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COMMENT

REGULATING RETIREMENT: UNDERSTANDING THE IMPACT OF NEW BEST INTEREST AND FIDUCIARY STANDARDS ON RETAIL INVESTORS

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I. INTRODUCTION

More than 75 million adults were born during the "Baby Boom" years between 1946 and 1964 in the United States alone.[1] Over the next nineteen years, approximately 10,000 people will retire each day from full-time employment.[2] Many of these individuals will seek the advice of financial institutions and advisors to help with management of their retirement assets. This influx of individuals in need of financial advice requires an increased risk of investors receiving advice that is not necessarily in their best interest. The federal government has taken proactive steps over the years to protect retirement investors through various forms of legislation.[3] In April 2016, the Department of Labor (DOL) proposed their Fiduciary Rule, which raised the standard that those providing financial retirement advice are to be held.[4]

1. Glenn Kessler, *Do 10,000 Baby Boomers Retire Every Day?*, WASH. POST (July 24, 2014), https://www.washingtonpost.com/news/fact-checker/wp/2014/07/24/do-10000-baby-boomers-retire-every-day/?utm_term=.d400412327a8 [https://perma.cc/T5ZS-N5XN].

2. *Id.*

3. Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 (1978).

4. Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20,946, 20,946 (Apr. 8, 2016) (to be codified at 29 C.F.R. pt. 2509).

While the DOL intended to create a uniform code of conduct among financial professionals, the rule was ultimately vacated by the United States Court of Appeals for the Fifth Circuit.[5] In the wake of this decision, the Securities and Exchange Commission (SEC) proposed a new standard (known as "Regulation Best Interest")[6] that is sure to leave retirement investors with the obligation of successfully navigating the state court system to seek redress against those who violate the standard.

This Comment, in Part I, provides an overview of the DOL's Fiduciary Rule, the SEC's Regulation Best Interest, and the potential impact these rules have on consumer litigation claims against financial professionals and institutions. Part II provides a history of the retirement advice industry, with a focus on the development of the primary methods of saving for retirement, including defined benefit and defined contribution plans, as well as accounts falling under the "individual responsibility model." Part III discusses the Employee Retirement Income Security Act of 1974[7] and the role preemptive language in the legislation had in attempting to create a uniform national standard of conduct for plan fiduciaries. Part IV encompasses a review of the Fiduciary Rule's key provisions defining the new fiduciary standard,[8] the Best Interest Contract Exemption,[9] and the fiduciary contract. Part V examines not only the impact of the Federal District Court for the Northern District of Texas ruling in *Chamber of Commerce of the U.S. v. Hugler*,[10] whereby the DOL did not create a federal private right of action for consumers, but also the vacating of the Fiduciary Rule.[11] In light of the Fifth Circuit decision, Part VI provides an in-depth review of the SEC's proposed rule, Regulation Best Interest.[12] Parts VII

5. *Infra* Part V.

6. *Infra* Part VI.

7. 29 U.S.C. § 1001.

8. Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. at 20,946.

9. Best Interest Contract Exemption, 81 Fed. Reg. 21,002 (Apr. 8, 2016) (to be codified at 29 C.F.R. pt. 2550).

10. Chamber of Commerce of the U.S. v. Hugler, 231 F. Supp. 3d 152 (N.D. Tex. 2017), *rev'd on other grounds*, 885 F.3d 360 (2018).

11. *See id.* at 181, 183 (holding a federal private right of action was not created under the Rule); Chamber of Commerce of the U.S. v. U.S. Dep't of Labor, 885 F.3d 360, 360 (5th Cir. 2018) (vacating the lower court decision in *Hugler*).

12. Regulation Best Interest, 83 Fed. Reg. 21,574 (proposed May 9, 2018) (to be codified at 17 C.F.R. pt. 240).

and VIII provide a discussion of state common law and statutory causes of action that may be brought by consumers to recover for breaches of the best interest standard.

II. HISTORY OF THE RETIREMENT ADVICE INDUSTRY

A. *Growth of the Defined Benefit, Defined Contribution, and "Individual Responsibility Model"*

Planning for retirement has been an important concern in the United States since the nation's founding.[13] As a result of the American Civil War, a military pension system was developed to help support veterans and their families cope with life after service.[14] During the Great Depression, the United States government enacted Social Security—expanding federal retirement benefits to all citizens.[15] Following World War II, and in conjunction with the post-war boom, Americans started to grasp the importance of having a plan for retirement as part of their employee benefit packages.[16]

The defined benefit plan was the traditional means by which postwar Americans saved for their retirement.[17] This concept gained in popularity during the 1940s, with nearly 25% of private sector workers participating.[18] Under a traditional defined benefit plan arrangement, assets contributed by either employers or employees are pooled in a single account, with the

13. *See Historical Background and Development of Social Security*, SOC. SECURITY ADMIN., https://www.ssa.gov/history/briefhistory3.html [https://perma.cc/KY9J-5Z53] (noting Thomas Paine after the Revolutionary War called for a social insurance system to be developed as a means to prevent poverty in old-age).

14. *See id.* (explaining disabled veterans, widows, and orphans were entitled to government benefits).

15. *See id.* (describing the development of the Social Security program in the United States).

16. *See* JUSTIN OWENS & JOSHUA BARBASH, RUSSELL INVS. RES., DEFINED BENEFIT PLANS: A BRIEF HISTORY 3 (2014), https://russellinvestments.com/-/media/files/us/insights/institutions/defined-benefit/defined-benefit-plans-a-brief-history.pdf?la=en [https://perma.cc/NC6W-U7NZ] ("In 1948, a National Labor Relations Board decision set the stage for a boom in private sector pensions plans. The decision allowed pension benefits to be part of union negotiations . . . ."); Liz Davidson, *The History of Retirement Benefits*, WORKFORCE (June 21, 2016), www.workforce.com/2016/06/21/the-history-of-retirement-benefits/ [https://perma.cc/CP7K-W73J] ("The idea that employees should have some kind of a defined benefit in retirement gained traction during the boom decades that followed World War II.").

17. *See* OWENS & BARBASH, *supra* note 16, at 2 ("[Defined benefit] plans were the retirement benefit of choice, covering almost half the private sector workforce in the U.S.").

18. *See id.* at 3 ("Pension coverage (percentage of private sector workers participating in [defined benefit] plans) increased from 15% to 25%, and plan contributions tripled in the 1940s alone.").

understanding that the employee will be able to receive a fixed income payment at retirement.[19] Throughout the 1950s, plan participation increased to 41% of private sector workers with $57 billion in assets saved.[20]

Participation in defined benefit plans remained level for the next two decades, especially after the passage of legislative fixes to address problems with the plans.[21] As popularity waned, a new type of plan, the defined contribution plan, became the preferred method of saving for retirement.[22] With the defined contribution framework, employers and employees contribute to an account dedicated to the employee.[23] The employee is subsequently entitled to whatever assets are in the account at retirement.[24] Congress, through a series of amendments to the Revenue Act of 1978, created the 401(k) plan—the most commonly used retirement account for employees today.[25] In the nearly forty years since enactment of the 401(k), over $5.1 trillion has accumulated in plans for more than 54 million American employees.[26]

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19. *See* Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 439 (1999) (detailing how defined benefit plans function with the employer assuming all investment and funding risk).

20. OWENS & BARBASH, *supra* note 16, at 3.

21. *See id.* at 5 (noting 45% participation in 1970 and 46% in 1980). *Compare* Colleen E. Medill, *The Individual Responsibility Model of Retirement Plans Today: Conforming ERISA Policy to Reality*, 49 EMORY L.J. 1, 16 (2000) (explaining the purpose of passing ERISA in 1974 was to address problems with defined benefit plans), *with* Davidson, *supra* note 16 (observing the Revenue Act of 1978 shifted employee focus from defined benefit plans to defined contribution plans).

22. *See* OWENS & BARBASH, *supra* note 16, at 5 ("In the first two decades after the passage of ERISA, the number of employees covered by [defined contribution] plans tripled, from about 20 million to over 60 million . . . .").

23. *Hughes Aircraft Co.*, 525 U.S. at 439.

24. *See id.* ("'[U]nder such plans, by definition, there can never be an insufficiency of funds in the plan to cover promised benefits,' since each beneficiary is entitled to whatever assets are dedicated to his individual account." (quoting Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359 (1980))).

25. The Revenue Act of 1978 detailed three criteria that established the modern day 401(k) plan: (1) employers may make contributions on behalf of employees; (2) distribution of plan assets may generally occur after reaching fifty-nine and one-half years of age, death, or separation from service; and (3) employee rights are nonforfeitable. Revenue Act of 1978, Pub. L. No. 95-600, § 135, 92 Stat. 2763, 2785 (codified at I.R.C. § 401(k)); *see also* Medill, *supra* note 21, at 7 (detailing the origins of the modern 401(k) plan).

26. *Frequently Asked Questions About 401(k) Plan Research*, INV. COMPANY INST., https://www.ici.org/policy/retirement/plan/401k/faqs_401k [https://perma.cc/27KL-JK86]; *see also* Medill, *supra* note 21, at 8 (highlighting the rise in the number of 401(k) plans between 1984 and 1993 from 17,303 to 154,527 respectively, with 23 million American employees participating by 1993).

Throughout the 1980s, Congress passed additional legislation allowing employees further flexibility in determining how to save for retirement.[27] The availability of Individual Retirement Accounts (IRAs) gave employees the freedom to direct their assets to an array of investment options while allowing them to have benefits that exist within a consolidated account balance.[28] The "individual responsibility model," created through congressional legislation, has transferred the responsibility of having a working financial knowledge of investments to employees.[29] In reality, a large percentage of the working population does not possess the knowledge necessary to make informed decisions about their retirement savings plans.[30] Critics suggest this knowledge gap may create a scenario where more employees are likely to fail in their retirement plans.[31]

27. The Economic Recovery Tax Act of 1981 states in part, "In the case of an individual, there shall be allowed as a deduction an amount equal to the qualified retirement contributions of the individual for the taxable year." Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 219(a), 95 Stat. 172, 274; *see* OWENS & BARBASH, *supra* note 16 ("In 1981, Congress began allowing employees to set up Individual Retirement Accounts (IRAs—first introduced with ERISA), even if they were already covered under an employer-sponsored plan, and expanded Employee Stock Ownership Plans (ESOPs).").

28. *See* OWENS & BARBASH, *supra* note 16, at 5 ("Employees liked their discretion over investment options, the portability of benefits and the simplicity of benefits being defined as an account balance.").

29. *See* Medill, *supra* note 21, at 16 ("Given the emphasis placed by the individual responsibility model[,] . . . it is particularly important for plan participants to be informed of the relative historical returns among basic investment options offered in participant-directed plans.").

30. According to the Financial Industry Regulatory Authority (FINRA), employees should do the following when participating in a 401(k) plan: (1) understand the fees paid to the plan; (2) track investment performance on a regular basis; (3) review account statements on at least a quarterly basis; and (4) seek outside advice whenever necessary. *Managing Your 401(k)*, FINRA, http://www.finra.org/investors/managing-your-401k [https://perma.cc/2SW2-WWP7]; *see* Medill, *supra* note 21, at 15–16 (noting 55% of employees had moderate financial knowledge and 11% had little to no knowledge); Jonas Elmerraji, *Retirement Planning: Introduction*, INVESTOPEDIA (Jan. 30, 2017, 6:00 AM), https://www.investopedia.com/university/retirement/ [https://perma.cc/YS9E-25JR] (emphasizing the importance of understanding asset allocation, how much retirement savings is necessary, and the tax implications of participating in a retirement plan).

31. *See* Medill, *supra* note 21, at 14 ("[M]any participants suffer from financial 'illiteracy.' As a result, they make decisions that place them at risk of failing to accumulate adequate savings for retirement."); David H. Bailey & Jonathan M. Borwein, *How Financially Literate is the Investing Public?*, HUFFPOST (July 29, 2014, 11:16 AM), https://www.huffingtonpost.com/david-h-bailey/how-financially-literate-investing-public_b_5625649.html [https://perma.cc/9D32-7ZX3] ("The trouble is, most individual investors are not sufficiently well-informed on financial matters, and thus make less-than-optimal choices in managing their retirement."); OFFICE OF INV'R. EDUC. & ASSISTANCE, THE FACTS ON SAVINGS AND INVESTING: EXCERPTS FROM RECENT POLLS AND STUDIES HIGHLIGHTING THE NEED FOR FINANCIAL EDUCATION 7 (Apr. 1999), https://www.sec.gov/pdf/report99.pdf [https://perma.cc/P367-VFQF] ("Too many Americans don't know how to manage

B. *The 2008 Financial Crisis*

The United States witnessed one of its largest declines in investor wealth during the 2008 Financial Crisis when 401(k)s and IRAs lost close to $2.4 trillion in value.[32] In addition, pension accounts—traditionally thought of as more conservative in nature—lost between $1 trillion and $2 trillion.[33] Not only did these losses have immediate impact on individuals who invested their retirement savings in the financial markets, but they also affected the long-term financial stability of employees.[34] Recognizing a need to address flaws within the financial markets, President Barack Obama and Congress sought a fix to better protect consumers.[35]

The Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010 provided the initial response desired by consumers to protect them from financial sales practices that, in part, led to the loss of trillions of dollars

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their retirement funds and don't realize the consequences—such as tax liabilities and other penalties—of failing to do so.").

