

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA,
et al.,

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

**BRIEF OF AMICUS CURIAE CONSUMER FEDERATION OF AMERICA
IN SUPPORT OF DEFENDANTS' CONSOLIDATED OPPOSITION TO PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT AND DEFENDANTS' CONSOLIDATED
CROSS-MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION AND INTEREST OF THE *AMICUS CURIAE*¹

Amicus curiae Consumer Federation of America (“CFA”) is a nonprofit association of more than 250 state, local, and national pro-consumer organizations, founded in 1968 to represent the consumer interest through research, advocacy, and education. On behalf of its organizational members, CFA represents tens of millions of consumers from across the nation. More information about CFA’s membership is available at <http://consumerfed.org/membership/>. For three decades, CFA has been a leading voice advocating strengthened protections for individual investors. CFA policy in this area is focused on ensuring that investors have a choice of appropriate investments and service providers, the information necessary to make informed choices, protection against fraud and abuse, and effective recourse when they are the victims of wrongdoing. CFA has promoted those policies before Congress, federal regulatory agencies, and state securities divisions; through participation in advisory committees to the Securities and Exchange Commission (SEC), the Financial Industry Regulatory Authority (FINRA); and others, and through research on important investor protection topics that has been widely covered in the media.

Over the past several decades, Americans have increasingly turned to the financial markets to save and invest for retirement. This trend has been encouraged and accelerated by private developments, such as the gradual disappearance of traditional pensions, and by public policies that have led to the growing reliance on retirement accounts, such as 401(k) plans and Individual Retirement Accounts (IRAs), where individuals bear the responsibility for making their own investment decisions. While these developments have been highly profitable for the

¹ Consumer Federation of America has moved for leave to file this brief. No counsel for a party authored this brief in whole or in part; no party or counsel for a party contributed money that was intended to fund preparing or submitting this brief; and no person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

financial sector, they have left all too many workers and retirees bewildered and overwhelmed by complex investment choices that have the power to determine their ability to afford a secure and independent retirement. Lacking confidence in their own financial expertise, many turn to financial professionals to help them cut through the confusion and decide on the course of action that is best for them. Financial firms encourage them to do just that, marketing themselves as trusted advisors who are dedicated to serving their customers' interests and promoting their well-being. What most people fail to realize, however, is that many if not most of the "financial advisors" they turn to for professional help are regulated as salespeople, with no legal obligation to act in their customers' best interests and with often substantial financial incentives to do otherwise. Paid more to recommend certain investments over others, they may recommend those that benefit themselves the most, even if they are not the best option for their customers. Retirement savers who end up paying higher costs, facing unnecessary risks, and receiving substandard returns can lose out on tens or even hundreds of thousands of dollars over a lifetime of investing as a result of self-serving recommendations from conflicted advisors.

Recognizing the degree to which investors are dependent on financial professionals, CFA has made strengthening protections for retail investors when they turn to financial professionals for advice a major focus of its advocacy. Having produced research highlighting the phenomenon of sales-based financial professionals' holding themselves out as trusted advisors and taking on an increasingly advisory role in clients' investment decisions, CFA has supported policies holding all financial professionals, including sales-based financial professionals, to an appropriate standard of care when providing investment advice. Since at least 2000, when CFA filed its first formal comment letter with the Securities and Exchange Commission in support of this regulatory reform, CFA has consistently and vigorously sought to close regulatory loopholes

that enable broker-dealers and insurance agents to operate as advisors without having to meet the fiduciary standard appropriate to that role. Key letters and documents advancing these policy goals are available at <http://consumerfed.org/issues/investor-protection/investment-professionals/>.

As a result of these years of research and advocacy, CFA has a deep understanding of how firms and financial professionals conduct their activities and of the different regulatory frameworks that apply to those activities. In addition, CFA has extensive expertise in the provisions of the DOL Conflict of Interest Rule and its accompanying exemptions (“Rule”) and has been intimately involved throughout the rulemaking process. For example, CFA filed two detailed comment letters with the DOL in strong support of the Rule. *See* Letter from CFA to the U.S. Dept. of Labor Employee Benefits Sec. Admin. (July 21, 2015), <https://www.dol.gov/ebsa/pdf/1210-AB32-2-00660.pdf>; Letter from CFA to the U.S. Dept. of Labor Employee Benefits Sec. Admin. (August 24, 2015), <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/03031.pdf>. In addition, CFA’s director of investor protection testified at the DOL’s public hearing in August of 2015. *See* U.S. Dep’t of Labor, Conflict of Interest Proposed Rule Public Hr’g, <https://www.dol.gov/ebsa/regs/1210-AB32-2-Hearing.html> (last visited August 22, 2016).

