

****ORAL ARGUMENT SCHEDULED FOR DECEMBER 8, 2017******IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

The National Association for Fixed
Annuities,

Appellant,

vs.

United States Department of Labor,
et al.,

Appellees.

Case No. 16-5345

**APPELLANT'S UNOPPOSED MOTION
TO CONTINUE ORAL ARGUMENT**

Appellant the National Association for Fixed Annuities (“NAFA”) respectfully moves to continue the oral argument currently scheduled for December 8, 2017 at 9:30 a.m. Appellees the United States Department of Labor and Secretary of Labor R. Alexander Acosta (collectively, “DOL”) take no position on NAFA’s motion. The grounds for this motion are as follows:

The issues on appeal here include whether the DOL’s promulgation of the “fiduciary rule” and certain related prohibited transaction exemptions (81 Fed. Reg. 20946-21002 to be codified at 29 C.F.R. § 2510.3-21 and 81 Fed. Reg. at 21002-21088 & 22010-22020) (the “Rule”) exceeds congressional intent and

statutory authority, whether DOL violated the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* in promulgating the Rule, and whether the Rule's mandate that compensation be "reasonable" is unconstitutional under the Due Process Clause of the United States Constitution.

On October 1, 2017, following the completion of briefing, the Clerk entered an order scheduling oral argument for December 8, 2017. The currently-scheduled oral argument should be continued, however, because of unique and extraordinary circumstances related to the DOL Rule and this case. *First*, many of the same legal issues before this Court have been under consideration by the United States Court of Appeals for the Fifth Circuit since July 31, 2017, and a decision is anticipated shortly. *Second*, the President has directed DOL to perform a full reassessment of the Rule, and DOL has adopted a series of delays in implementation of key elements of the Rule, most recently proposing a delay extending certain key elements of the Rule until July 1, 2019. Most recently, on November 1, 2017, DOL submitted a proposed notice of final rulemaking of this latest proposal to the Office of Management and Budget ("OMB") for final OMB review and publication. The Fifth Circuit decision and ongoing DOL reassessment may obviate the need for this appeal, in whole or in part.

As a result, continuing oral argument is warranted and justified under the extraordinary cause standard of the Federal Rules of Appellate Procedure and the

rules of this Court. As of the filing of this motion, the merits panel that will hear NAFA's appeal has not been revealed to the parties.

FACTUAL BACKGROUND

DOL published the Rule on April 8, 2016, during the Obama Administration. See 81 Fed. Reg. 20946-21,02; 81 Fed. Reg. at 21002-21088 & 22010-22020. This case and several other lawsuits followed, all challenging the Rule. See *Chamber of Commerce of the United States, et al. v. Perez, et al.*, Case No. 17-10238 (5th Cir.) ("*Chamber of Commerce*"); *American Council of Life Insurers, et al. v. United States Dep't of Labor, et al.*, Case No. 17-10238 (5th Cir.); *Indexed Annuity Leadership Council, et al. v. Perez, et al.*, Case No. 17-10238 (5th Cir.); *Market Synergy Grp., Inc. v. Perez, et al.*, Case No. 17-3038 (10th Cir.); *Thrivent Financial for Lutherans v. Perez*, Case No. 16-cv-03289 (D. Minn.) ("*Thrivent*"). Specifically as it concerns this motion, the *Chamber of Commerce* appeal addresses many of the issues before this Court. Compare NAFA's January 17, 2017 Statement of the Issues at 1-3 with *Chamber of Commerce*, Appellant's May 2, 2017 Brief - Statement of Issues at 24-25. A panel of the Fifth Circuit held oral argument on July 31, 2017. As of the date of this filing, the Fifth Circuit has not issued a decision.

Following a change in Administration, and while these lawsuits were ongoing, DOL changed its positions regarding the Rule and the Rule's

applicability date. In February 2017, President Trump directed DOL to examine the Rule and reassess whether it “is likely to harm investors due to a reduction [in] Americans’ access to certain retirement savings offerings, retirement product structures, retirement savings information, or related financial advice,” whether the Rule’s anticipated applicability date has resulted in “dislocations or disruptions within the retirement services industry,” and whether the Rule is likely to cause “an increase in litigation, and an increase in the prices that investors and retirees must pay to gain access to retirement services.” 82 Fed. Reg. 9675 (Feb. 3, 2017). DOL’s reassessment remains ongoing.

In light of the President’s directive, DOL extended the Rule’s applicability date (until June 9, 2017) and is in the process of extending the applicability date for some of the Rule’s key exemptions (until July 1, 2019). *See* 82 Fed. Reg. 12319, 12320, 12325 (Mar. 2, 2017); 82 Fed. Reg. 41365 (Aug. 31, 2017). As DOL explained: “The primary purpose of the proposed amendments is to give [DOL] the time necessary to consider possible changes and alternatives to these exemptions. [DOL] is particularly concerned that, without a delay in the applicability dates, regulated parties may incur undue expense to comply with conditions or requirements that it ultimately determines to revise or repeal.” 82 Fed. Reg. 41365. On November 1, 2017, DOL submitted to OMB the latest proposed notice of final amendments to certain key elements of the Rule for

publication. *See Thrivent*, ECF No. 109 at 1-2 (citing OMB, List of Regulatory Actions Currently Under Review, <https://www.reginfo.gov/public/jsp/EO/eoDashboard.jsp> (scroll down to “Department of Labor” heading)).

