No. 17-10238

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; FINANCIAL SERVICES INSTITUTE, INCORPORATED; FINANCIAL SERVICES ROUNDTABLE; GREATER IRVING-LAS COLINAS CHAMBER OF COMMERCE; HUMBLE AREA CHAMBER OF COMMERCE, DOING BUSINESS AS LAKE HOUSTON CHAMBER OF COMMERCE; INSURED RETIREMENT INSTITUTE; LUBBOCK CHAMBER OF COMMERCE; SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION; TEXAS ASSOCIATION OF BUSINESS,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF LABOR; R. ALEXANDER ACOSTA, SECRETARY, U.S. DEPARTMENT OF LABOR,

Defendants-Appellees.

AMERICAN COUNCIL OF LIFE INSURERS; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS – TEXAS; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS – AMARILLO; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS – DALLAS; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS – FORT WORTH; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS – GREAT SOUTHWEST; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS – WICHITA FALLS,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF LABOR; R. ALEXANDER ACOSTA, SECRETARY, U.S. DEPARTMENT OF LABOR,

Defendants-Appellees.

INDEXED ANNUITY LEADERSHIP COUNCIL; LIFE INSURANCE COMPANY OF THE SOUTHWEST; AMERICAN EQUITY INVESTMENT LIFE INSURANCE COMPANY; MIDLAND NATIONAL LIFE INSURANCE COMPANY; NORTH AMERICAN COMPANY FOR LIFE AND HEALTH INSURANCE,

Plaintiffs-Appellants,

V.

R. ALEXANDER ACOSTA, SECRETARY, U.S. DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF LABOR,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Texas
No. 3:16-cv-01476

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No. 17-10238

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Defendants-Appellees.

The undersigned counsel of record certifies that the following interested persons and entities described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

There are no corporations that are either parents of any plaintiff-appellant or that own stock in the plaintiffs-appellants.

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3. Financial Services Roundtable
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5. Humble Area Chamber of Commerce d/b/a Lake Houston Area Chamber of Commerce
6. Insured Retirement Institute
7. Lubbock Chamber of Commerce
8. Securities Industry and Financial Markets Association
9. Texas Association of Business
10. American Council of Life Insurers
11. National Association of Insurance and Financial Advisors
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17. National Association of Insurance and Financial Advisors – Wichita Falls
18. Indexed Annuity Leadership Council
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INTRODUCTION

Given the urgency of this matter, Appellants must oppose the Department of Labor's ("Department" or "DOL") Motion for a 30-Day Extension of Time to File Brief for Appellees ("Motion" or "Mot."). Although a significant portion of the "Fiduciary Rule" ("Rule," *see* ROA.322) becomes applicable on June 9, 2017, the remainder of the Rule, including some of its most controversial and onerous requirements, takes effect on January 1, 2018. Under the current briefing schedule, there is a reasonable prospect that this appeal will be resolved before that date, thus preventing the upheaval and significant injuries these requirements would otherwise impose on Appellants and the public. The 30-day extension the Department requests for its briefing deadline, however, would threaten Appellants' ability to issue a ruling before the full slate of the Rule's onerous (and unlawful) requirements take effect in early 2018.

While Appellants ordinarily would not hesitate to consent to an extension of a briefing schedule, they cannot consent at the risk of jeopardizing their chances of obtaining relief before some of the most onerous aspects of the Rule take effect. Accordingly, Appellants

respectfully request that the Court either deny the Department's Motion or, in the alternative, simultaneously grant the Motion and expedite oral argument to allow for resolution of the case at the soonest practicable time and, ideally, by no later than December 1, 2017. After the parties conferred, counsel for the Department confirmed that the government does not oppose Appellants' request for expedited oral argument.[1]

BACKGROUND

This case concerns multiple challenges to one of the most aggressive and hotly debated regulations ever promulgated by the Department of Labor: the Fiduciary Rule. Appellants filed lawsuits contesting the Rule in June 2016 and sought an expedited briefing schedule before the district court on June 24, 2016, in an effort to ensure judicial review of the Rule before its requirements took effect. ROA.301. The Department agreed to expedition, noting that "[p]rompt resolution . . . will serve the public interest," ROA.302, and the district court adopted the parties' proposed schedule, ROA.312–14. On February 8, 2017, the district court

[1] If the Court grants DOL's motion to extend its briefing deadline to July 3, Appellants request that their replies be due July 17 and that oral argument be held in September.

upheld the Rule, granting summary judgment in favor of the Department. ROA.9873–9953.

A few days before, on February 3, the President of the United States directed the Department to reassess whether the Rule is likely to "harm investors," reduce "certain retirement savings offerings," or cause "an increase in . . . prices." App. 1. The Department has acknowledged that this reassessment could "lead" it "to revise or rescind the Rule." Mot. 4.