CFA has a strong and special interest in the outcome of this case. This Rule is the culmination of decades of advocacy dedicated to updating protections for retirement savers; CFA seeks to ensure that the Rule stands so that workers and retirees who turn to financial professionals for advice about their retirement savings finally gain the protections against conflicted advice that they so desperately need and deserve. Without the protections afforded by

the Rule, retirement savers who need to make every dollar count will continue to see their nest eggs eroded, and their ability to afford a secure and independent retirement threatened, by sales-based professionals who exploit loopholes in flawed regulations in order to profit unfairly at their customers' expense.

In addition, CFA believes this brief will prove helpful to the Court. CFA offers its knowledge of industry practices and existing regulatory requirements to rebut certain mischaracterizations that pervade the Plaintiffs' filings. One of the central themes advanced throughout the Plaintiffs' filings is that brokerage and insurance firms and their representatives are salespeople merely selling products, which they characterize as wholly distinct from providing advice and engaging in an advisory relationship. They further claim that sales-based financial professionals do not exhibit any indicators of a trust-based relationship. However, actual broker-dealer and insurance industry practices, including those by Plaintiffs' own members, refute these claims. CFA submits this brief in the hope that it will help the Court better understand the nature, scope, and prevalence of these practices and why it was appropriate for the DOL to determine that such practices demand fiduciary protections.

ARGUMENT

I. The DOL Rule Is Reasonable In Light Of ERISA's Statutory Framework, How Firms and Professionals Function, and How Retirement Savers Reasonably Perceive Those Functions.

ERISA espouses the general statutory principle that any person who renders "investment advice for a fee or other compensation, direct or indirect" is a fiduciary.² 29 U.S.C. § 1002(21)(A). Fiduciary status under ERISA triggers obligations of prudence and loyalty and prohibitions from engaging in conflicts of interest. 29 U.S.C. § 1004, 1006. ERISA does not

² 26 U.S.C. § Section 4975(e)(3) includes a parallel provision to 29 U.S.C. § 1002(21)(A), creating the identical definition of who is a fiduciary for purposes of the prohibited transaction rules of the Code. These rules forbid fiduciaries from engaging in self-dealing transactions relating to IRAs.

define precisely what constitutes fiduciary investment advice, however. Because the statute is ambiguous and therefore susceptible to multiple interpretations, it is incumbent upon the DOL to provide a reasonable interpretation of what constitutes fiduciary investment advice.

ERISA takes a functional approach to determining fiduciary status. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993). Whether someone is an ERISA fiduciary is based on their conduct in the retirement plan context. ERISA itself, the policies and purposes underlying ERISA, and the regulations promulgated thereunder determine who is an ERISA fiduciary. *See Donovan v. Mercer*, 747 F.2d 304, 305 (5th Cir. 1984). Despite Plaintiffs' claims, ERISA fiduciary status is not bound by the contours of the common law of trusts. *Mertens*, 508 U.S. at 262. Nor is it bound by how someone is registered or regulated in another regulatory context. *See, e.g., Ellis v. Rycenga Homes, Inc.*, 484 F. Supp. 2d 694, 710 (W.D. Mich. 2007).

The DOL first delineated the circumstances in which someone is considered to be functioning as an investment advice fiduciary more than 40 years ago. In doing so, the DOL adopted a number of limitations on the application of the fiduciary status that are not reflected in the statute itself and frustrate the purposes underlying ERISA. In the ensuing years, it became apparent DOL's regulatory definition was overly narrow and susceptible to manipulation and evasion in a retirement system where financially unsophisticated individual workers and retirees bear responsibility for making their own investment decisions and turn to financial professionals for advice. Many financial professionals and firms have been able to exploit the flawed regulatory definition of fiduciary investment advice in order to escape the obligations and prohibitions that flow from being an ERISA fiduciary even as they perform the functions of an ERISA fiduciary. In short, despite acting as advisors and providing what any reasonable investor

would believe and expect to be advice, they have escaped being held accountable under an appropriate standard of conduct.

Plaintiffs claim, however, that the DOL's revised definition of fiduciary investment advice captures interactions that were never meant to be fiduciary in nature. Specifically, they claim that brokers and insurance agents are salespeople "merely selling a product" [DKT. 52 Pg. 17], not real advisors. They further claim that, because they clearly are in sales relationships with their clients, there are no indicators of a relationship of trust and confidence that would be essential to finding a fiduciary duty. [DKT. 52 Pg. 20]. But actual broker-dealer and insurance industry practices refute these claims.