32. Teresa Ghilarducci, *The Recession Hurt Americans' Retirement Accounts More Than Anybody Knew*, ATLANTIC, (Oct. 16, 2015), https://www.theatlantic.com/business/archive/2015/10/the-recession-hurt-americans-retirement-accounts-more-than-everyone-thought/410791/ [https://perma.cc/L287-A2YK].

33. Ruth Mantell, *Pensions Suffering in Financial Crisis*, MKT. WATCH (Oct. 7, 2008, 6:36 PM), https://www.marketwatch.com/story/pension-funds-take-1-trillion-hit-in-wake-of-financial-crisis [https://perma.cc/HPV4-ET92].

34. *See* Ghilarducci, *supra* note 32 ("And if current trends continue between 2013 and 2022, the number of poor or near-poor will increase by 146[%]. These numbers are unlikely to change as long as retirement accounts are exposed to the fluctuations of financial markets and their uneven recoveries."); Mantell, *supra* note 33 ("Teresa Ghilarducci, an economic-policy analysis professor at the New School for Social Research, said there is a long-run retirement crisis, and cited data that about half of workers will not have enough income after [sixty-five] to replace 70% of preretirement income.").

35. During the signing ceremony of the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010, President Barack Obama remarked, "Soon after taking office, I proposed a set of reforms to empower consumers and investors, to bring the shadowy deals that caused the crisis into the light of day, and to put a stop to taxpayer bailouts once and for all." Brady Dennis, *Obama Signs Financial Overhaul Into Law*, WASH. POST (July 22, 2010), www.washingtonpost.com/wp-dyn/content/article/2010/07/21/AR2010072100512.html [https://perma.cc/E9ZV-AZPL]; s*ee* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (legislating regulatory reform of financial institutions, markets, and various governmental agencies).

in wealth from "The Great Recession."[36] Within the legislation, Congress also established the Consumer Protection Finance Board (CFPB), an organization designed to enhance and ensure compliance with federal consumer protection laws.[37] While the Board was to exist as a separate entity from other federal agencies, its creation signaled to investors that the federal government was prepared to empower other departments to review those regulations impacting consumers of financial products.

III. THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

In 1974, Congress passed the Employee Retirement Income Security Act (ERISA) for the purpose of addressing issues over defined benefit plans administered by employers.[38] The intent behind ERISA was to reform the private pension marketplace by protecting workers from poor fiduciary practices and underfunded plans that resulted in a loss of benefits.[39]

36. The opening paragraph of the Act states its purpose: "[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system, . . . to protect consumers from abusive financial services practices, and for other purposes." 124 Stat. at 1376; *see also* David S. Huntington, *Summary of Dodd-Frank Financial Regulation Legislation*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (July 7, 2010), https://corpgov.law.harvard.edu/2010/07/07/summary-of-dodd-frank-financial-regulation-legislation/ [https://perma.cc/84BC-MGM7] ("The Act seeks to mitigate the systemic risk of financial collapse through several legislative and regulatory initiatives . . . [t]he Council will be required to meet at least once each quarter and will monitor U.S. financial markets in order to identify systemic financial risks . . . .").

37. § 1011, 124 Stat. at 1964 (2010) (codified as 12 U.S.C. § 5491 (2018)). The Act specifically states, "[t]here is established in the Federal Reserve System, an independent bureau to be known as the 'Bureau of Consumer Financial Protection', which shall regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws." *Id.* § 1011(a).

38. *See* Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 (1978)., (declaring that the purpose of the Act is to protect "the interests of participants in employee benefit plans and their beneficiaries"); Medill, *supra* note 21, at 4 ("Congress enacted ERISA to correct well-publicized flaws in the traditional employer-controlled defined benefit plan.").

39. Section 2(a) of the Act states:

> [T]hat owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans . . . .

Employee Retirement Income Security Act of 1974, § 2(a); *see also* Medill, *supra* note 21, at 4 (describing the issues Congress intended to resolve through implementation of the legislation); *ERISA at 40: Four Decades of Protecting America's Employee Benefits*, U.S. DEP'T. LAB., https://www.dol.gov/featured/erisa40/historical [https://perma.cc/9MXQ-67NM] ("ERISA established standards for private sector pension, health and other employee benefits, increasing protections for plan participants and their families."); OWENS & BARBASH, *supra* note 16, at 3 ("Many pension funds were poorly funded, vesting in benefits still took decades (up to 30 years); embezzlement of plan assets were not uncommon.").

Additionally, it placed the Department of Labor in charge of interpreting and enforcing provisions that "govern the conduct of plan fiduciaries, the investment and protection of plan assets, the reporting and disclosure of plan information, and participants' benefit rights and responsibilities."[40]

ERISA established an important provision for plan participants, the right to hold plan fiduciaries liable for breach of a fiduciary duty.[41] ERISA provides a uniform federal remedy for beneficiaries of any employer sponsored plan due to preemption language detailed in section 1132(a).[42] The preemption power stated in section 1132(a) is sweeping in nature, as it extends beyond employer-sponsored retirement plans to include even insurance benefits offered to employees.[43] Congress deemed the abuses taking place in the employer benefit plan marketplace to be of such national importance that it intended to make ERISA a matter of "federal concern," paving the way for federal courts to hear cases impacted by the

40. *Retirement Plans and ERISA FAQs*, U.S. DEP'T LAB., https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/retirement-plans-and-erisa-consumer [https://perma.cc/U28W-UQQ7].

41. ERISA's provision states:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

Employee Retirement Income Security Act of 1974, § 409(a); *see also Retirement Plans and ERISA FAQs*, *supra* note 40 (explaining plan participants have the right to sue fiduciaries for breach of a plan fiduciary duty).

42. Employee Retirement Income Security Act of 1974, § 502. Section 502(e)(1) legislates the following right of preemption: "Except for actions under subsection (a)(1)(B) of this section the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary." *Id.* § 502(e)(1); *see also* Aetna Health, Inc. v. Davila, 542 U.S. 200, 200 (2004) ("Because its purpose is to provide a uniform regulatory regime, ERISA includes expansive pre-emption provisions, such as ERISA § 502(a)'s integrated enforcement mechanism, which are intended to ensure that employee benefit plan regulation is 'exclusively a federal concern.'" (quoting Allessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523 (1981))); *see* Milby v. MCMC, LLC., 844 F.3d 605, 608 (6th Cir. 2016) (highlighting the use of ERISA to create "uniform national standards for plan administration." (quoting *Aetna Health*, 542 U.S. at 208)); Young v. Verizon, 615 F.3d 808, 817 (7th Cir. 2010) (noting plan standards ERISA attempted to make uniform).

43. *See* Ramirez v Inter-Continental Hotels, 890 F.2d 760, 763 (5th Cir. 1989) (finding plaintiff's state insurance claims were preempted by ERISA as those insurance benefits were part of an employee benefit plan).

legislation.[44] As a result, ERISA created stability within the pension industry by consolidating oversight and regulation under one statutory framework.[45]

IV. THE DEPARTMENT OF LABOR FIDUCIARY RULE

A. *Defining the Fiduciary Standard*

The Department of Labor's Fiduciary Rule was finalized in April 2016 and comprised of three separate regulations altering ERISA.[46] As written, the Fiduciary Rule was designed to address the growing conflict between how financial professionals are compensated and the quality of advice received by consumers.[47]

The Department of Labor believed the lack of disclosure of conflicts of interest by financial professionals placed consumers, particularly retirement investors, at a significant disadvantage.[48] Specifically, the recommendation by investment advisors to rollover monies from ERISA-sponsored plans to IRAs resulted in retirement investors losing billions of dollars per year in fees and investment results.[49] Initial definitions within ERISA classified an individual who provided advice "on a regular basis" as a "fiduciary."[50] This

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44. *See Alessi*, 451 U.S. at 523 (citing Malone v. White Motor Corp., 435 U.S. 497, 511 (1978)) (explaining Congress desired to enforce pension law under federal rather than state regulations).

45. *See* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987) ("The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants were free to obtain remedies under state law that Congress rejected in ERISA."); *cf* Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Tr., 463 U.S. 1, 25–26 (1983) (holding state causes of action "not of central concern to the federal statute" are not necessarily removable to federal court).

46. *See* Nat'l Ass'n for Fixed Annuities v. Perez, 217 F. Supp. 3d 1, 6 (D.D.C. 2016) (highlighting the purpose of the rule was to clarify what constitutes a conflict of interest in the retirement investment advice industry).

47. *See* Thomas C. Graves, *DOL Final Fiduciary Rule; Best Interest Contract Exemption or Level Fee Fiduciary Exemption from the Perspective of Advisers and Financial Institutions*, HAYNES BENEFITS PC, http://www.haynesbenefits.com/admin/uploads/DOL%20Final%20Fiduciary%20Rule.pdf [https://perma.cc/68T4-HE4E] ("The DOL believes that many investment professionals, consultants, brokers, insurance agents and other advisers operate within compensation structures that are misaligned with their customer's interests and they often create strong incentives to steer customers into particular investment products.").

48. *See id.* ("These conflicts of interest do not always have to be disclosed.").

49. *Id.*

50. The 1975 definition of a fiduciary developed by the Department of Labor was written as:

> Renders any advice described in paragraph (c)(1)(i) of this section on a regular basis to the plan pursuant to a mutual agreement, arrangement or understanding, written or otherwise, between

definition narrowed the interpretation as to who may qualify as a fiduciary from a legal perspective.[51] With a narrower definition in place, financial professionals could avoid a fiduciary classification by stating their advice was not of an ongoing nature.[52] Furthermore, advisors could also claim the advice was merely incidental to the service they provided and did not serve as the sole motivating factor to the final investment decision by the consumer.[53]

To address the issue of advice "on a regular basis," the Department of Labor simply dropped this language from its proposed rule change.[54] With the elimination of the regular basis standard, the concept of a fiduciary within the financial services industry has been broadened to include various types of advisor-client interactions, including not only ongoing advice but one-time transactional interactions as well. It is this new definition of "fiduciary" the financial industry now contests.

> such person and the plan or a fiduciary with respect to the plan that such services will serve as a primary basis for investment decisions with respect to plan assets, and that such person will render individualized investment advice to the plan based on the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments.

Definition of the Term "Fiduciary", 40 Fed. Reg. 50,842, 50,843 (Oct. 31, 1975) (codified at 29 C.F.R. § 2510 (1975)); *see also* Chamber of Commerce of the U.S. v. Hugler, 231 F. Supp. 3d 152, 163 (N.D. Tex. 2017) (detailing the Department of Labor established a five-part test to determine how an individual could qualify as a fiduciary), *rev'd on other grounds*, 885 F.3d 360 (2018); *Nat'l Ass'n for Fixed Annuities*, 217 F. Supp. 3d at 6 (D.D.C. 2016) ("Prior to the promulgation of the new rules[,] . . . the governing regulations defined a 'fiduciary,' in relevant part, as someone who renders investment advice 'on a regular basis . . . .'" (first citing 29 C.F.R. § 2510.3–21 (2015); then citing 26 C.F.R. § 54.4975–9 (2015))).

51. *See Nat'l Ass'n for Fixed Annuities*, 217 F. Supp. 3d at 13 (D.D.C. 2016) ("As a legal matter, the Department asserted that the 1975 regulation had 'significantly narrow[ed] the plain language of' the statutory definition of a 'fiduciary.'" (citing Definition of the Term Fiduciary, 75 Fed. Reg 65,263 (proposed Oct. 22, 2010) (to be codified at 29 C.F.R. pt. 2510))).

