

If you have questions, please contact your regular Groom attorney or one of the attorneys listed below:

**Jon W. Breyfogle**  
jbreyfogle@groom.com  
(202) 861-6641

**Erin K. Cho**  
echo@groom.com  
(202) 861-5411

**James V. Cole II**  
jcole@groom.com  
(202) 861-0175

**Jennifer E. Eller**  
jeller@groom.com  
(202) 861-6604

**David C. Kaleda**  
dkaleda@groom.com  
(202) 861-0166

**Michael P. Kreps**  
mkreps@groom.com  
(202) 861-5415

**Ian D. Lanoff**  
ilanoff@groom.com  
(202) 861-6638

**Jason H. Lee**  
jlee@groom.com  
(202) 861-6649

**David N. Levine**  
dlevine@groom.com  
(202) 861-5436

**Richard K. Matta**  
rmatta@groom.com  
(202) 861-5431

**Scott C. Mayland**  
smayland@groom.com  
(202) 861-6647

**Thomas Roberts**  
troberts@groom.com  
(202) 861-6616

**Stephen M. Saxon**  
ssaxon@groom.com  
(202) 861-6609

**Andrée St. Martin**  
astmartin@groom.com  
(202) 861-6642

**Kevin L. Walsh**  
kwalsh@groom.com  
(202) 861-6645

## Business and Trade Groups Bring First Lawsuits Challenging DOL Fiduciary Rule

During the first two days of June, several groups representing financial institutions, insurance companies, and other businesses filed two federal lawsuits ([Chamber of Com. of U.S. v. Perez](#), No. 3:16-cv-01476-G (N.D. Tex filed June 1, 2016) and [Nat’l Assoc. for Fixed Annuities v. Perez](#), No 1:16-cv-01035 (D.D.C. filed June 2, 2016)) against the U.S. Department of Labor (“DOL”). The lawsuits seek to strike down the DOL’s recently finalized regulations (the “Fiduciary Rule”) defining when someone is a fiduciary by providing investment advice under the Employee Retirement Income Security Act of 1974, as amended (“ERISA”) or the Internal Revenue Code of 1986, as amended (the “Code”), and related prohibited transaction exemptions. As described below, the plaintiffs are alleging that the DOL did not have the regulatory authority to issue the Fiduciary Rule and related exemptions, and that DOL did not follow the requirements of the Administrative Procedure Act.

### Background

Published on April 8, 2016, the Fiduciary Rule greatly expands the activities that make one an investment advice fiduciary under ERISA, particularly in the context of sales of investment products and services.<sup>1</sup> The Fiduciary Rule is accompanied by several new or amended prohibited transaction class exemptions. The most important new exemption is the Best Interest Contract Exemption (the “BIC Exemption”), which allows advice fiduciaries to receive certain forms of compensation, provided the fiduciary makes an enforceable commitment to, among other things, ensure that its recommendations are in the best interest of the plan, participant, or IRA owner and provided the fiduciary makes itself subject to class action lawsuits under either ERISA or state contract law. In addition, PTE 84-24 was pruned so that essentially only fixed rate annuities are covered, and fixed indexed annuities now must use the BIC exemption.

### The Lawsuits

The first lawsuit, *Chamber of Com. of U.S. v. Perez*, filed in the United States District Court for the Northern District of Texas, was brought by a coalition including the U.S. Chamber of Commerce, Financial Services Institute, Inc., the Financial Services Roundtable, the Insured Retirement Institute, and four other organizations. The National Association for Fixed Annuities filed the second lawsuit, *Nat’l Assoc. for Fixed Annuities v. Perez*, in the United States District Court for the District of Columbia.

As noted above, the lawsuits challenge the Fiduciary Rule and related exemptions on two broad grounds:

<sup>1</sup> For more information, please see our client alert on the Fiduciary Rule [here](#).

- DOL exceeded its regulatory authority. Among other things, the lawsuits argue that the DOL did not have the authority to broaden the definition of the term “fiduciary” so much that it would include sales of financial products and services or cover rollovers to IRAs. In this respect, the plaintiffs noted that Congress delegated to states and other organizations primary regulatory authority over the activities of broker-dealers and insurance agents. The lawsuits also dispute the ability of the DOL to require parties to become subject to state law class actions as a condition of BIC Exemption relief, due to the Federal Arbitration Act, which favors arbitration. Additionally, the lawsuits allege that DOL usurped the role of the Securities and Exchange Commission and contravened the Dodd-Frank Act by imposing a fiduciary standard on broker-dealers and wire houses. Finally, there are arguments that the Fiduciary Rule violates the First and Fourth Amendments.
- DOL’s process in finalizing the Fiduciary Rule and related exemptions failed to comply with the Administrative Procedures Act. The plaintiffs assert DOL failed to properly consider the costs and benefits of its regulatory efforts by failing to analyze (1) the costs of compliance, (2) costs imposed on independent marketing organizations, or “IMOs,” and (3) lost retirement savings that will occur because (i) the Fiduciary Rule will reduce access to investment advisers and (ii) individuals without investment advisers will contribute less to retirement plans and accounts than if they worked with investment advisers. The National Association for Fixed Annuities also argued that there was insufficient notice and opportunity for comment on DOL’s final amendment to PTE 84-24, requiring fixed indexed annuities to use the BIC Exemption rather than PTE 84-24, as contemplated in the proposed Fiduciary Rule.

The lawsuits ultimately seek to have the Fiduciary Rule and related exemptions vacated and set aside and return to the 1975 definition of “investment advice.” Collaterally, they seek to postpone the applicability date of the Fiduciary Rule and related exemptions by seeking a stay while the lawsuits are pending. We note that the plaintiffs must show both that they will suffer irreparable harm and demonstrate a likelihood of success on the merits to obtain a stay.

Separately, DOL issued a press release on June 2<sup>nd</sup> stating it would defend any legal challenges to the Fiduciary Rule “vigorously.”

We will closely monitor the development of these and any other lawsuits seeking to strike down the Fiduciary Rule.