An in-depth review of plaintiffs' members' public websites and other advertising shows that they routinely hold out as advisors not salespeople, make it virtually impossible to distinguish sales from advice, and seek to occupy positions of trust and engender reliance in their relationships with customers. These practices create the reasonable belief and expectation on the part of retirement savers that they are receiving fiduciary retirement investment advice, not mere sales recommendations.

A. Sales-based financial professionals and their firms, particularly Plaintiffs' members, hold out as advisors through the use of titles that convey the reasonable impression they are providing advice.

While Plaintiffs argue that the brokers and insurance agents whose interests they represent are "merely selling a product," [DKT. 52 Pg. 17], a review of Plaintiffs' members' websites contradicts this claim. Not once did we find on these firms' websites any prominent reference that labeled their financial professionals as salespeople. Instead, they adopted titles for their financial professionals that explicitly and implicitly identify them as advisors.

The title most commonly adopted by Plaintiffs' member firms for their financial professionals appears to be "Financial Advisor." Firms that use this title or a variation thereof include: Janney Montgomery Scott,³ D.A. Davidson,⁴ Stifel,⁵ Wells Fargo Advisors,⁶ HDVest,⁷ Baird,⁸ Raymond James,⁹ Ameriprise,¹⁰ Edward Jones,¹¹ BB&T Scott and Stringfellow,¹² Chase,¹³ UBS,¹⁴ Morgan Stanley,¹⁵ SignatorOne (formerly John Hancock),¹⁶ and VALIC.¹⁷ Indeed, one of the Plaintiffs in the case is the National Association of Insurance and Financial Advisors, which would be a bizarre choice of names if its member firms truly functioned solely as salespeople.

While "financial advisor" appears to be the title most commonly used by sales-based advisors, other firms have adopted variations that create a similar impression. For example, Schwab, Stephens, and Hilliard Lyons all use the title "Financial Consultant" for their financial

³JANNEY, Private Client Group Opportunities, <http://www.janney.com/about-janney/careers-at-janney/private-client-group> (last visited August 21, 2016).

⁴D.A. DAVIDSON HOME PAGE, <https://dadavidson.com/> (last visited August 24, 2016).

⁵STIFEL, Find a Financial Advisor, <http://www.stifel.com/fa> (last visited August 24, 2016).

⁶WELLS FARGO ADVISORS, Meet with an Advisor, <https://www.wellsfargoadvisors.com/services/financial-advisor.htm> (last visited August 24, 2016).

⁷HDVEST HOME PAGE, <https://www.hdvest.com/> (last visited August 24, 2016).

⁸BAIRD, Find a Financial Advisor, <http://www.locatebaird.com/> (last visited August 24, 2016).

⁹RAYMOND JAMES, Find an Advisor (USA), http://www.raymondjames.com/office_locator.htm (last visited August 24, 2016);

¹⁰AMERIPRISE FINANCIAL, Working with an Ameriprise financial advisor, <https://www.ameriprise.com/financial-planning/working-with-financial-advisor/> (last visited August 24, 2016).

¹¹EDWARD JONES, Find a Financial Advisor, <https://www.edwardjones.com/find-financial-advisor.html> (last visited August 24, 2016).

¹²BB&T SCOTT AND STRINGFELLOW HOME PAGE, <http://www.bbtscottstringfellow.com/> (last visited August 24, 2016).

¹³CHASE, Our financial advisors, <https://www.chase.com/investments/financial-advisor> (last visited August 24, 2016).

¹⁴UBS, Find a Financial Advisor, <https://www.ubs.com/us/en/wealth/find-a-financial-advisor.html> (last visited August 24, 2016).

¹⁵MORGAN STANLEY, Find a Financial Advisor, <https://www.morganstanleyfa.com/locator/> (last visited August 24, 2016),

¹⁶SIGNATORONE, Working With An Advisor, <http://www.signatorone.com/working-with-an-advisor> (last visited August 24, 2016).

¹⁷VALIC HOME PAGE, https://www.valic.com/home_3240_422903.html (last visited August 24, 2016).

professionals.¹⁸ Hilliard Lyons also uses the title “Chartered Wealth Advisor®.”¹⁹ Voya uses the title “Retirement Consultant,”²⁰ and USAA uses the title “Wealth Manager.”²¹ What all of these titles have in common is that they are designed to create the impression that advice, not product sales, is the essential service being offered by these professionals. If, as Plaintiffs claim, these financial professionals are merely selling a product, then the titles they use are inherently deceptive. If the titles accurately portray the function served by these financial professionals, then they clearly are engaged in services that fall well within a reasonable definition of fiduciary investment advice. Certainly, investors perceive and rely on these services as advice.