52. *See* Greg Iacurci, *How Will the DOL Enforce its Fiduciary Rule?*, INV. NEWS (Apr. 12, 2016, 2:07 PM), http://www.investmentnews.com/article/20160412/FREE/160419977/how-will-the-dol-enforce-its-fiduciary-rule [https://perma.cc/6J5X-Z3GC] ("Until the Labor Department's fiduciary rule, proving a broker was a fiduciary with an obligation to act in a client's best interest was difficult—brokers could easily skirt taking on fiduciary status by claiming their advice wasn't continuous . . . .").

53. *See id.* (detailing how an investment advisor could avoid a fiduciary responsibility to a client).

54. *See Nat'l Ass'n for Fixed Annuities*, 217 F. Supp. 3d at 6 ("The first new rule . . . modifies the definition of 'fiduciary' by, among other things, dropping the condition that the relevant investment advice be provided on a 'regular basis.'").

The United States District Court for the District of Columbia, in *National Ass'n for Fixed Annuities v. Perez*,[55] heard one of the first challenges to the updated "fiduciary" definition as it related to the annuity industry.[56] National Association for Fixed Annuities claimed an individual providing financial advice can only do so on a regular basis, and since their business model was focused on one-time transactions, they were exempt from the new definition.[57] The court found, however, that the act of providing investment advice to consumers was a universal act, regardless if it was ongoing or one-time.[58]

While the case before the district court in *National Ass'n for Fixed Annuities* was one of first impression regarding the Department of Labor Fiduciary Rule, its position on the nature of advice appears to be taking hold in other federal districts.[59] The Federal District Court for the Northern District of Texas in *Chamber of Commerce of the United States v. Hugler*,[60] reiterated that the statutory language of ERISA did not suggest investment advice was to be only viewed as advice given on a "regular basis."[61] Building on this foundation, the court explained advice regarding important financial decisions could also include those transactions occurring on a one-time basis.[62] With its holding in *Hugler*, the district court established that any

55. Nat'l Ass'n for Fixed Annuities v. Perez, 217 F. Supp. 3d 1 (D.D.C. 2016).

56. *See id.* at 21–22 (claiming the "regular basis" standard for advice must be retained because the sale of an annuity contract is a one-time transaction that was never intended to be covered under original ERISA language).

57. *See id.* at 23 ("As NAFA stresses, for over thirty years the Department used its five-part test to determine whether a person 'renders investment advice' to a plan or IRA, and . . . that test limited the reach of ERISA . . . prohibited transaction rules to those who render advice 'on a regular basis.'" (citing 29 C.F.R. § 2510.3–21(c)(1) (2015)).

58. *See id.* (stating from a plain reading of the statutory language there is nothing to suggest investment advice was only intended to be viewed as ongoing).

59. *See* Chamber of Commerce of the U.S. v. Hugler, 231 F. Supp. 3d 152, 168 (N.D. Tex. 2017) (declaring the Department of Labor has authority to define key terms within ERISA), *rev'd on other grounds*, 885 F.3d 360 (2018); *see generally* Mkt. Synergy Grp. v. U.S. Dep't of Labor, No. 16CV-4083-DDC-KGS, 2016 WL 6948061, at *30 (D. Kan. Nov. 28, 2016) ("The DOL has determined that the rule changes will benefit retirement investors throughout the United States by requiring investment advisers to act in the best interest of those investors.").

60. Chamber of Commerce of the U.S. v. Hugler, 231 F. Supp. 3d 152, 168 (N.D. Tex. 2017), *rev'd on other grounds*, 885 F.3d 360 (2018);

61. *See id.* at 171 (affirming an ongoing relationship is not required for someone to provide investment advice under ERISA); *see also Nat'l Ass'n for Fixed Annuities*, 217 F. Supp. 3d at 17 (noting the "regular basis" standard is no longer applicable to the current marketplace of financial advice).

62. *See Hugler*, 231 F. Supp. 3d at 171 n.64 ("Given that one time transactions such as rollovers can be the most important decision an investor makes, such transactions are both meaningful and substantial.").

individual who provides retirement advice is now subject to a fiduciary standard, regardless of the existence of an ongoing relationship.[63]

B. *The Best Interest Contract Exemption*

With the development of the Fiduciary Rule, certain transactions effected by financial professionals are now considered prohibited unless they qualify for relief under the Prohibited Transaction Exemption (PTE 84–24).[64] Acknowledging financial professionals are compensated through a number of methods, such as by fee or commission, PTE 84–24 was designed to allow these professionals to continue advising on various financial instruments, provided the compensation received was reasonable.[65] Recognizing enhanced regulation could prevent consumers from accessing certain types of financial products, the Department of Labor introduced the

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63. *See* Encino Motorcars, LLC. v. Navarro, 136 S. Ct. 2117, 2125 (2016) ("Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change." (citing Nat'l Cable & Telecomms. Assn. v. Brand X Internet Servs., 545 U.S. 967, 981–82 (2005); Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 863–84 (1984))); *Hugler*, 231 F. Supp. 3d at 175 (stating the definition of a fiduciary under the Department of Labor Fiduciary Rule is within "reasonable interpretation under ERISA").

64. PTE 84–24 states the following:

> In addition, the Secretary of Labor has discretionary authority to grant administrative exemptions under ERISA and the Code on an individual or class basis, but only if the Secretary first finds that the exemptions are (1) administratively feasible, (2) in the interests of plans and their participants and beneficiaries and IRA owners, and (3) protective of the rights of the participants and beneficiaries of such plans and IRA owners. Accordingly, while fiduciary advisers may always give advice without need of an exemption if they avoid the sorts of conflicts of interest that result in prohibited transactions, when they choose to give advice in which they have a financial interest, they must rely upon an exemption.

Amendment to and Partial Revocation of Prohibited Transaction Exemption (PTE) 84–24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters, 81 Fed. Reg. 21,147, 21,151(Apr. 8, 2016) (to be codified at 29 C.F.R. pt. 2550).

65. *See Hugler*, 231 F. Supp. 3d at 163 ("Relief under PTE 84–24 was conditional . . . and that '[t]he combined total of all fees, commissions and other consideration received by the insurance agent or broker . . . is not in excess of 'reasonable compensation' under ERISA and the Code." (quoting Amendment to and Partial Revocation of Prohibited Transaction Exemption (PTE) 84–24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters, 81 Fed. Reg. 21,147 (Apr. 8, 2016) (to be codified at 29 C.F.R. pt. 2550))).

Best Interest Contract Exemption (BICE).[66]

Under the BICE, those who give advice on retirement-specific accounts may be able to receive compensation that would traditionally be prohibited under PTE 84–24.[67] There are five distinct conditions a provider of advice must adhere to in order to qualify for this more stringent exemption.[68] First, any individual or company holding themselves out as an advisor to a retirement investor is required to state they are acting in a fiduciary capacity.[69] Next, the advisor must be governed by an Impartial Conduct Standard.[70] This standard requires advisors to know their customer with respect to their overall investment objectives and financial circumstances, while avoiding misleading statements during the advice conversation.[71] Thirdly, the BICE expressly states the need for policies to be in place to prevent abuses of the Impartial Conduct Standard.[72] Additionally, advisors cannot be incentivized to make retirement recommendations that are not in their customer's best interest.[73] Finally, all fees and forms of compensation must be disclosed to the consumer.[74]

C. *The Fiduciary Contract*

In order to formalize the fiduciary relationship under the BICE, the financial advisor, institution, and client must all enter into a written contract.[75] The contract must contain language stipulating the five

66. Best Interest Contract Exemption, *supra* note 9; *see generally Nat'l Ass'n for Fixed Annuities*, 217 F. Supp. 3d at 19 (highlighting the sale of a commission based product could subject that product to the restrictions of PTE 84–24).

67. *See* Graves, *supra* note 47 (explaining the role of the BICE in compensating those who give advice to retirement investors).

68. *See Hugler*, 231 F. Supp. 3d at 165 ("However, BICE proposed stricter conditions to securing an exemption from the prohibited transactions than did PTE 84–24.").

69. *Id.* at 167.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 165.

75. *See* Mkt. Synergy Grp., Inc. v. U.S. Dep't of Labor, No. 16-CV-4083-DDC-KGS, 2016 WL 6948061, at *4 (D. Kan. Nov. 28, 2016) ("To apply, the BICE would require a 'Financial Institution' (as defined in the proposed BICE) and the adviser to acknowledge fiduciary status by contract . . . ."); *NAIFA Fact Sheet: DOL Expands Fiduciary Definition*, NAIFA, http://www.naifa.org/NAIFA/media/GovRel/issuefed/NAIFA-DOL-Fact-Sheet.pdf [https://perma.cc/V6M8-KR4U] (outlining the necessity of a written contract to satisfy the BICE); *see also* Graves, *supra* note 47, at 3 ("An IRA other or non-ERISA Plan must enter into an enforceable written contract with the Financial Institution that acknowledges fiduciary status for itself and its Advisers.").

conditions for meeting the BICE detailed by the *Hugler* court.[76] For those investors who have an existing, ongoing relationship with a financial advisor, an amendment to the existing contract is sufficient.[77] In addition, the financial institution must make express warranties stating the institution is in compliance with Impartial Conduct Standards, has procedures in place to prevent material conflicts of interest, and does not create special incentives for advisors to recommend products not in the best interest of the investor.[78] While the fiduciary contract is now necessary to memorialize the advisor-client relationship, it merely needs to be executed at the time the account is opened and not during the initial retirement conversation.[79]

Once again, ERISA provides a regulatory framework for employer-sponsored retirement plans.[80] Participants of those plans typically receive plan documents detailing the responsibilities of the employee, employer, and plan administrators.[81] The primary role of the fiduciary contract is to provide protection to those participating in IRAs or non-ERISA governed retirement accounts.[82] While financial advisors do periodically provide

76. *See*. *Hugler*, 231 F. Supp. 3d at 167 (explaining the five conditions of the BICE); *see also* Graves, *supra* note 47, at 3–6 (discussing language necessary to fulfill contractual requirements); *NAIFA Fact Sheet*, *supra* note 75 (highlighting contractual requirements to be satisfied under the BICE).

77. *See* Graves, *supra* note 47, at 3 ("An alternative to executing a new contract with an IRA or other non-ERISA Plan is to amend an existing contract to include the terms described . . . .").

78. *See The Final Rule: DOL's Expanded Definition of Investment Advice Fiduciary Under ERISA and Revised Complex of Exemptions*, EVERSHEDS SUTHERLAND (Apr. 12, 2016), https://us.eversheds-sutherland.com/portalresource/DOLFinalRulev2.pdf [https://perma.cc/4BK4-FP2D] (discussing warranties existing within the contract terms); Graves, *supra* note 47, at 4 (listing three distinct warranties that must be present within the contract).

79. *See* Best Interest Contract Exemption, *supra* note 9, at 21,008 ("[T]he exemption does not require execution of the contract at the start of Retirement Investors' conversations with Advisers, as long as it is entered into prior to or at the same time as the recommended investment transaction.").

80. Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 (1978).

81. *See A Plan Sponsor's Responsibilities*, IRS, https://www.irs.gov/retirement-plans/plan-sponsor/a-plan-sponsors-responsibilities [https://perma.cc/2G4B-2D3L] (noting plan documents must remain in compliance with the law); *Retirement Plans and ERISA FAQs*, U.S. DEP'T LAB., https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/retirement-plans-and-erisa-consumer [https://perma.cc/U28W-UQQ7] (explaining the purpose of ERISA and the minimum amount of information necessary in plan documents to be furnished to consumers).

82. The Department of Labor stated the following in its purpose for regulatory action:

> If advice is provided to an IRA investor or a non-ERISA plan, the Financial Institution must set forth the standards of fiduciary conduct and fair dealing in an enforceable contract with the investor. The contract creates a mechanism for IRA investors to enforce their rights and ensures that they will have a remedy for advice that does not honor their best interest. In this way, the

advice on ERISA-sponsored plans, they typically work with consumers purchasing products in the retail IRA marketplace; thus, the fiduciary contract is designed to ensure these retail consumers receive advice that is in their best interest.[83]

V. *HUGLER*, PRIVATE RIGHTS OF ACTION, AND THE FIFTH CIRCUIT

A. Hugler *and the Private Right of Action Question*

One of the primary concerns and sources of confusion derived from the BICE is whether a private right of action to enforce federal law has been created on behalf of consumers.[84] Critics of the rule, mainly those representing the financial services industry, claim the fiduciary contract will permit consumers to bring breach of contract claims against fiduciaries.[85] It is suggested that if the Fiduciary Rule does create a private right of action, then the Department of Labor violated the Supreme Court's ruling in *Alexander v. Sandoval*,[86] where only acts of Congress, and not administrative

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> contract gives both the individual adviser and the financial institution a powerful incentive to ensure advice is provided in accordance with fiduciary norms, or risk litigation, including class litigation, and liability and associated reputational risk.

Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20,946, 20,947 (Apr. 8, 2016) (to be codified at 29 C.F.R. pt. 2509, 2510, 2550).

83. *See id.*(stating under current industry standards there are inadequate protections in place to ensure advice received is free from conflicts of interest as most financial advisors are compensated through a commission-based system).

84. *See* Paul Foley & John Sanders, *Fiduciary Rule Creates Breach of Contract Claim, But No Private Right of Action*, LEXOLOGY (June 12, 2017), https://www.lexology.com/library/detail.aspx?g=9d4dcada-155d-43c6-8020-0e74dcd5572c [https://perma.cc/M79Y-EEM2] ("The creation of a private right of action is one of the investment industry's chief concerns with the Fiduciary Rule.").

85. *See* Chamber of Commerce of the U.S. v. Hugler, 231 F. Supp. 3d 152, 181 (N.D. Tex. 2017) (detailing the plaintiff's claim that the Best Interest Contract Exemption and PTE 84–24 create a private cause of action), *rev'd on other grounds*, 885 F.3d 360 (2018); Foley & Sanders, *supra* note 84 ("Industry leaders claim that the BIC exemption creates a private right of action because it enables investors to bring breach of contract claims and class actions against the fiduciaries with whom they contract."); *see also* Nick Thornton, *Labor Puts Fiduciary Rule's Private Right of Action Under Microscope*, BENEFITS PRO (Mar. 15, 2017), http://www.benefitspro.com/2017/03/15/labor-puts-fiduciary-rules-private-right-of-action?page_all=1&slreturn=1508437981 [https://perma.cc/V7SG-DF3L] ("The private right-of-action provision prohibits financial service firms and insurance companies from writing class-action exclusions into the rule's Best Interest Contract Exemption . . . .").

86. Alexander v. Sandoval, 532 U.S. 275 (2001).

agencies, may create private rights of action to enforce federal law.[87]

The federal district court in *Hugler* addressed the private right of action issue after the United States Chamber of Commerce claimed the Fiduciary Rule was in direct conflict with *Sandoval*.[88] According to the court, the BICE and PTE 84–24 do nothing more than require written disclosures to be added to contracts between consumers and financial institutions seeking to qualify for the exemptions.[89] Violation of these written disclosures may result in breach of contract disputes rather than lawsuits claiming abuse of a federal regulation.[90] Although state courts typically hear breach of contract claims, even a federal court sitting in diversity would have to apply state contract law in order to enforce the contract's provisions.[91] Additionally, for those products used to fund retirement objectives and governed by a contract—namely, annuities—the BICE did not change how those contracts are enforced.[92] The court further stated it is not uncommon for regulated businesses that use written contracts to have mandatory provisions dictated by federal regulations.[93]

87. *See id.* at 286 (holding private rights of action to enforce federal law are created through legislative means); *see also* Touche Ross & Co. v. Redington, 442 U.S. 560, 577 (1979) ("The source of plaintiffs' rights must be found, if at all, in the substantive provisions of the 1934 Act which they seek to enforce, not in the jurisdiction provision." (citing Sec. Inv'r Prot. Corp. v. Barbour, 421 U.S. 412, 424 (1975))).

88. *Hugler*, 231 F. Supp. 3d at 181.

89. *Id.*

90. *See id.* ("The consequence may be a lawsuit for non-compliance with the contract, but the exemptions do not create a federal cause of action under Title II.").

91. *See id.* at 181–82 (explaining state contract law determines the enforceability of a contract regardless if a breach of contract suit is brought in state or federal court); Foley & Sanders, *supra* note 84 ("The judge reasoned that any lawsuit resulting from the breach of a BIC exemption contract would be brought under state contract law rather than federal ERISA law."); *see also* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.").

92. *See Hugler*, 231 F. Supp. 3d at 182 ("[B]ICE and the amended PTE 84–24 do not change the enforcement regime that existed prior to the current rulemaking." (footnote omitted)); *see also* Abbit v. ING USA Annuity & Life Ins. Co., 999 F. Supp. 2d 1189, 1197–98 (S.D. Cal. 2014) (stating criteria necessary to bring a breach of contract claim for an annuity contract under California state law).

93. *See Hugler*, 231 F. Supp. 3d at 182 (noting the existing precedent of federal regulations determining mandatory contract provisions); Foley & Sanders, *supra* note 84 ("The judge also noted that it is not a new concept for federal regulations to require entities to enter into written contracts with mandatory provisions . . . and multiple other agencies require that their regulated entities enter into written agreements with mandatory terms.").

With the *Hugler* court pronouncing that a private right of action to enforce federal law was not created by the Department of Labor, the burden of enforcing the Fiduciary Rule dramatically shifted from the federal government.[94] As contemplated, the Rule did not necessarily provide for an administrative enforcement structure.[95] While retirement plan participants have sufficient remedies available under ERISA, those consumers saving for retirement outside of employer-sponsored plans will need to seek redress in state court.[96] What should concern retirement investors is the consistency, or lack thereof, with which the Fiduciary Rule will be interpreted under state law. Depending on the state and its court's interpretation of what constitutes a breach of fiduciary duty, the Department of Labor's desire to create a uniform code of conduct throughout the financial services industry may face headwinds.[97]

94. *See Hugler*, 231 F. Supp. 3d at 184 (holding the Fiduciary Rule does not create a private right of action); Foley & Sanders, *supra* note 84 ("[A]ny claims brought as a result of BIC exemption contracts would be brought under state law rather than federal law.").

95. *See* Iacurci, *supra* note 52 ("The Labor Department isn't the government agency with enforcement jurisdiction over IRAs. That responsibility falls to the Internal Revenue Service . . . . However, the IRS 'has not been particularly interested or vigilant in enforcement . . . .'"); Nick Thornton, *Who Will Enforce the DOL Rule?*, BENEFITS PRO (June 1, 2016, 4:04 AM), https://www.benefitspro.com/2016/06/01/who-will-enforce-the-dol-rule/?page_all=1&slreturn=20190322155333 [https://perma.cc/WH7T-R6ES] ("Borzi acknowledged what critics of DOL argued throughout the regulatory process—'the DOL does not have direct enforcement authority' over IRAs. . . That means the BIC exemption will not be enforceable relative to IRAs through statutory rules . . . .").

96. *See* Mark Schoeff Jr., *Trump Administration Targets Class-Action Right in DOL Fiduciary Rule, but Other Legal Avenues Could Remain for Investors*, INV. NEWS (Aug. 31, 2017, 5:08 PM), http://www.investmentnews.com/article/20170831/FREE/170839980/trump-administration-targets-class-action-right-in-dol-fiduciary [https://perma.cc/W9K8-NH5F] (observing state contract law as the appropriate means available for individual retirement account holders to seek remedy against investment professionals who violate the fiduciary standard); Thornton, *supra* note 95 ("Absent the statutory authority, the BIC exemptions will have to be enforced through private legal action, or as Borzi put it, 'the consumer has to enforce the rules through state contract actions.'").

97. *See* Schoeff Jr., *supra* note 96 (according to attorney Joshua Lichtenstein, "[t]he actionable claims could differ from state-to-state. That could mean some behavior is a breach of fiduciary duty to an IRA in one state but not in another."). *Compare* Wasserman v. Kay, 14 A.3d 1193, 1219 (Md. Ct. Spec. App. 2011) ("In a claim for monetary damages at law, however, an alleged breach of fiduciary duty may give rise to a cause of action, but it does not, standing alone, constitute a cause of action."), *with* Snyder v. Cowell, No. 08-01-00444-CV, 2003 WL 1849145, at *6 (Tex. App.—El Paso Apr. 10, 2003, no pet.) (mem. op.) (noting the existence in Texas of a breach of fiduciary duty cause of action), *and* Daugherty v. Ray, No. 01-00-00311-CV, 2002 WL 501592, at *3 (Tex. App.—Houston [1st Dist.] Apr. 4, 2002, no pet.) ("A cause of action for breach of fiduciary duty in Texas refers to unfairness in the contract . . . .").

B. *Vacating the* Hugler *Decision*

Following the election of President Donald Trump in November 2016, the financial services industry saw a renewed opportunity to pressure the incoming Administration to revoke the Fiduciary Rule.[98] On February 3, 2017, only days before the *Hugler* decision, President Trump issued a memorandum directing the Department of Labor to conduct a full review of the Fiduciary Rule and its impact on American investors.[99] The directive by President Trump did not order the Rule to be revoked in its entirety, suggesting the Administration was willing to permit the existing judicial challenges taking place to run their course.[100] Resultingly, the Presidential Memorandum would require the Department of Labor to propose a new rule to terminate or revise the existing Obama-era rule.[101] Amongst the backdrop of lobbying, a Presidential Memorandum, and the federal district court ruling upholding the Rule, the United States Chamber of Commerce filed an appeal to the United States Court of Appeals for the Fifth Circuit in late February 2017.[102]

On March 15, 2018, the Fifth Circuit issued its opinion on whether the

98. *See* Kristen Ricaurte Knebel, *Wall Street Accepts (but Lobbies Against) the Fiduciary Rule*, BLOOMBERG (Sept. 8, 2017), https://www.bna.com/wall-street-accepts-n57982087610/ [https://perma.cc/72G4-LW5W] (reflecting how financial firms are working towards compliance with the Fiduciary Rule while lobbying against it to the government); *see also* Jessica Karmasek, *Trump Administration Sued Over Delay of Fiduciary Rule*, FORBES (Nov. 1, 2017, 10:19 AM), https://www.forbes.com/sites/legalnewsline/2017/11/01/trump-administration-sued-over-delay-of-fiduciary-rule/#228e43847501 [http://perma.cc/8Y7Z-6V5K] (recalling American Oversight Executive Director Austin Evers' position that "[t]he Department of Labor's attempts to roll back the . . . fiduciary rules are yet additional examples of how the Trump administration has sided with well-connected businesses . . . .").

99. *See* Fiduciary Duty Rule, Memorandum for the Secretary of Labor on the Fiduciary Duty Rule, 82 Fed. Reg. 9675, 9675 (Feb. 3, 2017) [hereinafter Fiduciary Duty Rule Memorandum] (requiring the Department of Labor to examine whether the Fiduciary Rule had and harmful effects on "the ability of Americans to gain access to retirement information and financial advice.").

100. *See* Zeke J. Miller & Haley Sweetland Edwards, *White House Stalls Obama Administration Rule on Retirement Advisors*, TIME (Feb. 3, 2017), http://time.com/4659152/donald-trump-fiduciary-rule-retirement-financial-advisers/ [https://perma.cc/6FQM-PDYA] ("The executive order for the regulatory review is largely symbolic, merely directing agencies and the Financial Stability Oversight Council to begin a regulatory review process.").

101. *See* Fiduciary Duty Rule Memorandum, *supra* note 99 ("[I]f you conclude for any other reason after appropriate review that the Fiduciary Duty Rule is inconsistent . . . then you shall publish for notice and comment a proposed rule rescinding or revising the Rule . . . .").

102. Notice of Appeal, Chamber of Commerce of the U.S. v. Hugler, 231 F. Supp. 3d 152 (N.D. Tex. 2017) (No. 3:16-cv-1476-M).

Department of Labor Fiduciary Rule would be permitted to stand.[103] In short, the Fifth Circuit vacated the Rule in its entirety.[104] According to the majority opinion, the definition of the word "fiduciary" as used by the Department of Labor was in conflict with how Congress envisioned the word to be interpreted under section 1002 of ERISA.[105] Since Congress used the term "fiduciary" within the ERISA legislation, the common law definition is presumed to be used.[106] However, Congress also added the words "to the extent," which was designed to limit the definition, not expand it as the Department of Labor intended to do.[107] The court suggested that it would defer to the use of words used by Congress in enacting the ERISA legislation rather than rely on the subjective interpretation of another administrative agency.[108]

Of greater consequence within the Fifth Circuit's opinion, the court found the Fiduciary Rule to be unreasonable in nature.[109] Although several of these unreasonable factors are discussed, there are two that will shape the future construction of best interest and fiduciary standards. First, state

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103. Chamber of Commerce of the U.S. v. U.S. Dep't of Labor, 885 F.3d 360, 360 (5th Cir. 2018).

104. *Id.* at 363.

105. According to ERISA, a fiduciary is defined as:

> Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1002(23)(A) (1978); *see U.S. Dep't of Labor*, 885 F.3d at 369 ("We conclude that DOL's interpretation of an 'investment advice fiduciary' relies too narrowly on a purely semantic construction of one isolated provision and wrongly presupposes that the provision is inherently ambiguous.").

