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

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

Plaintiffs,

v.

THOMAS E. PEREZ, SECRETARY OF LABOR, and UNITED STATES DEPARTMENT OF LABOR,

Defendants.

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

PLAINTIFFS' RESPONSE TO DEFENDANT'S
NOTICE OF FACTUAL DEVELOPMENTS

Plaintiffs respectfully submit this response to the Notice of the Defendant Department of Labor (the "Department," or "DOL") regarding purported "factual developments relevant to the parties' cross-motions for summary judgment." Dkt. 129.

1. DOL's new IMO proposal is merely that—a proposal—and may never become law. In any event, the proposal crystallizes two points. *First*, it confirms that the Rule will upend the distribution system for fixed-indexed annuities, including the role played by independent marketing organizations ("IMOs"). As explained by Plaintiffs, the Department failed to consider these deleterious effects or account for the resulting costs in its cost-benefit analysis. Dkt. 59 at 24-28; Dkt. 61 at 38-40; Dkt. 62 at 29-32; Dkt. 107 at 17-18; Dkt. 108 at 15-18; Dkt. 109 at 29. Instead, the Department played down these problems, speculating that they could be addressed on an *ad hoc* basis if every IMO separately sought (and succeeded in receiving) an individual exemption from the prohibited transaction rules. *See* Dkt. 72-1 at 86-87; *see also* Proposed Best Interest Contract Exemption for Insurance Intermediaries, 82 Fed. Reg. 7,366, 7,341 (Jan. 19, 2017). After receiving nearly two-dozen applications for these *ad hoc* exemptions, the Department now tacitly acknowledges that the fix the Department advocated in litigation is not feasible and that the Rule's impact on IMOs requires promulgation of a new rule.

In any event, this new proposal can do nothing to repair the flaws in DOL's case before this Court. It is a "foundational principal of administrative law that a court may uphold agency action"—here, the Rule currently before the Court—"only on the grounds that the agency invoked when it took the action." *Michigan v. EPA*, 135 S. Ct. 2699, 2710 (2015).

Second, the Department's belated attempt to fix one of the Rule's many defects highlights the regulatory overreach that afflicts the Rule as a whole. The Department erred regarding fixed-indexed annuities because they are outside its regulatory authority and expertise. So too, the

disclosure requirements of the securities laws; the appropriateness of proprietary financial products; the efficacy of class action litigation; and regulation and enforcement with respect to IRAs are matters that Congress never entrusted or delegated to DOL. DOL's complex new proposal—which occupies nearly 40 pages in the Federal Register—is the latest illustration of how DOL overextended itself into matters that are the province of other regulators and Congress.

2. The Notice asserts that the Department's FAQs show that its "explanations of the rulemaking" in its briefs and at oral argument were not "mere[] litigation posturing." In fact, the documents do nothing to allay Plaintiffs' concerns with the Rule, and at points merely illustrate the flaws Plaintiffs emphasized in their briefs and at the hearing. For instance, the January 13 FAQs further confirm that the Rule impermissibly transforms virtually all sales activity into fiduciary advice, in violation of the statute as well as the First Amendment. *See, e.g.*, FAQs on Your Rights and Financial Advisers 6 (Jan. 13, 2017) (including within the strictures of the Rule a "suggestion" that a person should "buy[] a particular security"). Even offering a *free* seminar to advertise services to potential customers could result in an agent or broker being slapped with the "fiduciary" label—if the agent or broker says anything during the seminar that might be interpreted as "a suggestion" that an attendee purchase or not purchase a security, she risks becoming a fiduciary "to all the attendees" at the seminar. Conflict of Interest FAQs (Part II - Rule) 9-10 (Jan. 13, 2017).

Dated: January 25, 2017

Respectfully submitted,

s/ Eugene Scalia

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 25, 2017, the foregoing document was electronically submitted with the clerk of the court for the United States District Court, Northern District of Texas, using the electronic case file system of the court. I hereby certify that I have served all counsel of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

s/ Eugene Scalia