PUBLIC SUBMISSION

Received: November 29, 2023
Tracking No. lpk-7mdd-hsdz
Comments Due: November 29, 2023
Submission Type: Web

Docket: EBSA-2023-0014
Definition of an Investment Advice Fiduciary

Comment On: EBSA-2023-0014-0003
Hearings, Meetings, Proceedings etc.: Retirement Security Rule; Definition of an Investment Advice Fiduciary and Associated Prohibited Transaction Exemption Amendments

Document: 1210-AC02 request 0031 Federation of Americans for Consumer Choice O'Brien Colleluori 11292023

Submitter Information

Organization: Federation of Americans for Consumer Choice

General Comment

1. the name, title, organization, address, email address, and telephone number of the individual who would testify;
Kim O'Brien, CEO, Federation of Americans for Consumer Choice, 5900 Balcones Dr Suite 100, Austin TX 78731, kim@facchoice.com, 414-332-9312

Don Colleluori, Partner, Figari + Davenport LLC, 901 Main St Ste 3400, Dallas TX 75202-3776 don.colleluori@figdav.com, 214-939-2007
2. if applicable, the name of the organization(s) whose views would be represented; and
Federation of Americans for Consumer Choice (FACC)
3. the date of the requester's written comment on the proposed rule or exemption proposals (if already submitted).
Initial comment letter submitted November 20, 2023

Attachments

1210-AC02 request 0031 Federation of Americans for Consumer Choice O’Brien Colleluori 11292023_attachment

don.colleluori@figdav.com
(214) 939-2007

November 20, 2023

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC 20210

Attention: Definition of Fiduciary – RIN 1210-AC02

Dear Sir/Madam:

Our firm represents the Federation of Americans for Consumer Choice, Inc. (FACC) in a lawsuit against the Department of Labor currently pending in the United States District Court for the Northern District of Texas, No. 3:22-cv-0243, *Federation of Americans for Consumer Choice, Inc., et al. v. United States Department of Labor, et al.*

FACC intends during the comment period to submit a detailed letter identifying various specific and technical concerns with the above-referenced proposals, which are intended to redefine who is an investment advice fiduciary under the Employee Retirement Income Security Act of 1974 (ERISA) and amend Prohibited Transaction Exemption (PTE) 84-24.

As an initial matter, however, as counsel to FACC we submit this letter to point out what should be obvious to the Department, *i.e.*, these proposals will be vigorously challenged in court should the Department proceed to adopt them. It is clear to FACC—as it surely must be to the Department—that these proposals are utterly irreconcilable with the holdings of the Fifth Circuit Court of Appeals' decision in *Chamber of Commerce of United States of Am. v. United States Dep't of Labor*, 885 F.3d 360, 363 (5th Cir. 2018).

In *Chamber of Commerce*, the Fifth Circuit vacated the Department's 2016 fiduciary rule as being unauthorized and inconsistent with ERISA. Like the current proposal, the 2016 fiduciary rule displaced the Department's time-honored 1975 rule setting forth a five-part test for determining who is an investment advice fiduciary under the statute. After the 2016 fiduciary rule was vacated—a decision the Department chose not to appeal—the Department reinstated the five-part test but proposed a radical reinterpretation of how it should be applied in the preamble of PTE 2020-02. FACC's current lawsuit challenges that reinterpretation on the ground that while it pays lip service to the *Chamber of Commerce* opinion, in reality the Department merely repackaged elements of the 2016 fiduciary rule that the Fifth Circuit held were fundamentally inconsistent with ERISA.

With the unveiling of its newest proposals to redefine investment advice fiduciary and amend PTE 84-24, the Department unabashedly drops any pretense of abiding by the Fifth Circuit's holdings as to the meaning of fiduciary as Congress used that term in ERISA. The new proposed definition of investment advice fiduciary is virtually indistinguishable from the 2016 fiduciary rule that was struck down. Other than token references to critical terms like trust and confidence, the Department completely disregards the Fifth Circuit's analysis and decision. And, other than replacing a bilateral contract requirement with unilateral acknowledgements that would have virtually the same legal effect, the proposed amendments to PTE 84-24 suffer from many of the same defects the Fifth Circuit condemned in *Chamber of Commerce*.

It is hard to state forcefully enough how the Department's proposals reflect a complete lack of deference to the *Chamber of Commerce* opinion. The Department seems to believe it is unencumbered by the Fifth Circuit decision, which it tries to reduce to mere criticism of the Best Interest Contract (BIC) Exemption. In fact, however, that decision represented a complete repudiation of the Department's approach to the definition of investment advice fiduciary, which the Department now returns to again without any acknowledgement that it is exactly what the Fifth Circuit already considered and rejected.

The purpose of this letter is to highlight just a few of the most glaring instances of the foregoing, starting with the Department's disregard of the central holding of *Chamber of Commerce*, namely that Congress's use of the word "fiduciary" in ERISA incorporated the common law meaning of that term, which turns on the existence of a special relationship of trust and confidence between parties that is "the *sine qua non*" of a fiduciary relationship. The Fifth Circuit explained that the Department's 1975 rule, establishing a conjunctive, five-part test for investment advice fiduciary, captured the essence of the common-law definition. While that does not mean the 1975 rule is necessarily immutable, it does mean any replacement of the 1975 rule must likewise conform to ERISA's exacting concept of fiduciary as informed by longstanding common law. The Department's dismissal of the five-part test as a mere regulatory obstacle, claiming it "narrowed the plain and expansive language" of ERISA's definition of investment advice fiduciary, is impossible to square with the Fifth Circuit's embrace of the five-part test as a proper reflection of both common law and Congress's intent in enacting ERISA.