In response to the President's memorandum, the Department proposed to delay the "applicability date" of the Fiduciary Rule by 60 days, from April 10, 2017 to June 9, 2017. *See* App. 3. (Certain of the Rule's other requirements have an applicability date of January 1, 2018.) An extension was necessary, the Department explained, in order to prevent "two major changes in the regulatory environment rather than one"; allowing the Rule to become applicable only to revise or rescind it later "could unnecessarily disrupt the marketplace, producing frictional costs." App. 4. The Department further stated that it might "issue a further extension of the applicability date" "[u]pon completion of its examination." App. 9.

Following the district court's ruling, Appellants promptly appealed to this Court, and two groups of Appellants (the Chamber of Commerce plaintiffs and the American Council of Life Insurance plaintiffs) sought an injunction of the Rule or expedition of this appeal ("Injunction Motion"). In opposing Appellants' request for an injunction or expedition, the Department relied heavily on the fact that it was reassessing the Fiduciary Rule at the President's direction and had proposed a new rulemaking that would extend the compliance deadline of the Fiduciary Rule. Inj. Resp. 2, 17–18, 20–21. The Department's opposition also implied that further extension of the applicability date beyond the proposed 60 days might be forthcoming. *Id.* at 18 (noting that "a meaningful delay of some of the fiduciary rule's requirements beyond the proposed sixty-day period is a realistic possibility"). Indeed, the Department expressly opposed expedited briefing on the ground that its "ongoing rulemaking . . . could result in modifications to both the rule's applicability date and the rule's substantive provisions." *Id.* at 21.

In early April, the Department finalized its 60-day extension of the compliance deadlines in a rulemaking that retreated from its earlier indications that further extensions might be forthcoming. App. 11

("Extension Rule"). The Extension Rule asserted, among other things, that the financial-services and insurance industries do not "need more time" to comply with many of the Rule's obligations, though it did move the deadline to comply with other important requirements to January 1, 2018. App. 14.

This Court denied Appellants' Injunction Motion on April 5, 2017, one day after the Extension Rule was adopted and lodged with the Court. The Court, however, set a tight briefing schedule, under which briefing would be completed by June 15, 2017 and oral argument likely could be held in August or September. *See* 5th Cir. IOP for Rule 34 (noting usual 60-day advance notice of oral argument).

On April 27, 2017, the United States Senate confirmed the Department's new head, Secretary R. Alexander Acosta. Unexpected delays in the process of confirming a Secretary of Labor have undoubtedly complicated the Department's task of reevaluating the Fiduciary Rule, decreasing the likelihood that the task could be completed before the Rule's revised compliance deadlines.

On May 18, the Department notified Appellants on that it would seek an extension of its briefing deadline that would consume much of

the short period remaining between the completion of briefing and the critical January 1, 2018 date triggering the full range of the Rule's requirements. When the Department conferred with Appellants about its extension request, Appellants offered to consent subject to the Department's agreement to extend the Rule's compliance deadlines by the same period. The Department refused that offer but confirmed that it would not oppose a request to this Court for expedited oral argument.

Late on the evening of May 22, Secretary Acosta announced that the Department would not further postpone the June 9, 2017 applicability date and that it intends to seek comment on whether to further extend the January 1, 2018 applicability date. *See* App. 28, 34, 36. The next day, the Department filed its Motion.

ARGUMENT

I. The Department's Extension Request Should Be Denied.

The Department's request to extend the briefing schedule threatens to prejudice Appellants substantially, absent counterbalancing relief. Two compliance dates are fast approaching. The namesake of the Fiduciary Rule—the provisions deeming brokers, insurance agents, and other sales professionals to be fiduciaries—will go into effect a mere 16

days from now. The Rule's remaining requirements—including controversial requirements under the Best Interest Contract Exemption ("BIC Exemption") to make disclosures, issue warranties and representations, and execute contracts with clients—become applicable on January 1, 2018. App. 14.

As detailed in Chamber Appellants' Injunction Motion, Appellants have incurred and will continue to incur significant and irreparable compliance costs in anticipation of the applicability of the Rule, including the requirements of the BIC Exemption. *See* Injunction Mot. 21–26. The Rule will severely disrupt not only many companies' relationships with other businesses, but also their relationships with their customers and employees. *See id.* at 23–24; Chamber Appellants' Opening Br. 16–17. Every day that passes before this appeal is decided compounds those costs, so any delay in this litigation is harmful to Appellants. Most significantly, once the BIC Exemption becomes completely applicable on January 1, 2018, massive compliance costs will hit the financial-services and insurance industries as a whole, and large portions of those industries will be forced into binding contractual arrangements that expose them to sweeping liabilities that the Department has no authority

to impose. The Department itself estimated that the Rule will cost $5 billion in the first year alone, "mostly reflecting the cost incurred by affected" industry in order to satisfy the BIC and other exemptions (including costs incurred from preparing to comply). ROA.327.