106. *See U.S. Dep't of Labor*, 885 F.3d at 369–70 (discussing the presumption of the common law meaning of the word "fiduciary" when used by Congress).

107. *See id.* at 371("That Congress did not place 'fiduciary' in quotation marks indicates Congress's decision that the common law meaning was self-explanatory, and it accordingly addressed fiduciary status for ERISA purposes in terms of enumerated functions." (citing John Hancock Mut. Life Ins. Co. v. Harris Tr. & Sav. Bank, 510 U.S. 86, 96–97 (1993))); *John Hancock Mut. Life Ins. Co.*, 510 U.S. at 96–97 (explaining phrases such as "to the extent that" should be viewed as limiting phrases).

108. *See U.S. Dep't of Labor*, 885 F.3d at 372–73 (arguing Congress was fully aware of the words it used to construct ERISA legislation and could have written the legislation in any manner it saw fit).

109. *Id.* at 380.

private rights of action were not created by the BICE since only Congress may confer that right, agreeing with the Chamber of Commerce's position in the earlier federal district court case in which it argued the *Sandoval* standard should apply.[110] The court further reasoned that if the BICE did create a state private right of action, then it was nothing more than an attempt by the Department of Labor to circumvent Congress's rulemaking authority.[111]

The second unreasonable factor of the Fiduciary Rule given by the Fifth Circuit was that the Department of Labor ran afoul of the powers granted to the Securities and Exchange Commission (SEC) by the 2010 Dodd-Frank Act.[112] According to the court, it was indeed Dodd-Frank that empowered "the SEC to promulgate enhanced, uniform standards of conduct for broker-dealers and investment advisers[.]"[113] The SEC was deemed to be the governing body having greater expertise in regulating the financial services industry, with the Department of Labor being in a position of supporting any SEC regulatory initiatives.[114] Under section 913 of the Dodd-Frank Act, the SEC was granted authority to develop a best interest standard as it deems appropriate.[115] Remarkably, while the Fifth Circuit vacated the Department of Labor's attempt to institute a fiduciary rule and best interest standards for financial professionals, it clearly left open the door for the SEC to develop similar standards.[116]

110. *Id.* at 384 ("Only Congress may create privately enforceable rights, and agencies are empowered only to enforce the rights Congress creates." (citing Alexander v. Sandoval, 532 U.S. 275, 291 (2001))).

111. *Id.* (claiming statutory authorization is the only means by which a lawsuit could be brought in either federal or state court).

112. *See id.* at 385 (observing the Fiduciary Rule was the result of the "DOL's decision to outflank two Congressional initiatives to secure further oversight of broker/dealers handling IRA investments and the sale of fixed-indexed annuities.").

113. *See id.*

114. *See id.* at 385–86 ("Rather than infringing on SEC turf, DOL ought to have deferred to Congress's very specific Dodd-Frank delegations and conferred with and supported SEC practices to assist IRA and all other individual investors.").

115. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 913(g), 124 Stat. 1376, 1828 (2010) (codified as 15 U.S.C.S. § 80b-11 (2018)). According to section 913(g)(1), "[T]he Commission may promulgate rules to provide that the standard of care for all brokers, dealers, and investment advisers, when providing personalized investment advice about securities to retail customers . . . shall be to act in the best interest of the customer . . . ." *Id.*

116. *See U.S. Dep't of Labor*, 885 F.3d at 386 ("DOL's direct imposition on the delegation to SEC is made plain by the text of Dodd-Frank Section 913(g)(2) . . . .").

VI. THE SECURITIES AND EXCHANGE COMMISSION: REGULATION BEST INTEREST

A. *Overview of Regulation Best Interest*

One month following the Fifth Circuit's decision in *Chamber of Commerce*, the Securities and Exchange Commission (SEC) proposed a rule entitled Regulation Best Interest (Regulation BI)[117] that would govern the conduct of those who provide investment advice to retail consumers.[118] In developing its proposed rule, the SEC considered the impact the Department of Labor Fiduciary Rule would have on investors and the financial services industry.[119] Regulation BI seeks to address the concerns over standards of care among financial professionals by incorporating concepts from the Department of Labor's BICE provision within the Fiduciary Rule.[120] With the preceding in mind, the SEC appears to be responding to the calls of the financial services industry to develop a rule that is fair to both consumers and investment professionals alike.[121]

Regulation BI seeks to improve on the restrictive language found in the Fiduciary Rule while expanding the scope of who and what type of

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117. Regulation Best Interest, 83 Fed. Reg. 21,574 (proposed May 9, 2018) (to be codified at 17 C.F.R. pt. 240).

118. *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Proposes to Enhance Protections and Preserve Choice for Retail Investors in Their Relationships with Investment Professionals, (Apr. 18, 2018), https://www.sec.gov/news/press-release/2018-68 [https://perma.cc/BU4B-GBJM] ("Under proposed Regulation Best Interest, a broker-dealer would be required to act in the best interest of a retail customer when making a recommendation of any securities transaction or investment strategy involving investment securities to a retail customer.").

119. *See* Regulation Best Interest, 83 Fed. Reg. at 21,583 ("We also considered the regulatory landscape applicable to broker-dealers under the Exchange Act and SRO rules and the investor protections provided when broker-dealers recommend securities . . . and any differences between those protections . . . particularly those that would exist under the DOL Fiduciary Rule . . . .").

120. *See id.* at 21,589 ("We believe that the principles underlying our proposed best interest obligation as discussed above, and the specific Disclosure, Care, and Conflict of Interest Obligations described in more detail below, generally draw from underlying principles similar to the principles underlying the DOL's best interest standard, as described by the DOL in the BIC Exemption."); *see also* Mark M. Goldberg, *How the SEC Advice Rule Improves on the DOL Fiduciary Rule*, INV. NEWS (May 29, 2018, 12:23 PM), https://www.investmentnews.com/article/20180529/BLOG09/180529924/how-the-sec-advice-rule-improves-on-the-dol-fiduciary-rule [https://perma.cc/2PGL-4RGU] (stating portions of the SEC proposed rule are based on work previously completed by the DOL).

121. *See* Rebecca Moore, *DOL, SEC Both Have Fiduciary Conduct Standards Slated for Next Year*, PLAN ADVISER (Oct. 19, 2018), https://www.planadviser.com/dol-sec-fiduciary-conduct-standards-slated-next-year/ [https://perma.cc/9PQN-HCQ8] ("The retirement plan and adviser industry has long called for the DOL and SEC to work together on a new fiduciary—or conflict-of-interest rule.").

recommendations should be covered under a best interest standard.[122] Regulation BI, as currently proposed, is designed to hold any individual or financial institution who provides investment advice to retail consumers—regardless of account type—to a heightened standard.[123] This standard holds the provider to three obligations: 1) disclosure, 2) care, and 3) conflict of interest.[124] Although Regulation BI imposes these obligations and does not directly confer a fiduciary standard on investment professionals, it also "does not clearly define 'best interest'" while still requiring a duty to the customer.[125] The ambiguity presented within the definition will leave the proposed rule subject to interpretation by consumers and eventually courts.[126]

B. *The Disclosure Obligation*

The first obligation under Regulation BI is one of disclosure. Under the disclosure obligation, when an investment professional makes a recommendation, they are required to "disclose to the retail customer, in writing, the material facts relating to the scope and terms of the relationship with the retail customer and all material conflicts of interest associated with the recommendation."[127] With respect to "scope and terms of the

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122. *See* PwC Fin. Servs. Reg. Prac., *Five Key Points from the SEC's "Best Interest" Rule Proposal*, PWC: FIRST TAKE (Apr. 26, 2018), https://www.pwc.com/us/en/financial-services/regulatory-services/publications/assets/pwc-sec-best-interest-rule-proposal.pdf [https://perma.cc/CR2J-DC46] (explaining the SEC's rule will cover all investment recommendations made to retail customers but will not yield on restrictions as to how investment professionals are compensated).

123. Regulation Best Interest, 83 Fed. Reg. at 21,575. The proposed rule states:

> That all broker-dealers and natural persons who are associated persons of a broker-dealer (unless otherwise indicated, together referred to as "broker-dealer"), when making a recommendation of any securities transaction or investment strategy involving securities to a retail customer, act in the best interest of the retail customer at the time the recommendation is made without placing the financial or other interest of the broker-dealer or natural person who is an associated person making the recommendation ahead of the interest of the retail customer ("Regulation Best Interest").

Id.

124. *Id.* at 21,585.

125. *See* PwC Fin. Servs. Reg. Prac., *supra* note 122, (noting Regulation BI provides little to no explanation as to the meaning of "best interest").

126. *See id.* ("While many broker-dealers may be pleased with the limited changes, retail customers may face more confusion than clarity without an explicitly defined standard.").

127. Regulation Best Interest, 83 Fed. Reg. at 21,599.

relationship," the SEC envisions a policy where broker-dealers disclose to the customer the capacity in which the investment professional is making a recommendation. In furthering this vision, a requirement exists that seeks to explain all costs associated not only to the recommendation but also to the accounts held by the customer with the broker-dealer.[128] Finally, under this proposition, the broker-dealer is required to disclose the nature of the services provided on the investment account, such as whether ongoing monitoring of investment performance is taking place.[129]

Within the disclosure obligation is the requirement that all disclosures be made to the consumer in writing in an attempt to reduce investor confusion.[130] The writing, also known as the "Relationship Summary," would detail all the information necessary for an investor to have in making a decision about working with the financial institution.[131] This information includes "the services, fees, conflicts, and disciplinary history of firms and financial professionals they are considering, along with references and links to other disclosure where interested investors can find more detailed information."[132] Of note is the requirement to deliver the writing at the time the consumer either enters into an investment advisory agreement or when first utilizing a broker-dealer's services.[133] While the SEC does not explicitly call the writing a contract, if it is incorporated as part of an investment advisory agreement or is a condition of engaging a customer in a financial relationship, it does leave to question whether it could be considered an enforceable agreement between two parties. Furthermore, the silence within Regulation Best Interest on this issue leads to the possibility that a breach of the writing could be contested in a court of law.

C. *The Care Obligation*

The second obligation proposed under Regulation BI is the care obligation.[134] Within this obligation resides an expectation that financial professionals will "exercise reasonable diligence, care, skill, and prudence"

128. *Id.*

129. *Id.*

130. *See id.* at 21,600 ("This Disclosure Obligation also forms an important part of a broader effort to address retail investor confusion . . . .").

131. *See id.* (detailing the overriding purpose of the Relationship Summary).

132. *Id.*

133. *Id.*

134. *Id.* at 21,608.

when making investment recommendations.[135] These expectations apply to three distinct areas of the recommendation process. First, the investment professional must reasonably believe that based on a risk–and–reward analysis, a recommendation that is in the best interest for a particular segment of clients is being made.[136] Second, using an investment profile for the specific customer, the professional must reasonably believe the recommendation is in the best interest of said customer.[137] Finally, there must be a reasonable basis to conclude that a series of recommendations is not excessive and is in the customer's best interest.[138]

Notably, the SEC appears to pay deference to the Impartial Conduct Standard under the Fiduciary Rule in crafting language for the care obligation.[139] The SEC interpreted the BICE within the Department of Labor rule to apply a standard of care requiring investment-advice fiduciaries to conduct themselves as impartial professionals.[140] Furthermore, the SEC stated—regarding the BICE—that "[t]he fiduciary must adhere to an objective professional standard and is subject to a particularly stringent standard of prudence when they have a conflict of interest."[141] The influence of the Fiduciary Rule language is apparent when the SEC explains the "proposed Care Obligation establishes an objective, professional standard of conduct for broker-dealers that requires broker-dealers to 'exercise reasonable diligence, care, skill and prudence[.]'"[142] One can infer the SEC is tying the care obligation directly to the duties set forth under the Fiduciary Rule. This nearly duplicative language by the SEC clearly suggests that if a financial professional violates the standard of care they are in danger of breach of a fiduciary duty to the customer.

135. *Id.*

136. *See id.* (suggesting recommendations should be generally accepted amongst a larger group of investors).

137. *See id.* (explaining the reasonable basis determination for an individual investor is dependent on an investment profile).

138. *See id.* (noting investment professionals have an obligation to ensure that a series of transactions are not excessive in nature).

139. *See id.* at 21,614 ("[W]e believe the proposed Care Obligation generally reflects similar underlying principles as the 'objective standards of care' that are incorporated in the best interest Impartial Conduct Standard as set forth by the DOL in the BIC Exemption.").

140. *See id.* (providing the SEC's interpretation into the DOL's meaning of standard of care).

