Nos. 15-1160(L) & 15-1199

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DENNIS WALTER BOND, SR. AND MICHAEL P. STEIGMAN,
Plaintiffs-Appellants-Cross-Appellees,

and

ROBERT J. ENGLAND; LEWIS F. FOSTER; DOUGLAS W. CRAIG,
Individually, and on behalf of all others similarly situated
Plaintiffs,

v.

MARRIOTT INTERNATIONAL, INC. AND MARRIOTT INTERNATIONAL, INC. STOCK AND CASH INCENTIVE PLAN,
Defendants-Appellees-Cross-Appellants.

On Appeal from the United States District Court for the
District of Maryland, No. 8:10-cv-01256 (Honorable Roger W. Titus)

BRIEF *AMICI CURIAE* OF THE AMERICAN BENEFITS COUNCIL, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND THE ERISA INDUSTRY COMMITTEE IN SUPPORT OF APPELLEES - CROSS-APPELLANTS

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Nos. 15-1160(L) & 15-1199, Bond v. Marriott Int'l Inc.

Pursuant to FRAP 26.1 and Local Rule 26.1,
American Benefits Council
who is amicus, makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES☑NO
2. Does party/amicus have any parent corporations? ☐YES☑NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES☑NO
   If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES☑NO
   If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question)

   If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES☑NO
   If yes, identify any trustee and the members of any creditors' committee:

Dated: July 2, 2015

By: /s/ Igor V. Timofeyev
Igor V. Timofeyev
Counsel for American Benefits Council

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Nos. 15-1160(L) & 15-1199, Bond v. Marriott Int'l, Inc.

Pursuant to FRAP 26.1 and Local Rule 26.1,
Chamber of Commerce of the United States of America
who is amicus, makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES☑NO
2. Does party/amicus have any parent corporations? ☐YES☑NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES☑NO
   If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES☑NO
   If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question)

   If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES☑NO
   If yes, identify any trustee and the members of any creditors' committee:

Dated: July 2, 2015

By: /s/ Igor V. Timofeyev
Igor V. Timofeyev
Counsel for Chamber of Commerce of the United States

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Nos. 15-1160(L) & 15-1199, Bond v. Marriott Int'l, Inc.

Pursuant to FRAP 26.1 and Local Rule 26.1,
The ERISA Industry Committee
who is amicus, makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES☑NO
2. Does party/amicus have any parent corporations? ☐YES☑NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES☑NO
   If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES☑NO
   If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question)

   If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES☑NO
   If yes, identify any trustee and the members of any creditors' committee:

Dated: July 2, 2015

By: /s/ Igor V. Timofeyev
Igor V. Timofeyev
Counsel for the ERISA Industry Committee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

INTEREST OF *AMICI CURIAE*[1]

The American Benefits Council ("the Council") is a broad-based nonprofit organization dedicated to protecting and fostering privately sponsored employee benefit plans. The Council's approximately 400 members are primarily large U.S. employers that provide employee benefits to active and retired workers. The Council's membership also includes organizations that provide services to employers of all sizes regarding their employee benefit programs. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans covering more than 100 million Americans.

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It directly represents 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of the Nation's business community in matters before Congress, the Executive Branch, and the courts.

The ERISA Industry Committee ("ERIC") is the only national trade association advocating solely for the employee benefit and compensation interests

[1]All parties to this appeal have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no entity other than *amici*, its members, or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

of the country's largest employers. ERIC, a nonprofit organization, enhances the ability of its large employer members to innovate health, retirement and compensation benefits for millions of employees, retirees and their families in a rapidly changing global business environment, and protects their ability to provide uniform benefits nationwide. ERIC frequently participates as *amicus curiae* in cases that have the potential for far-reaching effects on employee benefit design or administration.

The Council, the Chamber, and ERIC frequently participate as *amici curiae* in cases with the potential to significantly affect the design and administration of employee benefit plans. Many of *amici*'s member-organizations offer their employees the opportunity to participate in defined contribution plans similar to the one at issue here. Both the companies that sponsor those plans and the fiduciaries who administer them have significant interests in the theories of legal liability that may be enforced against them, as well as the length of time they may be exposed to potential litigation. The statutory construction of the top-hat exemption in 29 U.S.C. § 1051(2) advanced by Appellants and their *Amicus Curiae*, the Department of Labor ("the DOL"), as well as the district court's failure to apply the statute of limitations, would unwarrantedly increase the litigation burden on ERISA fiduciaries and negatively affect employer-sponsored retirement plans.

