

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

STEVE SHERESKY, *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

25 Civ. 8935 (PGG)

NOTICE OF MOTION

PLEASE TAKE NOTICE that, upon the accompanying *Memorandum of Law in Support of Defendants' Motion to Dismiss the First Amended Class Action Complaint*, defendants United States of America, Lori Chavez-Deremer, Daniel Aronowitz, and Janet Dhillon, by their attorney, Jay Clayton, United States Attorney for the Southern District of New York, hereby move this Court to dismiss the First Amended Class Action Complaint.

Dated: January 16, 2026
New York, New York

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**MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS
THE FIRST AMENDED CLASS ACTION COMPLAINT**

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Defendant United States of America and defendants Lori Chavez-Deremer, Daniel Aronowitz, and Janet Dhillon, each sued in their official capacity as officials of the United States Department of Labor (“DOL”), respectfully submit this memorandum of law in support of their motion to dismiss the First Amended Class Action Complaint, ECF No. 37 (the “Amended Complaint” or “Am. Cplt.”).¹

PRELIMINARY STATEMENT

For decades, DOL has answered questions from individuals and organizations potentially affected by the Employee Retirement Income Security Act (“ERISA”) by providing advisory opinions on the application of ERISA to particular factual scenarios described by the requesting party. In responding to requests, DOL does not conduct an investigation, factfinding, or adjudication; instead, it relies on information and documents submitted by the requester. The advisory opinion that results is not binding law; any force it has comes from its power to persuade. *See Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024). In subsequent legal proceedings, parties are free to dispute the accuracy of the facts relied on, the legal interpretation applied, or any other matter going to the persuasiveness of the advisory opinion.

Plaintiffs here ask the Court to set aside DOL Advisory Opinion No. 2025-03A (the “Advisory Opinion”), in which DOL—relying on facts submitted by Morgan Stanley Smith Barney LLC (“Morgan Stanley”)—expressed the view that certain Morgan Stanley incentive compensation plans “appear[ed]” not to be covered by ERISA. Plaintiffs are currently engaged in arbitrations against Morgan Stanley in which they assert to the contrary that ERISA governed these

¹ Defendant Dhillon, sued in her official capacity as Principal Deputy Assistant Secretary of the Department of Labor, has ceased to hold that office. The position is currently vacant. When it is filled, her successor will be automatically substituted for Ms. Dhillon pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

plans and that Morgan Stanley violated ERISA by cancelling deferred compensation due to them under the plans. They claim that the Advisory Opinion harms them because Morgan Stanley has relied on it in the arbitrations and will continue to do so. On the merits, Plaintiffs contend that the facts presented by Morgan Stanley to DOL were misleading, that the Advisory Opinion applied the wrong legal standard, and that the process leading to the Advisory Opinion was procedurally improper.

Plaintiffs lack standing to assert the claims in their Amended Complaint, in which they seek to set aside the Advisory Opinion. Plaintiffs are free to make their arguments against the Advisory Opinion to their arbitrators, who will reach their own decisions on whether ERISA applies, including by considering whether the Advisory Opinion is persuasive. But the arbitrators' independent decisionmaking prevents Plaintiffs from showing the certainly impending injury, causation, and redressability necessary for them to have standing for their claims in this Court. Moreover, their claims also fail because the Advisory Opinion is inherently tentative and does not determine rights or obligations or have legal consequences, and thus is not a final agency action challengeable under the Administrative Procedure Act.

Accordingly, the Court should dismiss the Amended Complaint.

BACKGROUND

I. ERISA Advisory Opinions

It has long been the Department of Labor's "practice . . . to answer inquiries of individuals or organizations affected, directly or indirectly, by [ERISA] as to their status under the Act and as to the effect of certain acts and transactions." Office of Employee Benefits Security, *Employee Benefits Plans—Advisory Opinion Procedure*, 41 Fed. Reg. 36,281, 36,281 (Aug. 27, 1976); *see also id.* at 36,282. In 1976, DOL published a notice that "describes the general procedures of the Department in issuing information letters and advisory opinions under [ERISA]." *Id.* at 32,681.

These procedures, generally referred to as “ERISA Procedure 76-1,” appear at 41 Fed. Reg. 36,281-83 and on DOL’s website at <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/filing-requests-for-erisa-aos>. The procedures’ purpose is “to promote efficient handling of inquiries and to facilitate prompt responses” by the agency. 41 Fed. Reg. at 36281.

“Any individual or organization affected directly or indirectly, by the Act may request an information letter or an advisory opinion from the Department.” ERISA Procedure 76-1, § 4.01. An “information letter” is a response by DOL that “does no more than call attention to a well-established interpretation or principle of the Act, without applying it to a specific factual situation,” whereas an “advisory opinion” “interprets and applies the Act to a specific factual situation.” *Id.* §§ 3.01-3.02.