A decision from this Court invalidating the Rule prior to January 1, 2018 would allow Appellants to avoid many (though unfortunately not all) of these enormous costs and liabilities. Moreover, in the recent past, one of the Department's primary bases for opposing requests to stay the Rule, or to further extend its June 9 applicability date, has been that some of the Rule's most serious obligations do not apply until January 1; indeed, additional requirements of the Rule were extended from June 9 until that date. App. 14. Now, however, an extension of the government's deadline—without countervailing expedition of the case—will expose Appellants to unnecessary burdens that the January 1, 2018 date was supposed to relieve.

Under the current briefing schedule, the timeline is already tight. Briefing is now scheduled to be completed on June 15, and in the ordinary course oral argument likely would be heard no sooner than August. Even assuming that the Court could issue an opinion within 60 days of oral

argument, Appellants would not know the outcome of their challenge until October—at which point they would be incurring compliance costs at a fever pitch. *See* Inj. Mot. 25. Under this schedule, which assumes a rapid argument and ruling, Appellants would face enormous uncertainty and burdens—implicating not only their financial resources, but also their relationships with clients and employees—until the final days before the Rule could be implemented in full.

Of course, this schedule is optimistic. Last year, the median time from notice of appeal to disposition in the Fifth Circuit was 8.8 months. App. 43. And that statistic is likely skewed by more routine cases. Thus, absent expedition, it is reasonable to expect that this appeal might be resolved in November or later even if the Department's motion does not delay the current briefing deadlines.

The Department misses the point when it argues that its "requested 30-day extension will not itself cause any regulatory requirement to be imposed upon plaintiffs with which they did not already have to comply." Mot. 10. The fact is that the Department's Motion proposes to consume about 20% of the limited time remaining between the January 1 deadline and the earliest likely argument date. This delay of the briefing schedule

would exacerbate the risk that the critical New Year's deadline will pass before this appeal is resolved.

The Department has been well aware of this concern for almost a year. Beginning in June 2016, Appellants have repeatedly sought administrative relief and consent to expedited proceedings or a judicial stay. *See* ROA.301. Moreover, the Department has long understood the substance of Appellants' arguments, which were briefed extensively and argued before the district court.

Appellants appreciate that the Rule is unprecedented and exceedingly complex. Indeed, that "the Department's new leadership" needs additional time "to consider the many specific questions presented by this litigation," Mot. 8, is a compelling reason for the Department to continue to defer the Rule's imminent transformations of the status quo, but the Department has not agreed to do so. Moreover, earlier this week the Department made a critical decision regarding the Rule, rejecting requests from numerous quarters to further extend the June 9 applicability date. App. 29. Having come to terms with the Rule sufficiently to decide to impose on industry and investors the immense burdens triggered by the June 9 deadline, the Department, with all due

respect, should not be heard to complain that it is not sufficiently familiar with the Rule to promptly defend it in court. Appellants therefore submit that the Department's motion should be denied, at least absent an order expediting argument such that the case could be decided before then.

II. If The Court Grants An Extension, It Should Also Expedite Oral Argument And Resolution Of This Case.

If the Court is inclined to grant the Department additional time to submit its response brief, Appellants respectfully request that the Court expedite oral argument to allow for the earliest practicable decision, ideally before December 1, 2017. *See* 5th Cir. R. 27.5, 47.7 (allowing expedited consideration upon a showing of "good cause").[2] The government does not oppose Appellants' request for expedition. Appellants recognize that this Court routinely grants extensions of briefing schedules without conditioning such relief on expedited argument. This case, however, is anything but routine.

[2] This Court has expedited cases without a showing of irreparable harm, *Hornbeck Offshore Servs., LLC v. Salazar*, No. 10-30585, Doc. 00511168004, at 2 (5th Cir. July 8, 2010) (per curiam), and without a showing of a likelihood of success on the merits, *Wilde v. Huntington Ingalls, Inc.*, 616 F. App'x 710, 716–17 (5th Cir. 2015).

The Fiduciary Rule would completely reshape the regulation of investment services provided to Individual Retirement Accounts ("IRAs") and in the process transform the provision of retirement investment services by broker-dealers and insurance agents. *See* Chamber Appellants' Opening Br. 18–21. As the Department has recognized, this wholesale regulatory overhaul may cause significant "investor confusion." App. 14. The Rule regularly receives front-page news coverage precisely because it would impose the most significant changes on the financial-services and insurance industries in decades.

The legal issues at stake are just as significant as the Rule's practical consequences. The Department seeks to remake the financial-services and insurance industries by regulating IRAs, but it lacks any authority to regulate those accounts or their service providers. *See* Chamber Appellants' Opening Br. 8–9. The Rule also impermissibly creates a private right of action, *id.* at 52–59, contravenes the Federal Arbitration Act, *id.* at 59–63, and violates Appellants' First Amendment rights, ACLI Appellants' Opening Br. 14–37. These issues of enormous public importance require prompt resolution.