SUMMARY OF ARGUMENT

This Court should affirm the district court's judgment below because the claims asserted in this litigation under the Employee Retirement Income Security Act of 1974 ("ERISA"), Pub. L. No. 93-406, 88 Stat. 829 (1974), are time-barred by the applicable statute of limitations. Where no formal denial of a benefit claim occurs, this Court looks to whether "some event other than a denial" should have alerted participants to their ERISA claims, thereby commencing the statute of limitations period. *Cotter v. E. Conference of Teamsters Ret. Plan*, 898 F.2d 424, 429 (4th Cir. 1990). The failure to apply this rule would lead to an absurd situation in which the statute of limitations for ERISA claims will *never* be triggered in the absence of a formal denial, allowing lawsuits many years — or, as in this case, decades — after benefit plan participants had full notice of their putative claims. Such a rule would frustrate ERISA's central objective of "encourag[ing] the maintenance and growth of single-employer defined benefit pension plans." 29 U.S.C. § 1001b(c)(2). Faced with open-ended liability, employers would face pressure not to offer benefits to employees in the first place, rather than risk the uncertainty and cost of substantive liability years in the future. This Court should apply the rule it set forth in *Cotter* and reaffirm that the ERISA statute of limitations is triggered when the clear repudiation of a benefit is made known to the participant.

Although the claims here are time-barred, if this Court elects not to decide that issue, it should affirm the judgment below because the deferred benefits plan qualifies under ERISA's top-hat exemption. This Court should reject Appellants' effort to limit the definition of the top-hat plans in 29 U.S.C. § 1051(2) to plans that consist *exclusively* of management or highly compensated employees. This interpretation contravenes both the statute's plain text, which requires only that the qualifying plans be composed "primarily" of management or highly compensated employees, and the statute's purpose. Every other circuit court to consider the issue has squarely rejected this contorted interpretation. Adopting the district court's approach would increase litigation and discourage employers from offering top-hat benefit plans in the first place. Nor should this Court give any deference to the DOL interpretation on which Appellants heavily rely — an interpretation that was not promulgated through the notice-and-comment procedure but announced in a non-binding opinion letter and a litigation-driven *amicus* brief. Section 1051(2) is not ambiguous, the DOL's interpretation of the top-hat provision is not based on any asserted agency expertise, and the DOL's insistence that its 1990 opinion letter articulated prior agency policy is merely a *post hoc* rationalization unsupported by contemporaneous agency pronouncements.

ARGUMENT

I. THIS COURT SHOULD REAFFIRM ITS SETTLED RULE FOR THE APPLICATION OF THE STATUTE OF LIMITATIONS IN THE ABSENCE OF A FORMAL DENIAL OF ERISA BENEFITS.

The district court's holding that the statute of limitations was never triggered in the absence of a formal denial of benefits directly contradicts this Court's precedent, which looks for "some event other than a denial of a claim" when no formal denial occurred. *Cotter*, 898 F.2d at 429. The record in this case is replete with such events, which provided plan participants with adequate notice about their putative claims. Participants in Marriott's plan received multiple written notices informing them that their plan — and, specifically, the vesting schedule — were exempt from various ERISA requirements. Plan participants also received recurrent notices about their vesting schedules. And, indeed, participants were informed, when the plan was amended in the wake of the DOL's 1990 opinion letter, that the prior plan did not adhere to the DOL's interpretation of ERISA. That is, Marriott expressly told participants that, according to the DOL, Marriott's plan had violated ERISA. Finally, participants were paid their benefits in full, in accordance with the vesting schedules set forth in their plan and communicated unambiguously to them, which constituted clear notice that Marriott repudiated any additional benefits obligations.

A. <u>This Court Should Correct the District Court's Failure To Follow this Court's Settled Accrual Rule for ERISA Claims.</u>

"[T]he standard rule" for the commencement of a statute of limitations in a host of contexts "is that a claim accrues when the plaintiff has a complete and present cause of action." *Gabelli v. SEC*, 133 S. Ct. 1216, 1220 (2013) (internal quotation marks omitted). This rule "advanc[es] the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Id.* at 1221 (internal quotation marks omitted). For certain claims, such as those involving fraud, courts apply a "discovery rule," under which a claim does not accrue until "in the exercise of reasonable diligence, it could have been discovered." *Id.* (quoting *Merck & Co. v. Reynolds*, 559 U.S. 633, 645 (2010)).