141. *Id.* at 21,615.

142. *Id.*

D. *The Conflict of Interest Obligation*

The final obligation under Regulation BI is the conflict of interest obligation. There are two requirements to the obligation that apply directly to financial institutions.[143] First, the company must maintain written policies and procedures disclosing material conflicts of interest as they relate to the recommendations being made to customers.[144] Second, financial companies must disclose any financial incentives resulting from the sale of a recommendation.[145] The conflict of interest obligation does appear to be the most flexible of the three as it permits financial institutions to make their own decision on which conflicts of interest to disclose.[146] In addition, the SEC is encouraging broker-dealers to develop compliance systems that fit within their own business model.[147]

E. *Pathway to Litigating Violations of Regulation Best Interest in State Court*

The Securities and Exchange Act of 1934 granted federal courts jurisdiction over alleged violations of the Act.[148] Indeed, since inception of the legislation, courts have ruled consistently that suit for violations under the Act are subject to federal court jurisdiction.[149] However,

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143. *Id.* at 21,617.

144. *See id.* (describing what is necessary to have a fully compliant company policy on conflicts of interest).

145. *See id.* ("[E]stablish, maintain, and enforce written policies and procedures reasonably designed to identify, and disclose and mitigate, or eliminate, material conflicts of interest arising from financial incentives associated with such recommendations.").

146. *See id.* (stating broker-dealers will "be permitted to exercise their judgment" on whether to disclose a conflict of interest).

147. *See id.* at 21,618 ("Use of a risk-based compliance and supervisory system would grant broker-dealers the flexibility to establish systems that are tailored to their business models . . . .").

148. 15 U.S.C. § 78aa (2010). The Code reads in part:

> The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder.

Id.

149. *See* Sparta Surgical Corp. v. Nat'l Ass'n of Sec. Dealers, 159 F.3d 1209, 1211–12 (9th Cir. 1998) (declaring federal courts have jurisdiction over suits to enforce the Act); Hawkins v. Nat'l Ass'n of Sec. Dealers, 149 F.3d 330, 331 (5th Cir. 1998) (explaining federal courts have "broad subject-matter jurisdiction in the arena of securities regulation"); Sec. Inv'r Prot. Corp. v. Vigman, 764 F.2d 1309, 1313 (9th Cir. 1985) (citing provision within the Act that grants federal jurisdiction over violations of the Act).

following the announcement of Regulation BI, state governments have criticized the proposed rule as not going far enough to protect its citizens.[150] As of August 2018, sixteen states including the District of Columbia commented on the deficiencies within the proposed rule.[151] Although it remains to be seen whether states will enact their own best interest standards, the displeasure amongst state attorneys general indicates potential state challenges—to the SEC's rulemaking authority and best interest standards—should be handled on a state-by-state basis.[152]

Should direct state challenges to Regulation BI prove to be unsuccessful, the United States Supreme Court in its 2016 decision in *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*[153] may provide an alternative means for states to protect consumers with respect to the SEC rule.[154] In *Manning*, Greg Manning brought suit against Merrill Lynch in New Jersey state court alleging the investment company purposefully devalued the share price of a NASDAQ traded stock resulting in significant losses for Manning.[155] Although Manning cited violations of federal law in his complaint, he also sought to make claims that Merrill Lynch violated New Jersey state law.[156] Merrill Lynch had the case removed to federal court district court, which ultimately denied Manning's motion to move the case back to state court.[157] Manning argued that even though he brought state-based claims alleging violations of a federal statute, those claims should be heard in state court.[158] The Supreme Court agreed with Manning, holding that state-based claims are not subject to removal to federal court simple because they reference a

150. *See Fiduciary Governance: A Fiduciary's 2018 Retrospective (and Predictions for 2019)*, STRADLEY RONON: RISK&REWARD 2 (Jan. 7, 2019), https://www.stradley.com/-/media/files/publications/2019/01/risk_and_reward_jan7_2019.pdf [https://perma.cc/YA3P-BCHH] (signaling the desire of the State of Massachusetts to develop its own fiduciary standard in light of the SEC's proposed rule).

151. *See id.* at 8 (showing a significant number of states do not believe Regulation BI will sufficiently protect their citizens).

152. *See id.* at 9 ("While regulations may face better odds than legislation, they also remain vulnerable to court challenge that the regulator acted beyond its powers.").

153. Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning, 136 S. Ct. 1562 (2016).

154. *See id.* (holding state court had proper jurisdiction over Manning's claims against an investment company).

155. *Id.* at 1566.

156. *Id.* at 1566–67.

157. *Id.* at 1567.

158. *Id.* at 1569.

violation of federal statute.[159] As a result of the *Manning* decision, a possibility now exists for consumers to bring causes of action such as breach of fiduciary duty, breach of contract, and other state-based deceptive trade practices claims against Regulation BI in state courts without fear of removal over a federal jurisdictional question.

VII. LITIGATING VIOLATIONS OF REGULATION BEST INTEREST UNDER STATE COMMON LAW CAUSES OF ACTION

A. *Breach of Contract*

Since the *Hugler* court suggested the breach of a fiduciary agreement between a retirement investor and advisor amounts to no more than a breach of contract, the investor would need to bring a common law cause of action in state court.[160] In a breach of contract cause of action, the plaintiff maintains the burden of proving (1) that a valid contract did exist between the parties, (2) there was performance of the contract on behalf of the plaintiff, (3) a breach occurred by the defendant, and (4) the plaintiff incurred damages.[161] State courts have universally recognized these elements in breach of contract cases.[162] Considering the intent of ERISA, the Fiduciary Rule, and Regulation BI was to create a uniform code of conduct in the financial services industry and standardize the means of recovery for aggrieved investors, the acceptance of these breach of contract elements may aid the SEC in reaching its stated objectives.

159. *See id.* at 1574 ("[W]e will not lightly read the statute to alter the usual constitutional balance, as it would by sending actions with all state-law claims to federal court just because a complaint references a federal duty."); Matsushita Elec. Indus. Co., Ltd. v. Epstein , 516 U.S. 367, 381 (1996) ("While § 27 prohibits state courts from adjudicating claims arising under the Exchange Act, it does not prohibit state courts from approving the release of Exchange Act claims in the settlement of suits over which they have properly exercised jurisdiction . . . .").

160. Chamber of Commerce of the U.S. v. Hugler, 231 F. Supp. 3d 152, 181–82 (N.D. Tex. 2017), *rev'd on other grounds*, 885 F.3d 360 (2018).

161. Abbit v. ING USA Annuity & Life Ins. Co., 999 F. Supp. 2d 1189, 1197 (S.D. Cal. 2014).

162. *See id.* (recognizing the four elements of a breach of contract cause of action in California); Smith v. Jones, 497 N.E.2d 738, 740 (Ill. 1986) (highlighting four elements a plaintiff must prove for breach of contract in Illinois); Kronos, Inc., v. AVX Corp., 612 N.E.2d 289, 292 (N.Y. 1993) (noting four elements to a New York breach of contract cause of action); Hussong v. Schwan's Sales Enters., Inc., 896 S.W.2d 320, 326 (Tex. App.—Houston [1st Dist.] 1995, no writ) (holding there are four main elements to breach of contract cases in Texas). *But see* J.J. Gumberg Co. v. Janis Servs., 847 So. 2d 1048, 1049 (Fla. Dist. Ct. App. 2003) (stating a breach of contract cause of action in Florida has three elements consisting of: 1) the existence of a contract; 2) breach; and 3) damages).

While Regulation BI creates predictability for consumers by holding retirement advisors to potential contractual obligations, it may also establish a limiting effect for the amount of damages a plaintiff receives. Under the common law, plaintiffs in breach of contract cases may recover actual damages.[163] Those damages necessarily arise as a result of the conduct of the defendant.[164] In the case of retirement accounts, damages resulting from the conduct of a financial advisor are those attributable to investment loss as a result of poor advice. For higher net worth investors these dollar amounts could be substantial; however, smaller account holders would more likely not be in a position to litigate their claims, as the damage sought is typically less than the cost associated with litigation.[165] In addition, breach of contract causes of action generally do not allow for the award of punitive damages.[166] Once again, small investors will find themselves in a position where they will pay more in litigation costs than damages received, all while attempting to convince attorneys to work on their behalf where there is little incentive to do so.[167]

B. *Breach of Fiduciary Duty*

If Regulation BI imposes a fiduciary obligation on behalf of financial professionals, and the *Manning* court places the responsibility to hear cases in which the proposed rule has been violated at the state level, one could expect consumers to bring common law breach of fiduciary duty causes of action. Like breach of contract, a breach of fiduciary duty requires a plaintiff to prove a number of elements.[168] For a claimant to recover, it must be shown that (1) both the plaintiff and defendant had a fiduciary relationship, (2) the relationship was breached by the defendant, and (3) damages

163. Tony Gullo Motors I, L.P. v. Chapa, 212 S.W.3d 299, 304 (Tex. 2006).

164. *See* Mead v. Johnson Grp., Inc., 615 S.W.2d 685, 687 (Tex. 1981) ("In an action for breach of contract, actual damages may be recovered when loss is the natural, probable, and foreseeable consequence of the defendant's conduct.")

165. *See* John L. Hill, *Introduction*, 8 ST. MARY'S L.J. 609, 610 (1977) (noting the remedies available to consumers are limited by contract clauses written by corporations and the high costs of bringing breach of contract claims to court under an unconscionability standard).

166. Bellefonte Underwriters Ins. Co. v. Brown, 704 S.W.2d 742, 745 (Tex. 1986).

167. *But see* Hill, *supra* note 165, at 614 ("[T]he new DTPA addressed the second hurdle—the disincentive to litigate arising from the imbalance between the high cost and practical difficulties of litigation and the small 'actual' damages characteristic of most consumer claims.").

168. Jones v. Blume, 196 S.W.3d 440, 447 (Tex. App.—Dallas 2006, pet denied).

occurred as a result of the breach.[169] Once again, most states have universally accepted these elements.[170]

Although there is agreement on what constitutes a breach of fiduciary duty cause of action amongst state courts, there is a split as to whether those who provide financial advice actually have a fiduciary duty.[171] The Texas Court of Appeals, in *Western Reserve Life Assurance Co. of Ohio v. Graben*,[172] is particularly instructive as to how Texas courts should consider these types of cases.[173] Timothy Hutton was a financial advisor who was licensed to sell products with Intersecurities.[174] He was approached by David Graben, a retired American Airlines pilot, in 1999 to discuss the possibility of managing Graben's retirement assets.[175] After conducting a financial interview with Graben, Hutton invested $2.5 million of Graben's assets in a variable annuity with Western Reserve Life Assurance Company of Ohio.[176] Hutton earned a commission on the sale and held himself out as the individual who would monitor the performance of the account on behalf of Graben.[177] Over a five-year period, the investment earned approximately 1% per year.[178] Frank Strickler, another retired American Airlines pilot who worked with and experienced a similar outcome in his relationship with Hutton, also joined the suit.[179] Graben and Strickler alleged a breach of fiduciary duty based on the advice they received from

169. *Id.*; *see also* Lundy v. Masson, 260 S.W.3d 482, 501 (Tex. App.—Houston [14th Dist.] 2008, pet denied) (detailing three distinct elements for a breach of fiduciary duty claim (citing *Blume*, 196 S.W.3d 440)).

170. *See* Baker v. Family Credit Counseling Corp., 440 F. Supp. 2d 392, 414–15 (E.D. Pa. 2006) (listing the elements for breach of fiduciary duty in Pennsylvania); Oasis W. Realty, LLC., v. Goldman, 250 P.3d 1115, 1121 (Cal. 2011) (highlighting elements for breach of fiduciary duty in California); Lawlor v. N. Amendment Corp. of Ill., 983 N.E.2d 414, 433 (Ill. 2012) (outlining breach of fiduciary duty elements in Illinois); *Blume*,196 S.W.3d at 447 (explaining Texas breach of fiduciary duty elements). *But see* Rendahl v. Peluso, 162 A.3d 1, 22 (Conn. App. Ct. 2017) (noting there are four elements to a breach of fiduciary duty case in Connecticut).

171. *Compare* W. Reserve Life Assurance Co. of Ohio v. Graben, 233 S.W.3d 360, 373–74 (Tex. App.—Fort Worth 2007, no pet.) (finding the existence of a fiduciary duty by an individual who provides financial advice in Texas), *with* Prod. Credit Ass'n v. Croft, 423 N.W.2d 544, 548 (Ala. Civ. App. 1988) (finding financial advice did not create a fiduciary relationship in Alabama).

