investment advisers" under the Act, they could usually could avoid the Act's requirements by invoking a statutory exemption for advisers with fewer than fifteen "clients"—a term the SEC had previously defined to mean "the limited partnership[,] not the individual partners." *Id.* at 876, 880. For no reason other than its desire to regulate hedge funds, the SEC expanded its interpretation of "client[]" to include every limited partner in a partnership. *Id.* at 877. The Court rejected that interpretation for two reasons: (1) the lack of a reasonable "fit" between the statutory text and the SEC's interpretation, *id.* at 881, and (2) the lack of evidence demonstrating that each limited partner must be treated as a "client," *id.* at 882. The Court declined to credit the SEC's evidence of the increased prevalence and significance of hedge funds because that evidence did not address whether limited partners should be classified as an investment adviser's "client." *Id.* at 882-83.

The fiduciary rule suffers from neither defect. The rule is a reasonable construction of ERISA's expansive text. And DOL's explanation of the changed market for retirement-investment advice speaks directly to the rule's extension of fiduciary responsibility to investment advisers on whom retirement investors have become increasingly reliant. *Cf. LaRue* v. *DeWolff, Boberg & Assocs.*, 552 U.S. 248, 254 (2008) (declining to adopt an interpretation of ERISA at odds with the "changed" "landscape of employee benefit plans").

In sum, plaintiff has identified support for why DOL reasonably could have adhered to its prior interpretation of the fiduciary-investment-advice definition, but it has failed to identify any basis for concluding that DOL's contrary interpretation is unreasonable. The definition adopted by DOL in the fiduciary rule should therefore be upheld under *Chevron*.

II. DOL Lawfully Conditioned Certain Exemptions on Adherence to Fundamental Obligations of Fiduciary Conduct.

Plaintiff argues (Br. 27-30), incorrectly, that the revised PTE 84-24 and the BIC Exemption cannot lawfully require fiduciaries to IRAs to adhere to fundamental obligations of fair dealing and fiduciary conduct as a condition of eligibility.

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)(1). Congress 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.

The challenged exemptions—the BIC Exemption and PTE 84-24—permit fiduciaries who recommend investment products to receive conflicted compensation under certain conditions. One condition is compliance with Impartial Conduct Standards, under which fiduciaries must adhere to the duties of loyalty and prudence, "avoid misleading statements," and "receive no more than reasonable compensation." See JA575 (BIC Exemption); JA733 (PTE 84-24). DOL adopted this condition to ensure that conflicted investment recommendations—which Congress categorically barred under ERISA—would occur only with the appropriate safeguards. After an extensive rulemaking process, DOL made the requisite statutory findings. See JA577 (BIC Exemption); JA722 (PTE 84-24). Plaintiff does not contest those findings on appeal, and they are all that ERISA requires.

B. Plaintiff instead contends (Br. 27-28) that DOL's exemption authority is implicitly constrained by the structure of ERISA. 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. Plaintiff believes this structure unambiguously prevents DOL from requiring fiduciaries to Title II plans to comply with the duties of prudence and loyalty as a condition of an administrative exemption.

Congress's decision not to extend such duties to fiduciaries to IRAs in *all* circumstances says nothing about whether DOL can require compliance with those duties as a condition of engaging in transactions Congress deemed so problematic that it otherwise categorically prohibited them by statute. See JA359. The latter question—the actual question presented—turns solely on whether the exemption is administratively feasible, is in the interests of retirement investors, and protects investors' rights. See 26 U.S.C. 4975(c)(2). Congress's decision not to impose additional prerequisites confirms the agency's "unambiguous[]" and "broad authority to * * * impose substantive conditions governing the relationship between" fiduciaries and investors. JA357.

Plaintiff's bizarre logic would mean that *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," 29 U.S.C. 1111(a)—could not be designated as a condition to any exemption applicable to fiduciaries to IRAs. JA359-60. There is no indication that Congress intended, much less unambiguously provided, that DOL's exemption authority is constrained in this upside-down manner, taking off the table the very duties that Congress deemed most important in the Title I context. 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.