While ERISA contains no special definition of "accrual," this Court has developed a pair of more specific tests for determining accrual in the ERISA context. As a threshold matter, this Court has stated that "[a]n ERISA cause of action does not accrue until a claim of benefits has been made and formally denied." *Rodriguez v. MEBA Pension Trust*, 872 F.2d 69, 72 (4th Cir. 1989). When there is no formal denial, however, this Court applies "the alternative approach of determining the time at which some event other than a denial of a claim should have alerted" participants to their "entitlement to the benefits [they] did not receive." *Cotter*, 898 F.2d at 429. As the Court explained, "[s]uch an alternative formulation for triggering the statute of limitations makes more sense than the usual claim-denial trigger in cases such as this where the participant may never have filed a formal claim for the disputed benefits." *Id.*

Other federal courts of appeals have similarly recognized that an ERISA claim accrues when participants should have known of their entitlement to benefits, in a doctrine known as the "clear repudiation" doctrine. *See* JAMES F. JORDEN ET AL., HANDBOOK ON ERISA LITIGATION § 5.04[B], at 5-61 & n.248 (3d ed. 2013 Supp.) (listing cases). Under the clear repudiation rule, "some 'event other than a denial of a claim' may trigger the statute of limitations by clearly alerting the plaintiff that his entitlement to benefits has been repudiated." *Miller v. Fortis Benefits Ins. Co.*, 475 F.3d 516, 521 (3d Cir. 2007) (quoting *Cotter*, 898 F.2d at 429). This requirement is met where there "is (1) a repudiation (2) that is clear and made known to the beneficiary." *Id.* at 521; *see also Carey v. Int'l Bhd. of Elec. Workers Local 363 Pension Plan*, 201 F.3d 44, 49 (2d Cir. 1999) (accrual point is "a clear repudiation by the plan that is known, or should be known, to the plaintiff").

The "clear repudiation" rule might be understood as an ERISA-specific application of the discovery rule, which is already a relatively plaintiff-friendly rule for a select set of claims. *Gabelli*, 133 S. Ct. at 1221. By refusing to apply even this clear repudiation rule, and by ignoring the notice of their claims that

Appellants have received, the district court departed dramatically from the settled understanding of what starts the running of the statute of limitations with respect to federal claims.

B. <u>This Court Should Reaffirm that Written Notice and Failure To Pay a Putative Entitlement Suffice to Alert a Benefit Plan Participant to His Claims.</u>

The district court erred in overlooking extensive and repeated notice of their claims that Appellants have received. The district court opined that the "Retirement Awards, annual statements, and 1978 Prospectus" for the benefit plan in question did not suffice as a clear repudiation, and castigated the disclosure statement in the Prospectus as "virtually indecipherable legalese." JA-1039.

Yet, the Prospectus was far from "indecipherable legalese." While it necessarily addressed a somewhat technical subject, the Prospectus clearly and expressly informed benefit plan participants that the plan was "exempt from the participation and vesting, funding and fiduciary responsibility provisions" of ERISA because it was "maintained by the Company primarily for the purpose of providing deferred compensation for a selected group of management or highly compensated employees." JA-298. Far from indecipherable, this disclosure was manifestly clear and should have alerted plan participants to the fact that the plan was not subject to any vesting provisions of ERISA. Indeed, given the technical nature of ERISA benefits, any attempt to further distill the Prospectus into "plain English" would have risked a loss of precision and accuracy.

The district court's brushing away of the Prospectus notice as "legalese" places employers in an untenable catch-22: Say too little, and an employer might not have given clear or accurate notice. Yet say too much, and an employer opens himself to an accusation that the disclosure is "legalese" and thus failed to communicate repudiation of participants' claims. Such an approach would have troubling implications for a host of contexts in which businesses must enter into contracts or provide notices addressing technical subjects. If SEC filings, mortgages, insurance contracts, or arbitration agreements were denied effect simply because they could be labelled "legalese," numerous important transactions would become unworkable. That is no doubt why courts routinely hold consumers to unambiguous contracts and notices, even those addressing technical subjects.

