

Federal Judge Strikes Down DOL Rollover Advice Guidance

A U.S. District Court ruled against Department of Labor interpretation that made rollover recommendations count as fiduciary advice.

Reported by [NOAH ZUSS](#)

A U.S. District Court judge ruled out Department of Labor guidance that made rollover recommendations count as fiduciary investment advice on Monday in granting summary judgment against the DOL [in the lawsuit](#), *American Securities Association v. United States Department of Labor, et al.*

Judge Virginia M. Hernandez Covington, of the U.S. District Court for the Middle District of Florida's Tampa Division, ruled the DOL's Employee Benefits Security Administration was "arbitrary and capricious" in the agency's [interpretation of the five-part](#) test used for determining when [recommendations count as investment advice](#) under the Employee Retirement Income Security Act and the amended Internal Revenue Code of 1986.

"While an offer to provide future advice may, as the Department suggests, be the beginning of a relationship, that relationship is inherently divorced from the ERISA-governed plan," Covington wrote. "Because any provision of future advice occurs at a time when the assets are no longer plan assets, it is not captured by the 'regular basis' analysis."

The Administrative Procedures Act is federal law that governs the procedures for agencies to develop and issue regulations. It empowers courts to set aside EBSA agency actions found to be without observance of procedure required by law.

[In April 2021](#), the EBSA published a series of responses to frequently asked questions to provide guidance on the Prohibited Transaction Exemption 2020-02. The FAQ bulletin set out the circumstances in which financial institutions and investment professionals who provide fiduciary investment advice to retirement investors can receive otherwise prohibited compensation.

"The court ruled that FAQ [Question] 7 essentially violates the Administrative Procedure Act," says John Schuch, a partner in law firm Dechert LLP, which was not involved in the litigation.

The [DOL finalized an amended fiduciary rule](#) in 2020, supplemented by fiduciary advice requirements, to allow compensation for financial professionals, as enumerated in the prohibited transaction exemptions in the FAQs. The 2020 rule replace [a vacated 2016 rule](#).

"One of the central aspects of the DOL's efforts to expand the reach of ERISA's fiduciary rules was the effort to capture rollover solicitations by financial institutions to new customers," explains Drew Oringer, a partner and general counsel at the Wagner Law Group, which also was not involved in the litigation.

The 2020 exemption governed the circumstances in which financial institutions and investment professionals who provide fiduciary investment advice to retirement investors can "receive otherwise prohibited compensation," Covington wrote in the court order.

"When the fiduciary rule was amended, the DOL acknowledged that it needed a rule change in order to reach many rollover solicitations by characterizing those solicitations as 'investment advice,'" Oringer adds. "A problem with the rule from the perspective of the DOL was that the 'regular basis' prong of the existing five-part test for what is

investment advice might not be met for a rollover solicitation, because once the rollover is complete, there's no longer any advice regarding the participant's plan account. Any continuing advice would be for the IRA."

The DOL, during the administration of President Barack Obama, proposed and finalized the 2016 fiduciary rule, which replaced 1975 regulations establishing a five-part test for fiduciary status under the federal retirement law, ERISA.

The 5th U.S. Circuit Court of Appeals vacated the 2016 version of the rule in 2018.

"When the 5th Circuit vacated the amended fiduciary rule, the DOL was left with the old five-part test," says Oringer. "Then, when the DOL finalized an exemption (PTCE 2020-02) to allow institutions to act as fiduciaries and still receive what might be prohibited compensation, the DOL reinterpreted the existing rule, contrary to its prior interpretations, effectively to say that the regular-basis test could be applied to the combination of the distributing plan and the receiving IRAs, so that rollover solicitations could potentially be brought within the ambit of ERISA's fiduciary rules."

Covington denied the DOL's motion to dismiss the lawsuit and granted summary judgment on additional ASA claims against the FAQs.

The ASA, a trade association for financial firms, celebrated the verdict in a press release.

"ASA is pleased the court recognized the DOL operated outside the scope of its legal authority and vacated its unlawful policymaking through guidance," stated CEO Chris Iacovella. "ASA filed this lawsuit to protect investor choice and America's retirement savers from administrative overreach and the court agreed the DOL's failure to seek public comment before changing its rules about retirement advice was a violation of the Administrative Procedure Act."

The ASA earlier expressed concerns about the definition of fiduciary advice in a [September 2021 letter](#) to the DOL.

Whether or not the court's decision will alter the provision of investment advice from advisers and financial professionals is unclear, according to Dechert's Schuch.

Oringer adds, "The ultimate outcome here is uncertain, and it would seem that ASA is virtually certain to be appealed. If the case stands, it will be interesting to see whether the DOL will go back to the well and try again to amend the underlying regulation to get to the result it wants. Financial institutions and other interested parties will want to watch with great care the next episodes."

A request for comment to the DOL was referred to the Department of Justice, where a spokesperson was not available.

Tags [Department of Labor](#), [Employee Benefits Security Administration](#), [Employee Retirement Income Security Act](#), [Fiduciary Advice](#), [retirement plan rollover](#)

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