To bolster its atextual reading of ERISA, plaintiff relies on a single passage from the legislative history. See Br. 29 (citing H.R. Rep. No. 93-1280, at 295 (1974) (Conf. Rep.)). That passage does not discuss limitations on DOL's exemption authority; it merely restates the undisputed premise that Congress created different remedies in Title I and Title II. The relevant portions of the legislative history confirm DOL's authority to "curb[] conflict-of-interest abuse" by conditioning exemptions on "adequate safeguards to the interests of participants and beneficiaries." See, *e.g.*, Senate Report 32-33.

C. Plaintiff separately argues (Br. 30) that DOL's exemption authority is limited to "the ability to ease regulatory burdens." That restriction likewise appears nowhere in ERISA's text, which to the contrary permits DOL to adopt "conditional" exemptions tied to the behavior of regulated parties—as DOL has done for decades. For instance, the 1984 version of PTE 84-24 required, as conditions of eligibility, that fiduciaries accept no more than "reasonable compensation," and that conflicted transactions occur on terms that were "at least as favorable" to the retirement investor as those offered at arm's length. 49 Fed. Reg. at 13211. A different exemption requires fiduciaries to acknowledge fiduciary status in a written and enforceable management agreement. 49 Fed. Reg. 9494, 9506 (Mar. 13, 1984).

Plaintiff cannot prevail even under its reading of the statute. ERISA categorically prohibits fiduciaries from engaging in conflicted transactions with tax-preferred plans and IRAs. Administrative exemptions reduce the industry's regulatory burden by lifting this statutory bar and allowing such transactions to occur. By definition, therefore, the challenged exemptions cannot impose greater burdens than the prohibited-transaction bans imposed by Congress. Plaintiff resists this conclusion by arguing (Br. 29-30) that the exemptions "provide the only path" for its members "to continue to earn commissions" with respect to such plans, making resort to those exemptions mandatory. But DOL reasonably determined that regulated entities can adopt alternative compensation systems that would not trigger ERISA's prohibited-transaction provisions—relieving them of the need to invoke *any* exemption. JA1086-92. Because these non-conflicted alternatives are "not illusory," plaintiff is wrong that "the predominance of commission-based compensation [is] inescapably fixed for all time." JA361.[11]

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[11] Regardless, nothing in ERISA demands that DOL accommodate a hypothetical fiduciary whose business model for some reason *requires* the receipt of commissions when advising retirement investors. DOL needed only to give a reasoned explanation concerning the rule's response to such a fiduciary's dilemma—as the agency did. See JA859-60.

D. Finally, plaintiff cites two cases in which an agency's attempted exercise of new powers fell outside its statutory authority. Neither has any bearing on the authorizing statute here. In *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 471 (2001), the EPA attempted to set air-quality standards by referring to economic considerations its enabling statute "unambiguously bar[red]" it from examining. And in *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 146-47 (2000), the 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. By contrast, Congress gave DOL broad authority to construe ERISA's fiduciary definition, and to grant exemptions from ERISA's prohibited-transaction provisions so long as three findings are made.

III. DOL Lawfully Conditioned Certain Exemptions on the Receipt of Reasonable Compensation.

Plaintiff erroneously argues (Br. 50-54) that the BIC Exemption and the revised PTE 84-24 are unconstitutionally vague because a regulated entity may only invoke the exemptions if it does not receive "compensation * * * in excess of reasonable compensation." JA652 (BIC Exemption); JA749 (PTE 84-24).

"[E]conomic regulation is subject to a less strict vagueness test" because "businesses * * * can be expected to consult relevant [rules] in advance of action." *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982). The Constitution demands only that "a reasonably prudent person, familiar with the conditions the regulations are meant to address and the objectives the regulations are meant to achieve, would have fair warning of what the regulations require." *Freeman United Coal Mining Co.* v. *Federal Mine Safety & Health Review Comm'n*, 108 F.3d 358, 362 (D.C. Cir. 1997). "[P]erfect clarity and precise guidance have never been required." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 794 (1989).