Appellants also received other notices that should have alerted them to their rights. Appellants knew the vesting schedule of their retirement awards, and could have easily determined that the schedule did not conform to ERISA's requirements. Most importantly, when it amended the plan subsequent to the DOL's 1990 opinion letter, Marriott expressly informed plan participants that the prior plan did not conform to the DOL's interpretation of ERISA's requirements and explained, in a proxy statement filed publicly with the SEC, that the plan was amended in light of the DOL's changed position. JA-934. The district court's conclusion that these written disclosures did not suffice for clear repudiation cannot be reconciled with this Court's holding in *Cotter*.[2]

At the very least, the payment to Appellants of all the benefits that Marriott deemed due under the plan conclusively established Marriott's repudiation of Appellants' entitlement to any additional benefits, and should have alerted them to their present claims. "[A]n erroneously calculated award of benefits under an ERISA plan can serve as 'an event other than a denial' that triggers the statute of limitations … ." *Miller*, 475 F.3d at 521. This is because, "[l]ike a denial, an underpayment is adverse to the beneficiary and therefore repudiates his rights under a plan." *Id.* Once Appellants received their total awards, in 2006 and 1991, they "should [have been] aware that [they had] been underpaid and that [their] right to a greater award ha[d] been repudiated." *Id.* at 522. At that point, they knew precisely the total amount of vested benefits they had received, the total amount (if any) that had been forfeited because unvested, and that the plan would not pay them anything further. Having already received their vesting schedule and

[2] The district court's analysis is also at odds with the decisions of other circuits, which have held that written disavowal of ERISA rights, although not constituting formal denials of applications for benefits, can constitute clear repudiation. *See, e.g.*, *Carey*, 201 F.3d at 46, 48 (written notice of ineligibility for pension, although not a formal denial of benefits, was accrual point); *Daill v. Sheet Metal Workers' Local 73 Pension Fund*, 100 F.3d 62, 66 (7th Cir. 1996) (written notice that participant was not entitled to a pension).

repeated explanations that the schedule did not conform to ERISA's requirements, there was nothing more Appellants needed to become aware of their claims.

C. **The District Court's Erroneous Rule Would Have Severe Negative Consequences, and Would Undermine the Policies Animating ERISA.**

The district court's rule would have considerable negative consequences by effectively eviscerating the statute of limitations for ERISA claims. Under this rule, "a plaintiff could … trigger the statute of limitations at his own discretion, creating an indefinite limitations period." *Miller*, 475 F.3d at 522. Indeed, in the proceedings before the district court Appellants argued that the appropriate triggering point for the running of the statute of limitations was the filing of *Marriott's answer* to their complaint. *See* Pl's. Br. in Opp'n to Marriott's Mot. for Summ. J. and In Supp. of their Cross-Mot. at 24, *Bond v. Marriott Int'l, Inc.*, No. 8:10-cv-01256-RWT (D. Md. Jan. 23, 2013), ECF No. 101 ("If the Court feels compelled to choose an accrual event, then it should choose Marriott's written denial of the Plaintiffs' substantive ERISA allegations in its answer to Plaintiffs' complaint."). This Court rejected this illogical (and unfair) approach in *Cotter*, observing that it "would lead us to the anomalous result that the statute of limitations ... did not begin to run until after [the] lawsuit was filed." *Cotter*, 898 F.2d at 429.

The statute of limitations is one of the ways ERISA limits the exposure (and thus the costs) of plan sponsors. A rule recognizing that the accrual date may occur even in the absence of a formal denial serves the "basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Rotella v. Wood*, 528 U.S. 549, 555 (2000). The statutes of limitations "are intended to encourage 'rapid resolution of disputes, repose for defendants, and avoidance of litigation involving lost or distorted evidence.' These aims are served when the accrual date anchors the limitations period to a plaintiff's reasonable discovery of actionable harm." *Miller*, 475 F.3d at 522 (quoting *Romero v. Allstate Corp.*, 404 F.3d 212, 223 (3d Cir. 2005)). A contrary rule would allow litigation to be brought — as is the case here — decades after the relevant events have occurred, contrary to the statutes of limitations' aim of "'promot[ing] justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" *Gabelli*, 133 S. Ct. at 1221 (quoting *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348-49 (1944)). An open-ended period of litigation exposure would also undermine the long-established ERISA goal of promoting uniformity and certainty in matters of plan administration. As the Supreme Court recognized,

> Congress sought "to create a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage

> employers from offering [ERISA] plans in the first place." ERISA "induc[es] employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred."