Although an advisory opinion, unlike an information letter, pertains to a “specific factual situation,” DOL does not conduct an investigation regarding the facts or make any factfinding. Instead, DOL depends on the party requesting the advisory opinion to submit both “[a] detailed description” of the relevant facts and “a copy of all documents” relied on. *Id.* at § 6.02(b). An advisory opinion “assumes that all material facts and representations set forth” by the requester “are accurate.” *Id.* § 10. Indeed, “as a routine matter, [DOL] ask[s] opinion requesters to review and confirm the facts” to be relied on in an advisory opinion prior to its issuance because DOL depends on the requester to inform it of the relevant facts. *Am. Cplt. Ex. 12*, at 11.

When an advisory opinion is issued, it remains contingent on the accuracy of the assumed facts submitted by the requester:

An advisory opinion is an opinion of the Department as to the application of one or more sections of the Act, regulations promulgated under the Act, interpretive bulletins, or exemptions. The opinion assumes that all material facts and representations set forth in the request are accurate, and applies only to the situation

described therein. Only the parties described in the request for opinion may rely on the opinion, and they may rely on the opinion only to the extent that the request fully and accurately contains all the material facts and representations necessary to issuance of the opinion and the situation conforms to the situation described in the request for opinion.

ERISA Procedure 76-1, at § 10.

Hundreds of ERISA advisory opinions issued by DOL are accessible on DOL's website. <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions>.

II. Advisory Opinion No. 2025-03A

On August 1, 2024, Morgan Stanley submitted a written request for an advisory opinion. Am. Cplt. ¶ 36 & Ex. 3 (letter request).² Morgan Stanley asked DOL to issue an advisory opinion on whether two Morgan Stanley incentive compensation plans “(i) . . . are not an ‘employee pension benefit plan’ under ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A), and (ii) . . . qualify as an exempt ‘bonus program’ under 29 C.F.R. § 2510.3-2(c).” Am. Cplt. Ex. 3 at 2-3.

Pursuant to ERISA Procedure 76-1, Morgan Stanley submitted both written descriptions of relevant facts and copies of relevant documents. Am. Cplt. ¶¶ 38, 39; *see* Advisory Opinion, 2025 WL 2642870, at *1-*5. As the Advisory Opinion was being prepared, DOL provided a draft statement of facts to Morgan Stanley for review and to confirm the accuracy of those facts. Am. Cplt. ¶¶ 54-55 & Exs. 9, 12. Plaintiffs allege that when Morgan Stanley responded to the draft statement of facts with what it termed “minor clarifications,” Morgan Stanley in fact “concealed a factual discrepancy” from DOL. Am. Cplt. ¶¶ 55, 56 & Ex. 10.

² For the purpose of this threshold motion to dismiss, Defendants assume the truth of the non-conclusory factual allegations of the Amended Complaint and facts reflected in its exhibits. Defendants reserve the right, with respect to merits briefing after production of the administrative record, to dispute these facts and to assert that particular allegations in the Amended Complaint or its exhibits are not properly considered because they are outside the administrative record for the Advisory Opinion.

Morgan Stanley also requested a conference with DOL personnel, as provided by ERISA Procedure 76-1. Am. Cplt. Ex. 3, at 9. The Amended Complaint alleges that DOL personnel did in fact have a conference and other communications with Morgan Stanley and its representatives. Am. Cplt. ¶¶ 42-50.

On September 9, 2025, DOL issued the Advisory Opinion. 2025 WL 2642870. The Advisory Opinion carefully and repeatedly explains that it is premised on specific materials and representations by Morgan Stanley.³ After reviewing relevant facts submitted by Morgan Stanley, the Advisory Opinion notes that ERISA’s definition of “employee benefit pension plan” covers a plan that “by its express terms or as a result of surrounding circumstances . . . —(i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond.” *Id.* at *3 (quoting ERISA § 3(2)(A)). The Advisory Opinion states that Morgan Stanley’s incentive compensation plans “do

³ See Advisory Opinion, 2025 WL 2642870, at *1 (“*You represent* that the Firm’s financial advisors receive a guaranteed base salary and are eligible to earn cash incentive compensation which is paid throughout the year.”); *id.* (“In this regard, *you represent* that by conditioning payment on continuous employment and good guardianship, the deferred compensation awards are designed to motivate advisors to stay with the Firm and to comply with firm policies that require advisors to act as good stewards of client assets.”); *id.* at *2 (“*You represent* that payments under these relatively uncommon situations are designed to uphold the awards’ primary purposes of encouraging long-term retention of financial advisors and promoting good conduct.”); *id.* (“*You also state* that the awards are structured to meet the expectations of the Firm’s financial regulators regarding the use of deferred compensation to motivate good conduct and penalize bad conduct.”); *id.* at 4 (“In this case, however, *the materials you submitted* do not appear to indicate the existence of any of the surrounding circumstances that the Department has previously said would tend to support the finding that an arrangement constitutes a pension plan.”); *id.* (“Taking into account both the program’s design and operative provisions, its annual disclosures, the data on when most awards were received, *and all other materials you provided*, in the Department’s view, the mere fact that the terms of the program contemplate limited situations where an award *could* be paid after termination of employment does not implicate a deferral of income of the kind contemplated by ERISA section 3(2)(A).”) (emphasis added in all parentheticals in this footnote, other than the final italicization).

not, by their express terms, make payment of deferred incentive compensation awards contingent on termination of employment or retirement.” *Id.* at *3. Then, noting that under Morgan Stanley’s incentive compensation plans “awards may be paid after the end of employment in limited circumstances,” the Advisory Opinion considered whether this fact, considered along with other surrounding circumstances and in light of the statutory language and prior advisory opinions, means “the program may be providing retirement income or results in a deferral of income for periods extending to the termination of covered employment or beyond” such that ERISA could apply. *Id.* at *3 (citing four prior advisory opinions). The Advisory Opinion concludes:

[T]he materials . . . submitted [by Morgan Stanley] do not appear to indicate the existence of any of the surrounding circumstances that the Department has previously said would tend to support the finding that an arrangement constitutes a pension plan under [ERISA section 3(2)(A)].