172. W. Reserve Life Assurance Co. of Ohio v. Graben, 233 S.W.3d 360 (Tex. App.—Fort Worth 2007, no pet.).

173. *See id.* at 373–74 (discussing when financial advice creates a fiduciary duty).

174. *Id.* at 363–64.

175. *Id.* at 364.

176. *Id.*

177. *Id.* at 365.

178. *Id.* at 366.

179. *Id.* at 366–67.

Hutton.[180] The court found that unsophisticated investors who trust those to make appropriate investments on their behalf create more than an arm's-length transaction.[181] Furthermore, those who hold themselves out as financial advisors have a duty to continuously review client accounts and to assume the role of a fiduciary.[182]

The Alabama Court of Civil Appeals, in *Production Credit Ass'n v. Croft*,[183] took a slightly different approach than the Texas courts as to whether financial advice confers a fiduciary duty on an individual.[184] Roger Croft, who operated a farm, sought a loan with Production Credit Association (PCA) in 1980.[185] He applied for additional loans in 1983 and 1984 to help pay for costs associated with operating his farm.[186] When PCA moved to foreclose on real estate mortgages used to secure the 1984 loans, Croft filed a counterclaim alleging breach of fiduciary duty.[187] He maintained that because he was a farmer he lacked the knowledge and sophistication required to make a sound lending decision, forcing him to rely on PCA for guidance.[188] While the court acknowledged a fiduciary duty can be created by contract, the mere existence of the contract does not establish a fiduciary duty.[189] Of greater consequence is the court's analysis of when a fiduciary duty is implied in law.[190] The court may consider a number of factors, including age, education, and business experience, to determine whether an individual seeking financial advice is in a subservient position to whomever

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180. *Id.* at 368.

181. *See id.* at 374 ("The relationship goes well beyond a traditional arms'-length business transaction that provides 'mutual benefit' for both parties.").

182. *See id.* ("Simply put, when Hutton assumes the role to act as a financial advisor to the Clients and to monitor and manage their investments, any arms'-length business transaction that may have existed between the parties was elevated by the very nature of Hutton's actions.").

183. Prod. Credit Ass'n v. Croft, 423 N.W.2d 544 (Ala. Civ. App. 1988).

184. *See id.* at 549 (holding there was no fiduciary duty created when financial advice was given).

185. *Id.* at 545.

186. *Id.*

187. *Id.*

188. *Id.* at 546.

189. *See id.* at 546–47 (explaining the terms and obligations of the parties within the contract will determine whether a fiduciary duty has been established).

190. *See id.* at 547 ("A fiduciary relationship arises from a formal commitment to act for the benefit of another . . . or from special circumstance from which the law will assume an obligation to act for another's benefit." (quoting Merrill Lynch, Pierce, Fenner, & Smith, Inc. v. Boeck, 377 N.W.2d 605 (Wis. 1985))).

is providing the advice.[191] As this decision relates to the Department of Labor Fiduciary Rule, investors may not be able to rely solely on the argument that their lack of education on investments automatically creates a fiduciary duty on behalf of their financial advisor.[192]

VIII. DO STATE STATUTORY SCHEMES PROVIDE CONSUMER RELIEF?

A. *Advantages of a State Statutory Cause of Action*

A number of states have adopted statutory frameworks to address the issue of deceptive trade practices committed against consumers.[193] Considering the intent of Regulation BI is to curb improper sales practices within the retirement-advice industry, these statutory provisions may provide a better alternative for consumers to seek relief.[194] While common law theories of recovery typically entail plaintiffs proving multiple elements, such as intent and reliance, deceptive trade practice statutes provide consumers with more favorable treatment by courts in eliminating these requirements.[195] Those seeking to bring suit for violations of Regulation

191. *See id.* (stating the criteria that a court may use to determine the existence of a subservient position).

192. *See id.* at 548 ("Debtors should not be allowed to rely blindly on advice given by a lender and hold the lender responsible for its losses if the advice, with the benefit of hindsight, is not appropriate." (quoting Steven C. Bahls, *Termination of Credit for the Farm or Ranch: Theories of Lender Liability*, 48 MONT. L. REV. 213 (1987))); *Boeck*, 377 N.W.2d at 609 ("A fiduciary relationship does not arise merely because a broker offers advice and counsel upon which a customer has a right to place trust and confidence.").

193. *See* Amy Algiers Anderson, Note, *State Deceptive Trade Practices and Consumer Protection Acts: Should Wisconsin Lawyers Be Susceptible to Liability under Section 100.20?*, 83 MARQ. L. REV. 497, 497 (1999) (highlighting the various states who have enacted statutes addressing the problem of deceptive trade practices); *see also* CAL. BUS. & PROF. CODE § 17200 (West 2017) ("As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, and untrue or misleading advertising . . . ."); N.Y. GEN. BUS. § 349 (McKinney 2017) ("Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful."); TEX. BUS. & COM. CODE ANN. § 17.46(a) ("False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful and are subject to action by the consumer protection division . . . .").

194. *See* Anderson, *supra* note 193, at 497 ("Although these statues vary from state to state and may be modeled after different federal acts, they all have the same basic purpose—to protect the public from unfair or deceptive acts or practices with respect to the sale of goods or services.").

195. *Compare* Michael C. Gilleran, *The Rise of Unfair and Deceptive Trade Practice Act Claims*, A.B.A. (Oct. 17, 2011), http://apps.americanbar.org/litigation/committees/businesstorts/articles/fall2011-unfair-deceptive-trade-practice-act-claims.html [https://perma.cc/BXB8-SHKS] (noting common law causes of action, such as fraud, generally require "intent to deceive and proof of reliance" to be shown by plaintiffs), *with* Hill, *supra* note 165, at 613 ("By extending to the consumer the same cause of action

BI using a statutory framework would not be required to prove a financial professional intended to deceive, but rather only need to show that the advisor had the capacity to deceive.[196] The obligations of disclosure, care, and conflicts of interest under Regulation BI could provide the backdrop for a successful consumer lawsuit, as any perceived violation of those obligations, regardless of whether an actual deceptive act occurred, would be subject to a claim.[197]

The ability to collect increased damage amounts also makes a lawsuit under a deceptive trade practices act cause of action more attractive to investors. State statutory models typically allow a consumer to create a multiplier effect, known as treble damages, when calculating damages owed for a claim.[198] Under the Texas Deceptive Trade Practices Act, a plaintiff can recover up to three times the economic damages incurred for a knowing violation committed by a defendant.[199] For a financial advisor or institution, the prospect of increased economic or punitive damages creates a powerful incentive to settle claims with investors and prevent future cases

for deceptive practices formerly available only to the attorney general, the DTPA substantially lightened the burden of proof required of the consumer in common law actions for fraud.").

196. *See* Hill, *supra* note 165, at 613 (explaining capacity and tendency replace the requirement of intent as necessary elements to a deceptive trade practice cause of action); Gilleran, *supra* note 195 ("Moreover, the representation does not have to be literally false; all that has to be shown is that the representation was likely to deceive, or even that it just has the capacity or tendency to deceive.").

197. *See* Hill, *supra* note 165, at 613 ("If the conduct could mislead the 'ignorant, the unthinking and the credulous,' it violates the law."); *see also* Gilleran, *supra* note 195 ("For example, UDTPAs expand liability to include unfair conduct . . . . and often causes courts to characterize UDTPAs as 'statute[s] of broad impact which create[ ] new substantive rights' and as 'making conduct unlawful which was not unlawful under the common law or any prior statute.'" (alterations in original)).

198. *See* Broussard v. Meineke Disc. Muffler Shops, Inc., 155 F.3d 331, 347 (4th Cir. 1998) (highlighting "the extraordinary damages authorized by the UTPA" in North Carolina); Kenai Chrysler Ctr., Inc. v. Denison, 167 P.3d 1240, 1259 (Alaska 2007) (noting under Alaska statute prevailing plaintiffs are entitled to three times actual damages); PPG Indus. v. JMB/Houston Ctrs. Partners Ltd. P'ship, 146 S.W.3d 79, 89 (Tex. 2004) (explaining the Texas DTPA provides for treble damages); Gilleran, *supra* note 195 ("They provide for an award of either a multiple of actual damages, or unlimited punitive damages, to a prevailing plaintiff.").

199. TEX. BUS. & COM. CODE ANN. § 17.50. Under the Texas Deceptive Trade Practices Act Relief for Consumers provision "[i]f the trier of fact finds that the conduct of the defendant was committed knowingly, the consumer may also recover damages for mental anguish, as found by the trier of fact, and the trier of fact may award not more than three times the amount of economic damage[.]" *Id.* § 17.50(b)(1); *see also* Tony Gullo Motors I, L.P. v. Chapa, 212 S.W.3d 299, 304 (Tex. 2006) (holding plaintiff could recover three times economic damages for a DTPA violation).

of abuse.[200] Furthermore, these damage awards would disincentive financial companies from engaging in material conflicts of interest, knowing the costs of doing so outweigh any perceived benefit. In the end, the awarding of damages under a deceptive trade practice statutory framework assists the SEC in achieving its goals under Regulation BI.[201]

Many states with deceptive trade practice statutory frameworks allow for the collection of attorney's fees for a prevailing plaintiff.[202] Common law causes of action, with the exception of breach of contract, typically do not permit plaintiffs to be paid attorney's fees by losing defendants.[203] On the other hand, the awarding of attorney's fees are in many instances deemed to be mandatory.[204] Similar to treble damages, allowing plaintiffs to collect attorney's fees provides an incentive for attorneys to litigate cases where a violation of the Fiduciary Rule has occurred, especially those involving smaller dollar amounts.[205]

B. *Proving Consumer Status*

Although suits brought under a statutory cause of action provide fewer hurdles for retirement investors to overcome in litigating their claims, there are issues that should give consumers pause for concern. A common element that must be shown by plaintiffs in deceptive trade practice theories of recovery is whether the plaintiff is considered a consumer under a

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200. *See* Gilleran, *supra* note 195 (reviewing the intent of multiple and punitive damage awards under state deceptive trade practice statutes); *see also Denison*, 167 P.3d at 1260 ("The legislative history of Alaska's provision establishes that treble damages were adopted not just to deter fraud, but also to encourage injured parties to file suits under the UTPA and to ensure that they would be adequately compensated for their efforts.").

201. *See* Regulation Best Interest, 83 Fed. Reg. 21,574, 21,617 (May 9, 2018) (to be codified at 17 C.F.R. pt. 240) (discussing the intent behind the Conflict of Interest Obligation).

202. Gilleran, *supra* note 195.

203. *See Tony Gullo Motors*, 212 S.W.3d at 311 ("Absent a contract or statute, trial courts do not have inherent authority to require a losing party to pay the prevailing party's fees." (citing Travelers Indem. Co. of Conn. v. Mayfield, 923 S.W.2d 590, 594 (Tex. 1996) (orig. proceeding))); Gilleran, *supra* note 195 (discussing the "American Rule" in which plaintiffs could not collect attorney's fees and were ultimately responsible for paying their own fees).

204. *See* TEX. BUS. & COM. § 17.50(d) ("Each consumer who prevails shall be awarded court costs and reasonable and necessary attorneys' fees."); *see also* Gilleran, *supra* note 195 (citing state case law where the award of attorney's fees was deemed to be mandatory).

205. *See* Hill, *supra* note 165, at 610 (revealing as an attorney in private practice before the development of state statutory frameworks John Hill turned down numerous cases due to the high costs associated with litigation).

statutory definition.[206] To establish consumer status, a plaintiff either has to seek or actually acquire goods or services through purchase.[207] Furthermore, the good or service purchased must form the basis of the plaintiff's complaint against the defendant.[208] As contemplated by the Department of Labor's regulatory action, for example, the purpose of the Fiduciary Rule was to improve the level of service retirement investors received by standardizing the financial advice process.[209] If aggrieved investors are to pursue claims against financial advisors for poor financial advice, it will be important for those investors to establish whether the advice received constitutes a service under a state deceptive trade practice statute.

The United States District Court for the Southern Division, in *Cobb v. Miller*,[210] addressed the issue of when financial advice is considered a service.[211] Joey Miller conducted investment trading workshops to the public on behalf of his company, Traders Edge, Inc., in February 2010.[212] Johnny Cobb paid $25,000 to attend a financial summit and receive financial advice on how to trade stock hosted by Miller.[213] During the summit, Miller made several representations, including that he had a number of years of industry experience, option trading was a conservative means of investing, and investors could witness large annual returns without risking

206. Section 17.45(4) under the Texas Deceptive Trade Practices Act defines a consumer as "an individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services . . . ." TEX. BUS. & COM. § 17.45(4).

