

DOL Stakes Out New Fiduciary Concept: Plaintiffs Would Uproot It

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The Federation of Americans for Consumer Choice Inc. (FACC), alongside and representing associated members of the FACC, filed a complaint against the U.S. Department of Labor (DOL) and Secretary of Labor Martin J. Walsh on February 2, 2022, challenging the DOL's adoption of a new "prohibited transaction" exemption, No. 2020-02. The complaint alleges that the "revised" exemption issued by the DOL on December 18, 2020, seeks to nullify and replace the DOL's current five-part test for determining investment advice fiduciary status, originally implemented in 1975. Premising key arguments on the 2018 Fifth Circuit decision *Chamber of Commerce of the United States of America v. U.S. Department of Labor*, the complaint argues the revised exemption circumvents the Administrative Procedure Act and oversteps into congressional authority to rewrite the definition of a fiduciary under ERISA and the Internal Revenue Code.

The revised exemption, according to the complaint, would not only result in an extension of the administrative branch's authority but also "radically change" who is deemed a "fiduciary" under ERISA and the Internal Revenue Code. The FACC maintains that the revised exemption would interpret "fiduciary" more broadly and could apply to individuals giving investment advice only once, but with the possibility of giving investment advice to clients again in the future. In other words, investment professionals could run the risk of being deemed a fiduciary, not on the traditional basis of established trust and confidence typical in a fiduciary relationship, but based on the number and nature of times they provide advice. The complaint also hints at an attempt by the DOL to obtain "broad authority" over the IRA market.

The FACC seeks a declaratory judgment deeming the revised exemption arbitrary and capricious and asks that it be set aside. The complaint also seeks to prevent the DOL from enforcing the provision.

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