The challenged condition satisfies this standard. It specifies that the phrase "reasonable compensation" has the same meaning as the identical phrases in 29 U.S.C. 1108(b)(2) and 26 U.S.C. 4975(d)(2), which have existed in ERISA since its enactment. Congress adopted the phrase against the backdrop of the common-law principle that a trustee is entitled to "compensation that is reasonable under the circumstances." Unif. Trust Code § 708(a) (2010); see Restatement (Third) of Trusts § 38(1) (2003). The meaning of the phrase has been further refined by DOL in decades-old regulations "mark[ing] the boundaries" of this fact-dependent inquiry by providing specific examples of excessive compensation. See JA374. And in the context of annuity sales, the previous version of PTE 84-24 similarly conditioned eligibility on a fiduciary receiving "consideration * * * not in excess of 'reasonable compensation.'" 42 Fed. Reg. at 32398; see also U.S. Dep't of Labor, *Conflict of Interest FAQs (Part I—Exemptions)* Q33 (Oct. 27, 2016), https://go.usa.gov/xRGJj (offering additional guidance on the challenged exemptions' reasonable-compensation condition). The Constitution thus does not prohibit DOL from incorporating this well-established standard into the BIC Exemption.

Plaintiff's contrary argument (Br. 50-51) rests on the discredited notion that that the term "reasonable" fails to provide regulated entities with constitutionally sufficient notice. "[T]he case law is replete with decisions rejecting vagueness challenges, like that raised here, to the words 'reasonable,' 'reasonably,' and 'unreasonably.'" JA372; see JA372-73 (listing cases). The term indeed appears in the very constitutional test plaintiff has invoked. See *Freeman*, 108 F.3d at 362. Nor would additional specificity be appropriate when, as here, the relevant inquiry—whether a fiduciary is charging too much money for advice—"is an inherently imprecise undertaking." JA374. As the district court recognized, a more precise standard risks opening "large loopholes allowing conduct which should be regulated to escape regulation." JA374 (citing *Freeman*, 108 F.3d at 362). The reasonable-compensation condition does not violate the Constitution merely because it is "marked by flexibility and reasonable breadth." See *U.S. Telecom Ass'n* v. *FCC*, 825 F.3d 674, 737 (D.C. Cir. 2016).

Plaintiff also faults (Br. 51) DOL for issuing allegedly contradictory guidance. But there is no tension between DOL's recognition that the reasonable-compensation standard "is a market based standard" and DOL's unwillingness "to condone all 'customary' compensation arrangements." JA599. "A price or payment is 'market based' if it is a product of competition; it is 'customary' if it occurs with some frequency." JA376. DOL reasonably declined to equate one concept with the other, lest regulated entities rely on customary practices to evade regulation. JA599.

Finally, plaintiff asserts (Br. 52-53) that the reasonable-compensation condition is unconstitutional because its violation would expose regulated entities to damages liability in state-law actions for breach. But plaintiff does not cite, and the government is not aware of, any case incorporating such considerations into the test for constitutional reasonableness—which, to the contrary, expresses a "greater tolerance of enactments with civil rather than criminal penalties." *Hoffman Estates*, 455 U.S. at 498-99. In any event, plaintiff's predictions are misplaced. As noted, the previous version of PTE 84-24—in effect for nearly four decades—limited fiduciary investment advisers to "compensation" that was "reasonable" when engaged in conflicted transactions involving annuities. *Supra* p. 12. Violations of this condition could be enforced by DOL and investors through civil litigation under Title I of ERISA or by the IRS through an excise tax. See *supra* pp. 6-7. Yet plaintiff has "fail[ed] to identify a single instance in which an insurance company was caught by surprise" and penalized as a result. JA377.

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

Plaintiff next challenges (Br. 30-35) DOL's decision to condition eligibility for the BIC Exemption on the presence of certain provisions in fiduciaries' contracts with IRA 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. JA571. Plaintiff contends, 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 and breach of fiduciary duty. See JA56-57. The BIC Exemption 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 the specified provisions by suing under a preexisting state-law cause of action, the same way they always have when advisers have not adhered to their agreements. JA56-57. 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).

In *Astra USA, Inc.* v. *Santa Clara County*, 563 U.S. 110 (2011), relied on by plaintiff, the question was whether a 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. That question has nothing to do with the question in this case, which is 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 JA368. 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.

