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Once More Unto the (Fiduciary) Breach – FACC Suit Against the DOL

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On February 2, 2022, the Federation of Americans for Consumer Choice (“FACC”) filed suit against the U.S. Department of Labor (“DOL”) in the United States District Court for the Northern District of Texas seeking to set aside the DOL’s latest foray into the investment advice fiduciary definition. 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. U.S. 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. U.S. Department of Labor*. Similarly, the U.S. 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.

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Substantively, the FACC’s complaint largely mirrors the Fifth Circuit’s reasoning in its decision in *Chamber of Commerce v. U.S. 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.

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