Id. at *4.

The Advisory Opinion also considers whether Morgan Stanley’s incentive compensation plans are in any event excluded from the definition of “pension plan” as “payments made by an employer . . . as bonuses for work performed, unless such payments are systematically deferred to the termination of covered employment or beyond, or so as to provide retirement income to employees,” as clarified by DOL’s regulation at 29 C.F.R. § 2510.3-2(c) (the “Bonus Regulation”). *Id.* at *3 (quoting 29 C.F.R. § 2510.3-2(c)) (quotation marks omitted). The Advisory Opinion cites four prior advisory opinions applying the Bonus Regulation, including one in which the calculation of compensation was “much like [Morgan Stanley’s] deferred incentive compensation program.” *Id.* at *4. It also notes the purposes and circumstances of payments under the Morgan Stanley plans, which “support the conclusion that the awards are bonuses” and notes that the information provided by Morgan Stanley show that payments to former employees were “only incidental” and not “systematically deferred.” *Id.* at *5 (quotation omitted). Accordingly, the Advisory Opinion

concludes, “it is the Department’s view that the deferred incentive compensation program appears to be a bonus program within the meaning of 29 C.F.R. § 2510.3-2(c).” *Id.* at *5.

Finally, the Advisory Opinion expressly states that it is subject to ERISA Procedure 76-1, including Section 10 of the procedures. *Id.* at *5. As noted above, Section 10 underscores that DOL advisory opinions premised on the assumption that accurate material facts have been submitted and that advisory opinions cannot be relied on to the extent the facts described are inaccurate or the assumed factual situation does not match the actual situation. ERISA Procedure 76-1, at § 10.

III. Allegations of the Amended Complaint

Plaintiffs are three former financial analysts at Morgan Stanley. Am. Cplt. ¶ 1. They allege that when they left Morgan Stanley, the firm cancelled deferred incentive compensation to which they otherwise would have been entitled. *Id.* They contend that ERISA governed this compensation and prohibited its cancellation. *Id.*

Two of the plaintiffs, Sheresky and Samson, are named plaintiffs in the 2020 purported class action against Morgan Stanley before this Court. *Shafer v. Morgan Stanley*, 20 Civ. 11047 (PGG). In November 2023, the Court stayed that action and granted Morgan Stanley’s motion to compel arbitration. *Shafer v. Morgan Stanley*, No. 20 Civ. 11047 (PGG), 2023 WL 8100717 (S.D.N.Y. Nov. 21, 2023). In the course of reaching this conclusion, the Court concluded that Morgan Stanley’s incentive compensation plans were subject to ERISA. *Id.* at *20. Morgan Stanley sought reconsideration of this point, which the Court denied in a subsequent decision. *Shafer v. Morgan Stanley*, No. 20 CIV. 11047 (PGG), 2024 WL 4697235, *1 (S.D.N.Y. Nov. 5, 2024). In its decision on the reconsideration motion, the Court noted that whether its ERISA decision would have preclusive effect in subsequent arbitrations was a question for the arbitrators to decide. *Id.* at *10.

The parties appealed from the Court’s decisions, and Morgan Stanley in the alternative sought mandamus. In particular, Morgan Stanley sought reversal of (or a writ directing the striking of) the portion of the Court’s 2023 decision that held that the incentive compensation plans were governed by ERISA. The Court of Appeals dismissed the appeals and denied the writ, noting that “[t]hough arbitrators may consider the district court’s opinion, Morgan Stanley is free to argue to those arbitrators that the district court’s conclusion that the plans were governed by ERISA was dictum and was legally incorrect.” *Shafer v. Morgan Stanley*, No. 24-3141(L), 2025 WL 1890535, at *2 (2d Cir. July 9, 2025).

All three plaintiffs allege that they are currently contesting these issues against Morgan Stanley in arbitrations, and that a class of similarly situated individuals is doing the same in arbitration or litigation. Am. Cplt. ¶¶ 1, 34, 85. They allege that “Morgan Stanley insists that it may rely on the Advisory Opinion, and it has been doing so in the pending FINRA arbitrations, to undermine its former financial advisors’ position and arguments” regarding whether ERISA governs Morgan Stanley’s incentive compensation plans. Am. Cplt. ¶ 79. “Plaintiffs anticipate that Morgan Stanley will advance the same arguments in [Plaintiffs’] upcoming arbitrations.” Am. Cplt. ¶ 81. They assert that the Advisory Opinion therefore “creates immediate and concrete harm to Plaintiffs.” Am. Cplt. ¶ 7.