B. Sales-based financial professionals and their firms, particularly Plaintiffs’ members, convey the reasonable impression they are offering investment advice and retirement planning.

Just as firms use titles to portray their financial professionals as advisors, they describe their services as advisory in nature. A review of a number of Securities Industry and Financial Markets Association (“SIFMA”) and The American Council of Life Insurers (“ACLI”) members’ websites shows broker-dealer firms and insurance companies prominently and routinely portray their services as providing expert investment advice, comprehensive financial planning, and retirement planning that is based on their clients’ needs and goals and that is designed to serve their best interests. Not once did we find on any of these firms’ websites any prominent reference that described their services as providing arm’s length investment sales

¹⁸ See SCHWAB, Wealth Management home page, https://www.schwab.com/public/schwab/wealth_management (last visited August 24, 2016); STEPHENS, Private Wealth Management, <http://www.stephens.com/private-wealth-management/> (last visited August 24, 2016); HILLIARD LYONS, Our Financial Consultants, <http://www.hilliard.com/site/our-financial-consultants/> (last visited August 24, 2016).

¹⁹ See HILLIARD LYONS, Chartered Wealth Advisors® Home Page, <http://www.hilliard.com/site/our-financial-consultants/chartered-wealth-advisors.html> (last visited August 24, 2016).

²⁰ See VOYA, Working with a Financial Advisor Can Help You Keep Your Goals on Track, <https://www.voya.com/articles/working-financial-advisor-can-help-you-keep-your-goals-track> (last visited August 21, 2016).

²¹ USAA, Wealth Management, <https://www.usaa.com/inet/pages/investing-wealth-management-main?akredirect=true> (last visited August 24, 2016).

recommendations. These practices further contradict Plaintiffs' legal claims that they are "merely selling a product," [DKT. 52 Pg. 17]. Below are a few representative examples of such messaging.

Schwab. The homepage of the firm's website features the question: "How will you help me with my financial goals?" The answer, in big, bold font: "A Schwab Financial Consultant can help you create a plan tailored to your needs." It continues: "It starts with a conversation and a fresh perspective, discussing your long- and short-term goals. We evaluate your current investments then create specific recommendations." SCHWAB, <https://www.schwab.com/> (last visited August 21, 2016). The website describes the benefits of meeting with a financial consultant this way: "Your Financial Consultant can work with you to create a holistic plan with specific investment recommendations and a clear explanation of the benefits and risks.... Your plan will reflect your priorities, from retirement income and estate planning to insurance and debt management." SCHWAB, Wealth Management, https://www.schwab.com/public/schwab/wealth_management (last visited August 21, 2016).

Janney Montgomery Scott. In explaining the firm's mission and history, the company website states: "Through our wealth management approach, we focus on the delivery of strategic financial plans that utilize a variety of financial products and services best suited to help individual investors and families meet their financial goals." JANNEY, Our Mission and History, <http://www.janney.com/about-janney/mission--history/our-mission--history> (last visited August 21, 2016). It describes the role of its Financial Advisors this way: "Janney Financial Advisors build long-term relationships with our clients and their families. They provide advice on a wide range of financial matters and use a full array of investment options to provide customized solutions to meet clients' needs." JANNEY, Private Client Group Opportunities,

<http://www.janney.com/about-janney/careers-at-janney/private-client-group> (last visited August 21, 2016).

D.A. Davidson. The center of the D.A. Davidson homepage features the following statement: “The Strength of Advice.” D.A. DAVIDSON, <https://dadavidson.com/> (last visited August 24, 2016). Another page discussing how and why one should establish a relationship with a D.A. Davidson Financial Advisor includes the statement: “For over 80 years, our advisors have offered straightforward advice, personalized solutions, and industry expertise to individuals, families, and businesses.” D.A. DAVIDSON, Wealth Management, <https://dadavidson.com/WHAT-WE-DO/Wealth-Management> (last visited August 24, 2016).

Wells Fargo Advisors. The center of the Wells Fargo homepage features the statement: “Helping Clients Succeed Financially. We provide advice and guidance to help maximize all elements of your financial life, whenever and however you need it.” WELLS FARGO ADVISORS, <https://www.wellsfargoadvisors.com/> (last visited August 21, 2016). A prospective client who clicks on the “Why Invest With Us” tab will find the following statement under the “Our Advisors” heading: “A Financial Advisor can provide the advice and guidance you need to focus on your short- and long-term goals while navigating life’s financial opportunities and turning points. Start planning now for the future. Choose a Financial Advisor from the firm that lives and breathes a client-centered approach to advice.” WELLS FARGO ADVISORS, Our Advisors, <https://www.wellsfargoadvisors.com/why-wells-fargo/financial-advisor.htm> (last visited August 21, 2016).