Conkright v. Frommert, 559 U.S. 506, 517 (2010) (quoting *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996), *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002)) (alterations in original).

The clear repudiation rule reduces litigation costs for ERISA plans by extinguishing potential liability within the requisite time after the alleged breach, thereby encouraging more employers to sponsor plans in the first place. A rule that would trigger the statute of limitations only upon filing of suit — the rule Appellants proposed below — would result in perpetual exposure to litigation and potential liability. Employers, who are under no obligation to offer benefit plans, would be reluctant to do so, for fear of potential liability stretching over decades. That is deeply at odds not only with the purpose of statutes of repose and limitations in general, but also with ERISA's fundamental objectives.

II. THE TOP-HAT PROVISION OF ERISA DOES NOT REQUIRE THAT THE QUALIFYING PLAN BE COMPOSED EXCLUSIVELY OF MANAGEMENT OR HIGHLY-COMPENSATED EMPLOYEES.

This Court should reject Appellants' effort to limit the definition of the top-hat plans in 29 U.S.C. § 1051(2) to plans that consist *exclusively* of management or highly compensated employees. This interpretation of section 1051(2) is contrary to the statute's plain text, legislative purpose, and public policy. Other circuits have squarely rejected this contorted statutory reading, and this Court should not be the first to embrace it. The DOL interpretation on which Appellants heavily rely — an interpretation announced in a 1990 opinion letter and a litigation-driven *amicus* brief — is not entitled to deference. Section 1051(2) is not ambiguous; the DOL's interpretation of the top-hat provision is not based on any asserted agency expertise; and the DOL's assertion that its 1990 opinion letter reflected articulated prior agency policy is a quintessential *post hoc* rationalization concocted for the purposes of this litigation.

A. Section 1051(2) of ERISA Requires Only that the Top-Hat Plans Be "Primarily" Composed of Management or Highly-Compensated Employees.

ERISA Section 1051(2) requires, in relevant part, that, in order to qualify for the top-hat exemption, a retirement plan must be "maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees." 29 U.S.C. § 1051(2). Appellants and the DOL contend that the term "primarily" in this statutory provision modifies solely the phrase "for the purpose of providing deferred compensation," and does not apply to the phrase "select group of management or highly compensated employees." Appellants' Opening Br. 29-33; DOL *Amicus* Br. 17-19. This reading cannot be squared with the statutory text or legislative purpose, and has been squarely rejected by other courts that have interpreted the statute.

As the Supreme Court explained, "[w]hen several words are [adjacent to] a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Porto Rico Ry., Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920) (construing a statutory qualifier as applying to "the entire phrase" preceding the qualifier, and not to the immediate antecedent); *see also Exxon Corp. v. Hunt*, 475 U.S. 355, 363-70 (1986) (rejecting the argument that a statutory term modifies only the "immediately preced[ing]" word, as opposed to "the entire [preceding] phrase"); *Collins Music Co. v. United States*, 21 F.3d 1330, 1337 n.14 (4th Cir. 1994) (construing the Senate Report's use of the adverb "generally" in a phrase "generally unrelated to, but shorter than, present law useful lives" to modify both the immediately adjacent phrase "unrelated to" and the subsequent phrase "shorter than") (internal quotation marks omitted).

This interpretive principle is consistent with a commonsense reading of the relevant provision and its statutory purpose. If asked whether a plan with a large majority of management or highly compensated individuals is maintained "primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees," any lay person would say yes.

And given that ERISA's overall concern is the promotion and regulation of single-employer defined benefit pension plans, *see* 29 U.S.C. § 1001b(c)(2)-(6), it would have been odd for Congress, in specifying the contours of the top-hat exemption, to be concerned with whether the qualified plan is "primarily" one that provides pension benefits (deferred compensation), as opposed to one that is primarily focused on issues outside of ERISA's concern, such as (as the DOL suggests) "retaining top talent" or enabling participants to benefit from marginal tax rates. *See* DOL *Amicus* Br. 18. The term "primarily" in section 1051(2)'s definition of the top-hat exemption is more naturally read as modifying the entire phrase that follows, including the term "select group."

