

Pensions & Investments

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After the Department of Labor suffered another setback in court in its efforts to regulate rollover recommendations, its next steps are uncertain.

The Department of Labor in federal court suffered another setback in its effort to regulate rollover recommendations as fiduciary investment advice, but while the next steps are uncertain, the story isn't over just yet, ERISA attorney sources said.

The latest event in the roughly 12-year debate around investment advice came Feb. 13 from a U.S. District Court in Tampa, Fla., that **ruled partially in favor** of the American Securities Association in its lawsuit against the Labor Department.

"I think the court decision is interesting, but it's not the last thing in this long and tortured saga," said Jennifer Eller, a Washington-based principal at Groom Law Group.

The ASA lawsuit, **filed in February 2022**, challenged the department's April 2021 guidance — a series of frequently asked questions — that related to the Labor Department's investment-advice exemption that took effect in February 2021. The exemption permits investment-advice fiduciaries to receive compensation for more types of guidance, including advice to roll over assets to an individual retirement account from a retirement plan.

The ASA lawsuit took issue with two of the Labor Department's FAQs concerning rollover advice recommendations, including FAQ 7, which outlines when rollover advice is considered

to be on a "regular basis," a component of the five-part test used to determine whether an investment professional or financial institution is a fiduciary.

Judge Virginia M. Hernandez Covington **ruled** that FAQ 7 conflicted with the Labor Department's existing regulations and said it is an "arbitrary and capricious" interpretation of the 1975 five-part test.

"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 judge wrote.

The court asserted that the regular basis prong of the five-part test is applied separately to a plan than it is to a participant who then rolls over their assets into an individual retirement account.

"When you give rollover advice to a plan participant, that is treated as advice to the plan," said Kent Mason, a Washington-based partner with law firm Davis & Harman LLP, in assessing the court decision.

"The subsequent advice to that same individual would be in the capacity as IRA owner, not as advice to the plan, so therefore it doesn't count as part of the regular basis test. The advice to the plan is one-time advice followed by advice to a separate entity."

A Labor Department spokesman directed comment requests to the Department of Justice; the Justice Department did not respond.

The Florida court's decision is similar to a September decision in another case — *Carfora et al. vs. Teachers Insurance Annuity Association of America et al.* — out of the U.S. District Court of the Southern District of New York that held that regular basis applies separately to advice pertaining to a specific ERISA-governed plan vs. advice regarding an IRA.

"Both courts have resoundingly rejected the department's move to reinterpret the regulation so as to allow the existing regulation to extend to rollover solicitations," said Andrew L. Oringer, partner at The Wagner Law Group who heads the firm's New York office and serves as its general counsel.

Added, Mr. Mason: "This is essentially saying the fundamental position (the Labor Department) took to turn rollover advice into fiduciary advice was invalid."

Mr. Mason filed an amicus brief last year on behalf the Hispanic Leadership Fund, a Washington-based public policy not-for-profit, in support of a lawsuit filed by the Federation of Americans for Consumer Choice. That lawsuit, **filed in February 2022**, seeks to vacate the Labor Department's new interpretation of a fiduciary that was finalized in the preamble to a 2020 exemption under the Trump administration.

The exemption's preamble stated that rollover advice to a plan participant can be fiduciary advice if it is followed by advice to the same individual as an IRA owner, which prompted the Federation of Americans for Consumer Choice to file its lawsuit in District Court in Dallas. The case is still pending.

What happens next is unclear, though an appeal from the Labor Department in the ASA case is expected, ERISA attorneys said.

The Labor Department is currently working on a rule-making initiative that could broaden who's considered a fiduciary under ERISA by amending the regulatory definition of the term fiduciary. That rule could cover rollover recommendations.

"I think there's a palpable distrust on the part of the Department of Labor for those that are engaged in the process of soliciting rollovers," Mr. Oringer said. "I think that the department has identified that interaction...as being one of the greater concerns (it) has with respect to its efforts to advance investor protections."

But the latest court decision out of Florida complicates matters for the Labor Department, Mr. Oringer added.

The problem with another rule-making initiative involving rollovers "is that it presents a risk to DOL because they'd have to go back to the well on an issue that may be perceived to be an issue on which they've already resoundingly lost," he said.

Ms. Eller said she expects the Labor Department to defend the guidance and exemption in court while also proposing a new rule.

"We're two years into the Biden administration, there could be a new administration in two years that has a different view or doesn't want to propose a rule, so there's just a lot of unknowns," she said. "I would expect that they would proceed on parallel tracks with this litigation, with the litigation in Texas (the FACC case) and with the proposal."

It's not often that the interpretation of regulators is rejected in legal challenges, particularly when it comes to areas as complicated as ERISA, Mr. Oringer said. "But the next chapter in

the never-ending story hasn't been written yet and the department could win at the appellate level."

Industry stakeholders have seen the last three administrations promulgate rules or guidance on fiduciary investment advice, most notably a rule finalized during the Obama administration that broadened the definition of a person or entity taking on fiduciary responsibilities and replaced the five-part test. That rule was **vacated in 2018** by the Fifth U.S. Circuit Court of Appeals in New Orleans, which said the department exceeded its legal authority.

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