Edward Jones. The Edward Jones website features the following statement: “Our goal is to provide advice and guidance based on your needs. We have more than 13,000 financial advisors in the U.S. – each one dedicated to doing what’s right for our clients.” EDWARD JONES,

Find an Advisor, <https://www.edwardjones.com/find-financial-advisor.html> (last visited August 21, 2016).

BB&T Scott & Stringfellow. The following statement can be found on the firm's Retirement Planning website: "Prudent portfolio management is a cornerstone of every successful long-term plan. Your Financial Advisor will be happy to review your plan and propose planning strategies that best reflect your current financial situation in relation to your life goals." BB&T SCOTT AND STRINGFELLOW, Retirement Planning, <http://www.bbtscottstringfellow.com/planning/retirementplanning> (last visited August 21, 2016).

Chase. A prospective client who navigates to the firm's "Working With Your Financial Advisor" webpage will find the following statement: "Our Advisors focus on what YOU need." CHASE, Our Financial Advisors, <https://www.chase.com/investments/financial-advisor> (last visited August 21, 2016). The webpage further states: "As you plan for the financial goals most important to you, your Financial Advisor can provide guidance on your overall investment approach. By getting to know you and understanding all of your financial goals and objectives, we'll work together to build a customized plan that helps meet your specific investing, retirement planning or college saving needs." CHASE, Our Financial Advisors, <https://www.chase.com/investments/financial-advisor> (last visited August 21, 2016).

UBS. On the firm's homepage, a rotating banner reads: "Advice. Beyond investing." A prospective client who navigates to the firm's Investing webpage will see the following statement:

Building an investment plan and an optimal asset allocation strategy to meet your unique needs requires careful consideration and often, outside expertise. Our UBS Financial Advisors are committed to helping you with this process, allowing you to spend more time on the activities you truly enjoy...UBS Financial Advisors take a holistic wealth management approach to carefully understanding your

overall financial situation, unique needs and goals, and deliver an optimal investment solution to meet them.

UBS, Wealth Management Americas, Investing, <https://www.ubs.com/us/en/wealth/investing.html> (last visited August 21, 2016).

Hilliard Lyons. Prominently featured in the center of the firm's homepage is the statement: "Investment counseling to grow, protect, manage wealth since 1854." HILLIARD LYONS, <http://www.hilliard.com/> (last visited August 21, 2016).

Voya. The firm's website includes the following explanation: "When you choose Voya, you're choosing to work with people who care about your needs and always put them first." It further states: "Our financial professionals are dedicated to providing one-on-one guidance geared toward your needs. No cookie-cutter advice – just thoughtful direction to help match your life and your goals." VOYA, Why Voya, <https://www.voya.com/articles/why-voya> (last visited August 21, 2016). Also available on the website is an article, titled "Working with a Financial Advisor Can Help You Keep Your Goals on Track," which extolls the virtues of working with a Voya Retirement Consultant. VOYA, Working with a Financial Advisor Can Help You Keep Your Goals on Track, <https://www.voya.com/articles/working-financial-advisor-can-help-you-keep-your-goals-track> (last visited August 21, 2016). The article explains: "With a Voya retirement consultant, you know you're getting a qualified professional who is thoroughly familiar with all of our products and services, able to offer good advice and make sound financial decisions on your behalf." VOYA, Working with a Financial Advisor Can Help You Keep Your Goals on Track, <https://www.voya.com/articles/working-financial-advisor-can-help-you-keep-your-goals-track> (last visited August 21, 2016).

USAA. The firm's "Wealth Management" webpage states:

Your wealth manager can advise you on a range of issues through a comprehensive financial planning process and provide you a personalized suite of integrated solutions to address even the most complex needs.... Through proactive contact and regular meetings to review your plan, your wealth manager will provide tailored advice at each stage of your life and help you achieve your goals while managing the challenges so you stay on track.

USAA, Wealth Management, <https://www.usaa.com/inet/pages/investing-wealth-management-main?akredirect=true> (last visited August 21, 2016).

Northwestern Mutual. The Northwestern Mutual website includes the following statement on a page titled “Financial Guidance:”

Whether you’re fresh out of college, well on your way to living your dream or eagerly approaching retirement, make sure you’re financially prepared to achieve a lifetime of goals. We can help you reach them with a personalized financial plan. We’ll apply time-tested strategies, provide expert advice and make recommendations based on your priorities.