Plaintiff contends (Br. 34-35) that, even if the challenged condition does not create a cause of action, it is unreasonable under the APA because these contract conditions "undermine[] *Sandoval*." This claim is not properly before the Court because plaintiff did not raise it before the district court. JA60. It also lacks merit. Plaintiff assumes that, because Congress did not deem private enforcement of fiduciary breaches necessary for IRA fiduciaries in *all* circumstances (as it did for Title I fiduciaries), Congress implicitly prohibited DOL from imposing contractual requirements that could be enforced in private actions against IRA fiduciaries in the *particular* circumstance of granting exemptions from the prohibited-transaction provision. That assumption is unwarranted in light of DOL's express authority to issue exemptions conditioned on a broad range of conduct—which authority Congress limited only by requiring DOL, after soliciting public comment, to find the exemption administratively feasible, in the interests of, and protective of the rights of retirement investors. DOL made the requisite findings here, and plaintiff has not contested them. Congress's endorsement of private enforcement in the context of Title I only underscores that DOL reasonably adopted the same safeguard in the context of permitting otherwise prohibited transactions to proceed.

Moreover, "rules requiring that regulated entities include particular terms in written contracts are far from novel." JA365. In the ERISA context, for instance, PTE 84-14 requires fiduciaries to acknowledge fiduciary status in "written management agreement[s]," 49 Fed. Reg. at 9506, while PTE 06-16 requires fiduciaries to accept no more than "reasonable" compensation "in accordance with the terms of a written instrument," 71 Fed. Reg. 63786, 63797 (Oct. 31, 2006). The Department of Transportation, the Federal Communications Commission, and the Department of Agriculture have imposed analogous requirements on regulated entities in other contexts. JA365-66. Such contractual terms, like the terms specified in the BIC Exemption, are "potentially enforceable in a state law breach of contract action." JA367. Accepting plaintiff's argument would call into question these and other common regulatory requirements—such as the presence of contractual disclosure and notice provisions—that an aggrieved party could invoke state law to enforce. It would also undermine many other ERISA exemptions that the financial-services industry has invoked to engage in conflicted transactions for more than forty years. Plaintiff has cited no authority for that remarkable result.

V. The Fiduciary Rule's Treatment of Fixed-Indexed Annuities Is Not Arbitrary or Capricious.

Finally, plaintiff argues (Br. 40-46) that DOL violated the APA by requiring that conflicted transactions involving fixed-indexed annuities satisfy the BIC Exemption rather than the amended PTE 84-24. But that decision, which DOL based on an extensive record, more than satisfies the "highly deferential" arbitrary-and-capricious standard. See *American Wildlands* v. *Kempthorne*, 530 F.3d 991, 997

(D.C. Cir. 2008). Under that standard, a reviewing court does not "substitute [its] own judgment for that of the agency"; the court "examine[s] only" whether the agency "consider[ed] * * * the relevant factors," whether the agency's decision "is supported by substantial evidence," and whether "there is a rational connection between the facts and the choice made." *Wisconsin Valley Improvement* v. *FERC*, 236 F.3d 738, 745 (D.C. Cir. 2001) (quotation marks omitted). The key question is whether the agency has provided the "minimal level of analysis" necessary to ensure that "its path may reasonably be discerned." *Encino Motorcars, LLC* v. *Navarro*, 136 S. Ct. 2117, 2125 (2016) (quotation marks omitted).[12]

A. DOL's treatment of fixed-indexed annuities was reasonable in light of the extensive record the agency compiled. That record demonstrates that fixed-indexed annuities are complex and risky products whose sale is "susceptible to abuse." JA586. Their returns can vary widely because they are tied to the selection and performance of a crediting index. JA887. And investors generally do not receive returns that reflect the full amount of index-linked gains because of complicated methods of crediting interest that may not be apparent on the face of the annuity contract.

[12] Plaintiff's brief asserts that the fiduciary rule is procedurally invalid because it was denied an opportunity to comment on (1) DOL's decision to shift fixed-indexed annuities from PTE 84-24 to the BIC Exemption, Br. 42, and (2) DOL's decision to permit financial institutions whose contracts with investors waived claims for punitive damages and rescission to qualify for the BIC Exemption, Br. 49 & n.7. The district court properly rejected these procedural arguments. See JA382-84. By failing to engage with the court's analysis, plaintiff has abandoned these claims. See *World Wide Minerals, Ltd.* v. *Republic of Kazakhstan*, 296 F.3d 1154, 1160 (D.C. Cir. 2002).