They also attach settlement communications sent by Morgan Stanley to Plaintiffs, in which Morgan Stanley cites “several recent and significant legal and factual developments [since this Court’s *Shafer* decisions] that directly impact the continued viability of Claimants’ claims.” Am. Cplt. Ex. 13A; *accord* Am. Cplt. Ex. 13B (same). Each letter states that “[n]ot least among these developments” are: (i) five recent arbitration decisions in favor of Morgan Stanley; (ii) a district

court decision (*Milligan*⁴); (iii) the Second Circuit order in *Shafer*, and (iv) the Advisory Opinion, which Morgan Stanley refers to as the “official position” of DOL. Am. Cplt. Exs. 13A, 13B. In the settlement communications, Morgan Stanley refers to Plaintiffs’ position as frivolous and asserts that Morgan Stanley may be awarded attorney’s fees and costs in their arbitrations if Plaintiffs do not settle. Am. Cplt. ¶ 7 and Exs. 13A, 13B.

Plaintiffs purport to represent a class of similarly situated former financial analysts who have pending arbitration or litigation on this issue against Morgan Stanley. Am. Cplt. ¶¶ 84-92. They ask the Court to (i) vacate and set aside the Advisory Opinion because it violates the APA on both substantive and procedural grounds; (ii) declare that the Bonus Regulation, 29 C.F.R. § 2510.3-2(c), is invalid as applied; and (iii) grant such other relief as may be proper.” Am. Cplt. ¶ 8.

ARGUMENT

The Court should dismiss the Amended Complaint for two threshold reasons: lack of standing and lack of a final agency action.

Plaintiffs lack standing to challenge the Advisory Opinion because it does not have legal force; its effect is only through the power of persuasion. Plaintiffs’ arbitrators are free to consider all pertinent legal arguments and factual matters, and to reach their own decision on whether ERISA governs the Morgan Stanley incentive compensation plans. As a result, Plaintiffs cannot meet the Article III standing requirements of showing that they face a certainly impending injury, caused by the Advisory Opinion, that would be redressed by the setting aside of the Advisory Opinion.

⁴ The settlement letters refer to this case as *Milligan v. Merrill Lynch*. Westlaw reports it as *Milligan v. Bank of Am. Corp.*, No. 3:24-CV-00440-KDB-DCK, 2025 WL 892972 (W.D.N.C. Mar. 11, 2025).

Plaintiffs further cannot show a final agency action permitting their Administrative Procedure Act claim. The Advisory Opinion, based only on facts submitted by Morgan Stanley and assumed by DOL to be true, and lacking the force of law, is not a final agency action because it is inherently tentative and does not determine rights or obligations or have legal consequences.

I. Plaintiffs’ Claims Should Be Dismissed for Lack of Jurisdiction Because Plaintiffs Lack Standing to Challenge the Advisory Opinion.

“[P]laintiffs must establish that they have standing to sue.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 408 (2013) (quotation marks omitted). “If plaintiffs lack Article III standing, a court has no subject matter jurisdiction to hear their claim.” *Mahon v. Ticor Title Ins. Co.*, 683 F.3d 59, 62 (2d Cir. 2012) (quotation marks omitted). Plaintiffs bear the burden of demonstrating subject matter jurisdiction, including Article III standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

“To establish Article III standing, an injury must be ‘concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.’” *Clapper*, 568 U.S. at 409. “[A] plaintiff cannot rely solely on conclusory allegations of injury or ask the court to draw unwarranted inferences in order to find standing[.]” *Lurenz v. Coca-Cola Co.*, No. 22 CV 10941 (NSR), 2025 WL 2773188, at *5 (S.D.N.Y. Sept. 29, 2025) (quotation omitted).

Moreover, it is “substantially more difficult” for a plaintiff to meet standing requirements when its theory of standing depends on the actions of third parties. *Lujan*, 504 U.S. at 561-62 (quotation marks omitted). Rather:

[Where] [t]he existence of one or more of the essential elements of standing ‘depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict,’ it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury.

Lujan, 504 U.S. at 562 (internal citations omitted). Standing cannot be based on “speculation about the unfettered choices made by independent actors not before the court.” *Clapper*, 568 U.S. at 414 n.5 (quotation marks omitted).

A. Plaintiffs Cannot Show Injury-in-Fact.

Plaintiffs cannot show the “actual or imminent” injury required by Article III standing. As an initial matter, Plaintiffs’ alleged injury is one of *future* harm. They object to Morgan Stanley’s anticipated reliance on the Advisory Opinion in their arbitrations, Am. Cplt. ¶ 81, because they believe it will lead their arbitrators to rule against them, *see* Am. Cplt. ¶ 3 (objecting that the Advisory Opinion will “prevent Plaintiffs and other arbitration claimants from vindicating their rights in the very arbitrations Morgan Stanley fought so hard to compel”). Likewise, Morgan Stanley’s assertions in settlement correspondence that Plaintiffs’ arbitration claims are “frivolous” and that the firm may seek the imposition of attorney’s fees are only meaningful if the arbitrators *agree* with Morgan Stanley on this point. Am. Cplt. ¶ 7.

