

Dear Friends:

We wish to keep friends and colleagues advised of developments in our case as we had with our letter back in February – in which we explained the timing and rationale for our action against the U.S. Department of Labor – challenging its reinterpretation of the five-part test and withdrawal of the Deseret Letter all of which improperly expands the reach of ERISA and fiduciary requirements.

As some of you may know, a joint scheduling order has now been entered in the case by way of agreement with the U.S. Department of Justice acting on behalf of DOL. FACC's first brief is due July 15th and oral argument is set for December 14th. This joint order was initiated by a request from DOJ attorneys to forego a formal answer and proceed directly to briefing on the substance. FACC is pleased to see a similar order entered in the challenge brought by the American Securities Association although with an even more expedited briefing schedule.

As FACC has stated consistently, this lawsuit is a critical step to protect our industry against unreasonable encroachment by a federal agency contrary to the Fifth Circuit decision rendered just a few years ago. We appreciate recent remarks of prominent industry commentators recognizing the value of the ASA and FACC challenges to the "final interpretation" adopted by DOL which essentially guts the holdings of the Fifth Circuit decision. FACC especially appreciates the assessment by some that these challenges are a no-lose proposition in the sense that a successful outcome would overturn DOL's position and anything less would still leave open avenues for appeal and other efforts by industry to prevail upon DOL and policymakers to fashion reasonable regulation of advisors in the tax-qualified markets.

FACC notes that a few early commentators predicted initial skirmishing over issues such as pre-enforcement action might derail our case or that DOL would issue new regulations that would somehow moot our lawsuit. To date none of those predictions have come to pass and now the path is cleared for the substantive issues to be put in front of a federal court for resolution. While FACC does not discount the possibility that DOL could along the way take further action such as proposing new regulations – FACC has been clear it would challenge any such action by taking appropriate procedural steps within FACC's lawsuit (e.g., amending our complaint) – unless DOL effectively capitulated on key issues of the case. At this point, we are simply pleased the case is moving forward and welcome any input or help as we continue to develop our case and arguments.

On a related note, FACC is also heartened to see industry awakening to what appears to be a kind of mission creep on the part of EBSA with respect to regulation of fiduciaries. In particular, we notice industry trade groups submitted a comment letter to DOL challenging EBSA's position on cryptocurrency as being inconsistent with current law and having been adopted without adherence to proper rulemaking procedures including public notice and comment. Similarly, we notice trade groups are calling into question new regulations issued by DOL relating to individual PTE applications where it appears EBSA is taking liberties with its interpretation of ERISA fiduciary requirements. We applaud our fellow trade groups for raising these issues which we think are in keeping with the FACC and ASA actions that likewise are pushing back on DOL's tendency towards overreach in these areas.



While we know there is a tough road ahead in our challenge to a federal agency with its virtually unlimited resources, FACC continues to have the strongest confidence in our counsel and our case. Recently FACC held its annual meeting in Dallas where we were able to visit in person with our board, co-plaintiffs, and law firm Figari + Davenport LLP led by accomplished litigators Andy Jubinsky and Don Colleluori. It was an invigorating session that further fueled our confidence that FACC will ultimately prevail in restoring the landmark *Chamber of Commerce* decision rendered by the Fifth Circuit in 2018 which this industry – through many of your organizations - fought so hard to win and spent so much money on to combat regulatory overreach and preserve the strengths of our financial services system derived out of various competing distribution channels and product options.

It must be emphasized that FACC sees this lawsuit as complementary to other industry efforts seeking to protect the pluralism of our financial services system and variety of choices available to consumers. Such efforts can and must be multi-pronged which may include discussions with DOL, addressing new regulatory proposals, working as needed with public policymakers, securing enactment of the NAIC model law in as many states as possible, and otherwise working towards a coherent regulatory system that provides for a level playing field and workable requirements for all segments of industry for the benefit of all consumers. It is the combination of these efforts that give us the greatest chance for success.

Please do not hesitate to contact us if there are any questions or you wish to hear more about our case.

Sincerely,


Federation of Americans for Consumer Choice

The Federation of Americans for Consumer Choice, Inc. (FACC) is a 501(c)6 non-profit organization incorporated in the state of Texas whose members are independent marketing organizations and agencies engaged in the distribution of fixed insurance and annuity products. FACC promotes public policy recognizing the value of guaranteed insurance solutions and preserving freedom of choice for consumers who seek products and services from independent agents representing multiple carriers and product options.