JA887, 1052. These methods of crediting interest limit investors' ability to realize market gains and impose considerable risks on them. JA891. DOL also detailed a number of other features of fixed-indexed annuities that would not be obvious to typical investors. JA1052.

DOL reasonably found that retirement investors—especially individual investors—are "acutely dependent" on investment advisers when purchasing fixed-indexed annuities. JA586-87, 1052, 1070. Without 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)." JA586. DOL therefore concluded that, in light of their "risks and complexities," fixed-indexed annuities should be subject to the same protective conditions that the fiduciary rule applies to other "complex" products—as opposed to the "somewhat more streamlined" conditions the rule applies to "relatively simpler annuity products." JA586. Furthermore, by regulating fixed-indexed annuities no differently from similarly complex products, such as "variable annuities * * * and mutual funds," DOL "create[d] a level playing field" so as not to encourage advisers to "preferentially recommend indexed annuities." JA586.

B. Plaintiff contends (Br. 41-42) that the BIC Exemption is unreasonable in light of the Harkin Amendment to the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 989J, 124 Stat. 1376 (2010) (Dodd-

Frank Act). That provision requires the SEC to treat fixed-indexed annuities as "exempt securities described under * * * the Securities Act of 1933" if their sale satisfies certain standards the Dodd-Frank Act sets forth. Plaintiff argues, text notwithstanding, that the Harkin Amendment provides that fixed-indexed annuities must be "treated as non-securities" for purposes of ERISA. Br. 41-42. The exemption allegedly violates that requirement by requiring transactions involving fixed-indexed annuities to satisfy the same conditions as transactions involving securities (such as mutual funds). *Ibid.* But the BIC Exemption does not "regulate annuities as 'securities.'" JA381. The exemption—like other exemptions DOL has issued, including the previous version of PTE 84-24, see *supra* pp. 12-13—merely applies the same investor safeguards to conflicted transactions involving both securities and fixed-indexed annuities.

In any event, the Harkin Amendment contains no such requirement. It applies by its terms to the SEC and the Securities Act, not to DOL and ERISA. And federal securities laws need not be construed in parallel with ERISA. Federal securities laws apply to securities transactions regardless of the nature of the investor, while ERISA imposes additional and more stringent obligations on advisers to retirement investors in tax-preferred funds in particular. See *Secretary of Labor* v. *Fitzsimmons*, 805 F.2d 682, 689 (7th Cir. 1986) (en banc). Moreover, this particular securities law 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). The two regimes are not coextensive.

C. Plaintiff contends (Br. 42-43) that the record lacks evidence demonstrating the negative impacts of conflicts of interest in the market for fixed-indexed annuities in particular. But the APA requires only a "reasoned explanation," not a specific quantum of data. *Stilwell* v. *Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009). DOL examined and discussed a wide body of evidence demonstrating the harms of conflicted advice in the market for these and other insurance products. On the existing record, DOL reasonably concluded that: (1) advisers recommending fixed-indexed annuities receive commissions, and face attendant conflicts of interest, that are larger and less transparent than those empirically demonstrated to harm mutual-fund investors, JA899-900; (2) relative to other investment products, fixed-indexed annuities are more complex and less transparently priced, leaving investors more vulnerable to advisers' conflicts, JA891-94; and (3) consumer protections applicable to annuity recommendations vary across States, JA810-11. DOL also noted that other regulatory bodies, including the SEC and FINRA, have expressed concerns that sales material for fixed-indexed annuities do not fully describe them and could confuse or mislead investors. JA585-86, 811.

DOL buttressed its qualitative conclusions with nine empirical studies of the mutual-fund market, which together demonstrated that IRA investors receiving conflicted advice can expect their investments to underperform. JA926-28. Relying on those studies, DOL estimated that conflicts of interest could cost investors between $95 billion and $189 billion over the next ten years. JA926. And that estimate, DOL cautioned, could understate the actual harm to consumers, because it reflected just one of many types of losses that can arise from conflicted transactions, just one of many types of conflicts of interest, and just one of many segments of the retirement-investment market. JA926, 1067.