NORTHWESTERN MUTUAL, Financial Guidance, <https://www.northwesternmutual.com/financial-guidance> (last visited August 21, 2016). In a video on the same webpage titled “Planning for Financial Security with Northwestern Mutual,” the voiceover states: “We’ll work together to create a personalized financial plan that’s built on a comprehensive process yet is as unique as your goals....we’ll give objective advice, offer options, turn your priorities into a plan....Together, we’ll review your options and implement strategies that can best help you achieve your goals.” NORTHWESTERN MUTUAL, Financial Guidance, <https://www.northwesternmutual.com/financial-guidance> (last visited August 21, 2016).

The examples cited here were excerpted from surrounding text that further emphasizes the advisory nature of the services offered. Even where the websites acknowledged the firm’s role in investment sales, nothing about the messaging suggested that the firms were “merely selling a product.” In the face of this sophisticated messaging, it is simply not reasonable to

expect that retirement savers would view these advertised services as mere sales rather than advice designed to serve their best interests.

C. Sales-based financial professionals and their firms, particularly Plaintiffs' members, seek to foster relationships of trust and reliance.

In addition to describing their financial professionals as advisors and describing their services as advisory in nature, sales-based firms also routinely use messaging that is designed to foster a relationship of trust and reliance. This was evident in our review of SIFMA and ACLI members' websites. We found that these broker-dealer firms and insurance companies prominently and routinely advertise how they foster trusted relationships with their clients in which they serve their clients' best interests. *See infra* p. 14-17. In so doing, firms encourage reliance on their expertise and recommendations. Below are a few representative examples of such messaging.

Schwab. On the webpage where potential clients go to find a Schwab branch location in their area, the most prominent language reads: "A relationship you can trust, close to home." SCHWAB, Find a Branch, <https://client.schwab.com/Public/BranchLocator/branchdetails.aspx?branchid=1213> (last visited August 21, 2016).

Janney Montgomery Scott. The first sentence in the "About Us" section on the firm's homepage states: "Putting clients first is ingrained in the way we do business." JANNEY, About Janney, <http://www.janney.com/about-janney/home> (last visited August 21, 2016). The company's "Mission and History" webpage further states: "Decisions are always made with our clients' best interests in mind." JANNEY, Why Janney, <http://www.janney.com/about-janney/mission--history/why-janney> (last visited August 21, 2016).

D.A. Davidson. When visited on August 21, 2016, the website featured an “About Us” section stating in boldface capital letters: “CLIENTS COME FIRST.” D.A. DAVIDSON, About Us, http://www.davidsoncompanies.com/indv/a_indv/aboutus.cfm (last visited August 21, 2016). App.001-002. The firm also published on its website a pamphlet explaining D.A. Davidson clients’ various rights and responsibilities, in which the opening paragraph stated in bold font, “Trust is the cornerstone of the relationship between you, as an investor, and the D.A. Davidson & Co. financial professionals working for you. Your needs should always come first.” D.A. DAVIDSON, Your Rights, <http://www.davidsoncompanies.com/indv/files/DADYourRights505.pdf> (last visited August 21, 2016). However, the firm’s website underwent substantial revisions thereafter and this content was erased.²² App.003-004.

Stifel. In the firm’s “Statement of Commitment” to clients, Stifel pledges: “Putting the welfare of clients and community first, we strive to be the Advisor of Choice in the industry.” STIFEL, About Stifel, <http://www.stifel.com/home/aboutstifel> (last visited August 21, 2016). Further, the firm states that its guiding principle is: “Safeguarding the money of others as if it were our own.” STIFEL, Letter From Ron, <http://www.stifel.com/docs/pdf/aboutus/welcometostifel.pdf> (last visited August 21, 2016).

Baird. The firm’s “Who We Are” webpage offers the following explanation of the firm’s “unique” culture:

Everything we are, do and hope to achieve at Baird is driven by a straightforward mission: *To provide the best financial advice and service to our clients and be the best place to work for our associates.* What this means for clients around the world is we strive to help create great outcomes in their financial lives by keeping their interests first – always.

²² CFA retained PDFs of these sources and has included them in the Appendix for the Court’s convenience.

BAIRD, A Unique Culture, <http://www.rwbaird.com/who-we-are/unique-culture/> (last visited August 21, 2016) (emphasis in original). Moreover, in distinguishing Baird and its Financial Advisors from other firms, the website states that, “Baird Financial Advisors serve as true partners to families and individuals across the United States.... And being employee-owned and independent makes us different from many other firms. We’re free to offer advice that is solely in your best interests – without worrying about outside shareholders.” BAIRD, About Private Wealth Management, <http://www.rwbaird.com/private-wealth-management/about> (last visited August 21, 2016).

Raymond James. Raymond James promises to conduct itself in accordance with several precepts, the first of which – and the only one in bold – is that: **“Our clients always come first.”** RAYMOND JAMES, Mission Statement, <http://www.raymondjames.com/about/mission.htm> (last visited August 21, 2016) (emphasis in original).

