

Florida Court Invalidates Part of the DOL's Interpretation of Rollover Investment Advice

February 24, 2023

PRACTICES Plan Fiduciaries Counseling, ERISA and Other Benefits Litigation, Employee Benefits and Executive Compensation

A Florida federal district court recently issued an opinion invalidating part of the DOL's interpretation of fiduciary investment advice as it relates to a rollover from an ERISA plan to an IRA. The decision is the latest development in a more than decade-long effort by the DOL to redefine what it means to be an investment advice fiduciary. Under the DOL's current definition (which is the reinstated 1975 regulation), the adviser must (i) provide individualized advice (ii) for a fee (iii) on a regular basis (iv) pursuant to a mutual agreement, arrangement, or understanding (v) that the advice will serve as a primary basis for the plan investment decision. As part of the DOL's Frequently Asked Questions issued in April 2021 ("**FAQs**") and available [here](#), FAQ 7 indicated the "regular basis" requirement of the above five-part test could be satisfied by first-time advice made in a recommendation to roll assets out of an ERISA plan into an IRA that is part of the beginning of an intended future ongoing relationship that an individual has with an investment adviser.

The American Securities Association ("**ASA**"), which is a trade association of regional financial services firms, challenged this guidance stating that the DOL expansion of the circumstances under which an investment adviser is subject to ERISA's fiduciary duties results in burdensome rollover compliance procedures. In partially granting summary judgement to ASA and vacating the DOL interpretation that "regular basis" includes IRA rollovers, the court determined that the FAQ was an unreasonable interpretation of the current fiduciary definition because it improperly removes the inquiry as to whether a person is a fiduciary to an ERISA plan. Instead, following the rollover, any future advice is with respect to an IRA (a non-ERISA plan) and such a "relationship is inherently divorced from" the ERISA plan, which the court viewed as being in conflict with the DOL's requirement that the advice be made to a plan on a regular basis. Thus, the court ruled that FAQ 7 conflicts with the DOL's existing regulations and is an arbitrary and capricious interpretation of the 1975 regulation.

Although the court invalidated the DOL's policy regarding IRA rollovers under FAQ 7, it partially granted summary judgment to the DOL with respect to another FAQ in dispute concerning fiduciary rollover documentation procedures and determined that such FAQ was alternatively a proper procedural interpretation. As the DOL has separately indicated that it plans to provide further guidance regarding the fiduciary investment advice regulation, we will continue to monitor developments in this area, including whether the DOL elects to appeal this decision.

The opinion in *American Securities Association v. United States Department of Labor* is available [here](#).