

CLIENT ALERT

DOL Abandons ERISA Fiduciary Rollover Guidance Appeal

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On May 18, 2023, the United States Department of Labor (the “DOL”) withdrew its appeal of a recent decision by the U.S. District Court for the Middle District of Florida that vacated a portion of the DOL’s 2021 guidance regarding individual retirement account (“IRA”) rollover recommendations to participants in retirement plans subject to the United States Employee Retirement Income Security Act of 1974, as amended (“ERISA”).¹ The guidance, a set of frequently asked questions, provided that a one-time rollover recommendation to an ERISA plan participant could trigger ERISA fiduciary obligations on the part of the investment adviser even if the advisory relationship would be developed only in the *future*. The DOL’s decision to drop this appeal suggests that, for the time being, investment advisers who do not *already* have an existing fiduciary relationship with an ERISA plan client may provide a one-time IRA rollover recommendation to a participant in that plan without triggering ERISA fiduciary status. The DOL’s withdrawal of the appeal may reflect its focus on promulgating an entirely new rule to codify its current views regarding fiduciary status as it relates to IRA rollovers.

Below is a brief history of the DOL’s application of ERISA to plan participant rollover advice, a summary of the *American Securities Association* ruling and the implications of the DOL’s decision to abandon the appeal.

¹ *American Securities Association v. Department of Labor*, No. 8:22-cv-330, 2023 U.S. Dist. LEXIS 24076 (M.D. Fl. Feb. 13, 2023). For a discussion of the *American Securities Association* ruling, please see the Willkie Farr & Gallagher LLP Client Alert, available [here](#).

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Background

Under ERISA, “a person is a fiduciary with respect to a plan to the extent . . . he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so.”²

In 1975, the DOL issued a regulation clarifying this definition of “fiduciary” under ERISA (the “1975 Regulation”). The 1975 Regulation provides a five-part test for determining when a person “renders investment advice” within the meaning of ERISA. Importantly, one prong of the test requires that such advice be given “on a regular basis to the plan.”³

There is a long saga between the DOL and the courts as to whether an investment adviser provides investment advice as a “fiduciary” under ERISA when the person provides an IRA rollover recommendation to an ERISA plan participant. An important event in the saga was the DOL’s promulgation of Prohibited Transaction Exemption 2020-02 (“PTE 2020-02”) in December 2020. Notably, in the preamble to PTE 2020-02, the DOL clarified its interpretation of the five-part test in the 1975 Regulation, stating that the “regular basis” prong of the test is satisfied in the rollover context when an adviser “expects to regularly make investment recommendations regarding the IRA as part of its ongoing relationship,” notwithstanding that such adviser may not have had a prior fiduciary relationship with the ERISA plan or plan participant.⁴ Simply put, under this recent DOL interpretation, a one-time rollover recommendation to an ERISA plan participant could trigger ERISA fiduciary obligations on the part of the investment adviser even if the advisory relationship would be developed only in the future.

In April 2021, the DOL issued a set of frequently asked questions with respect to PTE 2020-02 (the “FAQ”). Importantly, and consistent with the DOL’s revised interpretation of the “regular basis” prong discussed in the PTE 2020-02 preamble, FAQ No. 7 states that “when the investment advice provider has not previously provided advice but expects to regularly make investment recommendations . . . as part of an ongoing relationship, the advice to roll assets out of [an ERISA plan] would be the start of an advice relationship that satisfies the regular basis requirement.”⁵ FAQ No. 7 was the subject of the *American Securities* ruling and the DOL’s subsequent appeal, as discussed below.

American Securities Ruling and Appeal

In 2022, the American Securities Association, a trade association of regional financial services firms, sued the DOL for promulgating PTE 2020-02 and filed a motion for summary judgment seeking to invalidate FAQ No. 7.⁶ The U.S. District

² 29 U.S.C. § 1002(21)(A).

³ 40 Fed. Reg. 50842 (Oct. 31, 1975).

⁴ Class Exemption and Interpretation, PTE 2020-02, available at <https://www.federalregister.gov/documents/2020/12/18/2020-27825/prohibited-transaction-exemption-2020-02-improving-investment-advice-for-workers-and-retirees>.

⁵ New Fiduciary Advice Exemption: PTE 2020-02, *Improving Investment Advice for Workers & Retirees*, Frequently Asked Questions (April 2021), available at <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/new-fiduciary-advice-exemption>.

⁶ *American Securities Association*, 2023 U.S. Dist. LEXIS 24076 (M.D. Fl. Feb. 13, 2023).

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Court for the Middle District of Florida (the “Court”) determined that the policy referenced in FAQ No. 7 is not a reasonable interpretation of either the text of ERISA or the 1975 Regulation and is therefore not entitled to deference under the Administrative Procedures Act. Notably, the Court found that the policy referenced in FAQ No. 7 “impermissibly unmoors the focus of the inquiry into whether an individual is a fiduciary away from a specific ERISA plan, rendering it inconsistent with the statute and previous guidance.”⁷ Accordingly, the Court held that because the policy referenced in FAQ No. 7 conflicts with the text of ERISA and the 1975 Regulation, it is an arbitrary and capricious interpretation of the 1975 Regulation. The Court therefore vacated the policy referenced in FAQ No. 7, remanding it back to the DOL for further proceedings consistent with its order.

The DOL filed a notice of appeal regarding the opinion and all other adverse rulings on April 14, 2023. However, the DOL abandoned the appeal shortly thereafter, and a motion to voluntarily dismiss the appeal was granted on May 18, 2023.

Implications

The DOL’s decision to withdraw the appeal may provide a temporary reprieve from ERISA fiduciary status for investment advisers seeking to provide one-time rollover advice to ERISA plan participants. Left to stand, the Court’s ruling suggests that ERISA fiduciary status in the IRA rollover advice context is limited to investment advisers that have *existing* relationships with ERISA plans or ERISA plan participants. Those investment professionals will likely still need to rely on PTE 2020-02 in order to be paid for their advice. However, investment advisers that do not have an existing fiduciary relationship with an ERISA plan client may, until further DOL rulemaking, provide a one-time rollover recommendation without, it appears, triggering ERISA fiduciary status.

The policy referenced in FAQ No. 7 is effectively negated until further notice. While not certain, the DOL’s decision to withdraw its appeal may indicate that the DOL is now focused on amending or replacing the 1975 Regulation through notice and comment rulemaking, in order to codify its current views regarding fiduciary status as it relates to rollovers. This has long been on the list of the DOL’s regulatory initiatives, and the Court’s ruling may simply accelerate the DOL’s efforts in that regard. We continue to monitor developments in this area.

⁷ *American Securities Association*, 2023 U.S. Dist. LEXIS 24076, at 46 (M.D. Fl. Feb. 13, 2023).

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