Where standing is premised on future injury, the Supreme Court has “repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact, and that allegations of *possible* future injury are not sufficient.” *Clapper*, 568 U.S. at 409 (quotation marks and brackets omitted). In *Clapper*, the Supreme Court found injury in fact to be missing because, even if the Government took action under a statutory provision that the plaintiffs there claimed to be unconstitutional (regarding certain intelligence gathering), the plaintiffs “can only speculate as to whether” a court—which would have to approve the Government’s plan—would do so. *Clapper*, 568 U.S. at 413. As the Supreme Court explained, “we have been reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment.” *Id.* The Court interpreted its prior decision in *Whitmore v. Arkansas* similarly:

In *Whitmore*, . . . the plaintiff’s theory of standing hinged largely on the probability that he would obtain federal habeas relief and be convicted upon retrial. In holding that the plaintiff lacked standing, we explained that “[i]t is just not possible for a litigant to prove in advance that the judicial system will lead to any particular result in his case.”

Clapper, 568 U.S. at 413-14 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 159-60 (1990)).

Here, Plaintiffs will have every chance to argue the merits of their case—both legal and factual—before their arbitrators. At least since the Supreme Court’s decision in *Loper Bright*, it is clear that Advisory Opinions—like other agency legal interpretations—are not entitled to deference other than through their power to persuade. See *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024). Moreover, arbitrators have broad discretion in ascertaining the law and applying it to the facts before them, subject (in the Second Circuit) to review under a “manifest disregard of the law” standard. See *Wallace v. Buttar*, 378 F.3d 182, 189-90 (2d Cir. 2004); accord FINRA Arbitrator’s Reference Guide, at 64, available at <https://www.finra.org/sites/default/files/arbitrators-ref-guide.pdf>. This means that Plaintiffs will have the opportunity to raise all of the legal arguments that they previously raised in the *Shafer* cases and would raise in this case, see Am. Cplt. ¶¶ 61-77; to make any arguments they may choose to make about the estoppel effect of this Court’s prior decision on the key ERISA issue; and to show that the facts presented by Morgan Stanley to DOL were incomplete or inaccurate, see Am. Cplt. ¶¶ 56-57. Morgan Stanley, in turn, will have the ability to rely on all of the authorities contained in the settlement correspondence attached to the Amended Complaint: numerous recent arbitral decisions, the *Milligan v. Merrill Lynch* district court decision, the Second Circuit’s *Shafer* order, and the Advisory Opinion. And then, the arbitrators will make their independent decision. Cf. *Shafer*, 2025 WL 1890535, at *2 (the arbitrators will decide whether this Court’s prior holding is dictum and whether its interpretation of ERISA was correct); *Shafer*, 2024 WL 4697235, at *10 (the arbitrators will decide whether the Court’s rulings are preclusive).

Plaintiff cannot avoid the speculative nature of their future injury by asserting that they are already harmed by the mere fact that Morgan Stanley has cited the Advisory Opinion in settlement correspondence with them. Am. Cplt. ¶ 82. Plaintiffs must allege an injury that is “‘concrete’—that is, ‘real, and not abstract.’” *TransUnion LLC v. Ramirez*, 594 U.S. 413, 424 (2021) (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016)). The mere making of legal arguments by an adversary is insufficient to meet this standard. See *Clapper*, 568 U.S. at 413 (holding that *even if* the Government made the legal arguments opposed by the plaintiffs, the independent decisionmaking of a court made injury speculative.).

Because Plaintiffs’ alleged injury speculatively depends on the results of future independent decisionmaking by their arbitrators, Plaintiffs cannot demonstrate standing.

B. Plaintiffs Cannot Show Causation.

For similar reasons, Plaintiffs cannot satisfy the causation requirement of Article III standing. *Clapper*, 568 U.S. at 401-02. Plaintiffs must show not only a “certainly impending injury” but that also that the injury will be “fairly traceable to the challenged action of the defendant.” *Lujan*, 504 U.S. at 560-61 (alterations and quotation marks omitted). Where an injury may come about through various causes only one of which is the challenged action, a plaintiff cannot speculate that that challenged action will be the actual cause. *Clapper*, 568 U.S. at 401-02 (“And even if respondents could demonstrate that the threatened injury [of surveillance] is certainly impending, they still would not be able to establish that this injury is fairly traceable to” the statutory provision at issue because the Government may instead rely on other legal authorities to the same effect.).

Here, Morgan Stanley will no doubt present a wide range of arguments to Plaintiffs’ arbitrators to argue that ERISA does not govern Morgan Stanley’s incentive compensation plans.

As reflected in Morgan Stanley's settlement correspondence attached to the Amended Complaint, the firm will be relying not only on the Advisory Opinion but also the results in five recent arbitrations, *Milligan v. Merrill Lynch*, and the Second Circuit's *Shafer* decision. Am. Cplt. ¶¶ 13A, 13B. Moreover, Morgan Stanley will surely rely on the legal authorities underlying all these decisions and the Advisory Opinion, including ERISA statutory language and regulations, and as well the underlying facts. The arbitrators may or may not find Morgan Stanley's contentions persuasive. But even if they do—that is, even if the arbitrators rule against Plaintiffs—there is nothing beyond speculation that the Advisory Opinion itself, rather than other authority, will have *caused* that result.

