Empower Accused of Misusing Participant Data, Cross-Selling in Recent Lawsuit

Former participants of insurance company Swiss Re's retirement plan also accused the firm of allowing the plan to pay excessive recordkeeping fees, offering underperforming investments and under-utilizing forfeiture funds.

Reported by REMY SAMUELS

Former employees at Swiss Re American Holding Corp. are suing the company, its board of directors, the employee pension plan committee and its recordkeeper, Empower, for breach of their fiduciary duties under the Employee Retirement Income Security Act. The complaint alleges excessive recordkeeping fees, imprudent investment decisions and the misuse of forfeiture funds.

In *Rusadill et al. v. Swiss Re American Holding Corp. et al.,* Empower is specifically accused of making improper rollover recommendations and using participant data for cross-selling activities. The complaint was filed in U.S. District Court for the Southern District of New York on Wednesday and is seeking class action status covering the period since January 2019.

As of December 31, 2023, the Swiss Re Group U.S. Employees' Savings Plan had more than 4,000 participants with account balances and had assets totaling approximately $1.45 billion, according to the plan's most recent Form 5500 filing.

Allegations Against Empower

The plaintiffs allege that Empower did not solely use participant data to perform the "ministerial tasks" formally assigned to it, but instead "improperly appropriated this confidential information" to market its own Roth individual retirement accounts and, as a result, "generated profits for itself at participants' expense."

"Empower used its position as the plan's recordkeeper—and its access to confidential data about plan participants—to identify promising high-asset targets and [target] people who were likely to move assets," the complaint states.

Empower is also accused of concealing its employees' conflicts of interest, requiring employees to "falsely claim" that their recommendations were "personalized" when, according to the plaintiffs, Empower's bonus structure created financial incentives to recommend its Roth IRA to participants leaving the plan. According to the lawsuit, Empower's initial and only recommendation to departing participants was to roll their plan assets over into Empower's Roth IRA.

In addition, the complaint accuses Swiss Re of failing to mitigate Empower's cross-selling activities by failing to require Empower to sign a non-solicitation agreement or in any way restrict Empower's use of participants' confidential data for purposes other than administrative or recordkeeping functions.

Because Empower is a fiduciary of the plan and provides services to the plan as its recordkeeper, the complaint states that by giving investment advice and recommendations to participants to roll over assets in its Roth IRA, it caused the plan to engage in "prohibited transactions."

Allegations Against Swiss Re Fiduciaries

The former participants also claim that Swiss Re fiduciaries breached their duties under ERISA by allowing the plan to pay excessive recordkeeping fees. For example, in 2022, the plan charged participants $295.10 in recordkeeping fees, which the plaintiffs claim was more than seven times the average recordkeeping fee ($41) per participant for plans with between $1 billion and $5 billion of assets in 2022.

In addition, the complaint alleges that Swiss Re chose an underperforming target-date series for the plan's default investment option—the J.P. Morgan Smart Retirement TDFs in the R5 share class. The complaint states that Swiss Re could have chosen better-after-cost-performing TDF families but elected to stay with that J.P. Morgan TDF. The plaintiffs argue that the R6 share class, which has a lower expense ratio, would have provided participants with higher compounding returns.

Unlike the flurry of recent 401(k) lawsuits accusing companies of "misusing" their plan's forfeiture funds by allocating them toward future employer contributions, this complaint accuses Swiss Re of not doing enough with forfeiture funds.

While the company used some of the plan's forfeited funds toward employer contributions, according to the plan's Form 5500s, the plaintiffs are accusing the company of consistently amassing funds in its forfeiture account and not putting them toward paying plan expenses, reducing its contributions or allocating the funds as additional employer contributions, as plan documents stipulate.

"Swiss Re's actions to amass forfeiture monies is harming participants," the complaint states.

The former Swiss Re employees, represented by Sedhom Law Group PLLC, are seeking equitable, legal or remedial relief to return all "losses to the plan." Sedhom has not been involved in any other high-profile forfeiture complaints.

A spokesperson from Empower said the firm will not specifically comment on pending litigation, but "this suit and the claims it makes are without merit, and we will defend the matter vigorously."

Swiss Re declined to comment on the ongoing legal action.

Tags Empower, ERISA lawsuit, excessive fees, retirement plan forfeitures

Reported by Remy Samuels