As the First Circuit correctly concluded, the modifier "primarily" in section 1051(2) applies to the term "select group" because the statutory provision is concerned with "the configuration of the group as a whole." *Alexander v. Brigham & Women's Physicians Org., Inc.*, 513 F.3d 37, 48 (1st Cir. 2008). If, as Appellants and the DOL assert, Congress intended to strictly limit the top-hat exemption to plans composed *exclusively* of management or highly compensated employees, Congress would have phrased section 1051(2) differently, inverting the order of this provision, and would have defined the top-hat plans as those "maintained by an employer for a select group of management or highly compensated employees *primarily* for the purpose of providing deferred compensation."

For this reason, other courts to have construed section 1051(2) have squarely rejected the "absolutist construction" that Appellants and the DOL advocate here. *See Alexander*, 513 F.3d at 48; *see also Demery v. Extebank Deferred Comp. Plan (B)*, 216 F.3d 283, 289 (2d Cir. 2000).[3] Thus, the Second Circuit held that the modifier "primarily" applies to the entire statutory phrase that follows, rejecting an argument that a plan would not qualify for the top-hat exemption where "the participants were not all either management or highly compensated." *Demery*, 216 F.3d at 288-89. As the Second Circuit observed, "if a plan were principally intended for management and highly compensated employees, it would not be disqualified from top hat status simply because a very small number of the participants did not meet that criteria." *Id.* at 289 (citation omitted).

The First Circuit similarly rejected as "bizarre" the contention that "every top-hat plan can be rendered noncompliant by demonstrating that a single covered employee lacks individual bargaining power, no matter the overall characteristics of the 'select group of management or highly compensated employees' to which he

[3] The DOL contends (*see* DOL *Amicus* Br. 23 n.4) that the Third Circuit adopted a contrary interpretation in *In re New Valley Corp.*, 89 F.3d 143, 148 (3d Cir. 1996). But, as the DOL concedes, the parties in *New Valley* had "agree[d] that the plans in question are top hat plans." 89 F.3d at 149; DOL *Amicus* Br. 23 n.4. The issue was simply not before the Third Circuit, nor did the court of appeals offer any opinion on the scope of the modifier "primarily" in section 1051(2).

belongs." *Alexander*, 513 F.3d at 47-48. As the *Alexander* court explained, the top-hat provision "has been interpreted more generally to mean that not every member of the select group need belong to the upper tier of management or fit within the highest stratum of compensation." *Id.* at 48 (citing cases). This Court should not depart from the considered interpretation of section 1051(2)'s text and purpose adopted by its sister circuits.

The rigid interpretation advocated by Appellants and the DOL would have undesirable practical consequences. The question of who qualifies as "management or highly compensated employees" is necessarily fact-specific, and depends on both quantitative and qualitative factors. *See*, *e.g.*, *Demery*, 216 F.3d at 288. Given the prospective uncertainty that is inherent in this determination, employers would be reluctant to offer top-hat plans when they could be dragged into litigation based on the mere allegation that a single employee does not qualify as a "management or highly compensated employee[]." ERISA fiduciaries are already subject to some of the "highest [fiduciary duties] known to the law," *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982), and face an enormous volume of litigation challenging their performance of these duties. Appellant's unwarrantedly inflexible rule would further increase this litigation burden, undermining the employers' incentives to offer the top-hat plans in the first place, to the detriment of plan participants and their beneficiaries.

B. The DOL's Interpretation of Section 1051(2) — Advanced Only in 1990 — Is Not Entitled to Deference.

This Court should accord no deference to the DOL's interpretation of section 1051(2) — made not in a formal regulation through a notice-and-comment procedure, but only in an opinion letter and an *amicus* brief. Nor should this Court credit the DOL's unsupported assertion that it advanced this interpretation prior to its 1990 opinion letter.

Because the DOL never interpreted section 1051(2) through the notice-and-comment procedure, it does not claim deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), but seeks only a much lesser deference to informal agency opinions under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *See* DOL *Amicus* Br. 22. Even such deference, however, is appropriate only where the agency's interpretation is rooted in the agency's experience and expertise, and is persuasive. *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001); *Skidmore*, 323 U.S. at 139-40.

