Financial Groups Take DOL to Court—in Texas

By Kerry Pechter *Thu, Jun 2, 2016*

RIJ believes that the federal government subsidizes the financial industry through favorable tax treatment, and that the public therefore deserves the assurance that anyone advising them on their retirement investments will act in their best interest, and be held accountable for it.

Leaving investors to wonder why anyone would oppose a rule requiring brokers to act in their clients' best interests, financial trade groups and lobbying organizations sued the Department of Labor today for relief from the DOL's conflict-of-interest or "fiduciary rule," promulgated in early April.

Plaintiffs in the **lawsuit** are the Financial Services Institute, the Financial Services Roundtable, the Insured Retirement Institute, the Securities Industry and Financial Markets Association, the U.S. Chamber of Commerce, and a number of local Texas organizations. A law professor said today that the suit, if successful, might have force only in Texas.

The suit was filed in the United States District Court, Northern District of Texas, Dallas, rather than in the DOL's home court of the District of Columbia. The Chief Judge of the Northern District is Barbara M.G. Lynn, a Clinton appointee who joined the court in November 1999. She assumed the chief judgeship only about a month ago.

For an analysis of a then-hypothetical lawsuit against the DOL, published by RIJ last February, click **here**.

The plaintiffs ask the federal court to vacate and set aside the DOL rule and its prohibited transaction exemptions. In asking for relief, the plaintiffs named seven grounds for the lawsuit, or counts:

- *The Department has improperly exceeded its authority in violation of ERISA, the Internal Revenue Code, and the Administrative Procedure Act.*
- *The fiduciary rule violates the Administrative Procedure Act because it is arbitrary, capricious and irreconcilable with the language of ERISA and the Internal Revenue Code.*
- *The Department unlawfully created a private right of action.*
- *The Department failed to provide adequate notice and to sufficiently consider and respond to comments.*
- *The Federal Arbitration Act prohibits the BIC and principal transactions exemptions' regulation of class action waivers in arbitration agreements.*

- *The Department's regulation of fixed indexed annuities and group variable annuities is arbitrary, capricious, barred by the Dodd-Frank Act, and was not subject to proper notice and comment.*
- *The Department arbitrarily and capriciously assessed the rule's benefits, consequences and costs.*
- *The Department's Best Interest Contract Exemption impermissibly burdens speech in violation of the First Amendment.*

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A caveat emptor, "buyer beware" or "suitability" standard of conduct is simply not appropriate in a publicly subsidized industry. No one should expect to benefit from the subsidy, estimated at more than $100 billion per year, without bearing the burden of fiduciary duty. Those who don't like the rules are welcome to limit their sales activities to owners of after-tax accounts.

A central floorboard of the industry's argument also seems creaky. Commission-based brokers and agents say, in effect: My sales efforts are too valuable to impede because useful advice comes with it… but the advice is merely incidental, as the law provides, so you shouldn't regulate me as a fiduciary.

As we went to press: Secretary of Labor Tom Perez today issued the following statement regarding a lawsuit filed to stop the department from ensuring that retirement savers receive investment advice that is in their best interests.

"People saving for retirement have a legal right and a compelling economic need to receive retirement investment advice that is in their best interest. Today, a handful of industry groups and lobbyists are suing for the right to put their own financial self-interests ahead of the best interests of their customers.

"Conflicted advice is eroding the savings of working Americans to the tune of $17 billion each year. The Conflict of Interest rule aims to address that problem by requiring retirement advisors to look out for the best interests of their clients. Many financial services professionals, from small town advisers to some of the nation's largest firms, engaged constructively with the department throughout the rulemaking process and, after publication of the final rule, noted that they do put the interests of their clients first and are

well positioned to comply. They recognize that putting their customers first is good for business.

“But there is a small, vocal minority who support the status quo that enables them to put their own interests first. This lawsuit seeks to vindicate their desire to put their own interests ahead of their clients’ best interests.

“This rulemaking was one of the most deliberate, open regulatory processes in recent memory. We had countless meetings and conversations with industry and stakeholders, considered thousands of comments from the public, held several days of public hearings and coordinated with our fellow federal agencies over the course of more than five years. We heard what stakeholders had to say, thoughtfully considered their comments and made improvements to the rule based on their feedback.

The department’s Conflict of Interest rule is built upon solid statutory and legal foundations, and we will defend it vigorously.