Edward Jones. The firm states on its website: “Your financial advisor is your long-term financial partner. These are important goals and you need an advocate – someone who listens and really understands what’s important to you. We believe that’s the best way to develop a personalized financial strategy.” EDWARD JONES, Working with a Financial Advisor, <https://www.edwardjones.com/value/financial-advisor.html> (last visited August 21, 2016).

BB&T Scott & Stringfellow. The firm’s homepage features the following statement: “We put our clients' interests first.... A powerful partnership, working on your behalf.” BB&T SCOTT & STRINGFELLOW, <http://www.bbtscottstringfellow.com/> (last visited August 21, 2016). The company’s Mission Statement is: “Since 1893, our mission has been to put our clients’ interests first and foremost through our commitment to their financial success.” BB&T SCOTT &

STRINGFELLOW, Mission Statement,
<http://www.bbtscottstringfellow.com/aboutus/missionstatement> (last visited August 21, 2016).

Stephens. On the firm’s “About Stephens” webpage, it states: “We are committed to establishing and maintaining long-term relationships based on integrity and trust and delivering long-term results based on deep research and independent thinking.” STEPHENS, About Stephens, <http://www.stephens.com/about-stephens/> (last visited August 21, 2016). The Mission and Values section of the webpage states: “The Mission of Stephens Inc is to become a trusted advisor to our clients in all aspects of their business and personal investments.” STEPHENS, *supra* p. 16. The relations section of the webpage states: “Our clients come first.” STEPHENS, *supra* p. 16.

UBS. In the firm’s “About Us” section on its website, it states: “The UBS Wealth Management Americas approach is based on the trusted relationship of our **Financial Advisors** and their clients. Our experienced Advisors are committed to understanding clients’ needs and delivering insightful, informed advice to help them realize their dreams.” UBS, About Us, https://www.ubs.com/us/en/wealth/about_us.html (last visited August 21, 2016) (emphasis in original).

Mass Mutual. The firm’s homepage urges prospective clients to “Join **millions of people** who place their confidence and trust in us. We’re committed to the people who depend on us.” MASS MUTUAL, <https://www.massmutual.com/> (last visited August 21, 2016) (emphasis in original).

Northwestern Mutual. The firm’s “Financial Guidance” webpage declares: “Above all, we believe in doing what’s right for our clients. With every important decision, we ask ourselves this poignant question: ‘Is this in the best long-term interest of our clients?’ ” NORTHWESTERN

MUTUAL, Financial Guidance, <https://www.northwesternmutual.com/financial-guidance> (last visited August 21, 2016).

In addition to SIFMA's and ACLI's members, other Plaintiffs in this case directly engage in conduct designed to create a reasonable expectation that their members foster relationships of trust, confidence, and reliance. National Association of Insurance and Financial Advisors ("NAIFA") has launched a consumer advertising campaign that is called "Trust a NAIFA Advisor." NAIFA, NAIFA: Advisors You Can Trust, <http://www.naifa.org/practice-resources/prp/naifa-advisors-you-can-trust> (last visited August 21, 2016). Their website carries the heading "Advisors You Can Trust." ADVISORSYOUCANTRUST HOMEPAGE, <http://www.advisoryoucantrust.org/> (last visited August 21, 2016). The homepage of the website features the following statement in large capital letters and bold font: "TRUST YOUR FUTURE WITH A NAIFA ADVISOR." ADVISORSYOUCANTRUST HOMEPAGE, <http://www.advisoryoucantrust.org/> (last visited August 21, 2016). There is a video advertisement on the website, with voiceover stating: "Contact a NAIFA member for advice you can trust. NAIFA members adhere to a code of ethics that is about honesty and integrity. They're committed to working with you and guiding you with a financial plan that will lead you to a secure future and a retirement you'll enjoy." ADVISORSYOUCANTRUST HOMEPAGE, <http://www.advisoryoucantrust.org/> (last visited August 21, 2016).

It is simply not reasonable to expect that, in the face of all this sophisticated messaging, retirement savers would view their relationships with their "Financial Advisors" as anything other than ones of trust.

D. Sales-based financial professionals and their firms have "succeeded" in blurring the lines between sales and advice and between sales-based relationships and trust-based relationships.

Plaintiffs claim that through the DOL's revised definition of fiduciary investment advice, "distinctions between salespeople and fiduciary advisers are being erased." [DKT. 52 Pg. 1]. As shown above, it is Plaintiffs and their members who are responsible for erasing these distinctions. Blurring the lines by taking on an advisory role has undoubtedly benefited their business interests. If they portrayed themselves as salespeople moving products, they wouldn't be nearly as effective at attracting clients.