The Department's newly proposed definition proceeds to blatantly defy the holdings in *Chamber of Commerce* with the absence of any recognition or discussion of what constitutes a relationship of trust and confidence under common law. Remarkably, it skips over such analysis and replaces it with an assumption that a relationship of trust and confidence routinely exists in common commercial dealings between a financial professional and client. The proposed guidance looks only at whether an investor expects that he or she can "place their trust and confidence" in a professional to recommend an investment that is in the investor's best interest—a far cry from the rigorous elements demanded by courts in order to find a fiduciary relationship under common law. Where the Fifth Circuit held that it would ordinarily be "inconceivable that financial salespeople or insurance agents will have an intimate relationship of trust and confidence with prospective purchasers," the proposed rule indefensibly provides that even one-time recommendations will be treated as fiduciary investment advice if "the circumstances indicate that the recommendation is based on the retiree's particular needs and circumstances and may be relied upon for making an investment decision that is in the investor's best interest."

The Department's disregard for the Fifth Circuit's rulings perhaps reaches its pinnacle with the assertion that "[m]ore fundamentally, the Department rejects the purported dichotomy between a mere 'sales' recommendation to a counterparty, on the one hand, and advice, on the other, in the context of the retail market for investment products." Notably, the Department took the same position, using almost identical language, when it promulgated the 2016 fiduciary rule. The Fifth Circuit, however, categorically rejected the Department's thesis, holding that the 2016 fiduciary rule was at odds with the settled understanding of the term investment advice for a fee used in ERISA, which recognizes the "dichotomy between mere sales conduct, which does not usually create a fiduciary relationship under ERISA, and investment advice for a fee, which does."

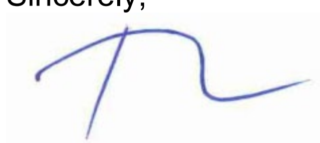
The Department's proposed amendments to PTE 84-24 also fly in the face of *Chamber of Commerce*, which rebuffed the Department's attempt to use its PTE granting authority to extend Title I fiduciary duties to financial professionals involved in the sale of investments to IRAs governed by Title II. Among other problems that led the Fifth Circuit to vacate the then proposed BIC Exemption along with the rest of the 2016 fiduciary rule, the Court held that the Department improperly failed to distinguish between its authority over employer-sponsored plans and IRAs. Specifically, the Court explained that ERISA Title I requires plan fiduciaries to adhere to statutory duties of loyalty and prudence, but the Internal Revenue Code imposes no such duties with respect to IRA accounts. This same problem infects the proposed amended PTE 84-24, where once again the Department has cast a wide net turning all financial professionals into fiduciaries and then requiring any insurance agent wishing protection under the revised PTE to acknowledge and accept liability as a fiduciary bound by duties of loyalty and prudence when making investment recommendations. This is inconsistent with the express choice made by Congress that such duties of prudence and loyalty exist only in Title I and not Title II.

The Department's proposed amendments to PTE 84-24 also lead back to another strong concern expressed by the Fifth Circuit relative to Congressional intent. The Fifth Circuit took issue with the "DOL's regulatory strategy" in the 2016 rule of forcing sellers of fixed-indexed annuities (FIAs) into compliance with the more stringent BIC Exemption as opposed to PTE 84-24. The Fifth Circuit explained that this operated as an end-run around Congress, which in adopting the Dodd-Frank legislation had rejected an SEC initiative to regulate FIAs, choosing instead to defer to state insurance regulation. In particular, the Fifth Circuit expressed concern that the Department was subjecting insurance agents to "stark alternatives" that threatened to create "entirely new compensation schemes" or be faced with "withdrawing from the market." The Fifth Circuit characterized what the Department was doing as "occupying the Dodd-Frank turf" which seems to be again what the Department is doing in 2023. While PTE 84-24 is nominally retained in the 2023 rulemaking package, its overhaul purposely seeks to supplant state insurance regulation with the Department's own regulatory regime in the same manner as the 2016 rule, only this time with respect to all annuities, not just FIAs.

This comment letter is not intended to be an exhaustive catalogue of the problems with the Department's latest proposals. It is, instead, a preview of the legal challenge that awaits the new rule and exemption if and when they are promulgated by the Department. FACC wishes to make clear on the record that which is obvious from any objective reading of the latest proposal: the Department is transparently ignoring the clear dictates of *Chamber of Commerce* and once again attempting to circumvent Congress's intent in ERISA. The Fifth Circuit flatly rejected the Department's first effort in 2016; FACC has no doubt the courts will do the same if these proposals proceed.

If the Department is truly open to consideration of the multiple ways in which the proposed rule departs from ERISA and the other industry and regulatory developments that obviate the need for further rulemaking—which FACC finds doubtful at this stage—we would urge these proposals be withdrawn in their entirety. This would spare the Department and industry unnecessary controversy and litigation, as well unnecessary confusion for investors as these repeated rulemaking efforts drag on incessantly. The Department itself seems to recognize that the SEC and state insurance departments are already addressing similar issues, and the Department's 2023 rulemaking package will therefore contribute little beyond a fresh round of legal actions.

Sincerely,



Don Colleluori