Here, no such deference is due. The DOL's 1990 opinion letter did not invoke any agency experience in the administration of top-hat plans, nor did it rely on any specialized expertise with respect to such plans. Indeed, as the First Circuit observed, the DOL's 1990 opinion letter "does not presume to interpret the statute" at all. *Alexander*, 513 F.3d at 48. Rather, "[t]he DOL opinion letter speaks only to Congress's rationale for enacting the top-hat provision. It does not present itself as an interpretation of the provision's requirements … ." *Id.* at 47. As the Supreme Court instructed, even where an agency is interpreting its own regulation, "deference is … unwarranted when there is reason to suspect that the agency's interpretation 'does not reflect the agency's fair and considered judgment on the matter in question.'" *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997)). Moreover, as the First Circuit correctly concluded, the DOL's interpretation flies in the face of statutory text, contravenes the legislative purpose, and would lead to absurd results, *Alexander*, 513 F.3d at 47-48, and thus can hardly be deemed persuasive.

Even in its *amicus* brief, the DOL does not claim to have identified any ambiguity or silence in section 1051(2). Nor does the DOL seek to justify its reading of this statutory provision by invoking its specialized expertise in the administration of ERISA. Instead, the DOL invokes "the traditional tools of statutory construction," and seeks to justify its interpretation of section 1051(2) by examining the statute's text and structure, as well as legislative history and purpose. *See* DOL *Amicus* Br. 17-21 (internal quotation marks and citation omitted).

The DOL has no special expertise with respect to deploying "the traditional tools of statutory construction." As this Court emphasized, "'[c]ourts are expert at statutory construction, while agencies are expert at statutory implementation.'"

North Carolina ex rel. Cooper v. TVA, 615 F.3d 291, 305 (4th Cir. 2010) (quoting *Negusie v. Holder*, 555 U.S. 511, 530 (2009) (Stevens, J., concurring in part and dissenting in part)). As decisions by other circuits demonstrate, a court can interpret the top-hat exemption provision applying the traditional tools of statutory construction. *See Demery*, 216 F.3d at 289; *Alexander*, 513 F.3d at 48.

Nor should this court defer to the DOL's self-serving assertion that the position advanced in its 1990 opinion letter represented a "long-standing and consistent reading" of section 1051(2). *See* DOL *Amicus* Br. 21-22. As Appellees demonstrated, ERISA practitioners at the time considered the DOL position advanced in the 1990 opinion letter to be a "sea change." Appellees' Response Br. 30 & n.109; *see also* JA-3546-47 (Hr'g Tr. 125:22-126:5) (discussing the 1990 opinion letter as constituting "a fairly significant expansion upon the perceived scope of the top hat exemption," and one recognized as such at the time); Groom Law Group, *Select Group Requirement for ERISA Top Hat Plans* at 2 (Nov. 27, 2007), http://www.groom.com/media/publication/58_tophatmemo_2007v2.pdf (the 1990 opinion letter "indicated a shift in [the DOL's] thinking on th[e 'select group'] issue").

In an attempt to portray its 1990 interpretation as encapsulating an agency's consistent reading of the statute, the DOL points only to its 1975 decision *not to adopt* a formal rule and its 1985 letter to *another agency*, the IRS. *See* DOL

Amicus Br. 21-22. Neither can bear the weight that the DOL seeks to place on it. The 1975 notice expressly stated that the DOL was not issuing a definition of the term "select group of management or highly compensated employees" in section 1051(2), and offered no opinion with respect to whether the word "primarily" modified that term. 40 Fed. Reg. 34530 (Aug. 15, 1975). The 1985 letter to the IRS concerned the question of whether a "rabbi trust" maintained in connection with a deferred compensation arrangement "constitutes a 'funded' plan" under ERISA. *See* JA-2548. The fact that the DOL, in a letter to another agency, also offered a cursory observation as to what it *may* propose in *a future regulation* with respect to the "select group" prong of the top-hat exemption is not an indication of an agency's considered judgment, much less a notice to the public.

The Supreme Court admonished:

> It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time … and demands deference.

Christopher, 132 S. Ct. at 2168. The DOL's assertion that, long before its 1990 opinion letter, employers establishing top-hat plans had to divine that interpretation on the basis of cryptic pronouncements in inter-agency communications about possible future regulations is "precisely the kind of 'unfair surprise' against which [the Supreme Court's] cases have long warned." *Id.* at 2167. This Court should reject the DOL's argument as merely "a '*post hoc* rationalizatio[n] advanced by an agency seeking to defend past agency action against attack.'" *Id.* at 2166 (quoting *Auer*, 519 U.S. at 462).

CONCLUSION

The district court's award of summary judgment should be affirmed.

Respectfully Submitted,

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