A timely decision by this Court is also necessary to ensure that its ruling can provide appropriate relief to Appellants. The accumulation of irrecoverable costs will only accelerate as the January 1, 2018 applicability date speeds closer. *See supra* 7. And after January 1, the Rule will take full effect, imposing extraordinary upheaval that will necessitate further costs to correct. A ruling by December 1, therefore, is essential to prevent the financial-services and insurance industries from expending massive amounts of resources unnecessarily.[3]

Finally, although the Court denied Appellants' earlier request for an injunction of the Rule pending appeal or expedition, the circumstances have materially changed since then. The Court denied Appellants' motion under the appeal's current schedule, which allows a realistic possibility of a decision vacating the Rule—and thus providing relief to Appellants—by autumn. *See supra* 5, 8–9. The Department now seeks to delay that schedule.

[3] The Department's new temporary enforcement policy, *see* Mot. 6–7, does not prevent the Rule from fully taking effect on January 1, 2018, nor does it prevent the continued accumulation of costs before January 1, 2018.

The Department also suggested that it might postpone the Rule's applicability dates, potentially multiple times, moderating the harms Appellants seek to avoid while the Department reevaluated the Rule at the President's direction. *See supra* 3–4. But since this Court's denial of Appellants' motion, meaningful extensions have failed to materialize. In its April 7 Extension Rule briefly postponing some of the Fiduciary Rule's compliance deadlines, the Department asserted that "the Fiduciary Rule (*i.e.*, the new fiduciary definition itself) will become applicable" on June 9, full stop. App. 14. Although DOL asserted that "it retains the ability to further extend the January 1, 2018 applicability dates," App. 15, the Department has since stated that it intends to seek public comment on whether to extend the January 1, 2018 deadline, App. 34, 36. And just days before that announcement, the Department rejected Appellants' request that it stay the Rule for 30 days to offset the harm that would follow from efforts to delay the briefing schedule. Any further extension of the New Year's deadline, therefore, is an uncertain proposition at best and would apparently occur—if at all—only after a notice-and-comment period that would delay relief to Appellants.

Furthermore, it now appears unlikely that any final action by the Department revising or rescinding the Rule will occur before the New Year. The Department's reevaluation of the Rule has undoubtedly been affected by the delay in the transition of the Department's leadership. The Department has made clear that its new leadership requires substantial time to analyze the complex issues presented by the Rule. Mot. 1, 4.[4] Therefore, ongoing reevaluation of the Rule does not mitigate Appellants' concerns about the timing of the appeal.

CONCLUSION

If the Department would like more time to prepare its brief, Appellants do not object—as long as that delay is accompanied by reasonable steps to guard against harmful delay in the administration of justice. Absent expedition, a delay in briefing would only serve to delay resolution of vitally important legal questions, while allowing highly burdensome market changes to take effect. The Court should either deny the Department's Motion or, in the alternative, simultaneously grant the Motion and order expedited argument and consideration of this appeal.

[4] The Department reported receiving nearly 193,000 comment and petition letters regarding the deferral of the applicability date alone. App. 12.

May 24, 2017

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CERTIFICATE OF CONFERENCE

In accordance with Fifth Circuit Rule 27.4, the undersigned hereby certifies that on May 24, 2017, I conferred with counsel for Appellees, Michael Shih. Appellees' counsel communicated that the government does not oppose expedition.

/s/ Jason J. Mendro
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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May, 2017, an electronic copy of the foregoing response and cross-motion was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and service will be accomplished on all parties by the appellate CM/ECF system.

/s/ Eugene Scalia
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CERTIFICATE OF COMPLIANCE

I hereby certify that on this 24th day of May, 2017, the foregoing response and cross-motion was transmitted to the Clerk of the United States Court of Appeals for the Fifth Circuit through the Court's CM/ECF document filing system, https://ecf.ca5.uscourts.gov. I further certify that: (1) this brief complies with the type-volume limit of Fed. R. App. P. 27(d)(2)(A) because, excluding any part of the document exempted from the word count, this brief contains 2,882 words; (2) this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 with New Century Schoolbook Linotype 14-point for text and 14-point for footnotes; (3) any required privacy redactions have been made pursuant to this Court's Rule 25.2.13; (4) the electronic submission is an exact copy of the paper document pursuant to this Court's Rule 25.2.1; and (5) the document has been scanned with the most recent version of Microsoft Forefront Endpoint Protection and is free of viruses.

May 24, 2017

/s/ Eugene Scalia
Eugene Scalia

Attorney of Record for Chamber of Commerce Appellants