Indeed, the industry efforts to conflate product sales and investment advice have "succeeded," leaving the majority of investors unable to determine whether their own financial professional is a salesperson or a true adviser and whether the service being offered constitutes mere investment sales or fiduciary investment advice. Survey after survey has shown that investors do not distinguish between the sales recommendations they receive from broker-dealers and insurance agents and the advice they receive from fiduciary advisers. Angela A. Hung, *et al.*, Investor and Industry Perspectives on Investment Advisers and Broker-Dealers, Rand Corporation, Sponsored by the United States Securities and Exchange Commission (January 2008) https://www.sec.gov/news/press/2008/2008-1_randiabdreport.pdf; Siegel & Gale, LLC and Gelb Consulting Group, Inc., Results of Investor Focus Group Interviews About Proposed Brokerage Account Disclosures, Report to the Securities and Exchange Commission (March 10, 2005) <https://www.sec.gov/rules/proposed/s72599/fcrpt031005.pdf>; Infogroup/ORC, U.S. Investors & The Fiduciary Standard: A National Opinion Survey (September 15, 2010) <http://www.hastingsgroup.com/fiduciarysurvey/docs/091510%20Fiduciary%20survey%20report%20FINAL2.pdf>.

E. The DOL's revised definition of "fiduciary investment advice" is reasonable and entitled to *Chevron* deference.

The revised definition of fiduciary investment advice constitutes a reasonable interpretation of ERISA based on the reasons the Defendants have provided in their memorandum and the market practices chronicled here. These market practices show financial firms and their sales-based financial professionals function as investment advice providers, despite Plaintiffs' legal claims to the contrary. They also show why it was appropriate for the DOL to determine that such practices demand fiduciary protections. 81 Fed. Reg. 20946, 20997 (Apr. 8, 2016)

The DOL's revised definition of fiduciary investment advice appropriately captures those recommendations that a reasonable investor would view as fiduciary investment advice. As a result, the updated definition better ensures that retirement savers will receive critical fiduciary protections against conflicts of interest for the types of interactions that retirement savers reasonably believe and expect to be advisory in nature.

The DOL's revised definition of fiduciary investment advice also better reflects the advisory role that financial firms and their sales-based financial professionals have not only eagerly accepted but encouraged. In addition, it is much less susceptible to evasion by market participants, reducing the risk that they function as advisors without complying with the standards that Congress intended should apply to that function.

For these reasons, this Court should grant deference to the DOL's reasonable interpretation of the statute. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

II. THE REAL-WORLD IMPLICATIONS OF GRANTING SUMMARY JUDGMENT FOR THE PLAINTIFFS WOULD BE DEVASTATING TO RETIREMENT SAVERS.

Granting the Plaintiffs' motion for summary judgment would greatly disserve the public interest. It would preserve sales-based financial professionals', including most prominently the Plaintiffs' own members', ability to hold themselves out as trusted advisors and provide self-interested advice, without being regulated appropriately. These sales-based advisors could continue to evade their fiduciary duty to their clients who are saving for retirement, resulting in billions of dollars in additional losses to retirement savers. All retirement savers would face the prolonged risk that self-dealing transactions would harm their retirement security, but small savers would be particularly at risk, since they need to make every dollar count and are currently most at risk of receiving conflicted advice.

For too long, the industry has escaped ERISA's fiduciary standards based on a legal farce -- that they are "merely" salespeople who do not function as advisors or seek to occupy positions of trust and confidence. But this is a position they adopt only when they are seeking to avoid regulation as advisers. All their other conduct -- from their titles to the way they describe and market their services -- sends precisely the opposite message. The DOL appropriately brought the advisory activities of these firms under fiduciary scrutiny by holding them accountable for the recommendations they provide that reasonably can be construed to be advisory in nature. Retirement savers will benefit from receiving genuine advice that's in their best interest rather than advice that is rife with conflicts of interest.

It is essential that the Rule go into effect as scheduled in order that retirement savers receive the protections they so desperately need and deserve.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Defendants' memorandum, the Court should deny the Plaintiffs' motion for summary judgment and grant summary judgment to the defendants.

Dated: August 26, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this *Brief of Amicus Curiae of Consumer Federation of America in Support of the Defendants' Consolidated Opposition to Plaintiffs' Motion for Summary Judgment and Defendants' Consolidated Cross-Motion for Summary Judgment* was served this 26th day of August 2016 upon counsel for all parties via the Court's CM/ECF electronic filing system.

/s/ Theodore C. Anderson
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