C. Plaintiffs Cannot Show Redressability.

Finally, for the same reason, Plaintiffs cannot satisfy the redressability requirement of standing. To do so, they must show that it is “likely, as opposed to merely speculative, that [their] injury will be redressed by a favorable decision.” *Lujan*, 504 U.S. at 560-61 (alterations and quotation marks omitted). But *even if* this Court were to rule for Plaintiffs on the merits and set aside the Advisory Opinion as to them, Plaintiffs cannot show that the absence of the Advisory Opinion would make a difference for the arbitrators. To the contrary, it is more than likely that arbitrators who found the Advisory Opinion persuasive would also be persuaded by arguments based not on the Advisory Opinion but on the authorities contained in it, even in the absence of the Advisory Opinion. Moreover, the arbitrators would still have the precedent of *Milligan* and the recent arbitration results that Morgan Stanley cites in its settlement correspondence, among other things. Because there is no reason to think it is likely that the arbitrators would change their views, Plaintiffs cannot show redressability. *Town of Babylon v. Fed. Hous. Fin. Agency*, 699 F.3d 221, 229 (2d Cir. 2012) (no redressability where vacatur of agency directive would leave

third parties free not to change practices); *Roberts v. Bassett*, No. 22-CV0710 (NGG) (RML), 2022 WL 785167, at *10 (E.D.N.Y. Mar. 15, 2022) (no redressability where “in the absence of the State and City guidance [challenged in the case], many elements of the guidance would certainly remain in place” in other legal authorities that would still be in force), *aff'd*, No. 22-622-CV, 2022 WL 16936210 (2d Cir. Nov. 15, 2022) (summary order).

II. Plaintiffs’ Claims Should Be Dismissed Because the Advisory Opinion Is Not a Final Agency Action.

Plaintiffs’ claims should also be dismissed on the separate and independent ground that the Advisory Opinion is not a “final agency action,” as required for review under Administrative Procedure Act. 5 U.S.C. § 704. Although it is unsettled in this Circuit whether the final agency action requirement is *jurisdictional*, it is at a minimum a threshold, non-merits requirement that may be resolved prior to deciding jurisdictional issues. *MTA v. Duffy*, 784 F. Supp. 3d 624, 657 n.53 (S.D.N.Y. 2025) (citing *6801 Realty Co., LLC v. USCIS*, 719 F. App’x 58, 60 n.1 (2d Cir. 2018) (summary order)).

The Supreme Court has long applied a two-part test to determine whether an agency decision is final agency action: “First, the action must mark the consummation of the agency’s decisionmaking process—it must not be of a merely tentative or interlocutory nature.” *U.S. Army Corps of Eng’rs v. Hawkes Co.*, 578 U.S. 590, 597 (2016) (citing *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)) (quotation omitted). “And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.” *Id.* (citing *Bennett*, 520 U.S. at 177-78).

The Advisory Opinion fails this test.

A. The Advisory Opinion Is Tentative in Nature.

The Advisory Opinion is not final agency action, first, because it is “of a merely tentative . . . nature.” *Id.* at 597 (quotation omitted). First and foremost, this is because the Advisory Opinion is not based on a factfinding but instead on facts submitted by Morgan Stanley and assumed by DOL to be accurate for the purpose of its analysis. Advisory Opinion, 2025 WL 2642870, at *1, *2, *4, *5. As such, definitive application of the Advisory Opinion to Morgan Stanley’s incentive compensation plans necessarily requires a future decisionmaker—such as the arbitrators in Plaintiffs’ cases—to ascertain what the actual facts are and how they comport with those assumed to be true in the Advisory Opinion. This future factual analysis, moreover, includes considering whether Plaintiffs are correct that that Morgan Stanley “concealed” a fact that it should have disclosed to DOL and allowed an “erroneous statement” of fact to be included in the Advisory Opinion. Am. Cplt. ¶¶ 56-57. The arbitrators will need to decide the facts and apply the law to them.

The tentative nature of the Advisory Opinion is only underscored by the specific, tentative language of DOL’s conclusions in the Advisory Opinion. On one key question, the Advisory Opinion conclusion is simply that “[t]he materials . . . submitted [to it by Morgan Stanley] *do not appear to indicate* the existence of any of the surrounding circumstances that the Department has previously said would tend to support the finding that an arrangement constitutes a pension plan” under ERISA section 3(2)(A). 2025 WL 2642870, at *4 (emphasis added). On the other key issue, the Advisory Opinion concludes that, “it is the Department’s view that the deferred incentive compensation program *appears to be a bonus program* within the meaning of 29 C.F.R. § 2510.3-2(c).” *Id.* at *5 (emphasis added). This careful, limited language—tied to what “appears” to be true based only on submitted facts assumed to be true—is inherently tentative.

