

**MEMO# 35730**

June 3, 2024

## Two Lawsuits Filed Challenging DOL Fiduciary Advice Rule

[35730]

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TO: ICI Members

Pension Committee

Pension Operations Advisory Committee SUBJECTS: Pension RE: Two Lawsuits Filed Challenging DOL Fiduciary Advice Rule

As we previously reported, on April 25, 2024, the US Department of Labor (DOL) published a final version of its regulatory package on fiduciary investment advice ("Final Package").<sup>[1]</sup> The Final Package includes both an amendment to the regulation defining who is a "fiduciary" under section 3(21) of ERISA and section 4975(e)(3) of the Internal Revenue Code ("Code") as a result of providing investment advice to a retirement investor ("Final Rule"), and amendments to prohibited transaction exemptions (PTEs) 2020-02, 84-24, 75-1, 77-4, 80-83, 83-1, and 86-128.

As of the date of this memorandum, two lawsuits have been filed challenging different portions of the Final Package. Both seek to have the Final Rule preliminarily and permanently enjoined and vacated, and variously attack different amended PTEs. We summarize these lawsuits below. Additional lawsuits may yet be filed.

### **Federation of Americans for Consumer Choice (FACC) v. DOL**

On May 2, 2024, FACC<sup>[2]</sup> along with several Texas independent insurance agents filed suit against DOL in the Eastern District of Texas.<sup>[3]</sup> FACC challenges the Final Rule and amended PTE 84-24 on the grounds that they are contrary to law and arbitrary and capricious under the Administrative Procedure Act (APA). Plaintiffs argue that amended PTE 84-24 imposes unworkable compensation restrictions for independent insurance agents. PTE 84-24 previously allowed insurance agents who were covered under the prior five-part test for fiduciary investment advice to receive commissions and other compensation for the sale of annuities to ERISA plans and IRAs, subject to certain disclosure requirements. The complaint alleges that, under amended PTE 84-24, independent insurance agents now face significant restrictions and burdens on their receipt of such commissions and other compensation.

The complaint criticizes the Final Package as virtually indistinguishable from DOL's 2016 fiduciary rulemaking which was struck down by the Fifth Circuit in *Chamber of Commerce of*

the United States of America v. US Department of Labor in 2018.<sup>[4]</sup> Among other things, the amendments to PTE 84-24 ignore the important distinction the Chamber court highlighted between fiduciary duties to Title I plans and to Title II plans such as IRAs. Additionally, the Final Package is inconsistent with Congressional intent as expressed in ERISA. As such, DOL has exceeded its authority and acted arbitrarily and capriciously in promulgating both the Final Rule and amended PTE 84-24. The Final Package also is a result of rushed rulemaking "without any substantial consideration of the consequences or the effect it will have on the insurance industry in particular." Among these consequences are the risk that the fiduciary acknowledgement requirement of PTE 84-24 creates a private right of action under ERISA, notwithstanding DOL's empty assertions in the Final Package that this is not the case.

The complaint pleads two causes of action. One, DOL in promulgating the Final Rule and the amendments to PTE 84-24 exceeded its authority under ERISA, the Code, and the APA. Two, the Final Rule and the amendments to PTE 84-24 violate the APA because they are arbitrary, capricious, and irreconcilable with the text of ERISA and the Code.

Plaintiffs ask that the court (as relevant):

- Declare the Final Rule and the amendments to PTE 84-24 to have been promulgated in excess of DOL's statutory authority, and that they are arbitrary, capricious, or otherwise contrary to law;
- Vacate and set aside the Final Rule and the amendments to PTE 84-24; and
- Preliminarily and permanently enjoin DOL from implementing, applying, or taking any action of any type under the Final Rule and the amendments to PTE 84-24.

## **US Chamber of Commerce amicus brief**

On May 31, 2024, the US Chamber of Commerce (Chamber) filed an amicus brief supporting FACC's Motion for Stay of Effective Date and Preliminary Injunction.<sup>[5]</sup> Noting that the FACC lawsuit is the consequence of DOL's dissatisfaction with Congress' design, the Chamber highlights its view that the Final Package is an improper attempt by DOL to bypass relevant statutory limitations in a manner similar to DOL's ill-fated 2016 fiduciary rulemaking. The Chamber also outlines the significant costs of the Final Package, which go beyond the direct costs of complying with the Final Package.

## **American Council of Life Insurers (ACLI) v. DOL**

On May 24, 2024, ACLI and eight other parties<sup>[6]</sup> filed suit against DOL in the Northern District of Texas.<sup>[7]</sup> In addition to arguing that the Final Package is contrary to law and arbitrary and capricious under the APA (as does FACC in challenging only the Final Rule and amended PTE 84-24), ACLI also asserts that the Final Package is unconstitutional under the First Amendment—the FACC lawsuit does not assert a constitutional challenge.

The ACLI lawsuit alleges that the Final Package was the product of a rushed, outcome-oriented process that was arbitrary and capricious in numerous respects, including arbitrarily targeting annuities, that DOL's cost-benefit analysis was not reasoned, and that DOL in the Final Package failed to address significant concerns raised by commenters. DOL also ignored other recent market reforms such as the SEC's Reg BI and state insurance regulation efforts, and instead moved forward without even meaningfully engaging with the responsible regulatory agencies. The Final Package also is contrary to the law in that it seeks to transform all agents and brokers who sell retirement products into ERISA fiduciaries. These are the same legal defects, the complaint alleges, that were inherent in DOL's vacated 2016 fiduciary rulemaking.