Plaintiff responds (Br. 43) that DOL ignored record evidence suggesting that there have been "very few consumer complaints" about fixed-indexed annuities. But DOL reasonably credited reports to the contrary. JA900 (noting that "increased sales of fixed-indexed annuities have been followed by complaints that the products were being sold to customers who did not need them"). Plaintiff also challenges (Br. 43) DOL's reliance on mutual-fund studies. But 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 only one segment of that industry so long as the comparison is "reasonable," "[w]hether or not" that segment is "fully representative of the whole industry." *National Small Shipments Traffic Conference* v. *Civil Aeronautics Bd.*, 618 F.2d 819, 831 & n.27 (D.C. Cir. 1980). Here, DOL explained that mutual funds and annuities are subject to similar regulatory regimes, see JA809, 879, and are sold under similar commission-based compensation regimes, see JA896-99. It was therefore reasonable for DOL to extrapolate data from the mutual-funds market to the fixed-indexed-annuities market.

D. Plaintiff contends that the BIC Exemption is unworkable, and therefore arbitrary and capricious, in three respects.

1. Plaintiff argues (Br. 43-46) that DOL failed to consider concerns that the fixed-indexed-annuity industry could not comply with the BIC Exemption as originally drafted. But DOL requested comment on this question in its notice of proposed rulemaking, as plaintiff acknowledges. See Br. 44. And DOL revised the final exemption "so that the conditions * * * are less burdensome and more readily complied with by * * * distributors of insurance products." JA586.

Relatedly, plaintiff faults DOL (Br. 48) for not classifying independent marketing organizations ("IMOs") as "financial institutions" eligible for the BIC Exemption.[13] But DOL rejected that proposal to ensure that the exemption's definition of "financial institution" is limited to "regulated entities * * * subject to well-established regulatory conditions and oversight." JA635. DOL further noted that IMOs remain free to request individual exemptions from ERISA's prohibited-transaction provisions. JA635. In light of these reasoned explanations, the district court correctly concluded that DOL "adequately addressed the questions that it itself posed." JA387.

[13] IMOs are middlemen in the annuity distribution system whose principal function is to market, distribute, and wholesale various insurance products. JA870-71.

2. Plaintiff argues (Br. 49) that the BIC Exemption is unworkable because fiduciaries whose contracts include waivers of punitive damages or rescission remain eligible for the exemption. Plaintiff believes this is a problem because fixed-indexed-annuity contracts must be approved by state insurance departments (who are unlikely to authorize such waivers), while securities contracts need not be—thus advantaging the latter products over the former. *Id.* But this *absence* of regulation is not arbitrary or capricious. To the extent any disparity in treatment exists, it is caused not by the fiduciary rule but by differences in the regulatory regimes governing insurance products and securities. And DOL reasonably "draft[ed]" the fiduciary rule "to work in harmony with other state and federal laws." JA798; see JA390-91.

3. Plaintiff argues (Br. 46-48) that the BIC Exemption is unreasonable as applied to insurance companies who sell their products through independent insurance agents.[14] Plaintiff reads the exemption to require, as a condition of eligibility, that each company certify that independent agents have complied with the Impartial Conduct Standards with respect to the sale of *every* company's products, not merely their own products. See Br. 47. This argument is forfeited because plaintiff failed to raise it during the notice-and-comment process. JA388-89; see *National Wildlife Fed'n* v. *EPA*, 286 F.3d 554, 562 (D.C. Cir. 2002) (per curiam).

[14] Independent insurance agents sell insurance products from multiple companies. JA869-70.

The argument, in any event, lacks merit. The BIC Exemption does not "demand the impossible," JA390; it requires only that financial institutions adopt "policies and procedures reasonably and prudently designed to ensure that [its agents] adhere to the Impartial Conduct Standards," JA588. To clarify this standard in response to plaintiff's belated concerns, DOL has explained that the exemption "does not require insurance companies to exercise supervisory responsibility with respect to the practices of unrelated and unaffiliated insurance companies." *Conflict of Interest FAQs* Q22. A company need only "adopt * * * prudent supervisory and review mechanisms to safeguard the agent's compliance" with respect to its own products. *Ibid.* Although plaintiff speculates that courts may take a different and more expansive view of the exemption's requirements, a rule may not be invalidated as arbitrary or capricious on this basis alone—especially given that courts typically give "controlling" weight to an agency's interpretation of its own regulation. See *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,977 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Garamond 14-point font, a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia 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.

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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.

* * * *