Case law recognizes that reliance on assumed facts rather than factfinding leaves the agency decision tentative and non-final. The Sixth Circuit, in particular, has held that “agency letters based on hypothetical facts or facts submitted to the agency, as opposed to fact-findings made by the agency, are classically non-final” and therefore not actionable under the APA. *Air Brake Sys., Inc. v. Mineta*, 357 F.3d 632, 639 (6th Cir. 2004). That court, in turn, relied on precedent in the analogous context of ripeness, reaching the same conclusion. *Id.*; see *Nat’l Res. Def. Council v. FAA*, 292 F.3d 875, 882 (D.C. Cir. 2002) (agency legal opinion based on facts assumed to be true is “not appropriate for review”); see also *Ass’n of Am. Med. Colls. v. United States*, 217 F.3d 770, 780-82 (9th Cir. 2000) (holding that a letter from the general counsel of the Department of Health and Human Services was not final where relevant findings had not been made). The Sixth Circuit’s holding in *Air Brake Systems* is consistent with the Supreme Court’s subsequent holding in *Hawkes*, where the Supreme Court found the agency action before it to be a “final agency action” in part because the agency had acted only after “after extensive factfinding.” *Hawkes*, 578 U.S. at 597-98.

Plaintiffs will likely rely on the Fifth Circuit’s decision in *Data Marketing Partnership v. DOL*, 45 F.4th 846, 854 (5th Cir. 2022), which found a different DOL advisory opinion to satisfy the first prong of the “final agency action” test. As an initial matter, the advisory opinion in that case is different from the Advisory Opinion at issue here in that its ultimate conclusions were more definitive and not qualified by what “appears.” See, e.g., Advisory Opinion 2020-1a (“This position cannot be squared with ERISA’s text.”), at <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2020-01a>; see also *id.* (“The arrangements proposed by LP Management meet none of these criteria.”); *id.* (“The text of the regulation will not support your expansive claim of ERISA coverage.”); *id.* (“[I]t is the Department’s view that

the proposed LP Management health benefit programs would not be single-employer group health plans or ERISA plans at all.”). As such, *Data Marketing Partnership* does not apply to the facts here.

But more fundamentally, the Fifth Circuit incorrectly applied the first “finality” prong. The court found the advisory opinion before it to be final simply because “it is ‘not subject to further Agency review.’” *Data Mktg. P’ship*, 45 F.4th at 853 (quoting *Sackett v. EPA*, 566 U.S. 120, 127 (2012)). Although that may address one aspect of finality, it does not answer the key question of whether the agency’s use of submitted facts, assumed to be true without factfinding, makes the action inherently tentative, as the Sixth Circuit correctly found in *Air Brake Systems*. To the contrary, the Fifth Circuit cited the Supreme Court’s *Sackett* decision to support its holding, but in that case, the agency *did* make factual findings, which the Supreme Court discussed at length. *Sackett*, 56 U.S. at 123-25. And while the Fifth Circuit concluded that it was irrelevant to finality that an agency might “change its position” after further factual development, *Data Mktg. P’ship*, 45 F.4th at 853, “changing positions” has nothing to do with the issue here. Rather, as the Sixth Circuit recognized in *Air Brake Systems*, the lack of factual findings and assumption of the truth of submitted facts makes the Advisory Opinion’s conclusions tentative when made. *Air Brake Sys., Inc.*, 357 F.3d at 639 (6th Cir. 2004).

B. The Advisory Opinion Does Not Determine Rights or Obligations or Have “Direct and Appreciable Legal Consequences.”

Although failing the first prong of the “final agency action” test is sufficient to require dismissal of Plaintiffs’ APA claims, the Advisory Opinion *also* fails the second prong, which asks if the agency action is one in which rights or obligations are “determined,” or that has “direct and appreciable legal consequences.” *Hawkes*, 578 U.S. at 597, 598 (quotations omitted). On this prong of the test, Plaintiffs apparently base their claim that the Advisory Opinion is a final

action on the fact that (i) ERISA Procedure 76-1 provides that a requester “may rely” on an advisory opinion “to the extent that the request fully and accurately contains all the material facts and representations necessary to issuance of the opinion and the situation conforms to the situation described in the request for opinion,” ERISA Procedure 76-1, § 10; Am. Cplt. ¶¶ 23, 78, and (ii) Morgan Stanley is “relying” on the Advisory Opinion in its legal advocacy in arbitrations, including in settlement demands. Am. Cplt. ¶¶ 79-82. But, as described above (regarding standing), the Advisory Opinion does not bind Plaintiffs, Morgan Stanley, courts, or arbitrators, but is simply a legal opinion on assumed facts that will have force only to the extent that it is persuasive. That is not enough to satisfy the second prong of the final agency action test. *See AT&T Co. v. EEOC*, 270 F.3d 973, 976 (D.C. Cir. 2001) (finding no final agency action because “[t]he Commission has not inflicted any injury upon AT&T merely by expressing its view of the law—a view that has force only to the extent the agency can persuade a court to the same conclusion”).