Additionally, as noted above the complaint alleges that the Final Package violates the First Amendment by imposing fiduciary burdens on garden variety sale conversations. These burdens violate the First Amendment rights of plaintiffs' members to communicate truthful information to consumers, as well as consumers' right to receive truthful information.

The complaint pleads four causes of action. Plaintiffs assert that:

- The Final Package's expansion of fiduciary status is contrary to law and in excess of statutory jurisdiction in that it redefines all sales speech as fiduciary speech, transforms one-time commercial transactions into fiduciary relationships, precludes parties from structuring their relationships as non-fiduciary through clear contractual language, embodies in the Final Rule a standard that is an unlawful end-run around the Chamber decision, conflicts with ERISA's requirement that there be advice for a fee, contravenes the 2010 Dodd Frank Act,<sup>[8]</sup> and ignores the differences in DOL's authority over Title I versus Title II plans;
- The Final Package is contrary to law and arbitrary and capricious because it unlawfully creates private rights of action under state law through the written acknowledgement requirements in PTE 2020-02 and PTE 84-24;
- The Final Package is the product of unreasoned decision-making, including DOL's failure to establish why it is necessary (particularly in light of existing regulations), the arbitrary targeting of annuities while ignoring their benefits, the use of an arbitrary and capricious cost-benefit analysis, and DOL's failure to adequately address the significant comments it received; and
- The Final Package violates the First Amendment as it applies to truthful commercial speech by financial salespersons by imposing unjustified content-based burdens on sales speech and by unlawfully compelling speech.

Plaintiffs ask that the court (as relevant):

- Declare the Final Package arbitrary, capricious, an abuse of discretion, and contrary to law, contrary to constitutional rights, and promulgated in excess of statutory jurisdiction, authority, or limitations;
- Set aside and vacate all components of the Final Package in its entirety as non-severable; and
- Preliminarily and permanently enjoin DOL from implementing, applying, or enforcing the Final Package, and stay its effective date.

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#### **Notes**

<sup>[1]</sup> For an overview of the Final Package, including the Final Rule and the amendments to various PTEs, see ICI Memorandum No. 35699, dated May 3, 2024, available at <https://www.ici.org/memo35699>.

<sup>[2]</sup> FACC is a trade organization whose members are independent marketing organizations, insurance agents, and agencies that market fixed insurance products including traditional fixed rate annuities and fixed indexed annuities.

<sup>[3]</sup> FACC v. DOL, No. 6:24-cv-00163 (E.D. Tx. filed May 2, 2024), available at

<https://facchoice.com/complaint-facc-et-al-vs-dol-05-02-2024/>. FACC on May 21, 2024, filed a Motion for Stay of Effective Date and Preliminary Injunction, available at <https://facchoice.com/filings-for-preliminary-injunction-facc-et-al-vs-dol-05-21-2024/>. FACC and one of the plaintiff independent insurance agents here also are parties in one of the challenges to DOL's original PTE 2020-02. See FACC, et al. v. DOL, No. 3:22-cv-00243-K-BT (N.D. Tx. filed Feb. 2, 2022); see also ICI Memorandum No. 35052, dated Feb. 28, 2023, available at <https://www.ici.org/memo35053>. This case remains open.

[4] Chamber of Commerce. of United States of Am. v. DOL, 885 F.3d 360, 363 (5th Cir. 2018) (Chamber). See ICI Memorandum No. 31137, dated March 16, 2018, available at <https://www.ici.org/memo31137>.

[5] The Chamber's amicus brief is available at <https://www.uschamber.com/assets/documents/U.S.-Chamber-Amicus-Brief-Federation-of-Americans-for-Consumer-Choice-v.-Dept.-of-Labor-E.D.-Tex.pdf>.

[6] The other plaintiffs, all of whom are Texas-based or national associations that represent life insurance companies, insurance agents, brokers, and distributors who issue, market, and sell insurance and securities products, including annuities, to retirement savers, are the National Association of Insurance and Financial Advisors (NAIFA)-Fort Worth, NAIFA-Dallas, NAIFA-Pineywoods of East Texas, NAIFA-Texas, NAIFA, the National Association for Fixed Annuities, the Insured Retirement Institute, and Finseca.

[7] ACLI, et al. v. DOL, No. 4:24-cv-00482-O (N.D. Tx. filed May 24, 2024), available at [https://www.acli.com/-/media/public/pdf/other/2024\\_05\\_24\\_ndtx\\_4\\_24\\_cv\\_00482\\_dkt\\_1\\_complaint.pdf](https://www.acli.com/-/media/public/pdf/other/2024_05_24_ndtx_4_24_cv_00482_dkt_1_complaint.pdf).

[8] As the Chamber court noted, the Dodd Frank Act delegated to the SEC the power to promulgate enhanced regulations of securities recommendations to retail customers, and also expressly reserved for States the authority to regulate fixed index annuities (when a State has adopted the NAIC model regulation). Chamber, 885 F.3d at 385.