207. *See* Melody Home Mfg. Co. v Barnes, 741 S.W.2d 349, 351–52 (Tex. 1987) ("First, the plaintiffs must have sought or acquired goods or services by purchase or lease." (citing Sherman Simon Enters., Inc. v. Lorac Serv. Corp., 724 S.W.2d 13, 15 (Tex. 1987); Cameron v. Terrell & Garett, Inc, 618 S.W.2d 535, 539 (Tex. 1981))); *Cameron*, 618 S.W.2d at 539 (defining consumer status as envisioned by the Texas statute).

208. *See Barnes*, 741 S.W.2d at 352 ("Second, the goods or services purchased or leased must form the basis of the complaint." (citing *Sherman Simon Enters., Inc.*, 724 S.W.2d at 15; *Cameron*, 618 S.W.2d at 539)); *Cameron*, 618 S.W.2d at 539 (holding in order to establish consumer status the good purchased needs to form the basis of plaintiff's complaint).

209. *See* Nat'l Ass'n for Fixed Annuities v. Perez, 217 F. Supp. 3d 1, 6 (D.D.C. 2016) (stating the intent of the Fiduciary Rule was to eliminate conflicts of interest that may arise in providing financial advice).

210. Cobb v. Miller, No. H–12–1943, 2013 WL 12142342 (S.D. Tex. Aug. 7, 2013).

211. *See id.* at *4 (addressing scenarios when financial advice is assumed to be a service for the purpose of establishing consumer status).

212. *Id.* at *1.

213. *Id.*

principal.[214] Shortly after the workshop, Miller convinced Cobb to invest $500,000 in an options trading strategy.[215] Between May and June 2010, Cobb communicated he was having difficulty understanding his account statements while losing more than $100,000 in his investments.[216] Miller stated the investment account was performing well; however, by November 2010, Cobb lost the entire $500,000 balance.[217] In June 2012, Cobb filed suit against Miller for a violation of the Texas Deceptive Trade Practices Act.[218] Miller maintained Cobb could not be a consumer since he received advice, which is not to be considered either a good or service.[219] The district court held that because the advice was purchased, it was the purpose of the transaction and could be considered a service under Texas statute.[220]

Earlier cases also examined whether financial advice can be viewed as service, but from a slightly different perspective. The United States Court of Appeals for the Fifth Circuit, in *Federal Deposit Insurance Corp. v. Munn*,[221] addressed if activities in connection with the purchase of an intangible could be construed as a service for the purpose of determining consumer status.[222] Hugh Munn was interested in purchasing stock in a company named TIDCO.[223] Prior to the purchase, a settlement agreement was negotiated with two shareholders, and Munn agreed to guarantee a loan issued by Southwest Bank to cover the cost of the agreement.[224] TIDCO subsequently went bankrupt and Munn brought suit for rescission of the guaranty contract.[225] Since Texas law does not recognize intangibles as goods under its deceptive trade practices statutory framework, Munn would have to show he purchased bank services to gain consumer status.[226] The Fifth Circuit ultimately held that activities not considered to be the main

214. *Id.*

215. *Id.* at *2.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.* at *3.

220. *Id.* at *4 (holding Cobb purchased advice from Miller and can be considered a consumer).

221. FDIC v. Munn, 804 F.2d 860 (5th Cir. 1986).

222. *See id.* at 861 (examining whether the guarantor of a loan purchased bank services as a consumer under the Texas Deceptive Trade Practices Act).

223. *Id.*

224. *Id.* at 861–62.

225. *Id.* at 862.

226. *See id.* at 863 ("Since the TIDCO stock and the bank loan are not goods, Munn must establish that he purchased 'services' to qualify as a consumer.").

objective of a transaction cannot also be considered services.[227]

Both *Cobb* and *Munn* highlight an important consideration courts will examine when determining if a retirement investor has a valid complaint of a violation of the Fiduciary Rule: whether the financial advice provided was the objective of the transaction or simply incidental in nature.[228] As a means to make this distinction, courts have two potential options. First, if an investor were to pay for advice from an advisor, a court could find the advice was the objective of the transaction, as the advisor was getting compensated directly for that advice.[229] Evidence of an ongoing fee-based relationship for advice or a one-time lump-sum payment would be sufficient to establish the advice as the objective of the transaction. Second, if the advice did no more than merely help facilitate the purchase of a product, such as a stock or annuity, then that advice would not be viewed as the objective.[230] Courts would need to find evidence that the result of an advisor-investor interaction was one in which the investor purchased a product.

C. *The Professional Services Exemption*

An equally problematic issue facing investors who bring suit under a deceptive trade practice cause of action is the existence of professional services exemptions within the statutory frameworks.[231] This exemption

227. *See id.* at 864 ("We only hold that where those activities are not the subject of the complaint, then the presence of such collateral activities in a transaction otherwise not covered by the DTPA does not subject the parties to liability under the DTPA." (quoting Riverside Nat'l Bank v. Lewis, 603 S.W.2d 169, 175 n.5 (Tex. 1980))).

228. *See id.* (noting not all "activities related to the sale of intangibles" should be considered services for purposes of conferring consumer status); Cobb v. Miller, No. H–12–1943, 2013 WL 12142342, at *4 (S.D. Tex. Aug. 7, 2013) (detailing the financial advice purchased by Cobb was the objective of the transaction); First State Bank v. Keilman, 851 S.W.2d 914, 929 (Tex. App.—Austin 1993, writ denied) ("[T]he court held that the key principle in determining consumer status is that the goods or services purchased must be an *objective* of the transaction, not merely incidental to it." (citing *id.* at 865)).

229. *See Cobb*, 2013 WL 12142342, at *4 ("Here, Cobb has likewise pleaded that he purchased the Miller Defendants' services for financial and investment advice for the sum of $25,000 . . . It is clear then that the advice that he allegedly purchased forms the basis of his DTPA claim.").

230. *See* Maginn v. Norwest Mortg., Inc., 919 S.W.2d 164, 167 (Tex. App.—Austin 1996, no writ) (highlighting the services provided by Norwest did nothing more than to help facilitate a customer's purchase of a mortgage loan).

231. Under Texas Deceptive Trade Practices Act § 17.49(c), "Nothing in this subchapter shall apply to a claim for damages based on the rendering of a professional service, the essence of which is

prevents claims against those who provide advice or opinions as part of a professional service.[232] It is an affirmative defense that can be pleaded in order to defeat a cause of action alleging violations of a deceptive trade practices statute.[233] For an investor to overcome the use of a professional services exemption by a financial advisor, the investor must demonstrate any of the following: 1) that a material fact during the rendering of advice was misrepresented; 2) there was a failure to disclose information; 3) an unconscionable action occurred that cannot be viewed as advice; or 4) an express warranty was breached.[234] While the burden of proof remains with the investor to show one of the previous actions took place, most cases regarding the professional services exemption focus on what defines a professional service.[235]

The Texas Court of Appeals, in *Atlantic Lloyd's Insurance Co. of Texas v. Susman Godfrey, LLP*,[236] reviewed the issue of whether an act by a professional constituted a professional service.[237] Thomas Adams, an attorney representing the law firm of Susman Godfrey, LLP., sent a letter to a patient informing her of the firm's involvement in a prior lawsuit against the woman's physician.[238] The law firm was subsequently sued by the physician and invoked a duty-to-defend provision in their insurance policy with Atlantic Lloyd's Insurance Company of Texas (hereinafter,

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the providing of advice, judgment, opinion, or similar professional skill." TEX. BUS. & COM. CODE ANN. § 17.49(c).

232. *Id.*; *see* Brennan v. Manning, No. 07-06-0041-CV, 2007 WL 1098476, at *4 (Tex. App.—Amarillo Apr. 12, 2007, pet. denied) (mem. op) (explaining the definition of a professional services exemption).

233. *See Brennan*, 2007 WL 1098476, at *4 ("The professional services exemption is properly characterized as an affirmative defense which must be pleaded because it is a plea of confession and avoidance." (citing TEX. R. CIV. P. 94; Head v. U.S. Inspect DFW, Inc., 159 S.W.3d 731, 740 (Tex. App.—Fort Worth 2005, no pet.))).

234. BUS. & COM. § 17.49(c); *see Brennan*, 2007 WL 1098476, at *4 (discussing the various ways a consumer may defeat the personal services exemption affirmative defense).

235. *See* Atl. Lloyd's Ins. Co. of Tex. v. Godfrey, 982 S.W.2d 472, 476–78 (Tex. App.—Dallas 1998, pet. denied) (reviewing how professional services should be interpreted for the purpose of a defendant to qualify for the exemption); Omni Metals v. Poe & Brown of Tex. Inc., No. 14-00-01081-CV, 2002 WL 1331720, at *8 (Tex. App.—Houston [14th Dist.] June 13, 2002, pet. denied) (noting the interpretation Texas courts have used to understand the meeting of professional services).

236. Atl. Lloyd's Ins. Co. of Tex. v. Susman Godfrey, L.L.P., 982 S.W.2d 472 (Tex. App.—Dallas 1998, pet. denied).

237. *See id.* at 476–77 (providing a working definition of professional services).

238. *Id.* at 473–74.

Atlantic).[239] Atlantic claimed there was no duty to defend since the duty in the insurance policy excluded coverage for any acts related to the rendering of professional services.[240] The court believed that not every act conducted by a professional necessarily should be considered a professional service.[241] In addition, professional services should exclusively include conduct that uses certain skills only found in the profession.[242]

Regulation BI, coupled with the professional services exemption, provides a unique defense for financial advisors against retirement investors. It is generally understood that financial advisors provide advice to customers on a number of topics, including long-term goals such as retirement planning.[243] In addition, Regulation BI focuses on recommendations made by financial professionals and the scope they are delivered in.[244] The public perception of an advisor's job responsibilities and how Regulation BI defines the scope of recommendation are strikingly similar to the state professional services exemption that focuses on "the essence of which is the providing of advice, judgment, opinion, or similar professional skill."[245] This similarity will allow financial advisors and institutions to argue that any level of advice provided should be considered a professional service, thus creating an exemption from suit for a violation of the Fiduciary Rule under a state statutory framework.

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239. *Id.* at 474.

240. *Id.*

241. *See id.* at 477 (reviewing acts that may be incidental to a professional's daily activities (citing Bank of Cal., N.A. v. Opie, 663 F.2d 977 (9th Cir. 1981))).

242. *See id.* ("Professional services are considered those acts which use the inherent skills *typified* by that profession, not *all* acts associated with the profession." (emphasis in original) (citing *Opie*, 663 F.2d at 981)); *see also* Brennan v. Manning, No. 07-06-0041-CV, 2007 WL 1098476, at *4 (Tex. App.—Amarillo Apr. 12, 2007, pet. denied) ("The essence of those legal services was the providing of advice, judgement, opinion, or similar skill.").

243. *See How to Choose a Financial Planner*, WALL ST. J. (Dec. 17, 2008, 12:25 PM), http://guides.wsj.com/personal-finance/managing-your-money/how-to-choose-a-financial-planner/ [https://perma.cc/FZ33-94V9] ("Financial planners advise clients on how best to save, invest, and grow their money . . . Some specialize in retirement or estate planning, while some others consult on a range of financial matters.").

244. *See* Regulation Best Interest, 83 Fed. Reg. 21,574, 21,593 (May 9, 2018) (to be codified at 17 C.F.R. pt. 240) (discussing the scope of making recommendations within the context of a broker-dealer setting).

245. TEX. BUS. & COM. CODE ANN. § 17.49(c).

IX. CONCLUSION

How people have planned for their financial future, especially retirement, has changed dramatically over the past century. The model of retirement planning has evolved from one in which retirees relied on the government for their benefits, to one where the individual is responsible for making decisions. To help facilitate retirement planning decisions, investors have turned to a growing field force of financial advisors for guidance. With the growing desire by the investing public to obtain assistance from a professional, comes a responsibility by the government to ensure proper standards are in place to guard against conflicts of interest.

The now-vacated Department of Labor Fiduciary Rule and subsequently proposed Securities and Exchange Commission Regulation Best Interest are positive steps in the right direction of holding financial advisors to the same level of accountability as attorneys or accountants. However, Regulation BI falls short in fully protecting investors when it comes to litigation of their claims. It allows financial professionals and institutions too many opportunities to defeat consumer causes of action against them. In order to fully protect investors from improper conduct, the SEC will need to revisit the proposed rule during its comment period and provide additional measures to ensure to those investors who have been wronged the opportunity to fairly prosecute their claims.