Again, Plaintiffs are likely to rely on the Fifth Circuit’s *Data Marketing Partnership* decision. That court found “legal consequences” not because of reliance of the sort alleged by Plaintiffs, but because “the advisory opinion bound [DOL] to some degree and withdrew its previously held discretion” with respect to enforcement against the requester. *Data Mktg. P’ship*, 45 F.4th at 854. But this largely unexplained conclusion is incorrect. Although ERISA Procedure 76-1 speaks of a requester “rely[ing]” on an advisory opinion, it does not purport to modify, for example, the Secretary of Labor’s statutory authority to seek relief from an ERISA plan fiduciary if the Secretary determines appropriate. 29 U.S.C. § 1132(a)(2). Nor does ERISA Procedure 76-1 modify the Secretary’s authority to assess civil penalties for violations. 29 U.S.C. § 1132(c), (*D*). Of course, like any agency, DOL considers the relevant circumstances in deciding whether to

exercise its enforcement discretion, and a requester that relied in good faith on DOL's views in an advisory opinion, after fully and accurately disclosing all material facts to DOL, would no doubt argue that its good faith reliance was a reason for DOL to refrain from enforcement or to mitigate penalty liability. *E.g.*, 29 U.S.C. § 1132(d)(3)(A) (“The Secretary may, in the Secretary’s sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that— . . . the fiduciary or other person acted reasonably and in good faith.”). But unlike the jurisdictional determination in *Hawkes*, which expressly bound the government agencies not to take enforcement action for five years, 578 U.S. at 597, any effect of an advisory opinion on future DOL’s enforcement actions is indirect and premised on DOL’s general consideration of relevant factors before proceeding. The Advisory Opinion does not “meaningfully circumscribe[]” enforcement discretion. *HIV & Hepatitis Pol’y Inst. v. United States Dep’t of HHS*, 728 F. Supp. 3d 1, 11 (D.D.C. 2023). Accordingly, it is not a final agency action.

The Fifth Circuit also erroneously determined that “legal consequences” are shown by ERISA Procedure 76-1’s recognition that “undue hardship” may exist in some cases if an advisory opinion is not issued. *Data Mktg. P’ship*, 45 F.4th at 855. There is no dispute that it is *useful* to regulated or potentially regulated entities to know their regulator’s tentative views, and in some cases the absence of that guidance may be a hardship. But the touchstone of the second prong of the final agency action test is “legal, not practical, consequences” flowing from an agency’s act; practical usefulness is not enough. *USFWS v. Sierra Club, Inc.*, 592 U.S. 261, 271 (2021).

Finally, the Fifth Circuit’s comparison of DOL advisory opinions to DOL’s “information letters”—which are “informational only and . . . not binding on the Department with respect to any particular factual situation,” ERISA Procedure 76-1 § 11—is beside the point. Information letters “do[] no more than call attention to a well-established interpretation or principle of the Act, without

applying it to a specific factual situation.” *Id.* § 3.01. ERISA Procedure 76-1 makes clear that these letters have no consequences at all because they are not meant to address specific factual situations. Advisory opinions, in contrast, do tentatively discuss an assumed factual scenario and therefore could, under appropriate circumstances, lead to reasonable reliance, which in turn (as discussed above) could be relevant to DOL’s exercise of enforcement discretion. But the distinction between the two types of advice letters is not meaningful for final agency action purposes, because even in the case of advisory opinions, any effects are indirect and removed, not the necessary “direct and appreciable legal consequences.” *Hawkes*, 578 U.S. at 597, 598.

III. Plaintiffs’ Purported “As-Applied” Challenge to the “Bonus Regulation” Fails on The Same Basis.

Although Plaintiffs also purport to bring an “as applied” challenge to 29 C.F.R. § 2510.3-2(c), that claim is not distinct, for standing and final agency action purposes, from the challenge to the Advisory Opinion. The only injury Plaintiffs allege from the Bonus Regulation is that the Advisory Opinion interpreted it unfavorably to Plaintiffs. Am. Cplt. ¶ 77. Their view, to the contrary, is that this regulation is in fact “inapplicable” to their case, Am. Cplt. ¶ 6, and that this Court in *Shafer* correctly held that Morgan Stanley’s incentive compensation plans were not “bonus programs” to which the regulation applied, Am. Cplt. ¶ 30. They also assert that Morgan Stanley provided DOL “erroneous” information on this point and that DOL relied on this inaccurate information in the Advisory Opinion. Am. Cplt. at 57. They further assert that the Bonus Regulation should not have been applied in the Advisory Opinion because, as applied, it is inconsistent with the statutory text. Am. Cplt. ¶ 104.

For the reasons that Plaintiffs lack standing to challenge to the Advisory Opinion, they likewise lack standing to challenge the Bonus Regulation based on its application in the Advisory Opinion. And for the same reasons that the Advisory Opinion does not constitute a “final agency

action,” there is no final agency action to support an “as applied” challenge. Accordingly, to the extent that the Amended Complaint purports to assert a separate claim for relief related to the Bonus Regulation, that claim too should be dismissed for lack of standing and a final agency action.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss the Amended Complaint.

Dated: January 16, 2026
New York, New York

Respectfully submitted,

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Certificate of Compliance

Pursuant to Local Civil Rule 7.1(c), the above-named counsel hereby certifies that this memorandum complies with the word-count limitation of this Court's Local Civil Rules. As measured by the word processing system used to prepare it, this memorandum contains 6,966 words.