
Lawsuits against DOL won't change client strategy: Reish

By Editorial Staff Thu, Feb 24, 2022

On February 2, the Federation of Americans for Consumer Choice sued the DOL in Texas federal court. In a second suit, the American Securities Association sued the DOL in Florida.

In a webinar this week, attorney Fred Reish of the law firm of Faegre-Drinker noted that his corporate clients are aware of the two federal lawsuits in Texas that are challenging the Biden Department of Labor's efforts to regulate the way financial advisers can talk to 401(k) participants about rollovers.

Reish said his clients are proceeding with their compliance efforts on the assumption that the suits will not change the course of DOL policy.

"No one is ignoring the lawsuits," Reish wrote in an email to RIJ. "And no outcomes are predictable regardless of where the lawsuits are filed. The insurance company clients I talked to believe the risk is too great to justify stopping compliance efforts with PTE 2020-02 and the fiduciary interpretation.

"If they 'bet' that the plaintiffs will prevail in the litigation, but they lose, those companies could have enormous amounts at risk. Compliance takes that risk away. I am not aware of any major financial services company that is not fully committed to complying with these rules."

On February 2, 2022, the Federation of Americans for Consumer Choice ("FACC") filed suit against the US Department of Labor ("DOL") in the United States District Court for the Northern District of Texas seeking to set aside the DOL's latest attempt to define "investment advice fiduciary."

In the second suit, filed in the Middle District of Florida, the American Securities Association objected to the Biden Labor Department's "frequently asked questions," issued in April 2021, because it said the guidance interpreted the Trump-era rule to mean that first-time advice to transfer retirement assets can constitute fiduciary advice, which the rule subjects to a strict standard of care.

Here are the Groom Law Group's [comments](#) on the first suit:

FACC's complaint seeks the court to declare that the DOL's interpretation of the investment

advice fiduciary regulation “five part test” articulated in the preamble to Prohibited Transaction Exemption 2020-02 (“PTE 2020-02”) exceeded the DOL’s statutory jurisdiction, authority, or limitations and is arbitrary, capricious, and contrary to law. In addition, the FACC asked the district court to vacate the DOL’s interpretation in its entirety. If the FACC’s complaint is ultimately successful some potential positive outcomes include: overturning some of the more controversial elements of the preamble to PTE 2020-02 including the DOL’s relatively new views on the regular basis prong and the mutual agreement prongs of the five part test; and overturning the DOL’s position that the advice to take a rollover is likely to be fiduciary advice.

For now, however, resolution of the case is a long way off. It is anticipated that the DOL will move to dismiss the lawsuit, and even if the lawsuit survives dismissal, the DOL is expected to vigorously defend against it.

The FACC’s complaint is part of a larger trend of plaintiffs challenging regulators and legislation in federal courts in Texas prior to any governmental enforcement. In 2016, for instance, in *Chamber of Commerce v. US DOL*, the Chamber successfully convinced the Fifth Circuit Court of Appeals to vacate the DOL’s 2016 fiduciary rulemaking package. In 2020, *Data Marketing Partnership* convinced a district court judge in the Northern District of Texas to vacate a DOL Advisory Opinion in *Data Marketing Partnership v. US Department of Labor*. Similarly, the US Supreme Court allowed a pre-enforcement review of legislation in *Whole Woman’s Health v. Jackson*. These holdings show some willingness of federal courts to become involved in adjudicating challenges to laws, regulations, and other agency action before a government actor begins enforcement.

Substantively, the FACC’s complaint largely mirrors the Fifth Circuit’s reasoning in its decision in *Chamber of Commerce v. US DOL*. It essentially argues that DOL has sought to avoid the court’s mandate by doing through the preamble of PTE 2020-02 what it was told it could not do through formal notice and comment rulemaking. Again, the plaintiffs assert that DOL has sought to expand the scope of who is an ERISA fiduciary beyond those who have a “relationship of trust and confidence” with an ERISA plan or IRA holder, thereby sweeping back in functions like regular sales activities.

We expect the DOL to push back on the trend towards pre-enforcement judicial review and to argue that the plaintiffs should not be permitted to sue at this time. The DOL will likely argue that until there is enforcement action by it or by a private litigant against someone for violating the preamble, the preamble has not caused the FACC and its members to have suffer judicable harm. As described above, the trend towards pre-enforcement judicial

review is new and there are strong arguments on both sides. It will be important to watch the district court and ultimately whatever other courts weigh in on this dispute. The outcome of the scope of pre-enforcement judicial review will likely have an impact, one way or the other, on the opportunity for members of the regulated community to challenge FAQs, Advisory Opinions, Prohibited Transaction Exemptions, preambles, and other formal and informal guidance that is issued by the DOL.

Should the FACC prevail in its effort to have a federal court resolve the case, the case will remain a blockbuster as it will either provide an opportunity for courts to decide that the DOL's interpretation is consistent with the Fifth Circuit's "relationship of trust and confidence" requirement or close off another route that the DOL had taken to attempt to further expand its regulatory authority. While a victory for FACC in the case would not invalidate PTE 2020-02, it would likely mean the exemption wouldn't be necessary for many transactions, including rollovers. Should the DOL engage in any further "fiduciary" rulemaking, this case demonstrates that additional litigation would be likely to ensue.

Here are [comments](#) on the second suit, from Bloomberg Law:

Guidance the US Department of Labor issued last year clarifying its stance on investment advice under a 2020 fiduciary rule violates the Administrative Procedure Act, a trade organization calling itself the American Securities Association, representing financial services firms, said in a federal lawsuit filed Wednesday.

The group filed suit in the US District Court for the Middle District of Florida, marking the second time this month the Labor Department was sued over the fiduciary rule.

In what are known as "rollovers," federally regulated retirement assets are transferred into self-directed retirement vehicles, and financial advisers usually earn a commission on such transactions. The department's updated guidance threatens to sap those resources from the industry, because a fiduciary under the rule is legally obligated to act solely in a client's interest and can't receive increased compensation because of their advice.

The Trump rule broadened the kinds of retirement plan investments from which financial advisers can profit by reinstating a five-part test establishing the definition of a fiduciary. The test includes a caveat limiting fiduciary advice to the kind made "on a regular basis to the plan." The Biden Labor Department allowed parts of the rule to take effect, using the guidance to flesh out the regulation.

The department said in the guidance that first-time advice can qualify as fiduciary advice if

the financial professional and investor later establish an “ongoing advice relationship” or intend to do so.

In its suit, the American Securities Association alleged that the department’s guidance “rewrote” the rule altogether. In so doing, the group said, the department imposed burdensome documentation and investigation requirements on businesses—changes that it believes should have been subject to public comment according to the regulatory process outlined in the Administrative Procedure Act.

“If the Department wanted to change its rules, it needed to do so through the required notice-and-comment process—not through guidance documents,” the suit states.

Earlier this month, the Federation of Americans for Consumer Choice Inc. filed a similar suit against the DOL, arguing the fiduciary rule itself was a violation of the Administrative Procedure Act for expanding the definition of a fiduciary in violation of federal law. The group, which represents insurance and annuity distributors, said Congress never gave the department the authority to change the definition of a fiduciary under the Employee Retirement Income Security Act of 1974.

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