



Court Rolls Back Rollover Rule in 401(k) Fiduciary FAQ Fight

BY JOHN SULLIVAN | FEBRUARY 13, 2023

FIDUCIARY RULES AND PRACTICES

A financial services trade group prevailed Monday in a key portion **of its suit against** the Department of Labor's fiduciary guidance involving rollovers.

The United States District Court's Middle District of Florida sided with the American Securities Association. It ruled that the DOL overstepped its authority with certain parts of its **Frequently Asked Questions** (FAQs) regarding Prohibited Transaction Exemption 2020-02.

As the court noted, the DOL issued a set of FAQs in April 2021, where, among other things, they addressed the point at which advice to roll over assets from an employee benefit plan to an IRA is considered to be on a "regular basis."

It also clarified when financial institutions and investment professionals must consider and document the "specific reasons" a rollover recommendation was thought to be in the client's best interest.

The suit focused on two FAQs in particular, 7 (regular basis) and 15 (specific reasons). Plaintiffs argued FAQ 7 unlawfully enlarged "the circumstances in which an investment advisor is subject to fiduciary duties." It thus would subject ASA members to the increased and expensive documentation requirements detailed in FAQ 15, which plaintiffs claimed were undue and burdensome.

The court first determined that at least one wealth management member^[1] of the association bringing the suit had suffered an injury as a result, and commented that "The policy referenced in FAQ 7 deviates from past agency guidance by explaining that the one-time provision of advice to roll over assets from a plan to an IRA can, in certain circumstances, trigger fiduciary duties." The court then determined that "the policy referenced in FAQ 7 contradicts the plain language of the rule it purports to interpret."

More specifically, "Because the policy referenced in FAQ 7 abandons the context of rollovers, it sweeps conduct into its purview that would





“In short, the type of documentation that FAQ 15 requires is precisely of the nature that a prudent investment advisor would undertake,” the court held. “Accordingly, it neither contradicts the 2020 Exemption nor goes beyond it. The Court finds that the policy referenced in FAQ 15 is not arbitrary and capricious.”

In fact, while the plaintiffs had asked for summary judgment on four separate counts, they prevailed on only one—though it was a big one in terms of potential long-term implications.

What It Means for Fiduciaries

“While the DOL won on the question of whether the procedure outlined in FAQ 15 was appropriate, they lost on the bigger issue of the re-interpretation of the fiduciary rule for rollovers,” noted ERISA attorney Fred Reish, a partner with legal powerhouse Faegre Drinker Biddle & Reath LLP. “If an advisor or agent isn’t a fiduciary, then a rollover recommendation won’t be a prohibited transaction, and PTE 2020-02 and the FAQ 15 process won’t be needed.”

That said, Reish believes the decision will be appealed, and the final outcome will not be known for at least a year. As a result, “it would be risky to rely on the opinion until there is a final decision at a higher level than this trial court,” he added.

Tom Clark, a partner with the Wagner Law Group, said advisors should contemplate staying the course until more is known.

"It's a blow to the Department of Labor, but if you're acting in people's best interest under PTE 2022-02 now, you should consider continuing to do so until the consequences of this decision become clearer," he explained. "This will almost certainly not be the DOL's last word on the issue."

As for the next steps, Brian Graff, CEO of the American Retirement Association and, said the court's decision was based on its determination that the language of FAQ 7 went beyond that permitted by the Administrative Procedures Act.

“The DOL may well respond to this decision regarding the FAQs by modifying or eliminating the ‘regular basis’ prong of the five-part test in the regulation itself in its pending, proposed changes to the fiduciary rule,” he concluded.

The American Retirement Association's [Nevin Adams](#) contributed to this article.

[1] Specifically, the court noted that “as the regulated party, Baird no longer provides rollover recommendations because of this guidance. This is sufficient to demonstrate that at least one ASA member fact for standing purposes.”



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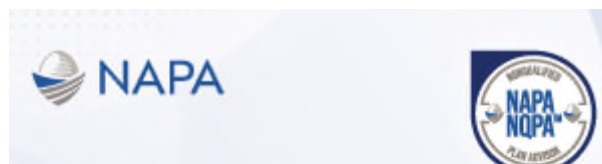
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