

Bill Aims to Help Shops Quash Costly '40 Act Fee Suits

By Beagan Wilcox Volz, [Ignites](#), April 24, 2017 [subscription required]

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A provision tucked into the revised Financial Choice Act would make it tougher for plaintiffs suing asset managers for alleged excessive mutual fund fees at every stage of litigation.

The measure would essentially make the legal hurdles much higher for plaintiffs who bring lawsuits under Section 36(b) of the Investment Company Act of 1940.

The recent addition to the bill — which aims to replace the 2010 Dodd Frank Act and is sponsored by Rep. Jeb Hensarling (R-Tex.) — follows a string of lawsuits against about two dozen managers within the past seven years that focus on differences between advisory and subadvisory fees and related services. Many of the cases have survived motions to dismiss, and two have gone to trial since early 2016, leading to significant litigation costs for defendants.

“At every stage of the case, it tips the scale in favor of the defendant,” says Tom Gorman, partner at Dorsey & Whitney, of Section 831 of Hensarling’s nearly 600-page [bill](#).

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The provision in the Financial Choice Act also states that the plaintiff “shall have the burden of proving a breach of fiduciary duty by clear and convincing evidence.”

That is a shift from the current standard of a “preponderance of evidence” for proving excessive fees under the '40 Act, says Gorman. If courts were required to apply the tougher standard of “clear and convincing evidence” in fee cases, defendants also would have a better chance of prevailing at later stages of litigation — summary judgment or trial — he adds.

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But at least one fund shareholder advocate sees the measure as an attempt to block all excessive-fee cases filed under the '40 Act.

“Instead of relying on the default standard for most civil lawsuits, this legislative provision would eliminate the possibility that a shareholder could bring a successful excessive-fee lawsuit,” said Niels Holch, partner at Holch & Erickson and executive director of the Coalition of Mutual Fund Investors, in a statement.