



“INSURANCE INDUSTRY TO COURT: IT’S AN EMERGENCY!”

“Our Ability to Take Advantage of Retirement Savers is About to End, Please Step in and Let Us Continue to Profit at their Expense”

The Department of Labor (DOL) finalized the Retirement Security Rule in April 2024, requiring all financial professionals to act in retirement savers’ best interest when providing investment advice to them. The insurance industry, not wanting to comply with the rule’s most basic requirements, sued to kill the DOL rule. These basic requirements are to:

- give advice to retirement savers that is prudent (they must act like a professional);
- give advice to retirement savers that is loyal (they must not put their own interests ahead of retirement savers’);
- charge no more than is reasonable for their services (they can’t charge excessive, unreasonable amounts); and
- avoid making misleading statements.

Not only did the insurance industry sue, but they are seeking an injunction to stop these basic requirements from going into effect. In seeking an injunction, they are arguing that it is an emergency, that they will suffer irreparable harm if they have to comply with these requirements, and the balance of harms between them and retirement savers weighs in their favor, not retirement savers’.

What They Are Effectively Saying to the Court is...

- **Our ability to take advantage of retirement savers is about to end;**
- **Please step in and let us continue to be able to profit at retirement savers’ expense;**
- **Otherwise, we will suffer irreparable harm, such that we will no longer be able to extract excessive compensation from retirement savers; and**
- **Our own interests, including our compensation, are more important than the harm retirement savers suffer currently from our bad, self-interested advice.**

Despite their seemingly compelling lobby pitches that make them sound noble, their statements to the court tell a very different story. The quotations below, stated by insurance industry opponents of the rule to the court, make clear that these opponents are advocating for their own interests, at the expense of retirement savers’.

	What They Told a Court:	What This Actually Means:
Lack of Rollover Analysis:	<p>“Although I do evaluate my clients’ situation and financial needs to determine if a fixed annuity will effectively address their situation, needs, and objectives, discussions with my clients about the benefits and limitations of a fixed annuity involve comparing those only to the risk of loss with securities generally and I am not required to analyze detailed plan information, such as fees and expenses or allocations of particular securities.”¹</p> <p>“Much of my annual income as an insurance agent comes from the sale of annuities that involve the rollover of funds from a 401k plan or Individual Retirement Account as well as non-rollover tax-qualified annuity sales.”²</p>	<p>When we recommend to retirement savers that they roll over their 401(k)s to IRAs, we don’t actually assess whether that decision is in their best interest. We don’t compare what they’re invested in with the products we recommend.</p> <p>The “effectively address their situation, needs, and objectives” standard that applies to annuity recommendations is significantly lower than the standard to provide advice in their best interest, including comparing all material aspects of what they are in vs. what we recommend.</p> <p>We make a lot of money on these kinds of recommendations and we would be at risk of losing this money if we had to operate under a higher standard that put retirement savers’ needs first, rather than our own interests.</p>
Unreasonable Compensation:	<p>“To ensure that there is no possibility” that they “may have violated the ‘reasonable compensation’ requirements of the new rules, FACC’s members will also be forced to forgo additional marketing and business services compensation that they were previously receiving...”³</p>	<p>Our ability to charge whatever we want, even if it’s excessive and unreasonable, would be compromised. We have serious concerns our compensation could be determined to be excessive.</p>

[1] Decl. of James Holloway, Federation of Americans for Consumer Choice, Inc. v. U.S. Department of Labor, Case No. 6:24-cv-00163, Appendix in Support of Plaintiffs’ Motion for Stay of Effective Date and Motion for Preliminary Injunction and Brief in Support, Filed May 21, 2024.

[2] Decl. of Jon Bellman; See also Decl. of Tyrone Clark.

[3] Decl. of Kim O’Brien.

