

DOL's Controversial Retirement Security Rule Faces Immediate Legal Challenge

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On April 23, 2024, the United States Department of Labor (DOL) issued updates to the investment advice fiduciary regulation, formally called the “Retirement Security Rule” and generally referred to as the “DOL Fiduciary Rule.” These updates, generally effective September 23, 2024 (a one-year transition period extends the effective date for some provisions into 2025), will have broad implications in the insurance and financial services industries. With the ink barely dry, the first legal challenge to the Retirement Security Rule has been filed. ([*Federation of Americans for Consumer Choice Inc. v. DOL*](#), complaint filed 5/2/24)(FACC Litigation.)

Statutory and Regulatory Background

Under the Employee Retirement Income Security Act (ERISA), certain individuals are considered “fiduciaries.” As such, they are held to the highest standards known to law and are personally liable for failing to abide by these standards. These fiduciary duties are reinforced by prohibitions against certain Prohibited Transactions, which forbid a fiduciary from “deal[ing] with the assets of the plan in his own interest or for his own account,” and “receiv[ing] any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.” DOL has authority to grant Prohibited Transaction Exemptions to these broad prohibitions for compliant transactions. Absent an exemption, a fiduciary cannot receive any consideration or compensation for any investment transaction involving the assets of an ERISA plan.

Since many protections, duties, and liabilities in ERISA hinge on fiduciary status, determining who is a “fiduciary” is of central importance. ERISA has a statutory definition of “fiduciary,” which includes three fiduciary categories. Relevant to the Retirement Security Rule are those individuals who are considered fiduciaries because they “render investment advice for a fee.”

Five Part Test

In 1975, the DOL implemented by regulation a “five-part test” for determining whether someone was rendering investment advice to an employee benefit plan and, therefore, would be considered an ERISA fiduciary. Under the five-part test, a person is a fiduciary only if they: (1) render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, buying, or selling securities or other property (2) on a regular basis (3) pursuant to a mutual

agreement, arrangement, or understanding with the plan or a plan fiduciary that (4) the advice will serve as a primary basis for investment decisions about plan assets, and that (5) the advice will be individualized based on the particular needs of the plan. All five parts of this test must be met for fiduciary status to attach.

2016 Final Rule and Judicial Challenges

Beginning in 2010, the DOL began revising the regulatory definition of an investment advice fiduciary. The impetus for this process was the changing retirement landscape from defined benefit to defined contribution plans and the resulting shift toward individual control over investment decisions via participant-directed (e.g., 401(k)) plans and individual retirement accounts. A proposed rule was adopted in 2010 and withdrawn in 2011 amid widespread criticism. In April 2015, the DOL again proposed new regulations defining investment advice fiduciary status and finalized that rule in April 2016 (the 2016 Final Rule.) After a series of legal challenges, the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit) vacated the 2016 Rule in [*Chamber of Commerce v. United States Department of Labor*](#).

The Retirement Security Rule

On November 3, 2023, the DOL adopted a proposed Retirement Security Rule. The Retirement Security Rule was adopted in final form on April 23, 2024. DOL also made widespread changes to the related Prohibited Transaction Exemptions.

The Final Rule states that a financial professional acts as a fiduciary if:

- The financial professional makes a recommendation to a retirement investor;
- That recommendation is for a fee (either direct or indirect); and
- One of the following:
 - There is a representation or acknowledgment that the professional is a fiduciary; or
 - The financial professional provides investment recommendations to investors on a regular basis as part of their business, and the facts and circumstances objectively indicate all the following about the recommendation:
 - it is based on the review of the retirement investor's particular needs or individual circumstances;
 - it reflects the professional judgment of the financial professional to the retirement investor's particular needs; and
 - it may be relied on by the retirement investor as intended to advance the retirement investor's best interest.

DOL has expressed concern that the “regular basis” and “mutual agreement” prongs of the prior Five-Part Test “worked to defeat legitimate retirement investor expectation of impartial advice” and attempted to close these perceived loopholes in the Retirement Security Rule. The rule, as adopted, broadens both the number of people who will be considered ERISA investment advice fiduciaries and the advice that will be considered investment advice.

The FACC Litigation

On May 2, 2024 (or 9 days after the Final Rule was adopted), the FACC filed its complaint in the United States District Court for the Eastern District of Texas. Not surprisingly, the Complaint relies

heavily on the Fifth Circuit's decision in *Chamber of Commerce* (which is controlling precedent.) The complaint alleges that the DOL both exceeded their regulatory authority and acted in an arbitrary and capricious manner in adopting the Retirement Security Rule and amending the related Prohibited Transaction Exemptions.

DOL's adoption of the Retirement Security Rule is the latest step in their ongoing (now approaching 15-year) attempt to shore up what they see as gaps in fiduciary coverage related to investment advice. The FACC Litigation is likely the first of several judicial challenges to the Retirement Security Rule.

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