ARGUMENT

The Federal Rules of Appellate Procedure and the D.C. Circuit Rules require “extraordinary cause” for continuing oral argument once it has been scheduled. *See* Fed. R. App. P. 34(g); D.C. Circuit Rule 34(g). Nonetheless, NAFA believes the present circumstances meet this standard.

First, given the similarities of issues on appeal here and in the *Chamber of Commerce* appeal, a decision by the Fifth Circuit may impact NAFA’s appeal with this Court. For example, if the Fifth Circuit were to vacate the Rule, this appeal would be largely superfluous.

Second, DOL’s position on both the Rule itself and in litigation in connection with the Rule has been evolving with the new Administration. As part of DOL’s reevaluation of the Rule, DOL has delayed key portions of the Rule’s applicability date on several occasions, most recently proposing an 18-month delay until July 1, 2019. *See* 82 Fed. Reg. 9675 (Feb. 3, 2017); 82 Fed. Reg. 12319, 12320, 12325 (Mar. 2, 2017); 82 Fed. Reg. 41365 (Aug. 31, 2017). DOL’s commitment to a thorough hard-look review is demonstrated by DOL’s past delays and the current proposal to extend the applicability date of key provisions of the

Rule until July 1, 2019. These are unique and extraordinary circumstances, and a continuance of oral argument will bring clarity to the issues under consideration during DOL's administrative review.

Additionally, DOL's evolving administrative position has impacted DOL's litigation positions. For example, in both the *Chamber of Commerce* appeal and *Thrivent* cases, DOL initially took the position that the Rule's restrictions on arbitration provisions did not violate the Federal Arbitration Act. Then, in DOL's July 3, 2017 Fifth Circuit brief and July 5, 2017 Notice to the *Thrivent* court, DOL admitted "that the arbitration provision [in the Rule] exceeded [DOL's] authority because it could not be harmonized with the Federal Arbitration Act." *Thrivent v. Perez*, ECF No. 54 at 1-2; see also *Chamber of Commerce v. Department of Labor*, Appellee DOL's July 3, 2017 Brief at 59-65.¹ On November 3, 2017, the *Thrivent* Court granted a preliminary injunction against DOL concerning certain key provisions of the Rule. See *Thrivent*, ECF No. 111 at 19 ("The implementation and enforcement of the [Rule's] BIC Exemption's anti-arbitration condition against Thrivent is hereby preliminary enjoined [and] Thrivent will not be considered out of compliance with [the Rule's] BIC Exemption"). The *Thrivent* Court also stayed the litigation pending further administrative reassessment by DOL of the

¹ After the *Thrivent* court denied DOL's first request for a stay (ECF No. 44), DOL renewed the request for stay of the litigation because "circumstances have changed" and noted that "there is no need for an immediate judicial ruling." *Thrivent v. Perez*, ECF No. 62 at 1-2.

Rule, stating that “[s]taying this matter will allow the administrative process to fully develop, possibly resolving this dispute, and thereby promoting judicial economy.” *Id.* at 19-20.

Similarly here, DOL’s administrative review and the Fifth Circuit’s decision could alter both DOL’s view of the Rule and DOL’s litigation position. In light of the foregoing, it is in the parties’ and Court’s interest to continue oral argument so as not to expend unnecessary judicial resources.

This Court’s recent decision in *Murray Energy* supports NAFA’s motion to continue oral argument. *See Murray Energy Corp. v. Environmental Protection Agency*, Case No. 15-1385 (D.C. Cir. April 11, 2017) (per curiam order). In *Murray Energy*, the EPA requested continuance of oral argument based on its ongoing review of a challenged rule that could, in turn, change the agency’s position in the litigation. In light of this argument, this Court granted the motion to continue oral argument. *Id.* The same logic applies here and warrants a continuance of oral argument.

Finally, a delay in oral argument will not cause any prejudice. It will give DOL further time to refine its administrative position and it will promote comity, judicial economy, and efficiency by allowing the parties and the Court to take account of the Fifth Circuit’s decision and reasoning.

On October 31, 2017, NAFA's counsel requested DOL's position on its motion to continue oral argument. DOL's counsel stated that DOL takes no position on NAFA's motion.

CONCLUSION

For the foregoing reasons, NAFA respectfully moves the Court to continue the oral argument currently scheduled for December 8, 2017. NAFA respectfully requests that the Court either order the parties to file a joint status report within ten days of a decision by the Fifth Circuit in the *Chamber of Commerce* appeal or, alternatively, file a joint status report within 90 days of entry of this Court's order, which was the approach this Court adopted in *Murray Energy*.

Respectfully submitted,

/s/ Philip D. Bartz

Philip D. Bartz

Jacob A. Kramer

Bryan J. Harrison

Adam L. Shaw

BRYAN CAVE LLP

1155 F Street, N.W., Suite 700

Washington, D.C. 20004

(202) 508-6000

Counsel for Appellant NAFA

Dated: November 6, 2017

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 27(d)(1) and Circuit Rule 27(a)(1), I hereby certify that the foregoing Unopposed Motion to Continue Oral Argument contains 1,624 words, and is within the word limit set by Fed. R. App. P. 27(d)(2)(A).

/s/ Philip D. Bartz

Philip D. Bartz

Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of November 2017, a copy of the foregoing Unopposed Motion to Continue Oral Argument was served electronically through the Court's CM/ECF system on all registered counsel.

Service was accomplished on the following through the CM/ECF filing system:

Michael S. Raab
Michael Shih
United States Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Avenue, Room 7268
Washington, D.C. 20530

Counsel for Appellees

/s/ Philip D. Bartz

Philip D. Bartz

Counsel for Appellant