	<p>"[T]he vague reasonableness test will reduce commissions paid by insurers who would otherwise pay commissions in excess of the average....The net effect of this [reasonable compensation requirement] will be that my income will decline if the 2024 Fiduciary Rule becomes effective."⁴</p>	
<p>Their Compensation Might Decline:</p>	<p>"FACC Members Will Suffer Diminished Revenues and Income."⁵</p> <p>"[T]he 2024 Fiduciary Rule and efforts to comply with the new PTE will directly harm my financial interests."⁶</p> <p>"This will significantly decrease my income in the future."⁷</p> <p>"Compliance with the ERISA requirements will also place additional burdens on my time and efforts that would otherwise be directed to sales activities and revenue generation, which will lead to a diminution in my overall business activity and particularly my tax-qualified annuity sales."⁸</p> <p>"The net effect of this will be that my income will decline if the 2024 Fiduciary Rule becomes effective."⁹</p> <p>"Once all the conditions become effective in September 2025, additional costs for supervision, documentation, and compliance will be incurred by insurers and are likely to be indirectly passed down to me in the form of lower commission structures and/or fewer other financial benefits."¹⁰</p>	<p>It's an emergency that our compensation could decrease. That's more important than ensuring retirement savers receive the best advice possible.</p>

[4] Decl. of James Holloway; See also Decl. of James Johnson.

[5] Decl. of Kim O'Brien.

[6] Decl. of Jon Bellman.

[7] Id.

[8] Id.

[9] Decl. of James Holloway; See also Decl. of V. Eric Couch.

[10] Decl. of James Johnson; See also Decl. of James Holloway.

	<p>"Any additional out-of-pocket expense results in a direct dollar-for-dollar reduction of my personal net income."¹¹</p>	
<p>Placing Their Interests Ahead of Their Consumers':</p>	<p>"In addition to the reasonableness test for compensation, my understanding is that the ICS [Impartial Conduct Standards] Loyalty Obligation will now prohibit compensation that could give any impression that I have recommended a product for reasons other than the product's benefit to a client..."¹²</p>	<p>I want to recommend products that benefit me by providing me higher compensation, even though those products may not benefit my client.</p>
<p>Serving Insurance Industry Interests in the Litigation, not Retirement Savers:</p>	<p>"FACC is dedicated to advancing and advocating for the interests of independent insurance agents and agencies in the distribution of guaranteed insurance products..."¹³</p> <p>"FACC was founded to represent and give voice to the interests of its membership consisting of independent insurance agents and agencies in matters of public policy..."¹⁴</p> <p>"FACC Itself Will Suffer Irreparable Damages."¹⁵</p> <p>"[A]s FACC members elect to stop selling tax-qualified sales because of the 2024 Fiduciary Rule, it is likely that they may also consider their membership in FACC to no longer be necessary, thereby resulting in a reduction in FACC's membership base and commensurate reduction in the membership fees it is able to</p>	<p>Our interests in the litigation are that our trade association, which represents the insurance industry, might see a reduction in membership and membership fees, and our members who work in the insurance industry will see a reduction in their compensation.</p>

[11] Decl. of Jon Bellman

[12] Decl. of James Johnson; See also Decl. of James Holloway.

[13] Decl. of Kim O'Brien.

[14] Id.

[15] Id.

	<p>generate to help support its purpose and initiatives designed to offer consumers greater access to guaranteed insurance and annuity products. Once members and their associated fees have been lost, there is no way for FACC to recover those lost revenues even if the 2024 Fiduciary Rule is later determined to be invalid or unenforceable.”¹⁶</p>	
<p>Disclosing They Aren’t Fiduciaries Won’t be Good for Business:</p>	<p>“And even if the 2024 Fiduciary Rule is later declared unenforceable, I will then be forced to inform clients that I am no longer a ‘fiduciary’ of theirs, souring relationships and confusing those clients. This will undoubtedly result in lost business opportunities and loss of goodwill.”¹⁷</p> <p>“I would have to explain to the client I am a fiduciary only for the tax-qualified sales and just a regular non-fiduciary insurance agent for the other sales. This will be highly confusing to consumers, complicated to explain, awkward for the agent having to explain the differences...”¹⁸</p>	<p>I don’t want to explain the differences between the weaker, less investor-protective standard that I currently operate under and the stronger, more investor-protective standard I would operate under if I were held to the DOL standard. My clients won’t want to use my services anymore, so I will lose money.</p>

Conclusion:

Insurance industry opponents of the DOL rule want to continue putting their interests ahead of what’s best for their clients. They are not the noble advice providers who are trying to help small savers that they have made themselves out to be in their lobby meetings.

Retirement savers who turn to insurance industry professionals are at risk of being harmed by these professionals’ bad, self-serving advice. Retirement savers are the ones with the most to gain from the strong protections of the DOL rule and the most to lose if the insurance industry plaintiffs kill the rule.

[16] Id.

[17] Decl. of James Johnson; See also Decl. of James Holloway.

[18] Decl. of V. Eric Couch; See also James Johnson, James Holloway.